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# TRANSBOUNDARY GROUNDWATER IN NEW MEXICO, TEXAS, AND MEXICO: STATE AND LOCAL LEGAL REMEDIES TO A CHALLENGE BETWEEN CITIES, STATES, AND NATIONS

JENNIFER EVANS\*

## INTRODUCTION

Natural resources are not always abundant and rarely obey political boundaries, making legal challenges common and allocation agreements necessary.<sup>1</sup> Traditionally, states have called upon the federal government when transboundary legal challenges arise, which have included everything from seeking approval of interstate compacts to litigating in the federal courts.<sup>2</sup> For example, rivers crossing the United States-Mexico border have been governed by bilateral treaties since the nineteenth century and the federal government has set up binational programs to address the allocation of river water.<sup>3</sup> Allocation of groundwater

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<sup>1</sup> See generally JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY* (Foundation Press 2004); *id.* at 36 ("Scarcity is perhaps the most basic feature of any natural resource conflict for the simple reason that if the resource were not scarce there would be no need for governmental intervention. . . .").

<sup>2</sup> See, e.g., *Kansas v. Colorado*, 206 U.S. 46 (1907) (holding that Kansas was entitled to an equitable apportionment of benefits of the Arkansas River); *Arizona v. California*, 283 U.S. 423 (1931) (approving the congressional apportionment of water between states); *Texas v. New Mexico*, 462 U.S. 554 (1983) (holding that the interstate compact between Texas and New Mexico was subject to federal court jurisdiction absent other equivalent methods). See generally RASBAND ET AL., *supra* note 1, at 848-66 (describing three methods of allocation available to states: judicial allocation, compact, and congressional allocation).

<sup>3</sup> See, e.g., Convention Providing for the Equitable Distribution of the Waters of the Rio Grande, U.S.-Mex., May 21, 1906, 34 Stat. 2953; Treaty Relating to the

on the United States-Mexico border, however, currently lacks a solid legal agreement.<sup>4</sup>

For decades scholars have expressed concern about the lack of transboundary groundwater management and have tried to resolve the inconsistency.<sup>5</sup> Proposals such as bringing groundwater within the jurisdiction of existing federal agencies and forming bilateral treaties between the United States and Mexico have been suggested.<sup>6</sup> These solutions all have one thing in common: The federal government is a key actor.

Groundwater management on the United States-Mexico border presents both national and foreign policy issues; thus, federal involvement in any agreement governing this groundwater seems

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Waters of the Colorado and Tijuana Rivers and of the Rio Grande and Supplementary Protocol, U.S.-Mex., Nov. 14, 1944, 59 Stat. 1219, 3 U.N.T.S. 313. The International Boundary and Water Commission was originally established in 1889 for the purposes of applying the water treaties between the United States and Mexico, and adopting subsequent agreements with Mexico in the form of minutes. *See id.* arts. 24-25.

<sup>4</sup> *See* Amy Hardberger, *What Lies Beneath: Determining the Necessity of International Groundwater Policy Along the United States-Mexico Border and a Roadmap to an Agreement*, 35 TEX. TECH L. REV. 1211, 1212 (2004); Stephen P. Mumme, *Minute 242 and Beyond: Challenges and Opportunities for Managing Transboundary Groundwater on the Mexico-U.S. Border*, 40 NAT. RESOURCES J. 341, 363-77 (2000) (setting forth a table describing the "Location, Allocation, Utilization, [and] Problems" of all aquifers on the United States-Mexico border).

<sup>5</sup> ALBERT E. UTTON & CLIFFORD K. ATKINSON, INTERNATIONAL GROUNDWATER MANAGEMENT: THE CASE OF THE MEXICO-UNITED STATES FRONTIER, 72-73 (New Mexico Water Resources Research Institute, Rep. No. 109 (Oct. 1979)); Hardberger, *supra* note 4, at 1215; Mumme, *Minute 242*, *supra* note 4, at 1212.

<sup>6</sup> *See* Robert D. Hayton & Albert E. Utton, *Transboundary Groundwaters: The Bellagio Draft Treaty*, 29 NAT. RESOURCES J. 663 (1989) (proposing a treaty); Ann Berkeley Rodgers & Albert E. Utton, *The Ixtapa Draft Agreement Relating to the Use of Transboundary Groundwaters*, 25 NAT. RESOURCES J. 713 (1985) (proposing a treaty); Marilyn C. O'Leary, *The Bellagio Draft Treaty as a Tool For Solving Border Groundwater Issues*, 11 U.S.-MEX. L.J. 57 (2003) (suggesting the Bellagio Draft Treaty as an appropriate structure for managing the region's groundwater); Mumme, *Minute 242*, *supra* note 4, at 341 (advancing the idea that existing structures might be able to draft agreements, but ultimately a comprehensive groundwater agreement will be necessary).

necessary. The negative impacts of inadequate groundwater management, however, would be felt the most by the local citizens who rely upon the water source for drinking water, crop irrigation, and other imperative activities. Thus, state and local governments, whose citizens will be affected daily by groundwater choices, should have control over the destiny of local aquifers and the ability to negotiate directly with Mexico. Although State and local governments are generally thought to be restricted from participating in foreign relations, they are becoming more active in international matters without federal oversight. Additionally, the current constitutional doctrine arguably does not preclude such regional agreements. Thus, a regional agreement between Mexico and a state or local government that shares the aquifers is both a reasonable and constitutional alternative for managing groundwater on the border.

Part I of this Note discusses the groundwater challenges facing the region of Las Cruces, New Mexico; El Paso, Texas; and Juarez, Mexico; and the reasons that transboundary groundwater has been such a challenge to manage.<sup>7</sup> This section also discusses the different federal solutions that scholars have suggested for a legal response to the problems of groundwater scarcity.<sup>8</sup> Part II discusses the role of state and local governments in foreign affairs.<sup>9</sup> This Part begins by summarizing Supreme Court cases addressing whether the constitution permits states to act in ways that impact foreign nations. It goes on to discuss the extent to which state and local governments are currently engaged in foreign affairs. Finally, Part III discusses whether local and state solutions are legal and appropriate measures to address the groundwater situation on the border.<sup>10</sup> Part III asserts that, absent federal oversight or Congressional consent, the Constitution permits regional groundwater agreements between Mexico and state or local governments.

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<sup>7</sup> See *infra* Part I.

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III.

## I. GROUNDWATER ALONG THE UNITED STATES-MEXICO BORDER

Groundwater along the United States-Mexico border is both scarce and necessary. As the aquifers dry up, however, no legal agreement between the two countries allocates the remaining water and prevents future harm to the public health, the environment, and the economy. This is the situation in the areas of El Paso, Las Cruces, Ciudad Juarez, and seventeen other areas along the border.<sup>11</sup> This section will describe the groundwater concerns in the regions of El Paso, Las Cruces, and Ciudad Juarez, the challenges that arise when considering a legal agreement, and the federal solutions that have been proposed to deal with this important issue.

### A. *Groundwater Concerns*

The cities of Las Cruces, El Paso, and Ciudad Juarez rely on two main aquifers: the Hueco Bolson and the Mesilla Bolson.<sup>12</sup> The Hueco Bolson<sup>13</sup> provides El Paso with sixty percent of its municipal water supply and Ciudad Juarez with one-hundred percent of its water supply.<sup>14</sup> Scientists, using the current pumping rates, estimate that the Hueco Bolson will run out of "economically recoverable freshwater supplies" by 2025.<sup>15</sup> As of 1995, the Mesilla Bolson<sup>16</sup> provided El Paso with about eighteen percent of its water

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<sup>11</sup> Mumme, *Minute 242*, *supra* note 4, at 344.

<sup>12</sup> Octavio E. Chávez, *Mining of Internationally Shared Aquifers: The El Paso-Juarez Case*, 40 NAT. RESOURCES J. 237, 239 (2000).

<sup>13</sup> The Hueco Bolson is located within New Mexico, Texas, and Ciudad Juarez, and is a water source for all three areas. *Id.*

<sup>14</sup> *Id.*; Mumme, *Minute 242*, *supra* note 4, at 374.

<sup>15</sup> Bill Hume, *Water in the U.S.-Mexico Border Area*, 40 NAT. RESOURCES J. 189, 191 (2000); United States Bureau of Reclamation, El Paso Field Division, Desert Blooms, *Regional Water Sources Overview*, <http://www.usbr.gov/uc/apps/dblooms/pages/Sources.jsp> (last visited Feb. 20, 2006) (case sensitive) [hereinafter USBR].

<sup>16</sup> The Mesilla Bolson lies mainly within Texas and New Mexico, with small portions in Mexico. See Mumme, *Minute 242*, *supra* note 4, at 373; USBR, *supra* note 15.

and has been a water source for Las Cruces for over fifty years.<sup>17</sup> Additionally, in the year 2000, Ciudad Juarez began a project of building twenty-five wells to the Mesilla Bolson with prospects of pumping additional water from there.<sup>18</sup> The Mesilla Bolson is recharged by surface water, meaning that the aquifer is renewable and has a more constant water level than the Hueco Bolson, but significant water withdrawal from the aquifer already results in a decline in water quality.<sup>19</sup> Because the amount of clean water available in the region's aquifers is limited, a legal battle to allocate the water between the three entities is a true and current concern.<sup>20</sup>

The groundwater problem in this border region is further exacerbated by rising populations, overdraft of the water source,<sup>21</sup> and increased development.<sup>22</sup> Today, almost two million people reside in the area, with most growth occurring in recent decades.<sup>23</sup> Between 1960 and 1995, the population in El Paso grew from 276,687 to 600,000 people, and the population in Ciudad Juarez

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<sup>17</sup> USBR, *supra* note 15. Las Cruces uses the water in the Mesilla Bolson primarily for agricultural purposes, while El Paso uses its water primarily for municipal purposes. Mumme, *Minute 242*, *supra* note 4, at 373.

