INTERNATIONAL CRIMINAL LAW: UNRESOLVED ISSUES FROM THE PAST IN THE KOREAN PENINSULA

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I. INTRODUCTION

There is no clear definition on international criminal law, but it can be narrowly defined—international criminal law *stricto sensu*—as international law penalizing individuals to protect the fundamental values of international society such as human rights and international peace and security. [1] Individual criminal responsibility, merging the principles of international law with modern concepts of human rights and humanitarian law, is a recent development since 1945. [2] This modern trend imposes obligations directly on individuals instead of states.[3] This narrow definition includes crimes against humanity, genocide, war crimes, and aggression.[4]

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1. Claus Kreß, *International Criminal Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 10 (2009), http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1423?rskey=OVdEFT&result=1&prd=EPIL (last visited Oct. 10, 2019).

2. MALCOLM N. SHAW, INTERNATIONAL LAW 397 (6th ed. 2008).

3. *Id.*; *see* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2d ed. 1999).

4. SHAW, *supra* note 2, at 430–40.

Historically, the Republic of Korea ("Korea") has been passively involved in international criminal law *stricto sensu* until recently. While the development of international criminal law *stricto sensu* is a recent event, international criminal law as applied to Korea cannot be understood without knowing its history, since Koreans suffered through many catastrophic events and international crimes since the late nineteenth century.[5] Korean citizens were victims of international crime—including slavery, war crimes, aggression, and crimes against humanity—committed by Japan during the Japanese colonial period from 1910 to 1945 and World War II and by North Korea during the Korean War from 1950 to 1953. Most of these international crimes, however, were not properly resolved or even addressed in international or national courts. As many years have passed, criminals, victims, evidence, and witnesses are difficult to find and obtain. Limited research has been performed in this area, and there is very little literature dealing with international criminal law issues relating to Korea.

International criminal law can be also broadly defined to include both the law of international cooperation in criminal matters and crimes happening across national borders—transnational crime—which Korea has been recently exposed to more than before. Examples of transnational crime include piracy, counterfeiting of currency, corruption, trade in narcotics, slavery, undersea cable cutting, terrorism, money laundering, organized crimes, and cybercrimes. Crimes committed by foreigners on Korean soil are mostly regulated by domestic Korean laws while crimes committed in a foreign jurisdiction are usually excluded,[6] and crimes committed by foreigners that have an international element may be also subject to universal or regional juridical jurisdiction.[7] As Korea's ties to the international community increase, foreigners increasingly interact with Korea, entering Korean borders through seaports and airports. Some of them commit immigration crime, entering illegally with forged documents. Some of them commit battery, assault, theft, fraud, robbery, or rape, usually against other foreigners. Some of them are involved in a syndicated crime relating to drugs, gangs, slavery, voice phishing, counterfeiting, and forgery, which are difficult to

5. The modern government of the Republic of Korea was not established until August 15, 1948. *Division of Korea*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Division_of_Korea#After_World_War_II (last visited Oct. 12, 2019).

6. *See* Hyeongbeob [Criminal Act], Act No. 293, Sept. 18, 1953, *amended by* Act No. 11,731, Apr. 5, 2013, arts. 2, 6 (S. Kor.), *translated in* Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG.

7. *See* SHAW, *supra* note 2, at 397.

trace, investigate, and prosecute; the lack of expertise and data collection by law enforcement in dealing with these types of crimes is another issue.

The difficulty of defining what international crime is leads to difficulty in researching international criminal law issues dealing with Korea. Fortunately, Korea is currently linked to many international and regional criminal legal systems, which helps to analyze international criminal law issues in multi-tier levels—multilateral, bilateral, and domestic. In this article, first I will analyze legal issues surrounding various events where Korea was exposed to international crime and how the results of the crime had been handled. Second, the current Korean status and contribution to international criminal law will be investigated. Finally, I will conclude with recommendations on how to approach unresolved international criminal issues surrounding the Korean peninsula.

II. KOREA'S HISTORICAL INVOLVEMENT WITH INTERNATIONAL CRIMINAL LAW

A. Japanese Crime During the Colonial Period

In 1876, by the forcible enacting of the unequal Ganghwado Treaty, Chosun—a former imperial Korea—began to open its door to Japan and Western countries.[8] Starting then, Japanese and Western powers began to exploit Korean resources and people and demolish the Korean imperial kingdom that had existed for over 500 years, from 1392 to 1897.[9] Finally, following the Russo-Japanese War, Japan deprived Korea of its diplomatic power in 1905 and annexed Korea as its colony in 1910 by series of illegal treaties.[10] From 1910 to 1945, Korea was devastated under the Japanese rule in terms of resources and culture, and Japanese military authorities committed a wide range of crimes against Koreans, including sexual slavery and forced labor.[11]

One notable example of crimes committed by the Japanese is Japanese military sexual slavery relating to Asian "comfort women" during the World War II. Japan exploited women and

8. *See Joseon Dynasty*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Joseon_Dynasty (last visited Oct. 11, 2019).

9. *Id.*; *see Ganghwa Treaty*, DOOPEDIA, http://www.doopedia.co.kr/doopedia/master/master.do?_method=view&MAS_IDX=101013000748492 (last visited Oct. 11, 2019).

10. *See Joseon Dynasty*, *supra* note 8.

11. Erin Blakemore, *How Japan Took Control of Korea*, HISTORY, https://www.history.com/news/japan-colonization-korea (last updated Aug. 29, 2018).

adopted forced labor during the wartime. The first military sexual slaves were Koreans from the North Kyushu area of Japan and they were sent to China by the Governor of Nagasaki Prefecture.[12] In 1938, the Japanese Imperial Army revived the comfort station, which had been established in Shanghai in 1932, and many other stations followed after Japan expanded its territory in China.[13] The comfort women, mostly Korean women, were forced and deceived to serve at the stations.[14]

Crimes committed by Japan during the colonial time and World War II were not properly resolved between Korea and Japan, and Japan had denied its responsibility until the early 1990s.[15] In 1994, the Committee on the Elimination of Discrimination Against Women reviewed Japanese reports on the treatment of comfort women; some members suggested that the Japanese Government should pay compensation to the surviving victims and create a women's fund in memory of those victims who had already died, thus meeting its commitment to the women of Asia.[16] The United Nations Commission of Human Rights stated that Japan's exploitation of comfort women was a clear violation of its obligations under international law and that Japan should accept legal responsibility by compensating victims and identifying and punishing perpetrators.[17] In 2001, the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, established by the efforts of nongovernmental organizations such as Violence Against Women in War-Network Japan, concluded that Japan had committed international crimes and that international law required Japan to make reparations.[18]

The colonial era ended in August 1945 by the surrender of Japan in World War II. On September 8, 1951, Japan signed the Treaty of Peace with Japan in which it officially recognized the independence of Korea and renounced all rights and claims to

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12. Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, ¶ 11, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996) [hereinafter *U.N. Report on Sexual Slavery*].

13. *Id.* ¶¶ 11–44.

14. *Id.*

15. Erin Blakemore, *The Brutal History of Japan's 'Comfort Women,'* HISTORY, https://www.history.com/news/comfort-women-japan-military-brothels-korea (last updated July 21, 2019).

16. Rep. of the Comm. on the Elimination of Discrimination Against Women, Thirteenth Session, ¶¶ 576, 578, U.N. Doc. A/49/38 (Supp.) (Apr. 12, 1994).

17. *U.N. Report on Sexual Slavery*, *supra* note 12, ¶ 137.

18. *Tokyo Tribunal 2000 & Public Hearing on Crimes Against Women*, WOMEN'S CAUCUS GENDER JUST., http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/index.html (last visited Oct. 12, 2019) [hereinafter *Tokyo Tribunal*].

Korea.[19] The International Military Tribunal for the Far East—also known as Tokyo War Crimes Tribunal ("Tokyo Tribunal")—was also established and on April 29, 1946, the Tribunal started trials dealing with aggression, war crimes, and crimes against humanity.[20]

After World War II, however, crimes committed against Korea by the Japanese between 1905 and 1945 were not investigated or tried. This is because after its independence in 1945, Korea was quickly whirled into turmoil and divided and occupied by the U.S. and Soviet Union. Korea began with a new democratic government from the South-only election hosted by the U.S. Military Government on August 15, 1948.[21] The Democratic People's Republic of Korea ("North Korea") started as a communist country in alliance with the Soviet Union on September 9, 1948.[22] Following these developments, the Korean War started on June 25, 1950, by an invasion of South Korea by North Korea, supported by China and the Soviet Union.[23] During the Korean War, from 1950 to 1953, U.S. Armed Forces and U.N. forces fought alongside Korean soldiers to defend South Korea.[24]

B. The Korean War and International Crime

Since its inception on August 15, 1948, the Republic of Korea has not been exposed to international crimes *stricto sensu* except during one catastrophic event—the Korean War. The Korean War, which happened from June 25, 1950, to July 7, 1953, created many international criminal issues—most of which resulted from international crimes initiated and committed by North Korea—still left still unresolved today.[25] Crimes against peace, such as the crime of aggression; war crimes, including crimes against civilians and their properties; and crimes against humanity, such as genocide, were widely committed. The North Korean army

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19. Treaty of Peace with Japan art. 2, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45. The treaty is Japan's promise to the other signatory nations; neither South Korea nor North Korea were invited to this treaty.

20. *The Tokyo War Crimes Trials*, PBS, https://www.pbs.org/wgbh/americanexperience/features/macarthur-tokyo-war-crimes-trials/ (last visited Oct. 26, 2019).

21. *Division of Korea*, *supra* note 5.

22. *Id.*

23. *Id.*

24. *The World Factbook: Korea, South*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html (last updated Oct. 30, 2019).

25. *See* S. Rep. No. 83-848 (1954), https://www.loc.gov/rr/frd/Military_Law/pdf/KW-atrocities-Report.pdf [hereinafter Korean War Atrocities Report]. *But see* Jeremy Williams, *Kill 'em All': The American Military in Korea*, BBC, http://www.bbc.co.uk/history/worldwars/coldwar/korea_usa_01.shtml (last updated Feb. 17, 2011).

committed widespread and systematic attacks on South Korea; killed hundreds of thousands of civilians, officials, and police officers; and destroyed cities, towns, villages, and properties.[26]

War crimes and grave breaches, including willful killing of and torture or inhumane treatment of prisoners of war and hostages and extensive destruction and appropriation of property not justified by military necessity were committed in violation of the 1949 Geneva Conventions.[27] As the Geneva Conventions entered into force on October 21, 1950, this may lead to the conclusion that crimes committed between June 25, 1950, and October 21, 1950, should be exonerated under the principle of *nullum crimen sine lege*. However, war crimes and grave breaches committed by North Korea even before October 21, 1950, are still subject to the customary international law and humanitarian principles that had been established and affirmed by the Nuremberg Tribunal and the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.[28] Therefore, individuals who committed war crimes during the Korean War should be held responsible. Additionally, the fact that a defendant was a government official or acted pursuant to an order of his government will not bar prosecution.[29]

However, the circumstances surrounding the Korean War have made it difficult to prosecute these international war crimes. While fighting in the Korean War ended in stalemate in 1953, the war did not officially end until April 27, 2018, with the joint "peace declaration" of President Moon Jae-in of the Republic of Korea and Chairman Kim Jong Un of the Democratic People's Republic of Korea.[30] During this stage of truce, no country had won the war, making it hard to punish war criminals from the other party. This

26. *See* Korean War Atrocities Report, *supra* note 25.

27. *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S 31 (entered into force Oct. 21, 1950); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Convention (III) Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

28. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

29. *Cf. id*. arts. 7–8.

30. Joshua Berlinger et al., *BREAKING: North and South Korea Vow to End Korean War*, CNN (Apr. 27, 2018, 6:08 AM), https://www.cnn.com/asia/live-news/north-korea-south-korea-summit-intl/h_93eb8f096a50f069c399dd2a359af8f5; *see also Read: Full Declaration of North and South Korean Summit,* CNN (Apr. 27, 2018, 6:10 AM), https://www.cnn.com/2018/04/27/asia/read-full-declaration-north-south-korea/index.html [hereinafter *Peace Declaration*].

sixty-five-year stalemate may be the main reason why the U.N. and other international bodies have failed to establish a special tribunal or criminal court to hold hearings on the war crimes arising from the Korean War. Establishing such a tribunal today would be difficult because more than sixty years have passed since the fighting ended; most war criminals, including the former leader of North Korea, Kim Il-Sung, have passed away; and witnesses and evidence would be difficult to obtain. Looking forward, it is unlikely that such a tribunal will be established given that the April 27, 2018, peace declaration did not establish any process for prosecuting the international crimes committed during the Korean War.[31]

C. U.S.-Korea Status of Forces Agreement

Another international criminal issue in Korea comes from the status of the U.S. Armed Forces in Korea as it relates to U.S. soldiers and workers committing crimes among themselves or against Korean citizens outside military bases. While this issue is not included in the definition of international crimes *stricto sensu*, the broad definition of international crime should include this issue because the crimes committed by the members of the U.S. Armed Forces have an international element and these crimes are governed by an international agreement between Korea and the U.S.[32]

Since the Korean War ended in 1953, Korea has been closely cooperating with the U.S. for Korea's defense. Both countries made a special agreement relating to the status of U.S. forces in the Korean peninsula. The Agreement Under Article IV [33] of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea ("SOFA") was concluded on July 9, 1966, and entered into force on February 9, 1967.[34] The United States and Korea revised SOFA

31. *Peace Declaration*, *supra* note 30.

32. *See* Mutual Defense Treaty Between the United States and the Republic of Korea and the United States of America, S. Kor.-U.S., Oct. 1, 1953, 5 U.S.T. 2368.

33. *Id.* art. 4 ("The Republic of Korea grants, and the United States of America accepts, the right to dispose United States land, air and sea forces in and about the territory of the Republic of Korea as determined by mutual agreement.").

34. Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, S. Kor.-U.S., July 9, 1966, 80 Stat. 271 (entered into force Feb. 9, 1967) [hereinafter SOFA].

through Subsequent Memoranda of Understanding in 1991 and 2001.[35] SOFA lasts until the Mutual Defense Treaty between Korea and U.S. expires.

Relating to the international criminal aspects of SOFA, Article 22 deals with criminal jurisdiction regarding alleged crimes committed by members of U.S. Armed Forces.[36] It also applies to the employees of the Armed Forces and families of military personnel.[37] Relating to subject matter, SOFA applies only to crimes that happen in the territory of Korea.[38] Korean adjudicative jurisdiction doesn't apply to crimes committed by U.S. persons outside of Korean territory; however, the U.S. still has jurisdiction over these matters.

Relating to personal jurisdiction, under Article 22(1), both U.S. military authorities and Korea can exercise jurisdiction over soldiers, employees, and family members of U.S. Armed Forces,[39] although the U.S. Armed Forces will not exercise jurisdiction during peacetime over members of the civilian component or dependents.[40] Under Article 22(2), U.S. Armed Forces has jurisdiction over the matters that can be punishable only by U.S. law, including crimes "relat[ed] to its security."[41] There is a risk that the phrase "relat[ed] to its security" could be broadly interpreted under the U.S. protective principle.[42] Article 22(2) may be considered as reciprocal since Korea also has jurisdiction

35. *See* Youngjin Jung & Jun-Shik Hwang, *Where Does Inequality Come from? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1112–14 (2003), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1207&context=auilr.

36. SOFA, *supra* note 34, arts. 1(a), 22.

37. *Id.* art. 22(1).

38. *Id.*

39. *Id.*

40. Agreed Minutes to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United Stated Armed Forces in the Republic of Korea art. 22(1)(a), July 9, 1966, 6127 T.I.A.S. 92 (entered into force Feb. 9, 1967) [hereinafter SOFA, Agreed Minutes] ("It is understood that under the present state of United States law, the military authorities of the United States have no effective criminal jurisdiction in peacetime over members of the civilian component or dependents. If the scope of United States military jurisdiction changes as a result of subsequent legislation, constitutional amendment, or decision by appropriate authorities of the United States, the Government of the United States shall inform the Government of the Republic of Korea through diplomatic channels.").

