THE RISE OF NONBINDING INTERNATIONAL AGREEMENTS: AN EMPIRICAL, COMPARATIVE, AND NORMATIVE ANALYSIS

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The Article II treaty process has been dying a slow death for decades, replaced by various forms of “executive agreements.” What is only beginning to be appreciated is the extent to which both treaties and executive agreements are increasingly being overshadowed by another form of international cooperation: nonbinding international agreements. Not only have nonbinding agreements become more prevalent, but many of the most consequential (and often controversial) U.S. international agreements in recent years have been concluded in whole or in significant part as nonbinding international agreements. Despite their prevalence and importance, nonbinding international agreements are not currently subject to any of the domestic statutory or regulatory requirements that apply to binding agreements. As a result, they are not centrally monitored or collected within the executive branch, and they are not systematically reported to Congress or disclosed to the public.

This Article focuses on three of the most important types of nonbinding international agreements concluded by the United States: (1) high-level formal agreements; (2) joint statements and communiques; and (3) nonbinding agreements concluded by administrative agencies. After describing these categories and their history, the Article presents the first empirical study of U.S. nonbinding agreements.

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drawing on two new databases that together include more than 2100 nonbinding agreements. Based on this study, the Article argues that many of the concerns that prompted Congress to regulate binding executive agreements starting in the 1970s also apply to nonbinding agreements. Finally, drawing in part on insights obtained from a comparative assessment of the practices and reform discussions taking place in other countries, the Article suggests legal changes designed to enhance coordination and accountability.
INTRODUCTION

The only process specified in the Constitution for making international agreements is the one set forth in Article II, which requires that presidents obtain the advice and consent of two-thirds of the Senators present. This treaty process, however, has been dying a slow death for decades. It has been replaced in part by various forms of “executive agreements” that are authorized by a statute, a prior treaty, or the president’s independent constitutional authority. Executive agreements, like treaties, are binding under international law. While executive agreements are increasingly used as substitutes for treaties, their numbers too have declined in recent years.

As treaties and executive agreements have declined, another form of international cooperation has grown in prominence: nonbinding international agreements. A nonbinding international agreement is an agreement between two or more sovereign states, or between a state and an international organization, that is not governed by international law. Whether an agreement is “binding” or not determines whether it triggers a range of formal rules under international law, including rules relating to compliance and state responsibility for breach. This is why international lawyers sharply distinguish the two categories. Yet because the international legal system often lacks centralized adjudication or enforcement, in practice nonbinding agreements operate in ways functionally similar to many binding agreements—that is, they rely on informal enforcement mechanisms such as coordination, reciprocity, and reputation.

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1 See U.S. Const. art. II, § 2.
2 See Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis, 134 Harv. L. Rev. 629, 632 (2020) (noting that the Clinton administration submitted approximately 23 treaties per year, the George W. Bush administration submitted around twelve per year, the Obama administration submitted around five per year, and the Trump administration submitted only five treaties in Trump’s first three and a half years in office). In the first year of his presidency, President Biden submitted one treaty to the Senate—the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer. That year, the Senate consented to no treaties.
3 See, e.g., Oona A. Hathaway, Presidential Power Over International Law, 119 Yale L.J. 140 (2009) (documenting “a little noticed transformation during the last half-century in the way international law is made in the United States” from Article II treaties to executive agreements).
It is difficult to overstate how important nonbinding agreements have become to U.S. foreign policy. Almost all of the most consequential (and often controversial) international agreements made by the last three presidential administrations were nonbinding.\(^5\) Recent examples of U.S. nonbinding agreements include the EECD/G20 agreement on global tax reform; the Glasgow Climate Pact among almost 200 nations that aims to reduce fossil fuel emissions; the Artemis Accords, an eight-nation framework for interpreting and implementing provisions of the binding Outer Space Treaty; the New Atlantic Charter, a United States–United Kingdom agreement for promoting democratic values and institutions; and the agreement between the United States and the Taliban concerning the withdrawal of U.S. forces from Afghanistan, which President Biden controversially implemented in August 2021. These high-profile agreements are the tip of the iceberg of a vast agreement-making practice that largely flies under the radar of public and congressional scrutiny.\(^6\)

The executive branch has many incentives to make agreements nonbinding rather than binding. In contrast to Article II treaties and executive agreements that are authorized by statute, the executive branch can make nonbinding international agreements without the need to obtain congressional authorization or approval.\(^7\) And in contrast to executive agreements, which most commentators believe are limited to matters that relate to the president’s independent constitutional authority, the executive branch maintains that it can make nonbinding agreements on practically any topic.\(^8\) Nonbinding agreements also permit the executive branch to avoid accountability and transparency mandates. The executive branch has a legal duty to

\(^5\) See infra Section I.C.

\(^6\) See infra Part II.