<sup>18</sup> *Id.*

<sup>19</sup> See USBR, *supra* note 15; Chávez, *supra* note 12, at 239; Mumme, *Minute 242*, *supra* note 4, at 373.

<sup>20</sup> UTTON & ATKINSON, *supra* note 5, at 72-73. Over twenty years ago Utton and Atkinson claimed "at some point [depletion of the groundwater] inevitably would lead to conflict between the two countries which, if not settled amicably by agreement, might be taken to the International Court of Justice or an arbitral tribunal." *Id.*

<sup>21</sup> The term overdraft means "withdrawing water from an aquifer at a rate faster than its natural, or artificial, recharge rate. If this practice continues for a long period of time, or if the aquifer has limited or little recharge, overdrafting is called mining." Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 257 (2001) (footnotes omitted).

<sup>22</sup> COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES-MEXICO TRANSBOUNDARY AQUIFER ASSESSMENT ACT, S. REP. NO. 108-297, at 8 (2004).

<sup>23</sup> See Chávez, *supra* note 12, at 238. As of 2003, the populations of the three cities were: Las Cruces, NM, 78,000; El Paso, TX, 650,000; and Ciudad Juarez, 1.2 million. The population in the region is predicted to reach four million by 2020. Paso Del Norte Water Task Force, *What is the Paso Del Norte?*, <http://www.sharedwater.org/en/whatIsPDN.htm> (last visited Feb. 18, 2006).

grew from 276,995 to 1,040,533.<sup>24</sup> Through careful water planning and conservation measures, El Paso has been able to reduce pumping of both the Hueco and Mesilla Bolsons, but these efforts do not quiet the concerns of overdraft.<sup>25</sup>

Overdraft of the aquifers is critical because a lack of water has more implications than the apparent lack of potable water. For many years the region has been warned that the depletion of groundwater could force farmers to abandon their agricultural activities, increase energy consumption from efforts to extract water from the low water table (i.e., deepen wells), and cause serious water quality concerns.<sup>26</sup> Today, overdraft of the aquifers creates serious environmental damage such as land subsidence.<sup>27</sup> Land subsidence accounts for the damage to homes, urban infrastructures, and gas and water lines in the area.<sup>28</sup> Additionally, the overdraft of the Hueco Bolson creates problems of salinization and contamination of the groundwater, resulting in public health

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<sup>24</sup> Hume, *supra* note 15, at 192.

<sup>25</sup> WILLIAM R. HUTCHINSON, HUECO BOLSON GROUNDWATER CONDITIONS AND MANAGEMENT IN THE EL PASO AREA: EL PASO WATER SUPPLY, EL PASO WATER UTILITIES HYDROLOGY REPORT (2004), [http://www.epwu.org/water/hueco\\_bolson.html](http://www.epwu.org/water/hueco_bolson.html) (follow "El Paso Water Supply" hyperlink).

<sup>26</sup> Albert E. Utton, *The Development of International Groundwater Law*, 22 NAT. RESOURCES J. 95, 102 (1982) [hereinafter Utton, *Development*].

<sup>27</sup> Land subsidence is the lowering of the land-surface elevation from changes that take place underground. Common causes of land subsidence from human activity are pumping water, oil, and gas from underground reservoirs . . . . Overdrafting of aquifers is the major cause of subsidence in the southwestern United States, and as ground-water pumping increases, land subsidence also will increase. . . . The lowering of land surface elevation from this process is permanent. For example, if lowered ground-water levels caused land subsidence, recharging the aquifer until ground water returned to the original levels would not result in an appreciable recovery of the land-surface elevation.

S.A. Leake, Land Subsidence From Ground-Water Pumping, U.S. Geological Survey, <http://geochange.er.usgs.gov/sw/changes/anthropogenic/subside> (last visited Feb. 18, 2006).

<sup>28</sup> S. REP. NO. 108-297, *supra* note 22, at 8; Mumme, *Minute 242*, *supra* note 4, at 373; O'Leary, *supra* note 6, at 57.

concerns.<sup>29</sup> The water quality is also being threatened by “[Ciudad] Juárez’s disposal of untreated sewage in the Rio Grande.”<sup>30</sup> Competition over scarce groundwater could also lead to higher water costs, the inability to support economic development, and national security problems.<sup>31</sup>

Thirty years ago, Albert Utton<sup>32</sup> advocated the need for groundwater management and water policies in the region in order to stop, or at least slow down, these seemingly inevitable results.<sup>33</sup> He observed that “[t]he heaviest groundwater users in the United States are the states which are contiguous to Mexico, and yet, paradoxically, the law and institutions of these border states are woefully inadequate to control the exploitation of their groundwater resources.”<sup>34</sup> The lack of an agreement might best be explained by the many obstacles that arise in drafting a groundwater agreement for the regions.<sup>35</sup>

#### *B. Important Considerations and Challenges with Transboundary Legal Agreements*

Although the Hueco Bolson and Mesilla Bolson are transboundary in nature, spanning New Mexico, Texas, and Mexico, there is no binational agreement governing allocation and rights to the groundwater.<sup>36</sup> The lack of a legal solution is caused partly by

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<sup>29</sup> S. REP. NO. 108-297, *supra* note 22, at 8; HUTCHINSON, *supra* note 25; Mumme, *Minute 242*, *supra* note 4, at 374.

<sup>30</sup> Mumme, *Minute 242*, *supra* note 4, at 374.

<sup>31</sup> Hume, *supra* note 15, at 192-93; Kaiser & Skillern, *supra* note 21, at 258.

<sup>32</sup> Albert Utton was co-founder of the International Transboundary Resources Center (“CIRT”) and the Natural Resources Center (“NRC”) at the University of New Mexico School of Law. Utton began researching issues related to transboundary groundwater in the region in 1977. O’Leary, *supra* note 6, at 57 & n.1.

<sup>33</sup> Utton, *Development*, *supra* note 26, at 102.

<sup>34</sup> Albert E. Utton, *An Assessment of the Management of U.S.-Mexican Water Resources: Anticipating the Year 2000*, 22 NAT. RESOURCES J. 1093, 1106 (1982) [hereinafter Utton, *Anticipating*].

<sup>35</sup> See *infra* Part I.B for a discussion about the obstacles to an allocation agreement.

<sup>36</sup> Mumme, *Minute 242*, *supra* note 4, at 373-74.



two main challenges that transboundary groundwater management in the region present: political scale and lack of scientific certainty.<sup>37</sup> Further, legal agreements on transboundary groundwater must include special considerations during the drafting process, making a final resolution even more elusive.<sup>38</sup>

## 1. Political Scale

Groundwater within the United States falls within the jurisdiction of the states, which means that the Hueco Bolson and Mesilla Bolson are governed by the legal system of two states (New Mexico and Texas), as well as the water law of Mexico.<sup>39</sup> New Mexico uses a system of prior appropriation, granting permits to those who take the water, while Texas uses a system derived from common law property rights to regulate water within the state.<sup>40</sup> Further, because the aquifers span two nations, there is a strong presumption that New Mexico and Texas must rely on the

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<sup>37</sup> Political scale and scientific uncertainty are two common themes that produce challenges to natural resource management. RASBANDETAL., *supra* note 1, at 36. Political scale refers to the situation where a natural resource is located within two jurisdictions. *Id.* at 50. Scientific uncertainty is a challenge because laws and policies are difficult to make when a natural resource is not fully understood. *Id.* at 43.

<sup>38</sup> See *infra* Part II.A(3).

<sup>39</sup> In the United States, groundwater management is governed by the states, while in Mexico the groundwater management is centralized. Mumme, *Minute 242*, *supra* note 4, at 349. The Mexican Constitution grants landowners the right to underground water—subject to federal regulation—when the public interest or other parties' interests so require. Today, Mexico does have national laws that regulate the use and protection of groundwater. Hardberger, *supra* note 4, at 1243-44.

<sup>40</sup> Hardberger, *supra* note 4, at 1240-42. In New Mexico, groundwater is owned by the state and allocated by a prior appropriation permit system. Permits are appropriated based on seniority and beneficial use, and permit holders must make reasonable use of the water. Texas uses a modified version of the capture doctrine to govern groundwater. The capture doctrine gives a landowner whose property is above an aquifer an unlimited right to the water. Texas, however, has limited these rights when the landowner pumps water with malice or wanton waste. *Id.*; see also Mumme, *Minute 242*, *supra* note 4, at 354.

federal government to enter into any agreement on management or allocation.<sup>41</sup>

Due to these political scale issues, the region has sometimes been resistant to the idea of an allocation agreement. Another reason for the resistance is that the states are reluctant to involve the federal government in their decisions about groundwater regulation.<sup>42</sup> Carlos Marin of the International Boundary and Water Commission ("IBWC") points out that "states are apprehensive about allowing federal government involvement in the regulation of groundwater."<sup>43</sup> States want to take part in the process because the national interests that drive the federal government's decisions may conflict with the interests of the border states.<sup>44</sup> Similarly, in Texas, local communities want to be in control of groundwater and are apprehensive about too much state involvement.<sup>45</sup>

Further, even assuming that the federal government must be involved in an agreement, federal involvement still does not solve the political scale challenge. The federal government must determine if it will address all groundwater along the border in one general agreement, or find separate solutions for each area on a case-by-case basis. A case-by-case approach that entails basin-oriented agreements is often advocated by scholars.<sup>46</sup> "[A]t the

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<sup>41</sup> Hume, *supra* note 15, at 190. ("The interests of the United States as a whole might clash with the interests of border region water users in particular instances.") The presumption that states must rely on the federal government for an agreement will be challenged in Parts II and III of this Note.