41. SOFA, *supra* note 34, art. 22(2).

42. *Cf.* CHARLES DOYLE, CONG. RESEARCH SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2016), https://fas.org/sgp/crs/misc/94-166.pdf (listing crimes that U.S. courts have construed to be related to U.S. security).

over crimes against Korean security.[43] Additionally, Korea has jurisdiction over matters which can be punishable only by Korean law.[44]

However, when both the U.S. and Korea have concurrent jurisdiction over an alleged criminal act by a member of the U.S. Armed Forces or a related civilian, the U.S. has preferential jurisdiction for a broad range of crimes, despite Korea's right to enforce its laws on its own soil per the territorial principle. Article 22(3) states that when there is concurrent jurisdiction,

> (a) [t]he military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or civilian component, and their dependents, in relation to:
>
> (i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or civilian component or of a dependent:
>
> (ii) offenses arising out of any act or omission done in the performance of official duty.[45]

Article 22(3) grants Korean authorities the primary right to exercise jurisdiction for any other offense.[46] However, the separate interpretive Agreed Minutes relating to the SOFA states that considering the U.S. military's primary responsibility to maintain good order and discipline, Korean authorities are required to waive its primary right to exercise jurisdiction unless the exercise of jurisdiction is particularly important to Korea.[47]

The SOFA also grants the U.S. preferential pretrial and post-appeal custody rights over U.S. military personnel and related citizens over whom Korean authorities are exercising concurrent criminal jurisdiction. Under the SOFA, Korean authorities must promptly notify U.S. military authorities of the arrest of any member of the U.S. Armed Forces or civilian component, or a dependent.[48] If the U.S. has exclusive or concurrent jurisdiction, Korean authorities must, upon request, return the accused to U.S. military authorities until the conclusion

43. SOFA, *supra* note 34, art. 22(2).
44. *Id.*
45. *Id.* art. 22(3)(a).
46. *Id.* art. 22(3)(b).
47. SOFA, Agreed Minutes, *supra* note 40, art. 22.
48. SOFA, *supra* note 34, art. 22(5)(b).

of all judicial proceedings.[49] While Korean authorities may request keeping pretrial custody of the accused and U.S. military authorities must give "sympathetic consideration" to the request, the SOFA does not require U.S. military authorities to make the transfer if the U.S. has jurisdiction.[50] However, U.S. authorities must promptly make such accused available to Korean authorities for purposes of investigations and trials.[51]

III. KOREA'S CONTRIBUTION TO INTERNATIONAL CRIMINAL LAW

A. Treaties to Which Korea Is a Party and Implementation

In addition to Korea being bound by international custom and general principles of law, since relatively recently, Korea has signed and ratified numerous treaties relating to international criminal law. The international criminal treaties Korea has ratified so far will resolve many international criminal issues as they relate to Korea.

First of all, Korea signed the Rome Statute of the International Criminal Court on March 8, 2000, and ratified it on November 13, 2002, without any declaration and reservation.[52] Thus, Korea started being subject to the jurisdiction of the International Criminal Court over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression[53] on November 13, 2002. Korea also signed the Agreement on the Privileges and Immunities of the International Criminal Court on June 28, 2004, and ratified it on October 18, 2006.[54] Under this treaty, Korea admitted the legal status of jurisdictional personality of the Court,[55] and the Court shall enjoy privileges and immunities in the territory of Korea.[56]

Korea also signed United Nations Convention Against Corruption on December 10, 2003, and ratified it on March 27,

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49. *Id.* art. 22(5)(c).
50. *Id.*
51. *Id.*
52. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute]. Note that as of Nov. 13, 2002, Korea did not yet sign and ratify the following Rome Statute amendments to be discussed.
53. *Id.* art. 5.
54. Agreement on the Privileges and Immunities of the International Criminal Court, Sept. 9, 2002, 2271 U.N.T.S. 3 (entered into force July 22, 2004).
55. *Id.* art. 2.
56. *Id.* art. 3.

2008.[57] Ratifying this treaty, Korea agreed to the seriousness of problems and threats posed by corruption to the stability and security of societies, democracy, ethical values, justice, sustainable development, and the rule of law.

Korea also actively participated in the international movement again terrorism by joining many anti-terrorism treaties. Korea entered the International Convention Against the Taking of Hostages on May 4, 1983,[58] and Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents on May 25, 1983.[59] More recently, Korea signed the International Convention for the Suppression of the Financing of Terrorism on October 9, 2001, and ratified it on February 17, 2004.[60] Korea signed the International Convention for the Suppression of Acts of Nuclear Terrorism on September 16, 2005, and ratified it on May 29, 2014.[61]

Furthermore, Korea has participated in international activities against transnational organized crime. Korea signed the United Nations Convention Against Transnational Organized Crime on December 13, 2000, and ratified it on November 5, 2015.[62] Korea also signed and ratified protocols supplementing this Convention. It signed the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime on December 13, 2000, and ratified it on November 5, 2015.[63] It signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime on December 13, 2000, and ratified it on November 5, 2015.[64] It

57. United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

58. International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 (entered into force June 3, 1983).

59. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977).

60. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002).

61. International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S. 89 (entered into force July 7, 2007).

62. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003).

63. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 507 (entered into force Jan. 28, 2004).

64. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003).

signed the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime on December 13, 2000, and ratified it on November 5, 2015.[65]

As of 2018, Korea also concluded and ratified bilateral extradition treaties with thirty-two countries, including Australia, Canada, Spain, the Philippines, the United States, China, Brazil, Thailand, Argentina, Mongolia, Mexico, Chile, Paraguay, France, Indonesia, Hong Kong SAR, Guatemala, Peru, India, Vietnam, Uzbekistan, Japan, New Zealand, Iran, the United Arab Emirates, Malaysia, South Africa, Kuwait, Kazakhstan, Cambodia, Bulgaria, and Algeria.[66]

Korea also made efforts to implement international criminal treaties. The Korean National Assembly promulgated the Act on Punishment, Etc. of Crimes Under Jurisdiction of the International Criminal Court on December 21, 2007, and further revised it on April 12, 2011.[67] The Act on International Judicial Mutual Assistance in Criminal Matters was enacted on April 8, 1991, and revised it four times, with the last revision in 2017.[68] The Act on International Judicial Mutual Assistance in Criminal Matters covers many topics, including the scope of mutual assistance (Art. 5), restrictions on mutual assistance (Art. 6), cooperation with requesting countries (Art. 9), arresting and repatriating persons to foreign countries (Art. 10), the acceptance and requesting of materials concerning mutual assistance (Arts. 11 & 12), actions and measures taken by prosecutors (Arts. 16 & 17), requests for examination of witnesses (Art. 18), and which courts are viewed as competent to handle jurisdiction (Art. 25).[69] Korea also enacted the Act on Anti-Terrorism for the Protection of

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65. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, May 31, 2001, 2326 U.N.T.S. 208 (entered into force July 3, 2005).

66. *See* Michael S. Kim et al., *Extradition: Korea*, GLOBAL INVESTIGATIONS REV. (U.S.), https://globalinvestigationsreview.com/jurisdiction/1005813/korea (last updated June 19, 2019).

67. Act on Punishment, Etc. of Crimes Under Jurisdiction of the International Criminal Court, Act No. 8719, Dec. 21, 2007, *amended by* Act No. 10577, Apr. 11, 2011 (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=24229&lang=ENG.

68. Act on International Judicial Mutual Assistance in Criminal Matters, Act No. 4343, Mar. 8, 1991, *amended by* Act No. 14839, July 26, 2017 (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=46746&lang=ENG.

69. *Id.* arts. 5–6, 9–12, 16–18, 25.

Citizens and Public Security on March 3, 2016, and revised it once.[70] The Act defines terrorism (Art. 2) and created the National Counter-Terrorism Commission (Art. 5).[71]

B. Domestic Development Relating to International Criminal Law

After the devastation created by the Japanese colonial period and the Korean War, Korea spent the next few decades recovering—this period of economic growth is referred to as the "Miracle on the Han River."[72] During this time, Korea may not have had the time or opportunity to look outside and contribute to the development of international law. Still under military dictatorship during the 1980s,[73] Korea started to actively join and contribute to the international society. Korea hosted the 1986 Asian Games and the 1988 Olympic Games. Also, the current Korean Constitution, which was revised last in 1987, reaffirmed Korea's contribution to international peace and security.[74] The Preamble of the Korean Constitution states a clear mission for the peaceful unification of two Koreas and to contribute to lasting world peace and the common prosperity of mankind.[75] Under Article 5 of the Korean Constitution, Korea pledged to maintain international peace and "renounce all aggressive wars."[76] Under Article 6, Korea gave international law the same status as the domestic laws.[77]

Relating to transnational crime committed in Korea, the courts in Korea are making efforts to provide fair and equitable trials to foreigners who commit crimes in the territory and sea of Korea. The courts in Korea officially use Korean as a communication language, but allow interpreters when relevant parties cannot

70. Act on Anti-Terrorism for the Protection of Citizens and Public Security, Act No. 14071, Mar. 3, 2016 (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=38450.

71. *Id.* arts. 2, 5.

72. *Miracle on the Han River*, WIKIPEDIA, https://en.wikipedia.org/wiki/Miracle_on_the_Han_River (last visited Oct. 24, 2019).

73. *See South Korea – Timeline*, BBC (May 1, 2018), https://www.bbc.com/news/world-asia-pacific-15292674.

74. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (S. Kor.).

75. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] pmbl. (S. Kor.).

76. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 5 (S. Kor.).

77. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 6 (S. Kor.).

speak and read Korean.[78] The courts also allow foreign documents and evidence, but these must be translated;[79] otherwise, a party who fails to translate loses her right to appeal.[80]

While Korea began to sign and ratify treaties in 1948, starting in the 1980s Korea made special efforts to contribute to the development of international criminal law, signing and ratifying numerous treaties relating to international criminal law. Korea is one of 122 parties to the Rome Statute.[81] Thus, Korea will be subject to the jurisdiction of the International Criminal Court over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. As a party to the Rome Statute, Korea also affirms general principles of international criminal law including *nullum crimen sine lege*,[82] non-retroactivity *ratione personae*,[83] individual criminal responsibility,[84] irrelevance of official capacity,[85] non-applicability of statute of limitations,[86] and allowance of the mistake of fact defense.[87] Any Korean who commits a crime enumerated above shall be individually responsible and liable for punishment according to the Rome Statute.[88]

Two Koreans have served as judges on the International Criminal Court. Sang-Hyun Song was elected in 2003 for a three-year term, and was elected again in 2006 for a nine-year term.[89] Judge Song was also elected as President of the International Criminal Court (ICC) in March 2009 and had served as the ICC's president until March 2015.[90] Chang-ho Chung is the second Korean judge serving at the ICC and was elected in 2015.[91]

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78. Court Organization Act, Act No. 3992, Dec. 4, 1987, *amended by* Act No. 13522, Dec. 1, 2015, art. 62 (S. Kor.), *translated in* Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=37126&type=sogan&key=9.

79. Criminal Procedure Act, Act No. 341, Sept. 23, 1954, *amended by* Act No. 9765, Jun. 9, 2009, art. 182 (S. Kor.) *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=22535&lang=ENG.

80. *See* Supreme Court [S. Ct.], 98Da1038, June 23, 1998 (S. Kor.).

81. *Status of Treaties: Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited Oct. 26, 2019).

82. Rome Statute, *supra* note 52, art. 22.

83. *Id.* art. 24.

84. *Id.* art. 25.

85. *Id.* art. 27.

86. *Id.* art. 29.

87. *Id.* art. 32.

88. *Id.* art. 25.

89. *Judge Sang-Hyun Song*, INT'L CRIM. CT., https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Sang-Hyun%20Song (last visited Oct. 26, 2019).

90. *Id.*

91. *Judge Chang-ho Chung*, INT'L CRIM. CT, https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Chang-ho%20Chung (last visited Oct. 26, 2019).

IV. CONCLUSION

Many Koreans during the Japanese colonial time of 1910 to 1945 were exposed to international crime, but these victims have not received adequate official apology or compensation.[92] Since international crime *stricto sensu* is a recent development and most were recognized after the Nuremberg Charter and Tokyo Charter, it cannot be applied retrospectively ex post facto to the events that happened before World War II. War crimes, however, can still be applied to this time period because war crimes had been developed under customary international law and were recognized and codified by 1907 Hague Convention IV.[93] After being illegally annexed by Japan in 1910, as part of the efforts for liberation, Koreans were able to establish a new government, a Provisional Government of the Republic of Korea in Shanghai, China on April 11, 1919, officially and systemically starting Korea's independence wars against Japan.[94] These circumstances triggered the war crimes mechanism during the colonial period. Thus, appropriate compensation and punishment should be made by Japan for their crimes committed against prisoners, the wounded, and civilians during the colonial period.

Relating to the crimes it committed during World War II, Japan officially compensated Myanmar, Indonesia, the Philippines, and Vietnam for Japan's various war crimes.[95] Korea, however, has not received an adequate official apology or compensation from Japan for its crimes committed during the World War II.[96] For

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92. *See, e.g.*, *Koreans Executed as 'Japanese War Criminals' After WWII*, JAPAN PRESS WKLY. (May 22, 2016), http://www.japan-press.co.jp/modules/news/index.php?id=9597 [hereinafter *Japanese War Criminals*].

93. Laws and Customs of War on Land (Hague, IV), Oct. 18, 1907, 36 Stat. 2277 (entered into force Jan. 26, 1910).

94. Sarah Kim, *Korea's Shanghai Gov't Was Born 100 Years Ago*, KOREA JOONGANG DAILY (Apr. 11, 2019), http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3061693.

95. *See* Geoffrey Gunn, *War Claims and Compensation: Franco-Vietnamese Contention over Japanese War Reparations and the Vietnam War*, 9 ASIA-PAC. J. 1, 8 (2011), https://apjjf.org/-Geoffrey-Gunn/3658/article.pdf.

96. *See* Gregg A. Branziksy, *How Japan's Failure to Atone for Past Sins Threatens the Global Economy*, WASH. POST (Aug. 11, 2019, 5:00 AM), https://www.washingtonpost.com/outlook/2019/08/11/how-japans-failure-atone-past-sins-threatens-global-economy/#comments-wrapper ("Since the 1990s, Japanese leaders have made several dozen statements apologizing for and expressing remorse for their country's past misdeeds. However, they have consistently undermined these statements by issuing clarifications or engaging in other actions such as visiting the notorious Yasukuni Shrine that raise questions about their sincerity."); *cf.* Hannibal Travis, *Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations*, *in* TOP TEN GLOBAL JUSTICE LAW REVIEW ARTICLES 2008 107, 149 (Amos N. Guiora ed., 2009) ("Victims

context, after World War II, Korea and Japan restored their official relations on December 18, 1965, signing the Treaty on Basic Relations Between the Republic of Korea and Japan.[97] In the concurrently signed Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-Operation Between Japan and the Republic of Korea, Japan agreed to support Korea economically by providing 300 million dollars and lending 200 million dollars with low interest rates. [98] This compensation was more about civil compensation than criminal compensation; satisfaction through official apology was not made. Regarding criminal prosecutions of Japanese war criminals, in addition to the Tokyo Tribunal, trials of about 5,700 Japanese criminals were held at 49 courts in Asia, and more than 900 people were executed.[99] Most Japanese criminals who committed crimes in the Korean territory or on Koreans during the World War II, however, were not prosecuted and punished. Furthermore, the comfort women issue should be resolved and treated as an international crime against humanity and sexual slavery. U.N. Human Rights Commission Special Report[100] and the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery[101] affirmed that Japan's exploitation of Korean comfort women represented a clear violation of Japan's obligations under international law. While Japanese officials have made some attempts to apologize,[102] Japan has not make any further efforts to prosecute criminals; and has only made minimal efforts to compensate comfort women and their survivors.[103]

Relating to the Korean War, the peace declaration on April 27, 2018, politically ended the war and started a new era of peace.[104] However, the period of armistice has been too long to blame and

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of Japan's occupation, mass murder, and enslavement of Asian populations during World War II have received very little in reparations payments compared to what they have lost.").

97. Treaty on Basic Relations Between Japan and Republic of Korea, Japan-S. Kor., June 22, 1965, 8471 U.N.T.S. 44.

98. Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Co-Operation Between Japan and Republic of Korea art. 1, Japan-S. Kor., June 22, 1965, 8473 U.N.T.S. 258 (entered into force Dec. 18, 1965).