\(^7\) In responding to a question from a member of Congress about why the Obama Administration did not use the Article II treaty process when concluding an important nuclear agreement with Iran, Secretary of State John Kerry explained, “I spent quite a few years trying to get a lot of treaties through the United States Senate and quite frankly, it has become physically impossible. That is why. Because you can’t pass a treaty anymore.” Secretary of State John Kerry, *Testimony Before the Committee on Foreign Affairs*, House Foreign Affairs Committee (July 28, 2015), https://www.c-span.org/video/?327359-1/secretaries-kerry-moniz-lew-testimony-iran-nuclear-agreement.

\(^8\) By contrast, under most accounts, the president’s constitutional authority to conclude binding executive agreements (a) must be tied to an independent presidential authority, (b) is narrower than the power to enter into Article II treaties and congressional-executive agreements, and (c) generally encompasses discrete issues such as the recognition of other governments and the settlement of claims. See Hathaway, Bradley & Goldsmith, *supra* note 2, at 639-41; see also, e.g., Medellín v. Texas, 552 U.S. 491, 532 (2008) (referring to “the Executive’s narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement”). For a broader view of the president’s independent authority, see Harold Hongju Koh, *Twenty-First-Century International Lawmaking*, 101 GEO. L.J. ONLINE 1 (2012).
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report to Congress all binding agreements other than Article II treaties and to publish the important ones.9 But it can skirt these duties altogether by making a nonbinding agreement, which it need not report or publish. In a world where foreign policy challenges persist but Congress is gridlocked, it is no surprise that the executive branch is drawn to a form of agreement that it can make on any topic, and without congressional approval or accountability.

By all indications, the executive branch’s use of nonbinding agreements has been growing for some time. In 2005, amidst the decline in binding agreements, a lawyer in the State Department Legal Adviser’s Office observed that nonbinding agreements had shown a “marked increase.”10 As this Article documents, that trend has accelerated since that observation. Moreover, many other countries have witnessed a similar shift from binding to nonbinding arrangements.11 For example, the legal adviser to Germany’s Federal Foreign Office has noted that “[a]s seemingly everywhere else, the significance of non-legally binding agreements has consistently been rising in our practice.”12 And the head of the treaty division of Mexico’s foreign ministry has reported that approximately 70% of Mexico’s international agreements are now nonbinding.13

Previous U.S. scholarship has highlighted the growing phenomenon of nonbinding international agreements. In 1977, in the wake of the nonbinding Helsinki Accords, Oscar Schachter wrote a brief comment analyzing the “twilight existence” of such nonbinding international agreements.14 In 2002, Kal Raustiala observed that agencies were using non-legally binding “Memoranda of Understanding” to structure “transgovernmental cooperation.”15 In 2009, Duncan

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9 See Hathaway, Bradley & Goldsmith, supra note 2, at 645-51.


11 This finding is the result of a survey we conducted of experts and officials from more than a dozen countries, as well as publicly available materials relating to a number of other countries.


13 See Alejandro Rodiles, ITAM School of Law, Mexico, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (submitted Sept. 1, 2021) (on file with authors).


Hollis and Joshua Newcomer emphasized the importance of nonbinding agreements (which they called “political commitments”) in U.S. practice, provided a taxonomy of these agreements, and considered their constitutional implications. In 2012, Harold Koh explained how nonbinding agreements operated in conjunction with binding instruments to effectuate “layered diplomacy” in U.S. practice. And in 2014, Jean Galbraith and David Zaring offered a foreign relations law perspective on nonbinding agreements concluded by administrative agencies (which they called “soft law agreements”).

These studies provide a valuable starting point for understanding nonbinding agreements. But none seeks to discern the extent and nature of the U.S. practice of concluding nonbinding agreements. Nonbinding agreements are extraordinarily difficult to study because they operate in a law-free zone—no international or domestic legal rules govern them—and because the systems that track international agreements do not include nonbinding agreements. Article II treaties are published by the Senate, listed in the Treaties in Force compilation prepared by the State Department, and registered with the United Nations; executive agreements are collected by the State Department and reported to Congress under the Case-Zablocki Act, and are published in both public and private databases. Nonbinding

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17 Koh, supra note 8, at 14.


19 See Congress.gov (“About Treaty Documents”), https://www.congress.gov/search?q=%7B%22source%22%3A%22%7D.


agreements, by contrast, have no central repository and are not subject to any rules about transparency or publication. Most nonbinding agreements are thus never made public. And the ones available to the public are scattered across the internet based on the varying preferences of the dozens of agencies and departments that make them. Most other countries similarly fail to make their nonbinding agreements public. This has made nonbinding agreements challenging to study.