<sup>42</sup> Carlos Marin, *Bi-National Border Water Supply Issues from the Perspective of the IBWC*, 11 U.S.-MEX. L.J. 35, 39 (2003).

<sup>43</sup> *Id.*

<sup>44</sup> Hume, *supra* note 15, at 190.

<sup>45</sup> Kaiser & Skillern, *supra* note 21, at 251 & n.5. "Notwithstanding the fact that excessive groundwater withdrawals are a statewide problem, the legislative sentiment [in Texas] remains strong that groundwater should be managed locally, if at all." *Id.* at 253.

<sup>46</sup> See, e.g., Stephen Mumme & Nicolas Pineda, *Water Management on the U.S.-Mexico Border: Mandate Challenges for Binational Institutions*, Summary of a workshop on The Future of the U.S.-Mexico Border: Population, Development and Water (2001), <http://wilsoncenter.org> (search "water management and mumme" and then choose first hyperlink option).

diplomatic level we must strive for incremental, case-by-case solutions to Mexico-U.S. transboundary groundwater problems, building up a common base of principles, experiences, and practices that will provide solutions for those remaining problems."<sup>47</sup> With "[eighteen] different problems areas scattered across eight geographic zones,"<sup>48</sup> it is evident why a case-by-case approach might be necessary.

## 2. Scientific Uncertainty

The lack of scientific data on aquifers, and on groundwater sources in general, poses a challenge to the formation of agreements on allocation.<sup>49</sup> "[D]issemination of accurate knowledge concerning the character, diffusion, availability, and value of the resource is critical to developing an understanding of the need to redefine the rules of allocation and management. . . ."<sup>50</sup> Although several binational working groups have contributed to an increase in scientific knowledge about groundwater and specific aquifers, much is still unknown.<sup>51</sup>

## 3. Concerns with the Drafting Process and Final Agreement

In addition to the issues of political scale and scientific uncertainty, an effective legal agreement must address concerns about both the drafting process and the final agreement. Important considerations in the drafting process of a legal agreement are the "policy development and implementation" of binational agreements, "public accessibility and procedural transparency," and "inclusion of domestic stakeholders and non-governmental bodies."<sup>52</sup> Any legal agreement reached on the issue also needs to be flexible

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<sup>47</sup> Mumme, *Minute 242*, *supra* note 4, at 361.

<sup>48</sup> *Id.* at 344.

<sup>49</sup> See *id.* at 361; S. REP. NO. 108-297, *supra* note 22, at 10; Hardberger, *supra* note 4, at 1214.

<sup>50</sup> Mumme, *Minute 242*, *supra* note 4, at 347.

<sup>51</sup> *Id.* at 361.

<sup>52</sup> See Mumme & Pineda, *supra* note 46.

to ensure the adequate management of the groundwater.<sup>53</sup> "The process of negotiating supplemental agreements, at best, consumes time and money; at worst, important projects might never be undertaken because the cost of reaching agreement is prohibitive."<sup>54</sup> The legal solution should also remedy the binational asymmetry on the border.<sup>55</sup> Most importantly, the legal agreement must be enforceable.<sup>56</sup>

C. *Current and Proposed Solutions Addressing Groundwater in the Region*

Proposed solutions to groundwater management in the region include implementing new treaties, expanding the scope of current United States-Mexico legal agreements governing surface water, and creating new binational efforts to study the region's groundwater. The most noted solution is the Bellagio Draft Treaty, written in 1982 by Robert Hayton and Albert Utton in response to the transboundary groundwater issues on the U.S.-Mexico border.<sup>57</sup> The Bellagio Draft Treaty is a model transboundary groundwater treaty that establishes the cooperative study and joint management between two nations to ensure "reasonable and equitable development" and "optimum utilization and conservation of transboundary groundwaters."<sup>58</sup> The treaty also creates a

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<sup>53</sup> See UTTON & ATKINSON, *supra* note 5, at 95.

<sup>54</sup> Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally Shared Water Sources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT'L L. 27, 47 (1994).

<sup>55</sup> See Hardberger, *supra* note 4, at 1251-52 (noting that past agreements have widened the power gap and that since water is a necessary resource, agreements should fulfill every party's needs). Hardberger also suggests that in order to come to an adequate agreement, all parties must realize that water is not an economic resource to be driven by self interest, but is instead necessary for survival and must therefore be shared. *Id.* at 1250-52; see also Mumme, *Minute 242*, *supra* note 4, at 361; Rodgers & Utton, *supra* note 6, at 717.

<sup>56</sup> UTTON & ATKINSON, *supra* note 5, at 97-98; Dellapenna, *supra* note 54, at 54-55; Hardberger, *supra* note 4, at 1255-56.

<sup>57</sup> See Hayton & Utton, *supra* note 6.

<sup>58</sup> *Id.* at 682 (Bellagio Draft Treaty art. II). See generally O'Leary, *supra* note 6.

commission that is responsible for assessing scientific data on the aquifers to aid groundwater management.<sup>59</sup> The Bellagio Draft Treaty has gained much acceptance in the academic community and is a valuable model agreement for the region.<sup>60</sup>

Another suggestion, requiring neither a new treaty nor the creation of a binational body to be implemented, is expanding the scope of the International Boundary and Water Commission's Minute 242.<sup>61</sup> Minute 242, signed in 1973, includes a provision that recognizes the need for a "comprehensive agreement on groundwater in the border areas,"<sup>62</sup> but only explicitly governs activity within certain areas of the Colorado River.<sup>63</sup> A suggestion exists that "Minute 242 arguably brought groundwater within the orbit of the 1944 Water Treaty, which provides a principled basis for dialogue and joint action on the somewhat taboo issue of equitable apportionment."<sup>64</sup>

The region's groundwater has also been addressed in the U.S. Senate. The United States-Mexico Transboundary Aquifer Assessment Act, introduced by Senator Bingaman from New Mexico, addresses several groundwater challenges facing the region.<sup>65</sup> A report accompanying the proposed Act reiterates the

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<sup>59</sup> Hayton & Utton, *supra* note 6, at 684-88.

<sup>60</sup> See, e.g., Mumme, *Minute 242*, *supra* note 4, at 359 ("[T]he Draft Treaty provides a credible and adaptable template for sustainable management of transboundary groundwater that links commonly accepted principles of customary international law to the varied hydrographic, socio-economic, and political circumstances found in relation to these aquifers."); O'Leary, *supra* note 6, at 60 ("It is time to take another look at the provisions of the Bellagio Draft Treaty."); Hardberger, *supra* note 4, at 1233 ("The draft treaty . . . creates useful guidelines for some important factors in the formation of international agreements.").

<sup>61</sup> See generally Mumme, *Minute 242*, *supra* note 4.

<sup>62</sup> International Boundary and Water Commission, Minute No. 242: Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, ¶ 5 (Aug. 30, 1973) [hereinafter Minute 242].

<sup>63</sup> *Id.*

<sup>64</sup> Mumme, *Minute 242*, *supra* note 4, at 342.

<sup>65</sup> Both the 108th and 109th Congresses passed a version of the Act. See United States-Mexico Transboundary Aquifer Assessment Act, S. 1957, 108th Cong. (engrossed as agreed to or passed by the Senate) (2004) [hereinafter S. 1957]; United States-Mexico Transboundary Aquifer Assessment Act, S. 214, 109th Cong. (engrossed as agreed to or passed by the Senate) (2005) [hereinafter S. 214].

fact that "allocation of ground water in the border region is poorly regulated because little is known about its availability, sustainability, and quality; about how ground water interacts with surface-water bodies; and about the susceptibility of ground water to contamination."<sup>66</sup> The Act calls for border cooperation in studying and assessing the availability of water in the aquifers in order to better allocate the water in the future.<sup>67</sup>

While the United States-Mexico Transboundary Aquifer Assessment Act is necessary to address pressing concerns about the groundwater in the region, it does not address the complex legal issues surrounding the scarce water in the region, nor does it attempt to propose temporary legal solutions for allocation.<sup>68</sup> The report states that the excessive pumping of water in some regions has not only depleted the aquifers, but has already lowered the water table, reduced the flow of streams (vital for riparian regions on the border), created land subsidence, degraded water quality, affected habitat and biodiversity, and threatened the health of border residents.<sup>69</sup>

The issues of groundwater allocation and water quality in this region require a prompt legal solution. "The alternative to mutual agreement is continued unilateral taking of these waters, which is not a sustainable solution."<sup>70</sup> As described earlier, the population increase on the border is already leading to concerns of overdraft and degrading water quality—threatening the future use of the aquifers.<sup>71</sup> The effects of total depletion of the groundwater could be disastrous and expensive, thus it is necessary to consider all legal options available to the region.

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<sup>66</sup> S. REP. NO. 108-297, *supra* note 22, at 8.

<sup>67</sup> S. 1957 § 4; S. 214 § 4.

<sup>68</sup> The purposes of the bills are to "systematically assess priority transboundary aquifers" and "provide the scientific foundation necessary for State and local officials to address pressing water resource challenges in the United States-Mexico border region." S. 1957 § 2; S. 214 § 2. Once the bill is enacted, the study will be funded for ten years. S. 214 § 78.

<sup>69</sup> S. REP. NO. 108-297, *supra* note 22, at 8.

<sup>70</sup> O'Leary, *supra* note 6, at 58.

<sup>71</sup> See *supra* Part I.A.

## II. FEDERAL EXCLUSIVITY AND STATE AND LOCAL INVOLVEMENT IN FOREIGN AFFAIRS

As suggested earlier, the prevailing legal view is that states cannot enter into legal agreements with foreign nations.<sup>72</sup> The notion that the federal government is the only actor in foreign relations, however, is beginning to change.<sup>73</sup> This section begins with a brief history of the roles of the federal government and the states in foreign relations matters.<sup>74</sup> Next, current trends in international law and policy will be discussed, with an emphasis on how the role of states in foreign policy matters has shifted dramatically.<sup>75</sup> Finally, this Part will also address whether states today have legal support for negotiating and entering into agreements with foreign states and why it is necessary that states have the ability to engage in such relations.