99. *Japanese War Criminals*, *supra* note 92. Note that of the around 5,700 who were tried, 148 of the prosecuted were Korean; most of these Korean soldiers were forced into working for the Japanese Imperial Army. *See id.*

100. *U.N. Report on Sexual Slavery*, *supra* note 12, ¶ 137.

101. *Tokyo Tribunal*, *supra* note 18.

102. *See* Kang Min-jin, *The First Official Apology of the Japanese Government Comfort Women, and 26 Years Have Passed*, HANKYOREH (S. Kor.) (Jan. 29, 2018), http://www.hani.co.kr/arti/politics/diplomacy/829830.html.

103. Cho Ki-weon & Park Min-hee, *UN Declares Japan's Compensation to Comfort Women as Inadequate*, HANKYOREH (S. Kor.) (Nov. 21, 2018), http://english.hani.co.kr/arti/english_edition/e_international/871186.html.

104. *Peace Declaration*, *supra* note 30.

punish criminals based on nearly seventy-year-old crimes. This may be the reason that the declaration did not resolve any criminal issues committed during the Korean War. Amnesty to the criminals may also be meaningless at this time unless one can clearly identify war criminals with witnesses and evidence. Maybe, for the peace of the Korean peninsula, the past can be better resolved politically than legally.

If we ask when the best time is to prosecute criminals, there may be no answer. Statutes of limitations are usually set for crimes due to the difficulty of arresting and prosecuting criminals, finding witnesses, and obtaining evidence after the passage of a certain period of time.

International criminal law issues surrounding Korea must be resolved either legally or politically, which will become a foundation for peaceful relations among North Korea, South Korea, and Japan. The equitable procedural cooperation in the criminal matters with the other countries, including the SOFA issue with U.S., will enhance the safety and peace in Korea.

CONSTITUTIONAL REVIEW OF STATUTES IN GERMANY AND THE UNITED STATES COMPARED

LOTHAR DETERMANN AND MARKUS HEINTZEN*

I. INTRODUCTION

In countries that task courts with constitutional review of statutes, judges are major political players and "most extraordinarily powerful"[1] since they can strike down laws passed by the elected legislature. In Germany, such constitutional

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1. Peter E. Quint, *"The Most Extraordinarily Powerful Court of Law the World Has Ever Known"?—Judicial Review in the United States and Germany*, 65 MD. L. REV. 152, 152 (2006).

review is conducted by a specialized Federal Constitutional Court (*Bundesverfassungsgericht*), whose power to conduct constitutional review is laid out in the German Constitution (*Grundgesetz*),[2] as well as a in a separate federal statute, the German Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*).[3] According to the German Constitutional Court Act, the Constitutional Court ought to declare a law to be null and void if it violates the German Constitution.[4] However, bearing in mind the political consequences of such a declaration with regard to a democratically passed law, the Court has in some cases developed other techniques to address the unconstitutionality of a law without fully invalidating it.

In the United States, courts also conduct constitutional review of statutes. Yet, U.S. judges find less guidance in the U.S. Constitution or U.S. statutes on how to conduct constitutional review or how to address unconstitutional statutes. This is not surprising as U.S. courts developed their approach based on a constitution that was written more than 225 years ago in a common law system, the oldest written constitution still in use today.[5] Despite the absence of explicit constitutional or statutory rules on how unconstitutionality should be dealt with, courts in the United States generally default to declaring a statute void if it conflicts with the Constitution of the United States. But, the Supreme Court deviates from the default remedy of nullity. It has developed other techniques to adequately address unconstitutionality. The Supreme Court's approaches are similar to approaches followed by the much younger German Constitutional Court, based on the much younger German constitution, despite the very different tradition, means, and structure of judicial review in both jurisdictions.

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2. GRUNDGESETZ [GG] [BASIC LAW], *translated at* https://www.gesetze-im-internet.de/englisch_gg/.

3. Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act], Aug. 11, 1993, BUNDESGESETZBLATT, Teil I [BGBL I] at 1473, last amended by Gesetz [G], Oct. 8, 2017, BGBL I at 3546, art. 2, https://www.gesetze-im-internet.de/englisch_bverfgg/index.html.

4. *See id.* art. 2, § 78.

5. *Constitution of the United States of America*, ENCYCLOPEDIA BRITANNICA, www.britannica.com/topic/Constitution-of-the-United-States-of-America (last updated Jan. 29, 2019).

II. THE ORIGINS OF CONSTITUTIONAL REVIEW

A. Germany

German law stems from a civil law background and is based on codified statutes. In cases of dispute over these statutes, different types of courts are responsible to judge the disputes at hand. The highest of these courts are the Federal Court of Justice (*Bundesgerichtshof*), the court for appeals in criminal and civil law matters; the Federal Administrative Court (*Bundesverwaltungsgericht*), the court for appeals on administrative matters; and several other specialized federal courts of appeals.[6] Below these courts there are different types of higher regional courts (appeals courts) within every state and different types of regional courts. Although all of these courts have the power to interpret the German Constitution, none of them actually has the power to declare a statute to be unconstitutional. With the introduction of the German Constitution in 1949, this power was explicitly granted to the specialized Federal Constitutional Court.[7] The Constitutional Court deals with cases involving federal constitutional law issues; it only reviews the correctness of interpretation and application of laws by other courts for infringements of "specific constitutional law" (*spezifisches Verfassungsrecht*).[8] It is not supposed to act as "super appeals court" (*Superrevisionsinstanz*)[9] and does not stand on a higher hierarchical level than the aforementioned highest federal courts of the country. "Specific constitutional law" is an unclear criterion that has been developed by the Constitutional Court itself. It is not mentioned in the German Constitution or in the German Constitutional Court Act, which gives the Constitutional Court some leeway. "Specific constitutional law" is affected if a specialized court has applied a law that is

6. The other specialized federal courts are the Federal Finance Court (*Bundesfinanzhof*), Federal Labour Court (*Bundesarbeitsgericht*), the Federal Social Court (*Bundessozialgericht*) and the Federal Patent Court (*Bundespatentgericht*). The aforementioned specialized federal courts, as well as the Federal Court of Justice and the Federal Administrative Court, were established under Articles 95 and 96 of the German Constitution. GRUNDGESETZ [GG] [BASIC LAW] arts. 95, 96.

7. *See id.* art. 100, ¶ 1.

8. *See* KLAUS SCHLAICH & STEFAN KORIOTH, DAS BUNDESVERFASSUNGSGERICHT: STELLUNG, VERFAHREN, ENTSCHEIDUNGEN ¶ 281, (10th ed. 2015). For the criteria of "specific constitutional law," see generally Andreas Voßkuhle, *Artikel 93*, *in* 3 KOMMENTAR ZUM GRUNDGESETZ 665, ¶¶ 54–66 (Peter M. Huber & Andreas Voßkuhle eds., 7th ed. 2018).

9. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198 (198).

unconstitutional. "Specific constitutional law" may further be affected if a decision of a specialized court breaches the Constitution itself, which is the more common case in practice.

B. United States of America

The law of the United States was originally derived from the common law system of English law, i.e., judge-made law, in which judicial review of statutes had not played any role in the past because of the principle of "Sovereignty of Parliament."[10] Since then, U.S. law has departed from this origin through the extensive introduction of written laws, the most significant of them being the Constitution. Naturally, its adoption raised the question whether courts were entitled to strike down statutes that violated the Constitution. With regard to laws passed by Congress, this question was answered positively in 1803 by Chief Justice John Marshall in the Supreme Court's landmark decision of *Marbury v. Madison*,[11] despite the fact that the U.S. Constitution does not expressly provide for a system of judicial review.[12] In *Fletcher v. Peck*,[13] the Supreme Court further established its authority to strike down state laws that it found to be incompatible with the U.S. Constitution.

Although the Supreme Court by these decisions primarily established its own power of constitutional review, it did not limit this power to itself. The Supreme Court binds with its decisions also lower courts regarding a finding of unconstitutionality of a given statute.[14] Other courts are also empowered to review statutes with regard to unconstitutionality. All other courts on the federal level essentially means thirteen Courts of Appeals, ninety-four District Court, and some specialized courts including the United States Bankruptcy Courts, the United States Court of

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10. Arguably, the situation has changed in the United Kingdom with the introduction of the Human Rights Act in 1998, which enables a certain degree of judicial review and gives the courts the right to give a declaration of incompatibility according to Section 4 of the Act if an Act of Parliament is incompatible with the European Convention on Human Rights. Human Rights Act 1998, ch. 42, § 4 (Eng.).

11. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

12. The fact that the U.S. Constitution does not expressly provide for a system of judicial review of statutes has led to an extensive discussion whether such form of judicial review is itself unconstitutional. *See, e.g.*, William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 13, 16–29 (1969); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 898 (2003).

13. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 87 (1810).

14. The doctrine of stare decisis refers to "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Claims, and the United States Court of International Trade, all of which are subordinate to the Supreme Court and are entitled to conduct judicial review of federal laws.[15]

U.S. states are generally free to organize their state court systems and constitutional review of their state statutes provided that such state constitutional review does not violate the U.S. Constitution.[16] A state can have either a two-tiered or three-tiered court system. A court of last resort, often called a Supreme Court, is the highest court. Some states also have an intermediate court of appeal. Below these state appellate courts are the state trial courts. States usually have specialized trial courts, e.g., probate courts, juvenile courts, and family courts. All of these state courts are entitled to conduct judicial review of the respective state laws.[17]

III. MEANS OF CONSTITUTIONAL REVIEW OF STATUTES

A. Germany

The German Constitution expressly sets forth three procedures according to which constitutional review by the Constitutional Court may be conducted and which can lead to a declaration of unconstitutionality by the German Constitutional Court: "Abstract Judicial Review" (*Abstrakte Normenkontrolle*),[18] "Concrete Judicial Review" (*Konkrete Normenkontrolle*),[19] and "Individual Constitutional Complaint" (*Verfassungsbeschwerde*).[20]

In the case of Abstract Judicial Review, the constitutionality of a federal law or a law of a state (*Land*) is reviewed upon request of either the federal government (*Bundesregierung*), the government of a German state (*Landesregierung*), or a quarter of the members of the German house of representatives (*Bundestag*). Abstract Judicial Review is not permitted until after a bill has been passed

15. Article III, Section 1 of the Constitution of the United States created the Supreme Court as the highest court in the United States and authorized Congress to pass laws establishing the lower federal courts. U.S. CONST. art. III, § 1.

16. 20 AM. JUR. 2D *Courts* § 5 (2015).

17. Some states have previously attempted to nullify federal laws. However, the U.S. Supreme Court has rejected state nullification attempts in a series of decisions. *See, e.g.*, Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1858) (rejecting Wisconsin's attempt to nullify the Fugitive Slave Act); Perez v. Campbell, 402 U.S. 637, 651–52 (1971) (holding that state law may not frustrate the operation of federal law even though the state legislature in passing its law had some purpose in mind other than the one of impinging federal law).

18. GRUNDGESETZ [GG] [Basic Law] art. 93, ¶ 1.

19. *Id.* art. 100, ¶ 1.

20. *Id.* art. 93, ¶ 1.

by the responsible legislative bodies and entered into effect.[21] However, there are exceptions with regard to constitutional review of statutes granting consent for ratification of an international treaty, e.g., the Maastricht Treaty and the European Union Treaty of Lisbon. These statutes can be challenged earlier because the subsequent determination of their unconstitutionality by the Constitutional Court would not affect Germany's obligations under public international law with regard to the respective treaties.

Concrete Judicial Review takes place when an ordinary court (may it be a civil, criminal, or an administrative court), which has to apply a law in a concrete case, deems the applicable statute[22] to be unconstitutional. In such a case, the court must suspend the proceedings and refer the question of constitutionality to the Constitutional Court for a final decision. After the Constitutional Court has decided on the constitutional issue at hand, the ordinary court may continue judging the case.

Individual constitutional complaints can be lodged by any natural person or legal entity[23] claiming a violation of his or her basic rights or a violation of similar rights expressly stated in the German Constitution,[24] caused by a judicial decision being based on an unconstitutional law or, in rare cases, immediately caused by the law itself.

In each of the aforementioned procedures, the question of whether a law is unconstitutional presents itself in the same

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21. BVerfG July 30, 1952, 1 BVERFGE 396 (408); BverfG Mar. 7, 1953, 2 BVERFGE 143 (144). Preventive legal protection is in rare cases granted by preliminary injunctions in accordance with Section 32 of the Federal Constitutional Court Act; however, the Constitutional Court is not entitled to give abstract legal opinions upon request. BVerfGG [Federal Constitutional Court Act], Aug. 11, 1993, BGBL I at 1473, § 32.

22. It should be noted that the Constitutional Court can only conduct Concrete Judicial Review on German laws that came into force after 1949, i.e. after the foundation of the Federal Republic and after the German Constitution came into force. Although this is nowhere explicitly codified, it is generally accepted by the courts and academics alike. Only the so-called post-constitutional legislator should be protected from having to accept the reproach of unconstitutional action by a simple court. *See, e.g.*, BVerfG July 21, 1956, 6 BVERFGE 55 (65); BVerfG May 17, 1960, 11 BVERFGE 126 (129–31); BVerfG Jan. 14, 1969, 25 BVERFGE 25 (26–27); BVerfG Jan. 14, 1969, 29 BVERFGE 40 (42–43). However, if the post-constitutional legislator has incorporated a pre-constitutional law (either civil or criminal) into its will—for instance, by amending the law—then this law as a whole is subject to the jurisdiction of the Constitutional Court.

23. According to the German Constitution, "basic rights" apply to domestic legal persons to the extent that the nature of such rights permits. GRUNDGESETZ [GG] [BASIC LAW] art. 19, ¶ 3.

24. The expression "basic rights" in the German Constitution refers to fundamental rights—such as personal freedom, equality before the law, freedom of speech, or freedom of assembly—granted to individuals or legal persons in the German Constitution. *Id.* arts. 1–19. "Similar rights" refers to rights that are akin to the basic rights, e.g., the right to equal citizenship or the fair trial principle.

way.[25] Should the Constitutional Court, as part of these procedures, declare a law to be unconstitutional, this declaration has the force of law[26] and is binding *erga omnes*, i.e., on the Federal Republic, the States, the courts, and all public authorities. The relevant operative part of the decision is to be published in the Federal Law Gazette.[27]

The overwhelming majority of cases come to the Constitutional Court by means of constitutional complaints. According to the most recent official statistics of the Constitutional Court, there have been 29 filed requests for judicial review of statutes by specialized courts in 2017 and 3,656 since 1951.[28] There have been no filed requests for Abstract Judicial Review in 2017 and only 180 since 1951.[29] On the other hand, there have been 5,784 Individual Constitutional Complaints in 2017 and 224,221 since 1951[30] (most of them being inadmissible or evidently unsubstantiated). In comparison, the U.S. Supreme Court usually receives 7,000 to 8,000 certiorari petitions filed in total during each yearly term, although not all of the petitions raise constitutional issues.[31]

B. United States of America

Unlike the German Constitution, the Constitution of the United States does not set forth the procedures according to which constitutional review has to be conducted. Article III, Section 2 of the U.S. Constitution solely indicates that courts have to decide on "cases" and "controversies." This provision was interpreted to mean that courts of the United States may not give advisory opinions or judge by means of abstract judicial review; instead, the U.S. Constitution only permits courts to issue a judgment in legal disputes in which at least two parties present a legal dispute to a court for resolution.[32] As a consequence, constitutional questions

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25. For a comprehensive overview, see Helmut Philipp Aust & Florian Meinel, *Entscheidungsmöglichkeiten des BVerfG* [*Choices of the Federal Constitutional Court*], 54 JURISTISCHE SCHULUNG [JuS] 25–30, 113–17 (2014).

26. *See* BverfGG [Federal Constitutional Court Act] Aug. 11, 1993, BGBL I at 1473, § 31.

27. *Id.*

28. *Eingänge nach Verfahrensarten* [*Inputs According to Process Types*], *in* JAHRESSTATISTIK 2017 [ANNUAL STATISTICS 2017] 6 (BVerfG 2017), http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2017/gb2017/A-I-4.pdf?__blob=publicationFile&v=2.

29. *Id.*

30. *Id.*

31. *Supreme Court Procedure*, SCOTUSBLOG, http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/ (last visited Nov. 2, 2019).

32. *See, e.g.*, Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546–47 (2016); *see also* Smith v. Adams, 130 U.S.

arise for courts in ordinary cases in which it happens that they have to apply a constitutional provision with regard to the dispute presented by the parties. The Supreme Court may decide on a constitutional matter as part of its appellate jurisdiction after a party has petitioned to the Court to grant a writ of certiorari.[33] If the Supreme Court grants certiorari, it gives a final judgment on the concrete case at hand and can choose whether to rule on any underlying constitutional issues. Unlike the German Constitutional Court, the Supreme Court does not have to decide on every constitutional issue brought to its attention but may select its cases on its own merits.[34] Moreover, in contrast to the German system, the Supreme Court's decision on the question of a statute's constitutionality technically affects the parties only and there is no judgment against the law itself, but the decision binds future courts through the doctrine of stare decisis.[35]

IV. UNCONSTITUTIONALITY

A law is unconstitutional in Germany and in the United States if it is incompatible with constitutional law of the respective jurisdiction, because of the constitution's superiority to statutes. Unconstitutionality has to be understood in light of the legal framework of a jurisdiction. Within the German legal framework, a law of a state has to be compatible with the constitutional law of this specific state as well as the German Constitution; a federal law takes precedence over the constitutions of the states and is to be reviewed constitutionally only in the light of the German Constitution. This hierarchy is very similar to that in the United States. In the United States, a state law has to be compatible with the constitution of the state, the U.S. Constitution, and federal statutes; a federal law only has to be compatible with the U.S. Constitution.[36] In light of this hierarchy, under both Germany's and the United States' legal systems, unconstitutionality means

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167, 173–74 (1889); U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21 (1994); Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993); Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663–64 (1993).

33. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 66–67, (13th ed. 1997), for the origins of this form of discretionary review.

34. See SUP. CT. R. 10, for an exemplary list of reasons for the Court to grant a writ of certiorari. Despite the fundamental obligation of the German Constitutional Court to grant a legal right to be heard in front of the Court, the Constitutional Court does not decide on every constitutional complaint brought to it. Out of the unmanageable amount of constitutional complaints received, the Constitutional Court selects those cases that it regards important to be decided on by one of the two chambers.

35. *See* BLACK'S LAW DICTIONARY, *supra* note 14.

36. *See* 16 AM. JUR. 2D *Constitutional Law* §§ 53, 55 (1962).

that a law, either a state law or a federal law, is not compatible with the federal constitution, or that a state law is not compatible with the state's constitution.

Furthermore, with regard to Germany, the primary and secondary law of the European Union also take precedence over federal laws and state laws. Law adopted by the institutions of the European Union (secondary EU law)—unlike primary EU law, the international basis of the Union—is not open to proceedings in front of the Constitutional Court. The task of interpreting and applying secondary EU Law rests with the Court of Justice of the European Union (CJEU).[37] The courts of the member states—specialized courts and constitutional courts—are in a dialogue with the CJEU, in particular through the preliminary ruling procedure according to Article 267 of the Treaty on the Functioning of the European Union. The CJEU does not decide itself on the incompatibility of national laws with EU law but answers interpretative questions of EU law. It is then for the national courts to draw the necessary conclusions with respect to the interpretation or invalidation of national laws. The power to declare a national law to be incompatible with laws of the European Union lies with the national courts. However, unlike with constitutional law, the German Constitutional Court does not have a monopoly on giving such declarations of incompatibility. Any German court can find incompatibility with EU law. Moreover, it has to be noted that EU law only takes priority in its application over national law; i.e., a national court that considers national law to be incompatible with EU law only refrains from applying the national law in a specific dispute at hand but does not invalidate the law in entirety with *erga omnes* effect.[38]

V. REASONING OVER QUESTIONS OF UNCONSTITUTIONALITY

Despite the different origins of judicial review within the United States and Germany, as well as the different means of conducting such review, the reasoning of the courts over questions of constitutionality is very similar within both jurisdictions.

Based on the so-called *canones*, developed by Friedrich Carl von Savigny, statutes in Germany are interpreted on the basis of

37. *See* Treaty on European Union art. 19, Feb. 7, 1992, 1992 O.J. (C 191) 1.

38. *See generally* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 464–508, 533–36 (6th ed. 2015); ULRICH HALTERN, EUROPARECHT, DOGMATIK IM KONTEXT (3rd ed. 2017).

grammatical, historical, systematic, and teleological arguments.[39] This technique is also used with regard to questions of constitutionality by the German Constitutional Court. In contrast, the U.S. Supreme Court bases its decisions regarding questions of constitutionality on a literal reading of the text of the U.S. Constitution, contextual considerations, the framers' intent, precedent, and policy considerations.[40]

Grammatical and literal interpretation are essentially the same. Courts look at the exact wording of the constitutional text in order to solve the respective constitutional question. Courts use grammatical and literal interpretation usually as the first line of arguments, however, these methods often fail to give a definite answer to a constitutional law question and dispute at hand and are often viewed in combinations with other methods and considerations.[41]

Historical arguments under German law and American arguments based on the framers' intent are also comparable. Both look at the genesis of the specific provisions in the respective constitution. But U.S. courts seem to give greater weight to the actual intent of the framers than German courts,[42] which tend to resort to teleological arguments more quickly. Perhaps this can be explained by the relatively higher esteem in which the framers of the U.S. Constitution—celebrated heroes of the American Revolution—are held as compared to the drafters of the German Constitution, who are less known and worked based on previous versions of German constitutions that were subject to a complex history of their own.

Arguments from constitutional theory and systematic arguments in Germany and in the United States are also comparable. Such arguments place the relevant section of the respective constitution within its wider framework when interpreting it.[43]

Value arguments under U.S. law and teleological arguments under German law are also similar in their application.

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39. *See* Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 660 (2004); Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 AM. J. COMP. L. 395, 396–401 (1994).

40. Rosenfeld, *supra* note 39; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

41. Rosenfeld, *supra* note 39.

42. *Id.* The importance of intent when deciding on constitutional questions can also be seen by the weight given to intent when deciding on the question of whether a partial unconstitutional law can be severed. *See also infra* Section VI.C.

43. Rosenfeld, *supra* note 39, at 661.

Teleological arguments look at the purpose of the relevant section of the German Constitution and of the German Constitution as a whole.[44] When applying value arguments, the courts in the United States look at arguments that "appeal directly to moral, political, or social values or policies."[45] Although the teleological arguments are more internal to the German Constitution and the value arguments under U.S. law are in fact external to the U.S. Constitution,[46] the German Constitutional Court has interpreted teleological arguments quite widely and has taken the change of moral, political, and social values within the German population into consideration. An example that illustrates this well can be seen with regard to the Constitutional Court's approach to homosexuality. In a judgment issued on May 10, 1957,[47] the Court declared the criminal liability of male homosexuality to be compatible with the fundamental rights of the German Constitution. Starting with a judgment issued on July 17, 2002,[48] the Court declared the introduction of the legal institution of registered civil partnership for homosexual couples constitutionally admissible and its equality with the legal institution of marriage for heterosexual couples to be constitutionally required.

Arguments from precedent under U.S. law stem from the common law origin of the U.S. legal system,[49] which establishes that U.S. courts are bound by stare decisis when deciding constitutional matters. However, the Supreme Court does not follow this doctrine "slavishly"[50] and sometimes overrules its own previous decisions.

Unlike U.S. courts, the German Constitutional Court is not bound by its own decisions and is permitted to dismiss legal opinions within earlier decisions. Yet, in practice, the German Constitutional Court tends to stick to its past decisions, which it regularly cites as authority, when judging constitutional matters.[51]

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44. *Id.*
45. Fallon, *supra* note 40, at 1204.
46. Rosenfeld, *supra* note 39, at 661.
47. BVerfG May 10, 1957, 6 BVERFGE 389.
48. BVerfG July 17, 2002, 105 BVERFGE 313.
49. *See supra* Section I.
50. Rosenfeld, *supra* note 39, at 662.
51. *See id.*; Wolfgang Zeidler, *Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV., 504, 521–22 (1986).

VI. LEGAL EFFECT OF A DECLARATION OF UNCONSTITUTIONALITY

A. Nullity

Under German law, if the Constitutional Court declares a law to be unconstitutional, it is generally regarded to be null and void, despite the fact that nullity and voidness are not expressly stated in the German Constitution. Unlike Article 140 of the Austrian Constitution, the German Constitution does not expressly state that the Constitutional Court can repeal unconstitutional laws.

The effects of a judgment by the Constitutional Court declaring a law to be unconstitutional and void are addressed in Sections 78 and 79 of the German Constitutional Court Act. A declaration of nullity has the effect that the unconstitutional law may not be applied henceforth.[52] However, in considering the constitutionality of the law as applied in the past, the situation is different. In criminal cases, a new trial is permissible if a conviction was based on an unconstitutional and void law.[53] In all other cases, official decisions resting on such a law—for instance, administrative acts or judicial rulings—remain valid if the statute of limitations for challenges has run out; however, these voided laws can no longer be prospectively enforced.[54] For example, if a citizen has paid taxes on the basis of an unconstitutional tax law and has let the tax assessment become incontestable, the citizen is not entitled to claim any tax refunds. But, if the assessment can still be challenged or the citizen has not yet paid, then tax authorities could no longer compel the citizen to pay taxes based on an unconstitutional law.

To avoid problems arising from incontestable decisions, administrative bodies issue decisions subject to a reservation of subsequent review. An administrative body might issue such a reservation to a decision if the body expects that the particular law on which the decision is based might be invalidated by the Constitutional Court.[55]

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52. Wiltraut Rupp-v.Brünneck, *Admonitory Functions of Constitutional Courts*, 20 AM. J. COMP. L. 387, 390 (1972).

53. BVerfGG [Federal Constitutional Court Act] Aug. 11, 1993, BGBL I at 1473, § 79, ¶ 1.

54. *Id.* § 79, ¶ 2.

55. As an example, taxes are only provisionally set by the tax authorities if the compatibility of the applicable superior tax law is the subject of proceedings before the CJEU, the Constitutional Court, or a federal court. ABGABENORDNUNG [AO] [FISCAL CODE OF GERMANY], § 165, ¶ 1(3), *translation at* https://www.gesetze-im-internet.de/englisch_ao/.

In the United States, neither the Constitution nor any other law states the legal effects of an unconstitutional law, but since *Marbury v. Madison*,[56] it is generally accepted that "an act of the legislature [that is] repugnant to the constitution[] is void."[57] As courts in the United States only make decisions in "cases" and "controversies," a declaration of a law to be void theoretically only means that the respective law is not enforced in the case at hand. However, judicial adherence to stare decisis assures that rulings declaring laws void will be applied in future cases involving the respective law.[58] Therefore, from a practical point of view, a court declaration that a law is void applies to all cases that are subsequently litigated. Moreover, just like in German law, in criminal cases the voidness of a law has retroactive effects. However, retroactive constitutional review of a US criminal case is only permissible if the conviction was based on a law that is unconstitutional due to a "substantive constitutional rule,"[59] rather than a procedural rule.

B. Voidness vs. Voidability

German constitutional scholars debate whether the Constitutional Court's judgment to nullify a law is best grasped by the *doctrine of voidness* or rather by the *doctrine of voidability*. Under the doctrine of voidness, an unconstitutional law is null and void ab initio and ipso jure and the Constitutional Court only determines that.[60] However, under the doctrine of voidability, an unconstitutional law is initially valid but the Constitutional Court voids the law with effect ex nunc, i.e., henceforth. Hence, the decision by the Constitutional Court is not a declaratory judgment, but rather a reformatory one.[61]

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56. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

57. *Id.* at 177.

58. GUNTHER & SULLIVAN, *supra* note 33, at 26.

59. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

60. Herbert Bethge, *in* BUNDESVERFASSUNGSGERICHTSGESETZ 159, § 31, ¶¶ 142–44 (Theodor Maunz et. al. eds., 54th ed. 2018); Andreas Heusch, *in* BUNDESVERFASSUNGSGERICHTSGESETZ § 31, ¶ 74 (Dieter C. Umbach et al. eds., 2nd ed. 2005); CHRISTIAN HILLGRUBER & CHRISTOPH GOOS, VERFASSUNGSPROZESSRECHT ¶ 548 (4th ed. 2015); Wolfgang Löwer, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 1285 (Josef Isensee & Paul Kirchhof eds., 3rd ed 2005); HARTMUT MAURER, STAATSRECHT I § 20, ¶ 84 (7th ed. 2015).

61. Malte Graßhoff, *in* BUNDESVERFASSUNGSGERICHTSGESETZ § 78, ¶ 31 (Dieter C. Umbach et al. eds., 2nd ed. 2005); Eckart Klein, *in* VERFASSUNGSPROZESSRECHT ¶ 1369 (Ernst Benda & Eckart Klein eds., 3rd ed. 2011); CHRISTIAN PESTALOZZA, VERFASSUNGSPROZEßRECHT § 20, ¶¶ 14–18, (3rd ed. 1991).

Both doctrines have advantages and disadvantages in evaluating the decisions of the Constitutional Court. The doctrine of voidness fits better with the traditional concept of how conflicting norms resolve in the legal hierarchy that exists under the German Constitution: federal laws void conflicting laws of the states, executive orders are voided by conflicting parliamentary statutes, and national laws are voided by conflicting EU law. The doctrine of voidability gives more weight and power to parliamentary legislation, even if it must not be confused with a presumption towards the constitutionality of laws passed by parliament. Moreover, the voidability doctrine aligns with the fact that for practical purposes many Constitutional Court judgments declaring a law unconstitutional and void only have prospective effect.

In the United States, courts and scholars also extensively debate the retroactivity and prospectivity of judgments declaring a law unconstitutionally null and void.[62] However, there does not seem to be quite as robust of a doctrinal dispute in the United States regarding the concepts of voidness and voidability as there is in Germany.

In *Norton v. Shelby County*,[63] the Supreme Court held that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[64] The Court thereby seems to have indicated that the doctrine of voidness must be applied with regard to United States' constitutional law. However, since courts within the United States are solely deciding on "cases" and "controversies," the aforementioned statement by the Supreme Court can better be regarded as an overstatement[65] than an actual statement of the law. In fact, since United States' courts only invalidate laws in particular cases, the doctrine of voidability better depicts the legal effects of such judgments within the United States' jurisdiction.

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62. *See, e.g.*, Richard Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. SUPP. 37 (2014); Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515 (1998); Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 887–910 (2016).

63. Norton v. Shelby Co., 118 U.S. 425, 438 (1886).

64. *Id.* at 442.

65. GUNTHER & SULLIVAN, *supra* note 33, at 27.

C. Partial Nullity

Regularly, only a single norm, one sentence, or even a single word of a law proves to be incompatible with the constitution. This raises the question of whether the offending part of the law is severable and whether only a declaration of partial (quantitative or quantitative) nullity may be given by the courts.

In Germany, according to the established precedent of the German Constitutional Court, a complete nullification of a law is only proper if the other constitutional provisions of the law are so closely connected with the unconstitutional part of the law that they form a comprehensive, inseparable unit that loses its meaning and its justification in the event of the removal of individual parts.[66] Therefore the Constitutional Court only rarely nullifies a law in its entirety.

Within the United States, the criteria for the question of whether a partially unconstitutional law may be severed by the courts has changed several times over the years.[67] The Supreme Court developed the modern test regarding severability in *Alaska Airlines, Inc. v. Brock*,[68] in which it held that a partial nullification can be applied when the remaining part will be "fully operative as a law"[69] and "the statute created [by severing the unconstitutional part of the law] . . . is [not] legislation that Congress would not have enacted."[70]

In both jurisdictions, upon taking the decision of whether to sever a statute, the courts ask themselves whether the remaining part of the law could stand on its own. However, within the United States, more emphasis is put on the legislature's intent regarding the law. Arguably, the approach by the U.S. Supreme Court gives less liberty to the courts to answer the question of whether a law may be severed since the courts are bound by the legislature's (hypothetical) intention regarding the question of severability.

Besides the concept of partial quantitative nullity, outlined above, the German Constitutional Court at times also applies the concept of qualitative partial nullity. Under this concept, certain use-cases of a law are nullified by the Constitutional Court, but

66. Zeidler, *supra* note 51, at 508; *e.g.*, BVerfG Dec. 6, 1983, 65 BVERFGE 325 (358).

67. See Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. LEGIS. 227, 232–43 (2004), for a comprehensive summary of the case law regarding severability within the United States.

68. Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987). See Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010), for a criticism of American law's approach to partial unconstitutionality.