### A. *Federal Exclusivity*

#### 1. The Constitution

The history of the federal government's monopoly over foreign affairs, or the "exclusivity principle,"<sup>76</sup> begins with the United States Constitution and several key Supreme Court decisions. Article I of the Constitution states that "[n]o state shall enter into any treaty, alliance, or confederation,"<sup>77</sup> and "no state

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<sup>72</sup> Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 823-24 (1989).

<sup>73</sup> See generally *id.*

<sup>74</sup> See *infra* Part II.A.

<sup>75</sup> See *infra* Part III.B.

<sup>76</sup> The term "exclusivity principle" was coined by Peter Spiro and represents the idea that "the federal government alone enjoys the capacity to conduct the nation's foreign relations." Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1224 (1999).

<sup>77</sup> U.S. CONST. art. I, § 10, cl. 1. The treaty power is further defined in Article II, § 2, cl. 2, giving the president the power to make treaties subject to the Senate's advice and consent.

shall, without the consent of Congress, . . . enter into any agreement or compact with another state, or with a foreign power . . . .<sup>78</sup>

These two provisions were included in the Constitution to constrain the ability of state and local governments to get involved in foreign affairs.<sup>79</sup> The framers felt that the nation ought to “speak with one voice” in foreign relations” so that no one state could produce adverse effects on the entire nation when it acted internationally.<sup>80</sup>

Additionally, the framers felt that “uniformity, credibility, and critical bargaining mass” were important in order for the United States to form treaties with other countries.<sup>81</sup> Allowing the states to enter into their own treaties, according to the framers, would diminish these qualities and threaten the country’s international capabilities.<sup>82</sup> The framers also felt that uniformity would promote national pride, which would help in foreign relations matters.<sup>83</sup>

However, even though these constitutional provisions limit the states in foreign affairs matters, the states have always had some role in shaping the foreign relations of the United States, and today both state and local involvement is increasing.<sup>84</sup> In fact, the

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<sup>78</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>79</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 228 (Foundation Press 1972) (“The language, the spirit and history of the Constitution deny the States authority to participate in foreign affairs.”) Article VI of the Constitution further constrains a state’s ability to intervene in foreign affairs because when treaties are the “supreme law of the land,” the states are bound by such international agreements. See U.S. CONST. art. IV; see also Bilder, *supra* note 72, at 823.

<sup>80</sup> Spiro, *supra* note 76, at 1224-25 (quoting Bilder, *supra* note 72, at 827).

<sup>81</sup> Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1237 (2000).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> HENKIN, *supra* note 79, at 228.

[D]espite many light, flat statements to the contrary, the foreign relations of the United States are not in fact wholly insulated from the States, are not conducted exactly as though the United States were a unitary state. In constitutional theory, the States are not irrelevant, playing a small part of their own, and even limiting somewhat the plenary authority of the Federal Government.



claim that the Constitution prohibits any agreement between a state and foreign nation has been challenged for centuries.<sup>85</sup> Justice Story, who sat on the Supreme Court in the early nineteenth century,<sup>86</sup> suggested in his commentaries that states might only be forbidden to enter into treaties with other countries when they are "treaties of a political character."<sup>87</sup> Agreements "deemed mere private rights of sovereignty," such as boundary issues, might still be permissible.<sup>88</sup>

## 2. Early Compact Clause Cases

In *Holmes v. Jennison*,<sup>89</sup> the only case to consider how the Compact Clause<sup>90</sup> relates to an agreement between a state and foreign nation,<sup>91</sup> the Supreme Court held that Vermont had exceeded its authority by attempting to extradite an individual to Canada.<sup>92</sup> The Court first determined that the Compact Clause prohibits states from entering into various types of agreements, in

<sup>85</sup> *Id.* at 229-30. (distinguishing between a treaty, compact, and agreement, and noting that "[n]o agreement by a State with a foreign power has been challenged as a forbidden treaty").

<sup>86</sup> Justice Story sat on the Supreme Court from 1812 to 1845. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 362 (7th ed. 2005).

<sup>87</sup> HENKIN, *supra* note 79, at 465 (quoting 2 STORY, *COMMENTARIES* § 1402 (listing treaties of political character as "treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependance, or general commercial privileges")).

<sup>88</sup> *Id.*

<sup>89</sup> 39 U.S. (14 Pet.) 540 (1840). Although the Court only reached a plurality decision, scholars emphasize that Justice Taney's plurality decision "marked the effective end of any independent state discretion in extradition" and has been "reflected in the pronouncements of leading commentators and political actors." Spiro, *supra* note 76, at 1231-32.

<sup>90</sup> See U.S. CONST. art. I, § 10, cl. 3 ("No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state, or with a foreign power . . .").

<sup>91</sup> HENKIN, *supra* note 79, at 231.

<sup>92</sup> *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 579 (1840).

addition to treaties.<sup>93</sup> The Court went on to hold that the attempt to extradite fell within the limitations of the Compact Clause, construing the clause broadly.<sup>94</sup> The decision also went beyond explicit constitutional restraints, stating that foreign relations matters could not be exercised by both the states and the federal government,<sup>95</sup> creating the “dormant theory of federal power over foreign relations.”<sup>96</sup> While the *Holmes* decision seems to firmly preclude the states from unilaterally forming any agreement with another country,<sup>97</sup> states today are forming such agreements

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<sup>93</sup> *Id.* at 571-72.

[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.

*Id.*

<sup>94</sup> *Holmes*, 39 U.S. at 572.

[T]he 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.

*Id.*

<sup>95</sup> *Id.* at 575-79; see also Spiro, *supra* note 76, at 1231 (describing this prohibition on states as the “dormant theory of federal power over foreign relations”). Spiro comments that this “expansive interpretation of [the compact] clause indicated an even more severe bar against state activity than that comprehended by the more recent conventional wisdom.” *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., *id.*; HENKIN, *supra* note 79, at 233 (interpreting the decision as meaning that any “agreement between a State and a foreign authority on any subject is forbidden unless Congress consents”).

without first obtaining congressional consent,<sup>98</sup> which raises doubts as to whether the federal government has the exclusive authority to deal with foreign nations.

In addition to state agreements with foreign nations, the early Supreme Court also considered federal oversight of interstate compacts. In *Virginia v. Tennessee*,<sup>99</sup> the Court decided an issue of whether an agreement setting state boundaries was valid despite the lack of congressional consent.<sup>100</sup> The Court held that the boundary lines were valid despite the lack of consent, emphasizing that the Compact Clause "is 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."<sup>101</sup> Because state and foreign compacts are both addressed in the Compact Clause, Louis Henkin suggests that the Court's reasoning may extend to an agreement between a state and a foreign nation, thus a foreign agreement will not need congressional consent unless it "tends to give a State elements of international sovereignty, interferes with full and free exercise of federal authority, or deals locally with a matter on which there is or might be national policy."<sup>102</sup> The Restatement of Foreign Relations also suggests that agreements between a state and foreign nation do not always need congressional consent.<sup>103</sup> "In

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<sup>98</sup> *Id.*

Whether by so narrowing the constitutional requirement of Congressional consent, or because consent was assumed, state and local authorities have in fact entered into agreements and arrangements with foreign counterparts without seeking consent of Congress, principally on matters of common local interest such as the coordination of roads, police cooperation, and border control.

*Id.*

<sup>99</sup> 148 U.S. 503 (1893).

<sup>100</sup> *Virginia v. Tennessee*, 148 U.S. 503, 517 (1893).

<sup>101</sup> *Id.* at 519.

<sup>102</sup> HENKIN, *supra* note 79, at 233.

<sup>103</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. f (1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 Reporter's Note 9 (1987) (citing § 302 cmt. f) ("A State may

general, agreements involving local transborder issues, such as agreements to curb a source of pollution, to coordinate police or sewage services, or to share an energy source, have been considered not to require congressional consent."<sup>104</sup>

The views of the Supreme Court, Louis Henkin, and the Restatement of Foreign Relations have surpassed theory and become reality. Border states have been entering into agreements with Canada, Mexico, and their local subdivisions for over one-hundred years.<sup>105</sup> Thus, it appears that a state's ability to form a legal agreement with a foreign nation is not completely foreclosed by the Constitution.

### 3. The Expansion of Dormant Foreign Affairs

Since *Holmes* and *Virginia v. Tennessee*, the Supreme Court has decided several other cases involving the states' roles in foreign affairs, often producing inconsistent opinions. In *Chy Lung v. Freeman*,<sup>106</sup> decided thirty-five years after *Holmes*, the Supreme Court seemed to further expand the dormant foreign affairs power.<sup>107</sup> At issue in this case was a California statute that limited

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make some agreements with foreign governments without the consent of Congress so long as they do not impinge upon the authority or the foreign relations of the United States.").

<sup>104</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. f (1987).

<sup>105</sup> Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, 65 FOREIGN POL'Y 154, 157-58 (1986-87) (listing "road and bridge oversight, electric power, water management, motor vehicle registration, civil defense, fire prevention, and border patrols" as issues of such agreements).

<sup>106</sup> 92 U.S. 275 (1875).