69. *Alaska Airlines, Inc.*, 480 U.S. at 684 (citations omitted).

70. *Id.* at 685.

the wording of the law remains unchanged. This concept may best be explained by outlining the facts of a case the German Constitutional Court has decided. At issue in this case was a German corporate income tax law that stipulated a general exemption from taxes on political parties. While if this law were applied generally it would be compatible with the German Constitution, under the law, communal voters associations were not granted this privilege and thus were subject to the general rules of corporate income tax liability. The Constitutional Court viewed this as a breach of the principle of equality and declared the general rules of corporate income tax unconstitutional insofar as communal voters associations were, in contrast to political parties, liable to pay corporate income taxes.[71]

The application of the concept of qualitative nullity by the Constitutional Court is widely criticized for a lack of transparency and publicity[72] since such judgments leave the law facially unchanged. For instance, in the above example, it is not visible in the statute that communal voters associations are exempted from the corporate income tax. Moreover, some authors criticize the concept since they believe that the Constitutional Court exceeds its role as a supervisory body over the legislature and, rather, actively designs the law.[73]

The U.S. Supreme Court also applies qualitative partial nullity in some of its decisions. One example of such a case is *FEC v. Wisconsin Right to Life, Inc.*[74] This case concerned the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibits corporate funds from being spent for issue advocacy advertisements during the sixty-day period prior to a general election. The plaintiffs in the case argued that the BCRA was unconstitutional as applied to an advertisement that asked voters to contact their Senators and urge them to oppose filibustering of judicial nominees. The Supreme Court agreed with the plaintiffs, holding that the BCRA was unconstitutional as applied to such advertisements that do not explicitly endorse or oppose a candidate and upholding the BCRA with regard to its other applications.[75] Another case in which the Supreme Court arguably used partial qualitative nullity concerned

71. BVerfG Sept. 29, 1998, 99 BVERFGE 69 (83).

72. See SCHLAICH & KORIOTH, *supra* note 8, ¶ 386, for criticism of the Constitutional Court's application of qualitative partial nullity.

73. *See, e.g.*, BVerfG Oct. 16, 1984, 67 BVerfGE 348 (349).

74. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

75. *Id.* The Supreme Court later ruled in Citizens United v. FEC, 558 U.S. 310 (2010), that the BCRA was unconstitutional with regard to all other applications too.

a New Hampshire abortion law.[76] In 2003, New Hampshire enacted the Parental Notification Prior to Abortion Act, which prohibited physicians from performing an abortion on a pregnant minor until forty-eight hours after written notice of such abortion was delivered to her parent or guardian. The Act did not explicitly permit a physician to perform an abortion in a medical emergency without parental notification, which the Court held to be unconstitutional. Nevertheless, the Court decided not to invalidate the statute but, rather, focused on potential remedies, arguing that lower courts were able to render narrower declaratory and injunctive relief in the given situation. However, by indicating that this law was unconstitutional with regard to the respective use-case, the Court arguably effected a declaration of partial qualitative nullity, similar to that used by the German Constitutional Court.

D. Exceptions from the Principle of Nullity

In certain cases, the nullification of an unconstitutional law is even less desirable than keeping the law in the statute books—at least for a limited amount of time. Therefore, the U.S. Supreme Court and the German Constitutional Court have developed instruments to allow avoidance of the effects of nullifying of a law.

1. Declaration of Incompatibility

In Germany, courts can make what German lawyers refer to as a "declaration of incompatibility"; here, a court declares a law to be unconstitutional but, nevertheless, allow for its future application. In some of these cases, the court only permits future application of the unconstitutional law for a limited timeframe, allowing the legislature time to modify the law.[77]

An often-used example to explain the application of a declaration of incompatibility relates to the legal rules regulating the salaries of civil servants. According to Article 33, paragraph 5 of the German Constitution, civil servants must be paid an appropriate salary for their services towards the state. In a case judged by the Constitutional Court, it held that the then-

76. *See* Ayotte v. Planned Parenthood, 546 U.S. 320 (2006).

77. Under German law, declarations of incapacity were originally developed through case law, but the power of the Constitutional Court to issue these declarations is now explicitly acknowledged by the Law on the Federal Constitutional Court. BVerfGG [Federal Constitutional Court Act] Aug. 11, 1993, BGBL I at 1473, § 31, ¶ 2.

applicable salaries paid to civil servants were too low and, therefore, unconstitutional.[78] However, if the Constitutional Court declared the law to be null and void, civil servants would—at least temporarily—not only receive too low a salary, but none at all. Such a judgment would go against the objectives of Article 33, Paragraph 5 of the German Constitution and create a worse result than if the unconstitutional statute were fully upheld. Therefore, the Constitutional Court decided to declare the law to be incompatible with the German Constitution and set the legislature a deadline to amend the law.

Another illustrative example relates to the Constitutional Court's treatment of the laws of two German states on the preventive detention of highly dangerous criminals.[79] In its judgment, the Constitutional Court came to the conclusion that the aforementioned laws were unconstitutional because the German states did not have the legislative competence to pass them. If the Constitutional Court had declared these laws null and void, highly dangerous criminals would have had to be released, which would have interfered with the state's institutional obligations to protect the fundamental rights of individuals. The Constitutional Court avoided this consequence by allowing the laws to remain valid for six months, giving legislative bodies enough time to pass new, constitutional statutes on the preventive detention of these criminals.

In cases where a law violates the principle of equality by excluding privileges from certain groups, the Constitutional Court will rarely completely void a law. Instead, the Constitutional Court will typically only give a declaration of incompatibility, leaving it up to the legislature to decide whether it wants to grant the advantage to another comparable group too, whether it wants to abolish the privilege altogether, or whether it wants to find other criteria to circumscribe the privileged groups in accordance with the Constitution.[80] Since in such a scenario none of these options is constitutionally preferable, a declaration of nullity would be one-sided. Therefore, as phrased by the Constitutional Court, "[t]he violation of the principle of equality leads to a mere declaration of incompatibility, because the contrariety to the principle of equality

78. BVerfG Mar. 22, 1990, 81 BVERFGE 363 (384).
79. BVerfG Feb. 10, 2004, 109 BVERFGE 190 (235).
80. *E.g.*, Zeidler, *supra* note 51, at 517.

does not force the legislature to certain conclusions, the legislature rather has multiple options to overcome the unconstitutional situation."[81]

As one can see from the examples outlined above, under German law, there are essentially two groups of cases in which the Constitutional Court avoids a declaration of nullity although a law is unconstitutional. First, a declaration of nullity is not made when the situation caused by that declaration would be in greater conflict with the constitutional order than the situation caused by the continued existence of the law. Second, a declaration of nullity is not made when the legislature has multiple options about how to overcome a breach of the Constitution.

The U.S. Supreme Court sometimes employs a similar approach in dealing with laws that are declared unconstitutional. In its landmark decision *Brown v. Board of Education*,[82] the Supreme Court ruled that racial segregation in public schools based on state laws is a violation of the Fourteenth Amendment's Equal Protection Clause but refrained from explicitly declaring the state laws to be void. In the second case of *Brown v. Board of Education*,[83] the Supreme Court determined that segregation should be ended as early as possible, but the Court also recognized that it would be extremely difficult to implement the related changes and that the decision concerned a hugely controversial and political issue. The Court therefore decided that segregation in schools must end "with all deliberate speed."

In addition, the U.S. Supreme Court sometimes leaves the remedy question to states after it declares a state law to be unconstitutional. For example, in *Levin v. Commerce Energy, Inc.*, a state tax scheme was declared to be unconstitutional because it discriminated against non-local companies.[84] Instead of invalidating the scheme, the Supreme Court left the remedial choice in the hands of state authorities, noting that the Constitution requires only equal treatment, which can be accomplished in more than one way. Moreover, the Supreme Court acknowledged that state courts are better positioned than their federal counterparts to correct unconstitutional state laws because the remedy should be tailored with "the State's legislative prerogative firmly in mind," and state courts are more familiar with state legislative preferences.[85]

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81. BVerfG June 22, 1995, 93 BVERFGE 121 (148).
82. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).
83. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).
84. Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010).
85. *Id*. at 427.

From the decisions of the Supreme Court in the cases just discussed, it appears that the Supreme Court also uses declarations of incompatibility in some circumstances to delay nullifying an unconstitutional law. However, unlike the German Constitutional Court, the Supreme Court has so far refrained from setting the legislature a concrete deadline for the revision of a specific law at hand.

2. Admonitory Decisions

Another means developed by the German Constitutional Court to avoid a declaration of nullity are the so-called "admonitory decisions" (*Appellentscheidungen*). When it issues an admonitory decision, the Court both declares the law in question to be presently constitutional while also indicating that the law might become unconstitutional in the near future if the legislature does not repeal or amend it.[86] The Court therewith appeals to Parliament for legislative action.[87] Hence, admonitory decisions enable the Constitutional Court to decide on constitutional principles and indicate the direction in which policies should be pursued, thus fulfilling the Court's constitutional duty without directly challenging the validity of the disputed legislation.

As an example of admonitory decisions in action, on April 10, 2018, the Constitutional Court decided on a challenge against the German Real Property Tax Act, which had been subject to previous admonitory decisions.[88] The Court found a violation of the constitutional guaranty of equality in Article 3 of the German Constitution, because valuation criteria had not been updated since 1964 which distorted valuations and unreasonably benefited some taxpayers while harming others. The Court determined that the Legislature is obligated to consider market values and enjoys some discretion in determining valuation methods for tax purposes.[89] However, the Court determined that the distortions created by this failure to update the valuation criteria created a constitutionally unacceptable level of inequality in taxation and required a correction.[90] To remedy the situation, the Court did not declare the Real Property Tax Act invalid, but instead set a

86. Rupp-v.Brünneck, *supra* note 52, at 387.

87. *Id.*

88. BVerfG Apr. 10, 2018, 148 BVERFGE 147; *see also* BVerfG June 22, 1995, 93 BVERFGE 121; BVerfG June 22, 1995, 93 BVERFGE 165; BVerfG Nov. 7, 2006, 117 BVERFGE 11.

89. BVerfG Apr. 10, 2018, 148 BVERFGE 147 (147, 183).

90. 148 BVERFGE 147 (187, 206).

deadline for the legislature to rewrite the law by December 31, 2019, and for the tax authorities to implement the changes by December 31, 2024. The court noted that if it declared the statute invalid, it would create an excessive amount of administrative burden to unwind prior tax assessments and payments[91] and harm the State's needs for the funds generated by the real property tax, which recently amounted to approximately fourteen billion Euros.[92]

Other examples of admonitory decisions in the Constitutional Court include the following. First is the indication by the Constitutional Court that a tax burden will become unconstitutional in the face of increasing inflation.[93] Another example relates to statutory default interests, the amount of which is inappropriate given the current low interest rate environment.[94] A third example is an indication of possible changes to previously settled case law by the Constitutional Court.[95]

The Supreme Court has taken similar approaches and indicated that a law may become unconstitutional in the future, urging Congress to make changes. An example of this can be seen in *Northwest Austin Municipal Utility District Number One v. Holder*,[96] in which the Supreme Court had to decide on the constitutionality of Section 5 of the Voting Rights Act. Section 5 requires certain jurisdictions to obtain federal authorization before implementing changes to their election laws, which is especially controversial due to its potential intrusion on state sovereignty. Despite this issue, the Court, by using a "superficial textual analysis," upheld the constitutionality of Section 5 while simultaneously signaling "that next time around [S]ection 5 would not survive constitutional scrutiny in its current form."[97] Although the Court thereby did not rule on the constitutionality of Section 5, the Court signaled to Congress that it should take legislative action in order to avoid a declaration of nullity in future cases.[98]

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91. 148 BVERFGE 147 (213–14).

92. 148 BVERFGE 147 (213).

93. BVerfG June 22, 1995, 93 BVERFGE 121 (income and property tax).

94. BVerfG Nov. 28, 1984, 68 BVERFGE 287 (308).

95. BVerfG July 26, 1972, 34 BVERFGE 9 (26); *see also* MAURER, *supra* note 60, at 472.

96. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205 (2009).

97. Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 784 (2012).

98. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197, 203–05 (2009). It should be noted that the Supreme Court again had to decide on the validity of Section 5 of the Voting Rights Act in the case of *Shelby County v. Holder*, 570 U.S. 529

E. Interpretation in Conformity with the Constitution

The U.S. Supreme Court, as well as the German Constitutional Court, can also avoid declaring a law to be unconstitutional by engaging in a technique that German lawyers refer to as an "interpretation in conformity with the constitution." As its name suggests, by engaging in this technique, the courts use regular methods of interpretation of laws to interpret a law in a way that is compatible with the country's constitution. If this technique is available to a court in a specific case, it shall be used to uphold the validity of a law.[99] As the Supreme Court phrased it in *Ashwander v. Tennessee Valley Authority*[100]: even if "serious doubt[s]" concerning the validity of an act of Congress are raised, the Court will first ascertain "whether a construction of the statute is fairly possible by which the question may be avoided."[101]

A recent prominent example in which the Supreme Court has used the aforementioned technique can be seen in the case of *National Federation of Independent Business v. Sebelius*, in which the Supreme Court had to decide on the constitutionality of two aspects of the Patient Protection and Affordable Care Act, commonly known as "Obamacare."[102] One of the issues to be decided was the so-called individual mandate clause that requires most Americans to maintain health insurance coverage. The clause generally provides for a penalty to be paid for non-compliance with the mandate. Although the clause would not have been constitutional as a penalty, the Supreme Court regarded it as a "tax" and hence an exercise of Congress's taxing power, even though Congress had described it as a "penalty" and had specifically avoided calling it a "tax." By interpreting the individual mandate clause as such, the Supreme Court therewith avoided declaring this aspect of the law unconstitutional.

(2013), since no legislative action has been taken since its decision in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009). Although it did not strike down Section 5 of the Act, within that case it held Section 4(b) of the Voting Rights Act to be unconstitutional. *Holder*, 570 U.S. at 530, 557. Section 4(b) contains the coverage formula that determines which districts are subject to authorization under Section 5. *Id.* at 529. This essentially made Section 5 inapplicable until a new coverage formula would be enacted.

99. Zeidler, *supra* note 51, at 509; Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

100. Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

101. *Id.* at 348 (citations omitted).

102. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

As one can see from the above, the technique of an interpretation in conformity with the constitution is closely akin to a declaration of qualitative partial nullity by the courts. Differences consist in the margins of interpretation. In essence, an interpretation in conformity with the constitution is a positive version of a declaration of qualitative partial nullity aiming to ensure the validity of the respective statute. Therefore, in German jurisprudential literature, interpretation in conformity with the constitution is often described as a hybrid declaration of compatibility and incompatibility.[103]

The method of interpreting a law in conformity with the constitution can surely be praised for the courts' efforts to uphold a law and upholding the legislature's intent. However, if this method is used too widely, the courts might overstep their institutional competence by rewriting the law to conform it to constitutional requirements.[104] To avoid this, the courts should focus greatly on the legislative intent when using the method of interpreting a law in conformity with the Constitution.

VII. CONCLUSION

Even though the origins, scope, and means of judicial constitutional review of statutes are different in the United States and in Germany, courts in both countries have a similar understanding of the meaning of unconstitutionality and apply similar techniques when deciding on the constitutionality of a law. In general, the courts in both countries declare a law void if it conflicts with their constitution, unless a declaration of invalidity worsens or fails to remedy the violation of the constitution. Bearing in mind the political consequences of invalidating a law, the courts have developed alternative approaches to deal with constitutionally problematic laws. For example, both courts can partially invalidate laws, declare laws to be incompatible with the respective constitution without invalidating the law, give admonitory decisions, and interpret laws in conformity with the respective constitution. However, in both countries such judge-

103. Klein, *supra* note 61, ¶ 1411; HILLGRUBER & GOOS, *supra* note 60, ¶ 536; SCHLAICH & KORIOTH, *supra* note 8, ¶ 441.

104. Arguably in a non-constitutional context the Supreme Court has done so when adopting the so-called *first sale doctrine* in the case of *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). *See* Lothar Determann & David Nimmer, *Software Copyright's* Oracle *from the Cloud*, 30 BERKELEY TECH. L.J. 161, 172–73 (2015).

made approaches remain controversial due to concern regarding the proper role of the judiciary vis-a-vis the other branches.[105]

105. See DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 38–41 (3rd ed. 2012), for criticism of the Federal Constitutional Court's power within the framework of the German balance of power.

QUASI-INTERNATIONAL ORGANIZATIONS: CROSS-BORDER SUBNATIONAL ORGANIZATIONS IN AMERICAN LAW

MICHAEL MELLI*

ABSTRACT

The past two decades witnessed what some have called a "Federalism Revolution." With new powers to state actors came scholarly questions, as new sub-organizations developed. These participants created subnational organized creatures that crawled over geopolitical borders. As these transnational quasi-organizations grew, questions followed. This paper examines the role of international organizations and federalism through the lens of the extant subnational climate change organizations. Can governors buck President Trump's decision on the Paris Climate Accords? Did this so-called Federalism Revolution grant new authority to join and form international organizations? What of the Compact Clause and Treaty Clauses? What pertinent precedent lies waiting? First, the paper explores and examines international law and then U.S. law, as well as the doctrine that created the previous federalism structure. Then, the paper delineates and explores the climate change international organizations as case studies. Finally, the paper discusses supplementary international environmental organizations as working precedent. This paper pays much needed attention to a trending form of cross-border global partnership to resoundingly show their undoubted efficacy and rising prominence.

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I. INTRODUCTION

The last several decades have witnessed ample fluctuation in the carefully strung and unyieldingly taut balance of vertical separation of powers,[1] becoming what scholars have called a "Federalism Revolution."[2] Treatises have been written and libraries filled with works, analyses, and compilations dissecting the nature of foreign relations and states' rights, but modern events are resoundingly bringing new questions. While this revolution was underway, pseudo-international organizations have sprouted and developed in tandem. What ramifications come from an overzealous governor and a complicit state legislature that might be inclined to enter in or create one of these organizations? What role should the international community play in a federalism dispute within a nation? What of the Compact Clause and Treaty Clauses in the U.S. Constitution?

This paper, at its core, examines international organizations, but specifically, subnational cross-border organizations. Peculiarly, the most noteworthy and substantial examples of these hybrid organizations surround climate change adaptation and mitigation efforts. Gubernatorial international forays unsanctioned by Congress could be constitutionally problematic and set dangerous precedent. This paper is likely one of the first to assess the domestic and international frameworks as well as the potential legality of these quasi-international organizations during the

1. *See* Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. REV. 35 (2010); Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 47 (2013); Christina E. Coleman, *The Future of the Federalism Revolution:* Gonzales v. Raich *and the Legacy of the Rehnquist Court*, 37 LOY. U. CHI. L.J. 803 (2006).

2. Garry et al., *supra* note 1, at 35; Huberfeld et al., *supra* note 1, at 5; Coleman, *supra* note 1, at 803.

Trump Administration, while also examining the Paris Climate Accords and questions raised in light of the Trump Administration's policy shifts and subsequent reactions.

This paper heavily illustrates precedent and case studies. Empirical and quantitative data have their place in assessing the efficacy of the case studies' mitigation efforts, yet for this paper's central argument, jurisprudential blueprints and authorities prove more illuminating than statistical assessment. The case studies employed by this paper work to elucidate the applicative value of these substantive constitutional doctrines. The history behind the framework, the modern challenges it faces, and the questions being raised are all examined.

Parts II and III of this paper focus on international and domestic law. The American Compact and Treaty Clauses are explored at length. Elucidation of international law and the role it plays in recognition or rebuttal of these quasi-international organizations becomes especially intriguing when assessing the international response to American foreign policy movement or the further development of these cross-border subnational organizations. These sections place particular emphasis on constitutional interpretation, case law, and historical advents in interpreting the Compact and Treaty Clauses.

Part IV of this paper then moves to examine and dissect case studies. First, the Western Climate Initiative is explored, a stunning creation and testament to gubernatorial foreign policy capabilities. Next, the paper examines the Midwestern Greenhouse Gas Reduction Accord. Finally, the paper delves into the Paris Climate Accords and the modern fallout of the Trump Administration's declaration of withdrawal. Through each of the studies, pertinent precedent and repercussions are explored in tandem with the intricacies of the original examples. This final case study, the Paris Climate Accords, works to thrust aged jurisprudence into the modern context and to illustrate the seemingly federalism-focused revolt against the Trump Administration's stance on the Paris Climate Accord. Part V works to illustrate factors leading to the creation of the case studies examined, namely the critiques of the preexisting international environmental organizations.

This paper was not developed to shame governors and state legislatures for good faith beliefs that they have the authority to enter these organizations. Nor was this paper written to attempt to hold back state action or inspire partisan political action. Rather, the goal of this paper is to call to light some of the murkier aspects of the current institutional framework's challenges in an

effort to give a clear blueprint for repairing it. This paper attempts to shine a light on a rapidly developing area of constitutional law that poses real concerns for the sanctity of the tenuous balance of American federalism.

II. INTERNATIONAL LAW

This section works to briefly assess the international community's degree of toleration of subnational international organizations. Indeed, there appears to be stark solidarity on the international stage in regard to international organizations beneath the penumbra of an existent countries and previously drawn geopolitical boundaries and demarcations. For, what good can understanding the legality of the domestic constitutional quandaries be if the organizations themselves are doomed to fail?

Regarding international agreements, and their regulations and power, the Vienna Convention is without doubt the highest binding document.[3] Generally, the international community, and international law, defer to the domestic policy of the parent nation when assessing if a subnational unit can enter into and become part of international organizations.[4] Scores of distinctions and peculiarities exist regarding the nature of the agreements, particularly if they are treaty or non-treaty agreements.[5] For this paper's broader argument, further exploration into individual peculiarities is not wholly warranted, but a brief foray is of some use. Questions are raised if the international organization is an organism of a binding treaty.[6] The Vienna Conventions set forth regulations for the process of entering into and being bound by a treaty as a state.[7] The Conventions emphasize functionalism over formalism in assessing intention in being bound as a nation.[8] Essentially, the actions of the nation are emphasized much more than the dictum.[9] Notions of the ever-pertinent "pacta sunt servanda," enshrined in Article 26, illustrate the Conventions' emphasis on the nation expressing the will to be bound by a treaty, and then performing obligations of that treaty in good faith.[10]

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3. Jeremy Lawrence, *Where Federalism and Globalization Intersect: The Western Climate Initiative as a Model for Cross-Border Collaboration Among States and Provinces*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,796, 10,800 (2008).
4. *Id.* at 10,801.
5. *Id.* at 10,800.
6. *Id.* at 10,801.
7. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331.
8. *Id.*
9. *Id.*
10. *Id.* art. 26.

Yet, some international organizations are not treaty-bound organisms, and are rather entered into and participated in without the full power of treaties; in particular, the International Electrotechnical Commission (IEC) proves to be a functioning example.[11] These groups still garner the resources and expertise of their members, without the binding threat of enforcement that accompanies traditionally anointed international organizations.[12] Non-treaty organizations are notably distinct: while members may express their will to participate, they do not formally declare any intent to be bound by law, and thus there are less legal recourse options available for non-compliance.[13]

The Conventions appear notably ambiguous as to whether subnational organizations have the ability to form international agreements.[14] While a draft of the Conventions did express explicit deference to domestic policy,[15] given the many varied federalism structures of the home nations' of the drafters, some discord was noted between the parties regarding this issue.[16] Ultimately, the final version of the Conventions was left with little mention of instruction for subnational international obligations and organizations, thus setting the stage for international law to remain largely silent and deferential towards domestic policy.[17] As such, any subnational international organization must be assessed through the lens of domestic constitutionality and legality, rather than international law.[18]

III. AMERICAN LAW

Not meant to be an absolute or exhaustive listing of all jurisprudence regarding state-led foreign policy and constitutional law, but rather an abridged, yet sufficient attempt to illustrate the traditional legal thought, Part III explains international and domestic frameworks and dogma. In analyzing American domestic frameworks, Part III examines the Compact Clause and the Treaty Clause. Precedent and legal scholarship are employed as well as

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11. James Bryce Clark, *Technical Standards and Their Effects on E-Commerce Contracts: Beyond the Four Corners*, 59 BUS. LAW. 345, 349 (2003).

12. *Id.*

13. *Id.*

14. *See* Lawrence, *supra* note 3, at 10,801.

15. *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR, Supp. No. 9 at 11, U.N. Doc. A/6309/Rev. 1 (1966), *reprinted in* [1966] 2 Y.B. INT'L L. COMM'N 178, U.N. Doc. A/CN.4/191.

16. Lawrence, *supra* note 3, at 10,801.

17. *Id.*

18. *Id.* at 10,802.

primary sources in a larger effort to not only shed light on the frameworks, but also the remaining questions underlying this seldom litigated area of constitutional law.

A. The Compact Clause

In an effort to circumscribe temptation for state actors to link together, and potentially chip away at federal authority, the Founders drafted the Constitution's Compact Clause.[19] Indeed, not content with the mere existence of the Supremacy Clause, the Founders sought to explicitly bar interstate or foreign compacts from being fostered and developed at the state and local level, it appears.[20]

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.[21]

Historical difficulties defining the exact contours and limits of what can constitute a "compact" in the eyes of the Constitution have occurred across various jurisprudential realms and time frames.[22] Questions riddle the academic arena and field of legal theory.[23] Yet, it appears that the Compact Clause can allow subnational organizations to create a "compact agency" that functions and exists, at least in part, to manage and oversee agreements between subnational bodies.[24] Many a justice, judge, and scholar alike have attempted to push the limits and test the metaphorical waters of the Compact Clause's boundaries in an attempt to further understand the intricacies of the Clause and further examine exactly what agreements are subject to its

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19. *See generally* Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1960–61 (2007) [hereinafter *Note on the Compact Cause and RGGI*].

20. *See* U.S. CONST. art. I, § 10, cl. 3.

21. *Id.*

22. Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 499–500 (2003).

23. *Id.*

24. *Id.* at 511.

requirements and demands.[25] However, it should certainly be noted that the text of the Clause indicates both foreign and interstate agreements are included.[26]

1. Case Law

Virginia v. Tennessee saw a border dispute and attempted negotiations between the two states reach the Supreme Court.[27] The court ultimately found the agreement between two states, in regards to the border dispute at hand, had not conflicted with the Compact Clause due to the evident ample effort to inform the federal legislature of the agreement, and the implicit assent ascertained.[28] This proves particularly insightful, as the dicta provides the starkest definitions of what is not a violation of the Clause and further iterates express explicit Consent of Congress is not necessarily mandated in permissive interstate compacts.[29]

In a dispute heard at the Supreme Court of North Dakota, the court in *McHenry County v. Brady* held that a cross-border agreement between North Dakota and Canada regarding northern river drainage did not encroach on federal authority.[30] The court in *Brady* emphasized that the agreement did not usurp political power from the federal government and indicated that this factor is important for identifying a violation of the Compact Clause.[31] Of course, *Brady* is a state court case and bears markedly little gravitas when federally litigating subnational agreements, but the case still provides rare insight into this seldomly litigated issue.

Holmes v. Jennison, pertinent in Compact Clause and Treaty Clause jurisprudence, warrants hefty examination; in *Jennison*, Chief Justice Taney took an extensive look at the constitutionality of compacts in the context of a dispute regarding Vermont Governor's extradition of a Canadian criminal in the absence of a federal extradition treaty but presence of an agreement entered into by Vermont and Quebec.[32] Taney explicitly delineated "treaties" from "compacts" and discussed the nature of agreements versus compacts.[33]

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25. *Id.*
26. U.S. CONST. art. I, § 10, cl. 3.
27. Virginia v. Tennessee, 148 U.S. 503, 526–28 (1893).
28. *Id.*
29. *Id.*
30. McHenry Cty. v. Brady, 163 N.W. 540, 546–47 (1917).
31. *Id.* at 544.
32. Holmes v. Jennison, 39 U.S. (1 Pet.) 540, 543–45 (1840).
33. *Id.*

> [T]he states are forbidden to enter into any "agreement" or "compact" with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive.
>
> . . . .
>
> After reading these extracts, we can be at no loss to comprehend the intention of the framers of the Constitution in using all these words, "treaty," "compact," "agreement." The word "agreement," does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an "agreement." And the use of all of these terms, "treaty," "agreement," "compact," show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.[34]

In practice, gubernatorial agreements are far less foreboding than the *Jennison* opinion might make them appear and in fact have flourished in recent times.[35]

Moving towards the modern jurisprudence, the following case provides perhaps the most accessible and pellucid dicta to assess a potential Compact Clause violation. In a conflict surrounding a prisoner transfer, the Supreme Court in *Cuyler v. Adams* assessed the nature of the Compact Clause and aggregated the older dicta as well as modern thought.[36] For a Compact Clause violation there must be (1) an agreement between states or a foreign government, (2) the agreement must increase the state's powers, and (3) the

34. *Id.* at 571–72.
35. Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2396 (2006).
36. Cuyler v. Adams, 449 U.S. 433, 437–40 (1981).

agreement must not have been approved by Congress.[37] Below, Justice Brennan elucidates the rationale behind the Compact Clause.

> The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority. . . .
>
> Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. Where an agreement is not "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States," it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. . . . But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause.[38]

The onus is on the power of the state, thus, the discussion centers on if said power was increased by a compact or agreement.[39] Notably, if Congress has sanctioned an agreement between a state and other states or governmental organizations, there is no Compact Clause violation.[40]

The test in practice has obvious, common-sense complications. For, should a court always look to the text of an agreement over a more functionalist approach? Should a court disregard the statements of the parties at hand and examine what is the effect of a de facto law? When assessing if a compact or agreement exists, the court must seek the traditional "indicia" of an agreement, rather than a formalistic approach.[41] It may be handily concluded

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37. *Id.*
38. *Id.* at 439–40 (citations omitted).
39. *Id.*
40. *See id.*
41. For an example of this approach, see Ne. Bancorp, Inc. v. Bd. of Governors. of Fed. Reserve Sys., 472 U.S. 159, 175 (1985).

that the instructions to disregard text and form while emphasizing function is in an effort to ultimately police potential encroachments on federal authority rather than to police zealous state actors or discourage foreign leadership from making deals with state leaders individually. The protection of federal supremacy as a goal, rather than the dignity of the formalist interpretation of separation of powers, drives Compact Clause jurisprudence and theory, as it led Justice White to describe the purpose of the Clause as a function of "the Framers' deep-seated and special fear of agreements between States."[42]

While the case law has demonstrated substantive constraints on interstate and foreign compacts, it has also shown the durability and strength of duly sanctioned agreements. While it may seem unpalatable to state actors to seek the approval of the federal government to enter into a compact or agreement, the benefits, namely the resilience of the agreement, can far outweigh the burdens. Later, the Compact Clause test and advents within the Trump Era will be discussed at length, but perhaps most intriguing regarding the case law is the relative lack of twenty-first century case law on the subject, potentially indicating ripeness for a new matter to come to the Supreme Court.

2. Scholarship and Legal Thought

Worthy of examination for further elucidation, the academic interpretation and schools of jurisprudence surrounding the Compact Clause prove intriguing. For, what good are scores of precedential case precedents and judicial conflict without explanation and testing from judicial scholars? The following subsection provides a circumscribed sampling of various discussions and arguments posited by scholars and theorists alike.

Professor Michael Greve calls for a more judicious enforcement and embrace of the Compact Clause from the judiciary.[43] Indeed, Professor Greve posits that the judiciary's tepid engagement with the Compact Clause has allowed state compacts to begin to run amok relatively unscathed and unafraid of repercussions.[44] Perhaps most insightful is the observation from Professor Greve that no compact has ever been struck down for failure to garner

42. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 489 (1978) (White, J., dissenting).

43. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 289 (2003).

44. *Id.* at 288–93.

Congressional blessing.[45] In addition, Professor Greve argues that one should approach compacts functionally, and that the Clause prohibits the agreements, not the actions, of maintaining a compact, thus proper enforcement mandates non-formalist engagement and interpretation.[46]

Curiously, Professor Duncan Hollis posits that the current form of Compact Clause jurisprudence is largely a result of jurisprudence and an aberration from the original text and interpretation.[47] Professor Hollis' argument surrounds the interpretation and functionalist approach to compact diagnosis; indeed, the departure from the formalistic origins poses a concern for Professor Hollis.[48] Finally, Professor Hollis argues that the political and federalism quandaries, among other factors, work to illustrate the need for distinct Interstate and Foreign Compact Clauses in the Constitution.[49] Unequivocally, Professor Hollis illustrates several weaknesses that the singular Compact Clause engenders.[50] Seemingly, this assessment of the weaknesses of the Compact Clause proves intriguing and holds some water. There can be little doubt that a more succinct and precise Compact Clause for both international compacts and domestic compacts could prove more directly helpful and insightful to actors at the state and federal level.