<sup>107</sup> *Chy Lung v. Freeman*, 92 U.S. 275 (1875). *But see Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is 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.

immigration of individuals into the state.<sup>108</sup> Despite the lack of any federal immigration statutes, the Court held that such powers were reserved for the federal government.<sup>109</sup> Over seventy years later, however, in *Clark v. Allen*,<sup>110</sup> the Court upheld a state statute that permitted non-resident aliens to inherit property only if a reciprocal right existed for United States citizens in the alien's nation of origin.<sup>111</sup> The Court stated that even though the law "will have some incidental or indirect effect in foreign countries . . . that is true of many state laws which none would claim cross the forbidden line."<sup>112</sup> Almost a century later, in *Zschernig v.*

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*Id.* Louis Henkin concludes that

[s]ince the same language applies to foreign compacts, one might adapt the Court's distinction and conclude that Congressional consent is required only if a foreign agreement tends to give a State elements of international sovereignty, interferes with full exercise of federal authority, or deals locally with a matter on which there is or might be national policy.

HENKIN, *supra* note 79, at 233.

<sup>108</sup> *Chy Lung*, 92 U.S. at 277-78.

<sup>109</sup> *Id.* at 280

The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

*Id.*

<sup>110</sup> 331 U.S. 503 (1947).

<sup>111</sup> *Clark v. Allen*, 331 U.S. at 506 n.1 (1947).

<sup>112</sup> *Id.* at 517. The Court also cited to *Blythe v. Hinckley*, 180 U.S. 333 (1901), a similar case from 1901, stating:

California had granted aliens an unqualified right to inherit property within its borders. The alien claimant was a citizen of Great Britain with whom the United States had no treaty providing for inheritance by aliens in this country. The argument was that a grant of rights to aliens by a State was, in absence of a treaty, a forbidden entry into foreign affairs. The

*Miller*,<sup>113</sup> the Supreme Court again returned to imposing limitations on a state's ability to engage in foreign relations. At issue in *Zschernig* was an Oregon inheritance law, similar to the law in *Clark*, which denied an East German national from inheriting an estate because East Germany did not permit Americans to inherit estates in Germany.<sup>114</sup> The Court held that the application of the Oregon inheritance law was an "intrusion by the State into the field of foreign affairs" and was therefore unconstitutional.<sup>115</sup>

In the tinderbox world of superpower competition, the potential consequences of giving offense were obviously profound. One could not expect the Soviets necessarily to understand that when a state official spoke, it was not for the nation; or at least one would not want to risk error in assessing that perception . . . [A]t worst, one could plausibly draw a scenario in which offense caused by state action lit the fuse to World War III.<sup>116</sup>

In holding that a state statute violated the Constitution if it impacted foreign affairs, the *Zschernig* Court expanded the dormant affairs doctrine.<sup>117</sup> Interestingly, however, *Zschernig* did not overrule *Clark*.<sup>118</sup> The Court reasoned that because the Oregon inheritance law put a large burden on the nonresident to establish

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Court rejected the argument as being an extraordinary one. The objection to the present statute is equally farfetched.

*Id.*

<sup>113</sup> 389 U.S. 429 (1968).

<sup>114</sup> *Zschernig v. Miller*, 389 U.S. 429, 430-31 (1968).

<sup>115</sup> *Id.* at 432.

<sup>116</sup> Spiro, *supra* note 76, at 1242.

<sup>117</sup> HENKIN, *supra* note 79, at 239 (1972). "There was no relevant exercise of federal power and no basis for deriving any prohibition by 'interpretation' of the silence of Congress and the President. The Court tells us that the Constitution itself excludes such state intrusions even when the federal branches have not acted." *Id.*

<sup>118</sup> *Zschernig*, 389 U.S. at 432.

reciprocity, whereas *Clark* only involved a general reciprocity statute, the Oregon law was more intrusive on foreign affairs.<sup>119</sup>

The *Zschernig* decision has been controversial.<sup>120</sup> Some scholars believe that the harshness of the *Zschernig* decision, and the "high mark of federal exclusivity" in general, are best explained by the context of the Cold War.<sup>121</sup> Even people who agree with the federal exclusivity principle believe that the decision may be too extreme,<sup>122</sup> and this may attenuate the impact that the case has today.

Yet over a decade later, in *Japan Line, Ltd. v. County of Los Angeles*,<sup>123</sup> the Court again adopted a dormant foreign affairs position, striking down a state regulation that taxed foreign goods.<sup>124</sup> The Court was concerned that one state's actions could prompt retaliation against the entire United States.<sup>125</sup> The *Japan Line* decision, however, has also been explained by its temporal context; *Zschernig* was decided during the Cold War, while *Japan*

<sup>119</sup> *Id.* at 434-35 ("[W]e would be required to do [more] here to uphold the Oregon statute as applied; for it has more than 'some incidental or indirect effect in foreign countries,' and its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle."). Louis Henkin draws upon the tone of the laws to give further insight into the differences between *Clark* and *Zschernig*: "it may be, then, that *Zschernig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments and involve a 'sitting in judgment' on them." HENKIN, *supra* note 79, at 240.

<sup>120</sup> Spiro, *supra* note 76, at 1242.

<sup>121</sup> *Id.* at 1241.

<sup>122</sup> See *id.* at 1242.

<sup>123</sup> 441 U.S. 434 (1979).

<sup>124</sup> *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 437 (1979).

<sup>125</sup> *Id.* at 448.

A state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is preeminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."

*Id.* (citations omitted).

*Line* was decided during a time when "trade wars loomed in economic relations even between friendly states."<sup>126</sup> Although the case law on foreign affairs exclusivity seems unyielding to states engaged in foreign affairs, the reality today is that states are involved in international issues more than ever before, and the federal government has not made such actions difficult.

*B. State and Local Involvement in Foreign Affairs*

Today, both state and local governments are becoming key players in foreign affairs matters traditionally viewed as off-limits.<sup>127</sup> For example, states are taking it upon themselves to engage in international trade and investments.<sup>128</sup> In fact, in 1999 it was estimated that "[o]ne in six private sector jobs in the United States [was] linked to the global economy."<sup>129</sup> Over forty states had already established trade or investment offices abroad in 1989.<sup>130</sup> "Without local management, the movement of people and goods across borders would be slower and more expensive and problems such as illegal immigration and drug traffic would be even worse than they are today."<sup>131</sup> Even before the emergence of the global economy, states had an effect on the international market. Today, that impact is just more prevalent.<sup>132</sup> Along with trading and investments, localities often enter into agreements with border communities for cultural reasons. In the 1980s, over 750 communities in the U.S. had over 1,000 sister city relations with cities in foreign nations.<sup>133</sup> With all of this activity, it is not surprising that

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<sup>126</sup> See Spiro, *supra* note 76, at 1242-43.

<sup>127</sup> Bilder, *supra* note 72, at 821-22 (noting that such actions have received little reaction by the federal government).

<sup>128</sup> Curtis A. Bradley, *Symposium Overview: A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1097 (1999).

<sup>129</sup> Spiro, *supra* note 76, at 1248.

<sup>130</sup> Bilder, *supra* note 72, at 822.

<sup>131</sup> Shuman, *supra* note 105, at 158.

<sup>132</sup> Swaine, *supra* note 81, at 1130.

<sup>133</sup> Shuman, *supra* note 105, at 159.



municipal foreign policies "can no longer be dismissed as simply aberrant, trivial, or unconstitutional."<sup>134</sup>

State and local involvement in foreign affairs permeates all aspects of society today. The tremendous impact that state and local governments have on foreign affairs is exemplified by local community actions. Local community involvement in foreign affairs, or "municipal foreign policies,"<sup>135</sup> takes the form of "consciousness-raising measures, unilateral measures, and bilateral measures."<sup>136</sup> The activities include "establish[ing] permanent foreign-policy bodies,"<sup>137</sup> entering into bilateral agreements, and introducing "international affairs-related curricula in . . . public schools."<sup>138</sup> Increased action in all three categories reveals that the federal government might permit local or state governments to enter into transboundary groundwater allocation agreements without federal oversight.<sup>139</sup>

Most local governments are involved in consciousness-raising activities related to foreign affairs,<sup>140</sup> which can involve activities such as establishing educational programs<sup>141</sup> or lobbying.<sup>142</sup>

<sup>134</sup> *Id.* at 155.

<sup>135</sup> "The term 'municipal foreign policy'—used by both advocates and critics of local involvement—suggests a purpose, significance and continuity that few of these state and local activities warrant." Bilder, *supra* note 72, at 829.

<sup>136</sup> Shuman, *supra* note 105, at 159.

<sup>137</sup> *Id.* at 161.

<sup>138</sup> *Id.* at 159.

<sup>139</sup> In addition to these three categories, in which states are the primary actors, the federal government today has used states as a shield to international law compliance. One key area in which the federal government has explicitly allowed the states to shape foreign affairs is the death penalty. See discussion *infra* on the federal government's resistance to intervene when states refuse to follow international law.

<sup>140</sup> Shuman, *supra* note 105, at 159 (adding that local governments are involved "whether they realize it or not").

<sup>141</sup> *Id.* at 160 (giving examples of "peace studies" courses implemented in high schools in New York and Massachusetts which were designed to teach the effects of nuclear war and anti-communism programs implemented during the Cold War).

<sup>142</sup> *Id.* (giving lobbying examples such as efforts by mayors to persuade other mayors not to do business with investment firms doing business with South Africa during Apartheid, protesting to show concern for human rights).

Unilateral actions arise when a city uses its police powers to shape foreign policy.<sup>143</sup> For example, after an incident in which the Soviet Union shot down a South Korean airplane, some U.S. cities denied United Nations representatives from the Soviet Union access to their airports and even banned the sale of vodka from the Soviet Union in protest.<sup>144</sup> Further, by the mid-1980s over one-hundred cities had become nuclear free zones, passing zoning ordinances to prohibit the building of nuclear weapons within their city.<sup>145</sup> Cities also use their police powers to establish economic sanctions against nations that violate human rights.<sup>146</sup> Several cities either penalized firms engaging in business with South Africa, or refused to contract with companies that make nuclear weapons.<sup>147</sup>

The most obvious example of a city government impacting foreign affairs occurs when a city engages in bilateral activities with another city, such as formally entering into a bilateral agreement with another nation or city. Several U.S. cities have formed agreements with foreign cities to help establish preschools or give humanitarian aid.<sup>148</sup> Some cities form permanent bodies to deal with foreign relations,<sup>149</sup> while others participate in foreign affairs on a more ad hoc basis, establishing foreign policy as issues arise.<sup>150</sup> Seattle, for example, established a permanent international affairs office to oversee issues of trade, tourism, and sister city relations.<sup>151</sup>

State and local involvement in foreign affairs raises a variety of legal issues depending on the activity in question.<sup>152</sup> Activities that fall under the consciousness-raising category create only one legal concern: "[c]an a local government undertake

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<sup>143</sup> *Id.* at 160-61.

<sup>144</sup> *Id.* at 160.

<sup>145</sup> *Id.* at 160-61.

<sup>146</sup> Shuman, *supra* note 105, at 161.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (calling these bodies "miniature state departments").

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Bilder, *supra* note 72, at 829.

education, research, and lobbying that challenge the foreign policies of the federal government?"<sup>153</sup> While the federal government may have a national interest in curtailing such efforts, these activities involve free speech and vital political functions and it is therefore important, and likely, that they continue.<sup>154</sup> But foreign affairs activities within the unilateral and bilateral categories raise constitutional issues that could restrict states and localities through the Supremacy Clause, the Commerce Clause, and dormant foreign affairs preemption.<sup>155</sup> The Supreme Court decisions discussed earlier emphasize such constitutional limits through the Court's striking down of state attempts to regulate areas of international importance.<sup>156</sup>

When a state partakes in bilateral actions with other nations, such as a groundwater allocation agreement, a further constitutional question arises as to whether such an agreement is an impermissible treaty or compact in violation of the Constitution.<sup>157</sup>

[W]hether an agreement or compact requires Congressional consent will often be determined by the State. If it proceeds without consent, and if Congress learned of it and were moved to act to reject it, Congress would doubtless prevail, but ordinarily the States's judgment would not be reviewed unless some aggrieved private interest challenged the agreement in court.<sup>158</sup>

Thus, the question is whether such an agreement would prevail if challenged by an aggrieved party.

Some scholars challenge the federal government's exclusive right to make treaties. Although it has been noted that "we should be more hesitant to scale down affirmative federal powers than

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<sup>153</sup> Shuman, *supra* note 105, at 162.

<sup>154</sup> Bilder, *supra* note 72, at 829.

<sup>155</sup> See Shuman, *supra* note 105, at 163-68.

<sup>156</sup> See *supra* Part II.A(2).

<sup>157</sup> Shuman, *supra* note 105, at 168.

<sup>158</sup> HENKIN, *supra* note 79, at 233-34.

dormant ones,<sup>159</sup> certain issues do not necessarily need to be debated in Washington.<sup>160</sup> One example particularly relevant to the groundwater debate is the famous (or infamous) Migratory Bird treaty between the United States and Canada.<sup>161</sup> Supreme Court precedent<sup>162</sup> reminds us that states' rights are subject to the federal government's right to make treaties protecting migratory species, but some challenge the necessity of such treaties today.<sup>163</sup> A foreign nation "can communicate directly with [states] and, if necessary, apply discrete pressures to further its interests."<sup>164</sup> What called for a traditional bi-national treaty in past scenarios can today be replaced with multistate commissions or other agreements between a foreign nation and an individual state.<sup>165</sup> The law, in fact, seems to be moving in the direction of permitting states and local governments to engage in foreign affairs.<sup>166</sup> The idea of federal exclusivity is losing support for several reasons, such as the intertwining of domestic and international affairs, the end of the Cold War, and the expansion of international law.<sup>167</sup>

The federal government has tolerated state and local government attempts to impact foreign affairs, and also has "deferred to and in some cases abetted, such policies."<sup>168</sup> One example of extreme deference by the federal government is its refusal to intervene when states violate international law.<sup>169</sup> This

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<sup>159</sup> Spiro, *supra* note 76, at 1273.

<sup>160</sup> *Id.*

<sup>161</sup> See, e.g., Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12 (2000 & Supp. II 2002).

<sup>162</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>163</sup> Spiro, *supra* note 76, at 1272-73.

<sup>164</sup> *Id.* at 1272.

<sup>165</sup> *Id.* at 1272-73.

<sup>166</sup> Bradley, *supra* note 128, at 1104-05 ("the new law appears more tolerant of state involvement in foreign affairs, more willing to impose limits on the national government's exercise of power, and less reliant on the judiciary to maintain a foreign affairs uniformity").

<sup>167</sup> *Id.* at 1105.

<sup>168</sup> Sarah H. Cleveland, *Symposium: Crosby and the One-Voice Myth in U.S. Foreign Affairs Relations*, 46 VILL. L. REV. 975, 1001 (2001).

<sup>169</sup> See *id.* at 1001; Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 506 (2004); Bradley, *supra* note 128, at 1098.

issue came to a forefront when several states failed to follow the Vienna Convention on Consular Relations<sup>170</sup> and imposed the death penalty on foreign nationals despite their failure to abide by the Convention's consular rights.<sup>171</sup> A preliminary injunction was issued by the International Court of Justice ("ICJ") to stop the executions while the merits were pending in the court.<sup>172</sup> The United States, however, refused to comply with the order, claiming that it was beyond the scope of federal authority to order the states to comply with the ICJ ruling because criminal punishment was a matter left solely to the states.<sup>173</sup> This opinion is inconsistent with the federal exclusivity principle and seems to promote state involvement in matters that affect foreign policy, at least when the issue is one where states have traditional jurisdiction.<sup>174</sup> Groundwater control, like criminal justice, is an issue within the jurisdiction of the states.

In addition to court proceedings regarding violations of international law, the federal government has explicitly deferred to the states when ratifying certain treaties.

<sup>170</sup> Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261 (1963). Article 36 of the Convention requires that countries who have arrested foreign nationals contact the consular of the foreign national's home nation, as well as notify the foreign national that he has the right to contact his nation's consular representative. *Id.*

<sup>171</sup> See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Apr. 9).

<sup>172</sup> See *id.*

<sup>173</sup> Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 684 (1998) (citing the government's amicus curiae brief to the Supreme Court); see also Ku, *supra* note 169, at 506-21.

<sup>174</sup> Ku, *supra* note 169, at 520.

While it is true that states appear to hold discretion over certain foreign policy questions in such circumstances, the reason the states hold that power is because the foreign policy question directly implicates a matter of state control . . . such state intervention in foreign policy issues is tolerated because the interest in maintaining state authority over such domestic matters outweighs the need for imposing a national and international system.

*Id.*

In ratifying recent human rights conventions, such as the Genocide and Torture Conventions, the Convention Against Race Discrimination and the International Covenant on Civil and Political Rights, the United States expressly adopted federalism declarations and understandings that delegated responsibility for certain U.S. international human rights obligations to the states.<sup>175</sup>

These examples demonstrate the international community's increased involvement with individual states, the federal government's diminishing concerns of foreign retaliation, the states' willingness to be involved with the international community and intervene in foreign affairs, and the federal government's approval of states abiding by international agreements on their own.

Instead of addressing their concerns with the federal government, the international community has chosen to place the individual states at the forefront of the debate. Countries with nationals on death row have sent communications directly to the states, moving beyond communications on only the national level.<sup>176</sup> "These efforts all evince a clear international understanding that both the problem and the solution for death penalty excesses will be found in the states."<sup>177</sup> In addition to specific pleas for clemency, the international community has also suggested plans to penalize those states that employ the death penalty. One such example is the European Parliament's proposal

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<sup>175</sup> Cleveland, *supra* note 168 at 1003. See, e.g., U.S. RESERVATIONS, UNDERSTANDINGS, AND DECLARATION CONCERNING THE 1996 COVENANT ON CIVIL AND POLITICAL RIGHTS, S. REP. NO. 102-23, at Understanding 5 (2d Sess. 1992) ("The proposed understanding serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to 'federalize' matters now within the competence of the States.").

<sup>176</sup> Spiro, *supra* note 76, at 1262-63.

<sup>177</sup> *Id.* at 1263.

that death penalty states in the U.S. be boycotted when it comes to investing.<sup>178</sup>

These actions by foreign nations demonstrate not only that states are increasingly becoming players on the international front, but also that the federal government should have less concern over country-wide retaliations. "[T]he existence of this system strongly supports the constitutional legitimacy of a robust and independent state role in fulfilling international law obligations, and perhaps even participating in foreign relations."<sup>179</sup> In fact, the federal government's refusal to intervene despite the ICJ's requests is perhaps an explicit example that the federal government's past justifications for maintaining exclusive powers in foreign affairs are waning.<sup>180</sup> The international community today appears to not only understand the federal system in the United States, but also that one state's actions are not necessarily attributable to the federal government or the entire country as a whole.<sup>181</sup>

The federal government has become increasingly tolerant of state and local involvement in foreign affairs. Today, the justifications behind the dormant foreign affairs power of the federal government may be outdated,<sup>182</sup> and globalization has encouraged

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<sup>178</sup> *Id.*

<sup>179</sup> *Ku*, *supra* note 169, at 461.

<sup>180</sup> Edward Swaine, however, suggests that such acts by the federal government might not signify that the federal government has transferred international relations powers to the states. "The federal government has not really yielded its international role to the states. Failures to preempt state foreign relations activities might signal genuine agreement with a state's position, an inability to intervene due to political or administrative constraints, or simply opposition to preemption as a matter of principle." Swaine, *supra* note 81, at 1237.

<sup>181</sup> *See Spiro*, *supra* note 76, at 1261.