Professor Jessica Bulman-Pozen posits a fascinating prediction; essentially, the real Compact Clause chaos will form in future sanctioning of compacts.[51] Indeed, Professor Bulman-Pozen argues the Compact Clause assumes a unified federal government, or at least one without vehement partisanship, and today's realities will lead to conflict in sanctioning these agreements between the Commander-in-Chief and Congress.[52] For, while the Congress is designated to bless the compact, the President has broad vested authority in foreign policy and international agreements. Intriguing and foreboding, this notion is predicated on the prediction that more compacts shall continue to arise and inter-branch discord will then result. Working with this theory, what if ardent climate change enthusiasts hold the Congress, actively

45. *Id.*
46. *Id.* at 287–93.
47. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 766 (2010).
48. *Id.* at 765–68.
49. *Id.* at 769–70.
50. *Id.*
51. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1025 (2016).
52. *Id.*

sanctioning climate change compacts across borders, and an active opponent to climate change policy holds the Presidency? How can blessing truly be assessed?

Not purported to be absolute, the above sample of scholarly thought works to illustrate the schools of jurisprudence regarding the Compact Clause. Of course, each come along with counterarguments and retorts from critics in the legal community, as law review articles typically engender. Yet, each unequivocally posits real concerns and theories. The discussion from academia at large works in tandem with the precedent to illustrate the Compact Clause as fully as possible.

B. The Treaty Clause

"[The President] shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . . ."[53]

The Treaty Clause clarifies and elucidates the roles the various governmental actors are to play in the negotiation and implementation of treaties.[54] Seemingly straightforward and initially outside the scope of subnational compacts, the Treaty Clause without doubt still plays a substantive role in this paper's argument. The Treaty Clause holds state actors back by mandating a carefully wrought procedure for treaty implementation and restrains state actors from entering into binding prototypical treaties.[55]

As stated previously, the Treaty Clause ties the hands of the actors attempting to negotiate agreements.[56] Essentially, governors are prohibited from entering fully binding agreements with the nuances of prototypical treaties, but are instead relegated to memorandums of understanding or various other forms of participation signaling.[57] This inhibits state actors from acting freely in their own microcosm of international relations and foreign policy and binds them by the actions of the federal government.[58]

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53. U.S. CONST. art II, § 2, cl. 2.
54. *Id.*
55. *Id.*
56. *Id.*
57. Lesley Wexler, *Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law*, 28 MICH. J. INT'L L. 1, 43 (2006).
58. *Id.*

The Treaty Clause was seen in action in *Holmes v. Jennison*.[59] The primary dispute in *Jennison* surrounded an extradition treaty entered into by state actors,[60] as discussed earlier. In this case, Chief Justice Taney demarcated the difference between agreements and treaties and attempted to distinguish the two, with agreements being less suspicious and less constitutionally questionable.[61] The treaty dichotomy in *Jennison* sets state-led treaties into a route of marked and clear vulnerability,[62] yet has seldom been embraced by the Court since, which may or may not reflect the judiciary's given preferences as substantive cases have rarely risen high enough to see the Court discuss them.[63] Utilizing the *Jennison* test, one must diagnose if the alleged state partnership represents a treaty or an agreement; treaties more expressly illustrate the long-term will of the partners while agreements pertain to individuals and or particular subject matters, with trappings closer to contracts.[64] Treaties must meet higher scrutiny and are likely to require the express consent of the Congress while agreements are given more deference, mirroring the strict scrutiny and rational basis distinctions in other areas of constitutional analysis.[65]

Of course, a cynical reader may just assume most of this by the nature of the Supremacy Clause and the American concept of dual sovereignty and notion of federalism. Yet, the Treaty Clause still warrants examination and elucidation as the nature of sub-federal international compacts treads closely to the nature of international treaties. Indeed, it is with firm grasp of the nature of the Compact Clause and the Treaty Clause working in tandem that the restraints placed upon state-level actors become unequivocally clear.

IV. CASE STUDIES

Part IV examines real-world compacts in play when they cross national borders. Almost exclusively, these compacts have surrounded climate change and environmental policy domestically and abroad. The following section delineates three individual case studies. First, the Western Climate Initiative is studied. Next, the

59. Holmes v. Jennison, 39 U.S. (1 Pet.) 540, 543–45 (1840).
60. *Id.*
61. *Id.* at 572.
62. *Id.*
63. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 489 (1978) (White, J., dissenting).
64. 39 U.S. (1 Pet.) at 572.
65. *Id.*

Regional Greenhouse Gas Initiative and its repercussions are examined. Finally, the Paris Climate Accords and the massive reaction to the American withdrawal from them are assessed.

A. The Western Climate Initiative

This subsection focuses on the chief working case study of a functioning subnational cross-border international organization.[66] Brief exploration of the origins of the Western Climate Initiative (WCI), the modern advents and quandaries, and application to the Compact Clause scheme proves insightful. The Initiative presents an intriguing fact-pattern worth surveying and, more broadly, raises fascinating questions regarding federalism and separation of powers.

Born in 2007 by the governors of Arizona, California, New Mexico, Oregon, and Washington, the Western Climate Initiative was inaugurated with the purpose of greenhouse gas reduction through business-oriented solutions, namely cap-and-trade schemes.[67] Membership to the WCI is broken into "observers" and "partners."[68] In addition to the five states listed above, other partners and observers of the WCI at various times included Manitoba, British Columbia, Quebec, Ontario, Utah, Montana, Saskatchewan, Alaska, Nevada, Idaho, Colorado, Wyoming, and Kansas.[69] The Mexican states of Baja California, Sonora, Tamaulipas, Coahuila, Nuevo Leon, and Chihuahua have also been observers of the WCI.[70]

The formation of the Initiative paralleled and drew inspiration from the Regional Greenhouse Gas Initiative (RGGI);[71] joint talks were held as leaders, premiers and governors, met together, ultimately culminating with the formation of a subnational compact.[72] The RGGI developed in 2005 among several northeastern states that wished to usher in a cap-and-trade

66. *See* Brooks V. Rice, *The "Triumph" of the Commons: An Analysis of Enforcement Problems and Solutions in the Western Climate Initiative*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 401, 402–05 (2010).

67. W. CLIMATE INITIATIVE, WESTERN REGIONAL CLIMATE ACTION INITIATIVE (Feb. 26, 2007), http://westernclimateinitiative.org/index.php?option=com_remository&Itemid=37&func=fileinfo&id=12.

68. *Id.*

69. *Conservation in a Changing Climate*, LAND TR. ALLIANCE, https://climatechange.lta.org/western-climate-initiative/ (last visited Sept. 15, 2019).

70. *Western Climate Initiative*, AZIMUTH PROJECT, https://www.azimuthproject.org/azimuth/show/Western+Climate+Initiative (last updated Nov. 7, 2011).

71. *Note on the Compact Clause and RGGI*, *supra* note 19, at 1959–60.

72. *Id.*

scheme to reduce long-term greenhouse gas emissions.[73] The RGGI, unlike the WCI, operated only on fossil fuel plants,[74] making it not nearly as all-encompassing as the WCI. Member states would include New York, Rhode Island, Connecticut, Delaware, Vermont, Maine, Massachusetts, New Hampshire, New Jersey, and Maryland; as political pressures and preferences shifted, membership did as well.[75] RGGI has seen moderate success; after implementation of the RGGI, member states have decreased the carbon dioxide emission of their power sectors by 40%.[76]

Moving away from the instrumental precedent and back to the case study at hand, the Western Climate Initiative has notable differences from the Regional Greenhouse Gas Initiative. The Western Climate Initiative is, broadly, a large-scale cap-and-trade scheme in an effort to reduce greenhouse gas emissions.[77]

1. Constitutional Questions

How can the Western Climate Initiative stand up to the Compact Clause? The Western Climate Initiative is a substantive departure from federal climate policy: foreign nations are being negotiated with and subnational actors created an entire international organization alone. Can this truly be constitutional?

Obviously, one of the first places to look is precise dicta from the Supreme Court. In the seminal *Massachusetts v. EPA* case, the Court noted, "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives" and then later "[a State] cannot negotiate an emissions treaty with China or India."[78] This poses a threat to the fabric of the WCI,[79] but on what level? This dictum seemingly stands as the first line of offense against the Western Climate Initiative's structure and legality.

Regarding the Treaty Clause, the Constitution itself sets no exact dicta forth delineating the differences between international partnerships, compacts, or collaborations. A functionalist approach

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73. Lauren E. Schmidt & Geoffrey M. Williamson, *Recent Developments in Climate Change Law*, 37 COLO. LAW. 63, 70 (2008).

74. Robert Zeinemann, *Emerging Practice Area: The Regulation of Greenhouse Gases*, 82 WIS. LAW. 6, 8 (2009).

75. *Id.*

76. Silvio Marcacci, *RGGI Carbon Market Invests $1 Billion in Clean Energy*, CLEAN TECHNICA (Apr. 22, 2015), https://cleantechnica.com/2015/04/22/rggi-carbon-market-invests-1-billion-clean-energy/.

77. *See generally id.*

78. Massachusetts v. EPA, 549 U.S. 497, 519 (2007).

79. *See id.*

then must be employed when assessing if the alleged subnational international agreement treads on the treaty powers of the federal government. The only substantive Treaty Clause case was seen with the *Jennison* dispute regarding a subnational extradition treaty entered into at the state level,[80] as discussed above. Applying Chief Justice Taney's dichotomy, as substantive other frameworks failed to have emerged in Treaty Clause jurisprudence, it appears given the limited subject matter of the WCI and the voluntary basis of membership the WCI does not rise to the level of Taney's treaties. Without rising to this level, the WCI requires no congressional consent as the Initiative's expansion of state climate regimes makes no grab for succinct long-term federal power given the WCI's limited scope and potentially temporally limited membership. The functionalist nature of assessment mandates failure to this line of attack on the constitutionality of the WCI; the states have not expressed any substantive intent to be bound or to usurp for the federal government's authority, and thus the internal assessment demanded by the Treaty Clause mandates failure. The Treaty Clause would not be the substantive platform for attack on the legality of the Western Climate Initiative.

Moving to Compact Clause analysis, the *Cuyler* test proves to be the most illuminating tool for assessment. For a violation, there must be (1) an agreement between states or a foreign government, (2) the agreement must increase the state's powers, and (3) the agreement must not have been sanctified by Congress.[81] The WCI's first line of defense could be that the voluntary nature of the partnership prevents the WCI from rising to the level of an "agreement" under the Compact Clause. For the sake of argument, this subsection will move to prong two. To violate prong two, the power of the state must be expanded and the federal government's authority must be encroached on. Given the WCI's largely dispersed regulatory authority and that the states have the ability to create their own constitutionally valid cap-and-trade schemes, the WCI seems to survive prong two. The WCI holds no central mechanisms or trappings of a constituted regulatory international body.[82] While the cap-and-trade scheme as it is currently constituted creates a cross-border partnership scheme, it does not anoint a body or internationally distinct organization that saps power from the federal government. If the Western Climate

80. Holmes v. Jennison, 39 U.S. (1 Pet.) 540, 561 (1840).
81. Cuyler v. Adams, 449 U.S. 433, 437–40 (1981).
82. Schmidt & Williamson, *supra* note 73, at 70.

Initiative were to increase in scope and begin to create more centrally governed organisms, there could be an argument that the power of the federal government would be infringed upon. However, this potential development seems too remote right now for any substantive, successful challenges on prong two.

Of course, as mentioned earlier, international law stands as a permissive body not willing to intervene. As deference is given to the domestic policy and jurisprudence, international law allows the WCI to survive as long as U.S. and Canadian law allow it to survive. Generally, Canadian law is more permissive of subnational climate agreements than the U.S. so the WCI stands little risk in the Canadian arena.[83]

Thus, applying the Treaty Clause and the Compact Clause, it appears that the Western Climate Initiative is safe from constitutional challenges. Of course, there are scores of other legal schools to attack the legality of the WCI; as examples, the preemption and foreign affairs powers pose substantive risks to the WCI. Of course, at any given time, simply gaining congressional blessing would abate the WCI's potential Compact Clause or Treaty Clause dangers.

B. The Midwestern Greenhouse Gas Reduction Accord

In 2005, a band of six governors from the Midwest and the premier of Manitoba gathered to begin joint talks on climate change; these talks culminated with the creation of the Midwestern Greenhouse Gas Reduction Accord (MGGRA).[84] Formed perhaps out of necessitated fear for the agriculture sector for which each executive was responsible, the Midwestern Greenhouse Gas Reduction Accord was designed with agricultural sustainability and climate change in mind.[85] The MGGRA created an institutional framework and design for a cross-border cap-and-trade scheme; regionally confined and holding goals that were primarily localized, as opposed to a more global aim, the MGGRA was meant to immediately institute a mitigation scheme to begin insulating the region from the consequences of climate change.[86]

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83. *See* Shawn McCarthy, *National Carbon Market Faces Opposition*, GLOBE & MAIL (Can.) (Mar. 12, 2008), https://www.theglobeandmail.com/report-on-business/national-carbon-market-faces-opposition/article1351530/.

84. Erin Benoy, Note, *Wanted: Farmer-Friendly Climate Change Legislation*, 16 DRAKE J. AGRIC. L. 147, 150 (2011).

85. *Id.* at 154.

86. *See id.*

The Accord's apogee was the production of the Midwestern Greenhouse Gas Reduction Program, a formal manifesto and documented blueprint of the Accord's designated plan-of-attack regarding climate change mitigation.[87]

Political winds changed and state executives came and went, thus turning the individual members' positions on climate change policy and initiative implementation, resulting in the MGGRA never being fully implemented and the program partially abandoned.[88] Yet, it remains a stark demonstration of the quasi-foreign powers of the state executives. The Accord, should it have been implemented, would have raised a slew of constitutional concerns and questions, apparently paralleling the WCI in becoming a quasi-international organization. Hefty research and studies were commissioned to create the Midwestern Greenhouse Gas Reduction Program; if the political tides turn in favor of policies to reduce greenhouse gas emissions, a large-scale blueprint to combat climate change is ready.[89]

The Accord was largely a U.S.-led initiative and, despite Manitoba playing a role, it is likely exempt from typical international organization analysis.[90] As such, there was likely no Treaty Clause violation, even if the strategic initiatives and greenhouse gas reduction goals were deployed. Yet, what questions does the Accord raise regarding the Compact Clause and International Organizations? Employing the previous tests, there is a blatant agreement between states, opening vulnerability for Compact Clause jurisdiction. There was no sanctioning from Congress on the particularities of the MGGRA, thus failing the anointment portion of the test. The final prong may be a bit trickier. Should the MGGRA have been fully executed with a central governance scheme or regulatory body, there could have been a substantive argument that there was power being grabbed by the states that needed to be delegated by the federal government. Arguably then, a Midwestern cap-and-trade scheme or other large-scale centrally located governing body dedicated on implementing a climate change policy scheme contrary to the

87. *See* Press Release, Cal. Office of the Governor, Governor Schwarzenegger Applauds Nine Midwest States for Creating Regional Climate Partnership (Nov. 15, 2007).

88. Maria Gallucci, *Cap and Trade Resurrected? Some States Awaken to Its Economic Benefits*, INSIDECLIMATE NEWS (July 12, 2012), https://insideclimatenews.org/news/20120708/cap-and-trade-rgg-states-california-economic-benefits-energy-efficiency-jobs-carbon-auctions-proceeds-deficits.

89. *See* KATHRYN ZYLA & JOSHUA BUSHINSKY, DESIGNING A CAP-AND-TRADE PROGRAM FOR THE MIDWEST (2008), https://www.c2es.org/site/assets/uploads/2008/03/designing-cap-and-trade-program-midwest.pdf.

90. *See id.* at 11.

stated will of the federal government could theoretically begin to erode federal power. Though the best argument against this is the fact that states were not legally bound by the ill-fated regulatory body and thus, the MGGRA was so voluntary, that it was a mere coalition, rather than a binding organization operating without the blessing of the Congress.