<sup>182</sup> However, these same reasons given over two centuries ago to support exclusive federal authority over foreign affairs are still important considerations today. *See id.* at 1247. "[B]ecause [states] do not shoulder the consequences of their actions, [they] will not take into account those consequences in the decision-making balance. [This will lead to further] information deficiencies [because states will] have less incentive to understand what those consequences will be." *Id.*

localities to become involved in matters abroad. Additionally, the types of foreign activities that state and local governments are engaging in today are beyond those imagined during the drafting of the Constitution and early Supreme Court decisions. Globalization has brought foreign relations to the local level. Not only have trading and investing expanded the discourse between nations, they have increased relations between sub-national entities.<sup>183</sup> States also sign agreements with foreign nations and take part in international summits.<sup>184</sup> Numerous constraints on business would occur if the federal government denied individual states the ability to speak for themselves in the foreign markets.

### III. FEDERAL EXCLUSIVITY, THE LIMITS ON STATE AND LOCAL TRANSBOUNDARY AGREEMENTS, AND THE CASE FOR MORE STATE AND LOCAL CONTROL

As discussed in Part I, the cities of El Paso, Las Cruces, and Juarez must address the groundwater situation in their regions.<sup>185</sup> The various proposals previously set forth by scholars were based on the assumption that any agreement between these cities, or even between Mexico, Texas, and New Mexico, requires involvement of the federal government.<sup>186</sup> Federal involvement, however, generates feelings of resistance and apprehension by the states.<sup>187</sup> Thus, the region might best be served by proceeding without the federal government. The question then becomes whether a regional

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<sup>183</sup> *Id.* at 1248 ("Most states now maintain at least one trade office abroad; many have concluded trade-related agreements with foreign entities; and the foreign trade mission has become a standard responsibility for governors and large-city mayors.").

<sup>184</sup> Swaine, *supra* note 81, at 1130.

<sup>185</sup> UTTON & ATKINSON, *supra* note 5, at 72-73; Utton, *Development*, *supra* note 26, at 102.

<sup>186</sup> Proposed solutions to groundwater management in the region include implementing new treaties, expanding the scope of current United States-Mexico legal agreements governing surface water, and creating new binational efforts to study the region's groundwater. *See supra* Part I.C.

<sup>187</sup> Marin, *supra* note 42, at 39.



approach to groundwater management, absent any federal control or oversight, is both within the bounds of the Constitution and also good policy.<sup>188</sup> Drawing upon Supreme Court precedent, this section first discusses the constitutionality of such an agreement, and will then go on to discuss the possible positive and negative impacts of a regional agreement.

A. *Possible Legal Constraints on State or Local Allocation Agreements*

Any regional agreement made by a state or local government falls into the bilateral category of municipal foreign affairs. Thus, a regional agreement will raise constitutional issues, such as whether it is an impermissible treaty or is preempted by the federal exclusivity principle.<sup>189</sup>

Drawing upon the early Compact Clause cases in the Supreme Court, a regional groundwater agreement is arguably constitutional. In *Holmes*,<sup>190</sup> the Court determined that states were

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<sup>188</sup> This Note will not explore the issue of whether the federal government can actively enter into a treaty or enact a statute to control or allocate the groundwater in this region. Because the aquifers are located within two U.S. states and another nation, the assumption is that the federal government has jurisdiction to create such laws. In fact, the Supreme Court, in *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982), held that inter-state groundwater is subject to congressional allocation because it is an article of commerce. This Note will instead explore whether a regional agreement, absent state intervention or other conflicting federal laws, is constitutional. Many scholars have challenged the federal government's monopoly over foreign affairs, but have limited the issue to whether "the federal government may exclude the states from foreign affairs only through the exercise of a specific power, such as the treaty or legislative power, delegated to Congress or the President." Ku, *supra* note 169, at 471 (citing to two "revisionist scholars," Professor Ramsey and Professor Goldsmith). Thus, the test is whether a federal court would uphold such an agreement if a party challenged its interpretation or validity.

<sup>189</sup> The notion that the federal exclusivity principle is based on constitutional law has been challenged. See Spiro, *supra* note 76, at 1260 ("The exclusivity principle is ultimately premised not in a rule of constitutional law but in a rule of international law and the construction of international society.").

<sup>190</sup> *Holmes*, 39 U.S. (14 Pet.) at 571-72. See *supra* note 89 and accompanying text.

limited from entering into various types of agreements with foreign entities, but in *Virginia v. Tennessee*,<sup>191</sup> the Court began to clarify what types of agreements require Congressional approval. The test set forth in *Virginia v. Tennessee*, and applied to foreign agreements by the Restatement and scholars, is whether the agreement “increase[s] [the] political power in the States” or “encroach[es] upon or interfere[s] with the just Supremacy of the United States.”<sup>192</sup>

First, because groundwater is controlled by state and local governments in the United States, a regional groundwater agreement would not interfere with any existing right of the federal government, nor does it seem to increase the power of the state or local community. The examples of valid agreements between a state and foreign nation given by the Restatement of Foreign Relations<sup>193</sup> are also similar to an agreement on groundwater allocation. Allocating groundwater is comparable to establishing pollution controls, coordinating police efforts, and sharing energy sources. All involve areas that are at least partly within the jurisdiction of the state, and that require cooperation to successfully address the issue. Groundwater allocation is also similar to the Restatement examples in that it could still give rise to a legal challenge. Mexico could potentially become an aggrieved party, wanting to sue Texas or New Mexico if denied its fair share of water; the same could occur if a party does not abide by agreed-upon pollution controls or coordinated energy or sewage policies.

A regional groundwater agreement can also survive an application of the foreign affairs exclusivity or dormant foreign affairs cases.<sup>194</sup> These cases raised the same concerns as the

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<sup>191</sup> 148 U.S. 503 (1893). See *supra* note 99 and accompanying text.

<sup>192</sup> *Virginia v. Tennessee*, 148 U.S. at 519. See discussion *supra* at text accompanying note 99.

<sup>193</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. f (1987). See discussion *supra* at text accompanying note 104.

<sup>194</sup> See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *Clark v. Allen*, 33 U.S. 503 (1947); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

Compact Clause cases, thus the analysis is much the same.<sup>195</sup> The Supreme Court in these cases engaged in balancing tests to determine if the state action was constitutional, and were very much driven by the content and context of the activity.<sup>196</sup> Comparing a groundwater agreement to the immigration statute in *Chy Lung*, obvious differences arise. In addition to the basic fact that a groundwater agreement between two consenting parties is different from a statute that is imposed upon a foreign nation with no control over the drafting process, immigration is more of a federal issue than is groundwater. A groundwater allocation agreement will directly impact only those regions that rely upon the transboundary aquifers, and will have no direct impact on the nation as a whole. In contrast to issues like immigration, groundwater allocation can be specific to the affected aquifers and localities. Thus, the agreement will not create national policy or even the appearance of a national policy, hence it will not interfere with the nation's overall foreign policy goals.

Immigration has traditionally been reserved to the federal government,<sup>197</sup> but the location of natural resources within a state traditionally gives that state the exclusive rights to exploit that resource, even over federal government attempts to intervene.<sup>198</sup> While recent natural resource management policies have subjected groundwater to federal controls, these regulations have not

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<sup>195</sup> See *supra* Part II.A(3).

<sup>196</sup> See, e.g., *Zschernig*, 389 U.S. 429; *Japan Line*, 441 U.S. 434.

<sup>197</sup> Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1371-72 (1999) ("[T]he early . . . cases established a pattern of discourse that conceptualized immigration control as a matter of national sovereignty, including national self-preservation against foreign threats . . . . This view of immigration control, in turn, made immigration a matter of foreign affairs.").

<sup>198</sup> See RASBAND ET AL., *supra* note 1, at 161-82, 727-94. Today, the federal government has jurisdiction over state natural resources through the Commerce Clause. The federal government can explicitly pass regulations when the resource is an article of interstate commerce, and a court can invalidate a state regulation that discriminates against interstate commerce. *Id.* at 164-80; see also *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (applying the dormant commerce clause to groundwater).

touched the issue of allocation.<sup>199</sup> Further, the immigration statute in *Chy Lung* was a more generalized policy that gave the state of California the ability to exclude immigrants for various reasons.

Understandably, the Court fears "disastrous quarrels with other nations."<sup>200</sup> A regional groundwater agreement, however, will only impact one other foreign nation and will not give state or local governments significant discretionary powers. While national security is a concern if water on the border is not managed and each state begins a race to the bottom, a groundwater allocation agreement may actually prevent such a national security crisis. An agreement between the regional governments on the border that is based upon mutual understanding and equal rights will not only prevent unnecessary overdraft, but will also encourage, if not create, a peaceful distribution of this vital resource.

Further, even though *Zschernig* limits state and local governments more than *Chy Lung*, a groundwater agreement is still much different from an inheritance prohibition on foreign nationals from non-reciprocating countries.<sup>201</sup> Additionally, because the Court decided *Zschernig* at a time of heightened of national security concerns, it is reasonable to assume that a court today would validate a similar inheritance law.<sup>202</sup> Yet even if such a law still violates the Constitution, a groundwater agreement is distinguishable, as "*Zschernig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments and involve 'sitting in judgement' on them."<sup>203</sup>

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<sup>199</sup> See John D. Leshy, *The Federal Role in Managing the Nation's Groundwater*, 11 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 1, 5-7 (2004) (listing, for example, the Endangered Species Act and Clean Water Act). Leshy's article advocates for more federal involvement in groundwater management. *Id.* But see *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (holding that inter-state groundwater is subject to congressional allocation because it is an article of commerce).

<sup>200</sup> *Chy Lung*, 92 U.S. at 280. A regional groundwater agreement will have even less of an "incidental or indirect effect in foreign countries," than the inheritance law in *Clark v. Allen*. See *supra* note 110 and accompanying text.

<sup>201</sup> See discussion *supra* at text accompanying notes 113-22.

<sup>202</sup> See discussion *supra* at text accompanying notes 120-22.

<sup>203</sup> HENKIN, *supra* note 79, at 240.

Even if the validity of a regional groundwater agreement is not supported by current case law, there is evidence that the case law is evolving. The changing nature of domestic and international law also supports the validity of a regional agreement.<sup>204</sup> The federal exclusivity principle is based upon several assumptions that may not remain true today.<sup>205</sup> First, the Constitution was drafted against the backdrop of the failing Articles of Confederation.<sup>206</sup> The federal government had good reason to fear that treaties between states and other nations would diminish the already vulnerable federal power and credibility of one uniform nation.<sup>207</sup> Since the founding of the Constitution, the federal government has become internally stable and has gained credibility with other nations.<sup>208</sup> Further, the federal exclusivity principle has been supported by fears that foreign nations might retaliate against the nation as a whole for acts by one state.<sup>209</sup> The federal government had an incentive to control the actions of the states because the doctrine of state responsibility in international law allows an aggrieved nation to challenge the federal government for state actions.<sup>210</sup> While the doctrine of state responsibility is still part of international law, foreign nations today are beginning to hold subnational actors responsible for their own acts.<sup>211</sup> Additionally, in the recent instances where foreign nations have expressed concern or actually retaliated, many of the state acts involved crucial human rights concerns.<sup>212</sup> And even in the face of such

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<sup>204</sup> Spiro, *supra* note 76, at 1260-61.

<sup>205</sup> *Id.*; Swaine, *supra* note 81, at 1237-42.

<sup>206</sup> *Id.* at 1237.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 437 (1979); Spiro, *supra* note 76, at 1224-25.

<sup>210</sup> *Id.* at 1260.

<sup>211</sup> *Id.* at 1261 ("International society is being reconstructed to include subnational actors as legal entities distinct from their national governments. To the extent this development is perfected, the basis for federal exclusivity over foreign relations slips away.").

<sup>212</sup> *Id.* (listing Proposition 187 and imposition of the death penalty on juveniles or defendants not afforded treaty rights as examples).

retaliation, the federal government has not always chosen to intervene.<sup>213</sup> Further, as described earlier, state and local governments are becoming key players in the global community.<sup>214</sup>

*B. The Impact of State or Local Agreements on the Region and the Nation*

A state or city agreement with Mexico or the city of Juarez raises many policy considerations, both positive and negative, for both the state and local communities and the nation as a whole.<sup>215</sup> A regional groundwater agreement may be legal, but whether it is good policy is a separate question. The policy issues raised by such an agreement span from the classic political scale concerns in natural resource management to the policy concerns behind the federal foreign affairs exclusivity.

A regional groundwater agreement is attractive because the states of Texas and New Mexico and the cities of El Paso and Las Cruces are more attached to the underlying issues. "States, and particularly local communities, are typically closer to the problem, often understand it better, and have to live with the consequences of the policy."<sup>216</sup> An agreement binding the region's water sources should involve those parties most affected by such an agreement. Because the state and local communities have a personal stake in ensuring adequate management of the aquifers, a regional

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<sup>213</sup> After the passing of Proposition 187 in California, a federal court immediately enjoined the law, but the federal government refused to intervene in the death penalty instances. *See id.*

<sup>214</sup> *See supra* Part II.B.; *see also* Spiro, *supra* note 76, at 1249 ("If they stood as independent nations, seven American states would be counted among the top twenty-five countries in terms of gross domestic product.").

<sup>215</sup> This section will treat state and city agreements the same and will not distinguish between these two types of regional and non-federal agreements. An interesting topic that is not explored in this Note is whether an agreement between New Mexico or Texas and Mexico would be more constitutional and better public policy than an agreement between El Paso or Las Cruces and Mexico.

<sup>216</sup> RASBAND ET AL., *supra* note 1, at 52.

agreement increases potential for achieving its management goals. Further, a sense of entitlement to the groundwater may also give the localities an incentive to protect the resources. Such a sense of entitlement, however, may also lead to an agreement that does not take full account of conservation issues.<sup>217</sup> Self-interest can be both an asset and a liability. The regional governments may be driven to allocate more water than necessary to their own jurisdiction in order to benefit their local economies.<sup>218</sup>

Much of these same concerns are also found within the exclusivity principle. State and local governments will not feel the consequences and effects of their international actions in entirety, thus their decision-making processes might be flawed and could impose negative externalities upon other state and local governments.<sup>219</sup> State and local governments are criticized for their involvement in foreign affairs because they are believed to lack expertise, information and resources.<sup>220</sup> But a regional groundwater agreement does not require foreign policy expertise—it requires scientific expertise.<sup>221</sup> Federal, state, and local governments alike can hire scientists to explore the aquifers. Even though an agreement with a foreign entity has the potential to impede or frustrate the national policy of the United States,<sup>222</sup> a regional groundwater agreement should be viewed as an advancement of the regional interest in protecting the groundwater. Like other state actions that impact foreign policy, its “purpose is simply to promote legitimate local concerns and interests and to express the

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<sup>217</sup> *Id.* (describing how a sense of entitlement to a natural resource might lead to the belief that the use can be continued despite other concerns).

<sup>218</sup> *Id.* at 53.

<sup>219</sup> Bilder, *supra* note 72, at 827.

<sup>220</sup> Spiro, *supra* note 76, at 1247 (“Indeed, a standard lament of state-level foreign policy activity is that it is based on insufficient expertise.”).

<sup>221</sup> In fact, it is noted that in general “the kinds of international matters and issues with which state and local governments are concerned do not require special expertise or information.” Bilder *supra* note 72, at 829 (listing examples such as sister city relationships and local trade).

<sup>222</sup> *See id.* at 827.

views of their citizens on . . . issues of relevance and importance to them."<sup>223</sup> In addition, such an agreement may benefit relations between Mexico and the United States, especially when it comes to the water crisis on the border.<sup>224</sup>

A regional groundwater agreement also raises concerns that Mexico might retaliate against the United States, individual states, or local governments. Although the international community as a whole might understand the federalist nature of the U.S., retaliation by foreign governments has not been entirely eliminated.<sup>225</sup> When Virginia failed to follow the Vienna Convention on Consular Relations, it was the United States who had to defend itself at the International Court of Justice.<sup>226</sup> But such retaliation has also been directed at the responsible state.<sup>227</sup> For example, after California passed Proposition 187, Mexico threatened that it would take its California business to other states.<sup>228</sup> In addition, nations who disapprove of the death penalty for juvenile offenders directed their concerns to state governors. A groundwater agreement most likely will not produce such retaliation on a national level. The agreement will be specific to certain aquifers and will not directly impact citizens outside of the region. This limited scope means that the state or city parties will not be able to impose policies or laws on new parties that have not already agreed to the terms of the agreement. Further, groundwater allocation, at least currently, seems to raise fewer human rights concerns than the death penalty; thus a breach of an allocation agreement will likely prompt more tempered reactions.

Unlike the state actions listed above, a regional agreement will be an *agreement*. As a party to the agreement, Mexico or

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<sup>223</sup> See *id.* at 828.

<sup>224</sup> See *id.*

<sup>225</sup> Spiro, *supra* note 76, at 1261.

<sup>226</sup> See *supra* notes 168-73 and accompanying text.

<sup>227</sup> See *supra* note 178 and accompanying text.

<sup>228</sup> Spiro, *supra* note 76, at 1261-62.



Juarez will be able to address its concerns before such an agreement is finalized, thus minimizing, if not eliminating, the negative impacts on the community. A unilateral action by a state is much different than a bilateral agreement, thus it can realistically be expected that Mexico or Juarez will not have reason to penalize non-parties. However, this assumes that the parties will have addressed the drafting concerns listed in Part I,<sup>229</sup> such as binational symmetry.

A regional groundwater agreement can encompass the procedural and drafting concerns listed earlier. A regional agreement is consistent with the basin-oriented approach advocated by scholars.<sup>230</sup> An advantage of local or state control is that the groundwater agreement can be tailored to the specific aquifer concerns in the region. An "incremental, case-by-case solution . . ."<sup>231</sup> could be achieved with a federal plan with, for example, the implementation of local commissions. Such a plan, however, might lack the necessary flexibility to address changes and new information. Additionally, a more local approach can better ensure that the community has the opportunity to participate in the agreement process.

A regional groundwater agreement for the El Paso, Las Cruces, and Ciudad Juarez region is a viable option. Today, bilateral agreements between states and other nations do not violate the Constitution or trigger the dormant foreign affairs principle. Further, a regional agreement is an attractive option for the groundwater crisis because the benefits outweigh the incidental negative impacts to national foreign policy, and the local community is adequately equipped to address such pressing concerns.

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<sup>229</sup> See *supra* Part I.B.

<sup>230</sup> See Mumme, *Minute 242*, *supra* note 4, at 353, 361; Mumme & Pineda, *supra* note 46. See also *supra* notes 46-48 and accompanying text.

<sup>231</sup> Mumme, *Minute 242*, *supra* note 4, at 361.

## CONCLUSION

Groundwater in the El Paso, Las Cruces, and Ciudad Juarez region is a valuable resource that is threatened by the lack of adequate transboundary groundwater management. An agreement addressing allocation and other groundwater management concerns is necessary for the future. "[T]he alternative to mutual agreement is continued unilateral taking of these waters, which is not a sustainable solution."<sup>232</sup> Because the groundwater is located within two states and two nations, past approaches have included the federal government as a key player. But states today are becoming increasingly involved in foreign policy, and case law reveals that the federal government is not always a necessary party for bilateral agreements. A regional groundwater agreement, absent federal involvement, is a viable option.

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<sup>232</sup> O'Leary, *supra* note 6, at 58.