The precedential role the MGGRA, in tandem with the international composition of membership[91] warranted examination for purposes of this paper's argument. Though the MGGRA was never implemented fully, it remains a substantive blueprint should political tides turn and the policy preferences of gubernatorial actors fluctuate again. If the MGGRA is dusted off, implementation challenges may follow shortly after. Though, as noted, the MGGRA is likely in no obvious legal peril and, given the current understanding of Compact Clause jurisprudence, would require a particularly judicially active court to find the Accord in violation of the Compact Clause.

C. The Paris Climate Accords

Politically pungent and seemingly never out of the mainstream news cycle for long, the Paris Climate Accords, or Paris Climate Agreement (PCA), not only shed light on modern U.S. climate policy, but provided a stunning and intriguing case study in subnational organizations and partnerships. Briefly, Part IV-C works to provide a summation of the relevant provisions of the Paris Climate Accords, in efforts to apply this paper's arguments to the core mechanics of the PCA.

Agreed to in November of 2015, and taken effect in November of 2016,[92] the Paris Climate Accords seek to immediately begin emission mitigation and adaptation efforts worldwide.[93] The PCA explicitly aims to fight climate change and global warming effects while still allowing developing nations to industrialize.[94] While the PCA has claimed to be a step in the right direction, many including President Barack Obama have argued the need for more

91. *See generally id.*

92. Paris Agreement to the United Nations Framework Convention on Climate Change, *opened for signature* Dec. 12, 2015, T.I.A.S No. 16-1104.

93. Eric Reguly, *Paris Climate Accord Marks Shift Toward Low-Carbon Economy*, GLOBE & MAIL (Can.) (Dec. 14, 2015), https://www.theglobeandmail.com/news/world/optimism-in-paris-as-final-draft-of-global-climate-deal-tabled/article27739122/.

94. *Id.*

action.[95] Notably, President Obama did not have the PCA ratified by the Senate;[96] rather the PCA's mandates were enacted through the administrative and environmental regulations under his administration.[97]

The PCA's stated intent is to address climate change by working to keep the global temperature from rising above two degrees Celsius as compared to pre-industrialization levels.[98] One of the main goals of the PCA is to analyze the industrialization of developed countries in an effort to understand how still developing, or yet-to-develop countries could do so in the most climate-change friendly way possible.[99] Under the PCA, each country self-reports and self-sets their own goals, with it being understood that developing nations can proportionally emit more gasses as they develop, relatively.[100] No enforcement mechanism exists within the PCA to punish countries that fail to comply. Understood in the PCA is the eventual goal to divest from fossil fuels and other high-emission activities, at least partially, within the next several decades in an attempt to fight climate change.[101]

Curiously, this structure substantively departs from the most notable precedent, the Kyoto Protocols.[102] Whereas the Protocols were enforceable and held to a firm agreement, the PCA attempts to individualize each country's goals, in an attempt to keep individual countries participating and focused on the global effort.[103] The PCA also attempts to keep active negotiations and participation in an attempt to stay more prescient and omnipotent regarding international climate change efforts.[104]

President Trump promptly withdrew from the PCA in June 2017.[105] President Trump expressed his belief that the PCA contains longstanding negative implications for the United States,

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95. *See Obama: Paris Climate Accord Best Possible Shot to 'Save' Planet*, NBC NEWS (Oct. 5, 2016, 3:50 PM), https://www.nbcnews.com/news/world/obama-paris-climate-accord-best-possible-shot-save-planet-n660446.

96. *Id.*

97. *See id.*

98. *Id.*

99. *What Is the Paris Agreement?*, U.N. CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement (last visited Aug. 25, 2019).

100. *Id.*

101. *Id.*

102. Brad Plumer, *Stay In or Leave the Paris Climate Deal? Lessons from Kyoto*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/05/09/climate/paris-climate-agreement-kyoto-protocol.html.

103. *Id.*

104. *Id.*

105. Elle Hunt et al., *Paris Climate Agreement: World Reacts as Trump Pulls Out of Global Accord – As It Happened*, GUARDIAN (June 2, 2017, 2:47 P.M.), https://www.theguardian.com/environment/live/2017/jun/01/donald-trump-paris-climate-agreement-live-news.

while expressing a desire to construct a better agreement for American interests.[106] Though it should be stated, that technically, the United States is still a party to the PCA as the earliest formal withdrawal date under the Accords is in November 2020.[107] President Trump's Environmental Protection Agency has moved to abandon President Obama's regulatory scheme to keep compliance with the PCA.[108] Quite ironically, during drafting, one large criticism of the PCA was the lack of enforcement mechanisms within the PCA itself, which later blatantly manifested by the lack of legal repercussions following President Trump's withdrawal.

1. The U.S. Climate Alliance

In response to President Trump's withdrawal from the Paris Climate Accords, numerous actors emerged upon the domestic and international stage to state their intent to adhere to the mandates and requirements of the PCA despite the federal withdrawal.[109] The U.S. Climate Alliance (Alliance) was formed from a bipartisan group of governors who all stated their intention to adhere to the greenhouse gas goals of the PCA within their state.[110] Much is still unfolding regarding the Alliance and the backlash of the American withdrawal; nonetheless, pertinent concerns and details have been raised that pertain to the center of this paper's argument.

The Alliance boasts thirteen members, and several prospective participants expressing interest in keeping in line with the PCA's goals.[111] Curiously, these members appear to have crossed party lines, with two members and six prospective member states being led by Republican governors.[112] The Alliance has been straightforward about wanting each member to meet the standards agreed to, within their own states, that the Paris

106. *Id.*

107. *See generally* Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html.

108. Interview with Scott Pruitt, EPA Administrator (June 1, 2018), https://wjla.com /news/bottom-line/interview-with-epa-administrator-scott-pruitt-paris-agreement.

109. *See, e.g.*, Matt Murphy, *Gov. Baker Enters Mass. into Multi-State Climate Alliance After U.S. Withdraws from Paris Agreement*, WBUR, (June 2, 2017, 6:35 PM), http://www.wbur.org/news/2017/06/02/baker-massachusetts-joins-climate-alliance.

110. *See id.*

111. *See* Michael Greshko, *Map Shows Growing U.S. 'Climate Rebellion' Against Trump*, NAT'L GEOGRAPHIC, (June 8, 2017), https://news.nationalgeographic.com/2017/06/ states-cities-usa-climate-policy-environment/.

112. Robinson Meyer, *17 Bipartisan Governors Vow to Fight Climate Change—and President Trump*, ATLANTIC (Sep. 13, 2018), https://www.theatlantic.com/science/archive/ 2018/09/17-states-vow-to-fight-climate-change-with-new-policies/570172/.

Agreement puts forward.[113] The U.S. Climate Alliance seeks to implement, verbatim, the goals of the PCA, as if the federal departure from it had never happened at all, perhaps raising even more federalism questions.

What questions of legality does the U.S. Climate Alliance raise? Moving first towards the Treaty Clause, it appears the U.S. Climate Alliance is safe from attack on that front. The organization boasts no legally binding treaty. In addition, for now, the U.S. Climate Alliance is firmly a domestic organization and does not cross national boundaries, thus preventing it from gaining the stature of a true international organization. Further, the structure, composition, and details of the U.S. Climate Alliance are so fresh and fluid, there is a strong argument that the Alliance's existence has not solidified enough to form into a domestically agreed to organization vulnerable to suit via the Treaty Clause.

The next pertinent argument lies in the application of the Compact Clause. It appears that the Alliance might be a compact within the definition of the Compact Clause. There is an extant agreement between more than one state that in effect bolsters their powers on the international stage. Additionally, Congress did not sanctify the Alliance. In fact, if intent were to be inferred, one could argue that the current Congress would certainly not sanctify the Alliance; this agreement runs contrary to the stated policy preferences of the executive branch government and its Senate-majority Republican allies in Congress. However, there is a strong counterargument that state greenhouse gas emission standards are all ably accomplished by utilizing the state police powers, which exist with or without the U.S. Climate Alliance. Bolstering this particular argument, member states could point to the Western Climate Initiative as an example of successful implementation of strong emission policy by relying on the police powers of the state. Further, defenders of the U.S. Climate Alliance could posit that the dicta employed by the President when withdrawing from the PCA did not indicate rejection of the Accords' ideals and goals altogether, but rather a desire to renegotiate portions of it. This argument could be employed to posit that by embracing the PCA, the U.S. Climate Alliance is not explicitly countering the stated presidential policy, as President Trump argued a desire for a better deal, not a purist rejection of the PCA and its goals.

The U.S. Climate Alliance likely survives under both the Treaty Clause and the Compact Clause and, as stated earlier,

113. *Id.*

international law defers to domestic law. The Paris Climate Accords seemed to create a decentralized quasi-international organization, and the state adherence to it, seems to create a pseudo-quasi-international organization, so to speak. Challenges to the legality of these issues would likely be difficult to mount given the vulnerability of the U.S. Climate Alliance to political pressures. If the White House should change hands to a President that embraces the PCA, the entire case could be rendered moot, and given the lengthy nature of litigation, the U.S. Climate Alliance's potential challenges would almost certainly still be ongoing at that point in time. Thus, this appears to leave an observer with an overwhelming sense of futility in challenging the U.S. Climate Alliance at all, and perhaps making the best show for the Alliance's long-term stability.

V. INTERNATIONAL ENVIRONMENTAL ORGANIZATIONS AS PRECEDENT

The previously discussed and explored case studies are of great importance, constitutionally and internationally, but for a more thorough understanding, one must grasp the international organizations leading up to the creations of the case studies. This section works to clarify leading steps to the PCA and other precedent. First, the United Nations Environment Programme (UNEP) is explored, and then the Intergovernmental Panel on Climate Change (IPCC), finally the United Nations Framework Convention on Climate Change (UNFCCC) is examined.

The UNEP is an agency of the United Nations (UN).[114] The UNEP works to implement international environmental policy through the UN's mechanisms.[115] The UNEP has been instrumental in implementing and drafting standardized conventions on environmental issues and addressing climate change;[116] for example, the UNEP played a pivotal role in creating the IPCC, which will be addressed shortly. However, the UNEP has faced some criticism, particularly during the 2007 Rio+20 Summit, wherein some called to abandon UNEP and create a

114. *See* Mark S. Blodgett et al., *A Primer on International Environmental Law: Sustainability as a Principle of International Law and Custom*, 15 ILSA J. INT'L & COMP. L. 15, 25 (2008).

115. *Id.*

116. *See* Carol Annette Petsonk, *The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law*, 5 AM. U.J. INT'L L. & POL'Y 351, 355, 365 (1990).

stronger organization.[117] Curiously, the critiques of the UNEP were reaching their apex as the WCI and RGGI were christened.

The IPCC was formed by UNEP and the World Meteorological Organization in 1988 and is still held under the umbrella of the UN.[118] The IPCC is, primarily, a group dedicated to scientific understanding of climate change and open to any members of the UNEP.[119] Primarily pursuing adaptation and mitigation policies to combat climate change, the IPCC does not commission studies; rather it aggregates and assesses international climate change reports in an effort to remain unbiased and deferential to localized findings.[120] Its once yearly substantive panel meeting,[121] the highest-profile IPCC event, is the subject of perennial derision from those who advocate for a more weighty response to climate change. Criticisms of the IPCC have ranged from its bulky organization to its potential politicization and exaggeration of climate data.[122] The desire of U.S. quasi-international organizations to avoid these critiques can be seen manifested in the relatively efficient structure of the Western Climate Initiative and the WCI's overt effort not to riddle the organizations in the international political drama that can occasionally be associated with international organizations.

The United Nations Framework Convention on Climate Change (UNFCCC), signed by the United States early in the Clinton Administration,[123] is an international treaty meant to aid the mitigation of climate change related activities, namely the emission of greenhouse gases.[124] The UNFCCC led to numerous subsequent environmental treaties, such as the Kyoto Protocols,[125] and even contributed to the build-up of the Paris Climate Accords.[126] The UNFCCC has yearly meetings to address emissions, during which agreements and new treaties come to

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117. *See* Alister Doyle, *46 Nations Call for Tougher U.N Environment Role*, REUTERS, (Feb. 3, 2007, 8:26 A.M.), https://www.reuters.com/article/idUSL03357553.

118. *See* THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, https://www.ipcc.ch/ (last visited Aug. 25, 2019).

119. *Id.*

120. *See, e.g.*, D. Bart Turner & Chris J. Williams*, Law in a Changing Climate*, 70 ALA. LAW. 358, 359–62 (2009).

121. THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http://www.ipcc.ch/ (last visited Aug. 25, 2019).

122. *See, e.g.*, Ben Webster, *UN Must Investigate Warming 'Bias', Says Former Climate Chief*, TIMES (London), (Feb. 15, 2010, 12:01 AM), https://www.thetimes.co.uk/article/un-must-investigate-warming-bias-says-former-climate-chief-lgplj89s8dz.

123. Schmidt & Williamson, *supra* note 73, at 63–64.

124. *Id.*

125. *Id.*

126. *See* Erin L. Deady, *Why the Law of Climate Change Matters: From Paris to a Local Government Near You*, 91 FLA. B.J. 54, 54 (2017).

fruition.[127] The UNFCCC and the subsequent protocols it has helped produce have drawn ire due to their lack of long-term solutions and binding enforcement.[128] In the context of this international failure to adequately address climate change, the U.S. quasi-international organizations discussed earlier drew even more inspiration to take matters into their own hands.

The problems with these long-extant organizations helped directly cause the creation of the quasi-international organizations discussed at length in this paper. It is not an accident that these organizations went largely under the national-political radar. Quasi-international climate organizations have attempted to avoid the problems of the Intergovernmental Panel on Climate Change and other similar international organizations. A direct link appears clear between the flawed extant international organizations, christened with authority, and the quasi-international organizations that have developed.

VI. CONCLUSION

Yet, what exactly does this tell us about international organizations? It seems abundantly clear the international trends point to organizations dedicated to certain interests alone, rather than more general partnerships dedicated to wide-ranging, more global causes. Is this the future of international and subnational partnership: cause-specific unity? The wealth of climate organizations discussed above make clear the patterns emerging involve subnational organizations redeveloping arrangements and agreements regardless of national leadership. With ample precedent, at this point, little argument exists to posit that these subnational groups are in any way slowing or will do anything but steadily increase. The organizations above show the new trends moving away from national-stated interests and toward emerging regional and quasi-international partnerships.

Obvious political conclusions could be drawn from this paper's arguments. Opponents of climate change action could see a "call-to-arms" and read a methodology for challenging the Western Climate Initiative. Perhaps defenders of the Initiative could see lessons to ensure the preservation of the quasi-international

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127. *See generally* Ian Prasad Philbrick, *Trump Thinks We Spend "Billions and Billions and Billions" on the Paris Climate Deal. We Don't.*, SLATE: MONEYBOX (June 2, 2017, 5:37 PM), http://www.slate.com/blogs/moneybox/2017/06/02/president_trump_falsely_claims_the_u_s_spends_billions_and_billions_and.html.

128. *See generally id.*

organization model. This paper was not written to pursue a policy agenda, but rather to explore an often-confounding arena of international and American law.

Part II and Part III worked to illustrate the international and American legal frameworks in place to assess and diagnose the legality of these pseudo-international organizations. With international law largely deferring to domestic policy and our domestic framework leaving archaic tests, the legal formulas prove intriguing. Regretfully, there is not a wealth of jurisprudence or abundance of case law at this paper's disposal. Scholarship was employed in an effort to fill the gap that more robust precedent and case law could have provided for this paper's argument.

Part IV provided a series of case studies in an effort to shed more light on the real-world examples of cross-border subnational international organizations. These case studies largely surrounded climate change mitigation and adaptation efforts employed by active states. With the Western Climate Initiative as the shining, extant example of one of the quasi-international organizations discussed, the other case studies remain less active and hold less utility for this paper's purpose and argument. Part V illustrated the international atmosphere and how the case studies came into existence.

The Federalism Revolution and the near-immediate backlash to President Trump's withdrawal from the Paris Climate Accords suggest that more of these pseudo-international organizations could appear, or that existing subnational organizations may even strengthen, to defy President Trump's climate policy. With thorough study and appreciation of the frameworks and legal tests discussed through this paper, the next generation of quasi-international organizations stand a substantively better chance of remaining effective and extant. The importance of a strong grasp of international and domestic law regarding these curious organizations cannot be understated.