To overcome these problems, we took three steps. First, we built the first-ever database of the nonbinding agreements concluded by U.S. administrative agencies. Working with a team of research assistants, we gathered all public information we could obtain on such nonbinding agreements. We then filed Freedom of Information Act (FOIA) requests with more than twenty federal agencies that we determined conclude nonbinding agreements, in order to obtain their nonpublic records. When they failed to respond in a timely manner to our FOIA request, we sued the Departments of State, Defense, and Homeland Security to obtain their records of nonbinding agreements. In addition, we built a smaller (but still substantial) database of a second form of nonbinding agreements—joint statements and communiques issued following high-level international meetings or conferences. These efforts have resulted in two databases that together already include over 2100 nonbinding agreements that we have coded and analyzed to provide an unprecedented quantitative empirical glimpse into the U.S. nonbinding agreements practice.24

Second, we interviewed government officials in several administrative agencies about their experiences in connection with the drafting and conclusion of nonbinding agreements. These interviews provided invaluable information about why agencies choose to conclude nonbinding agreements and the processes that they follow. Third, we reached out to experts and officials in other countries to learn more about how their legal and regulatory systems address nonbinding international agreements. This gave us a broader comparative perspective from which to view U.S. practice than prior scholarship.

A key contribution of this Article, then, is to excavate and describe a growing practice relating to international law. Nonbinding agreements, we show, are not just an important part of the international agreement landscape; they are, increasingly, the dominant part. The field of international law—in the United States and globally—

24 We will continue to update a publicly available database on Dataverse that will include all current agreements as well as additional agreements obtained through litigation or under FOIA.
must reorient itself to this new reality. Increasingly, international cooperation is shaped by commitments that claim not to be law at all. This development has important ramifications for how international law is taught and studied, both in the United States and elsewhere, and it raises fundamental questions about the nature of the international legal system.

The growing importance of nonbinding agreements also raises the question—largely unaddressed in prior scholarship—about whether and how such agreements should be regulated domestically.\(^{25}\) In the United States, nonbinding agreements in many cases serve the role once reserved for Article II treaties and binding executive agreements. And yet they are entirely exempt from the reporting and publication requirements that apply to binding agreements. As we will explain, in some ways nonbinding agreements should be treated differently, in part to preserve the flexibility that such agreements offer. With this in mind, and drawing upon ideas being discussed in other countries, we recommend reforms to enhance executive branch accountability and transparency.

Unlike many issues of government accountability and transparency, legislative reform here is plausible. Congress has often amended the Case-Zablocki Act since the 1970s, and pending legislation proposes to amend it yet again—in part to address reform proposals that we made in an earlier article.\(^{26}\) The proposed legislation, if enacted, would also begin to address some nonbinding agreements. The proposed legislation does not go far enough, but it shows that Congress is interested in improving accountability and transparency in this context.

Part I of this Article describes the rise of nonbinding international agreements in U.S. practice and their current lack of legal regulation. Part II presents a novel empirical account of the nonbinding agreements concluded by U.S. administrative agencies based on numerous sources. Part III is a comparative analysis of how other nations are addressing the regulatory challenges presented by nonbinding agreements. Building on Parts II and III, Part IV considers potential legal reforms for the United States, with a particular focus on executive branch coordination and public transparency. The Article concludes with reflections on the implications of the rise of nonbinding international agreements for the field of international law.

\(^{25}\) We addressed this question briefly in prior work. See Hathaway, Bradley & Goldsmith, supra note 2, at 708-10. See also Ryan Harrington, A Remedy for Congressional Exclusion from Contemporary International Agreement Making, 118 W. Va. L. Rev. 1211, 1236-42 (2016) (discussing how the Case-Zablocki Act could be construed to apply to nonbinding agreements).

\(^{26}\) See infra note 224.
I. NONBINDING INTERNATIONAL AGREEMENTS IN U.S. LAW AND PRACTICE

A nonbinding international agreement can be bilateral or multilateral and can take many forms. A common element among all forms of these agreements is that they are not governed by international law—a characteristic that has implications for why nations make them and how they operate in practice. This Part provides background on nonbinding agreements made by the United States to set the stage for the empirical, comparative, and normative analysis that follows. It begins by defining nonbinding agreements. It then explains the historical use of these agreements by the United States and their place in the U.S. domestic legal system. Finally, it examines contemporary U.S. practice concerning nonbinding agreements and organizes the agreements into three categories for purposes of analysis.

A. What is a Nonbinding International Agreement?

A nonbinding international agreement can best be understood by comparison to a binding international agreement, which in international law nomenclature is called a “treaty.” A treaty is “an international agreement concluded between States. . . and governed by international law.” Important legal consequences of a legally binding treaty include pacta sunt servanda (a duty to observe the terms of the treaty), state responsibility for violations, and legal remedies for breach, such as reparations and countermeasures.

A nonbinding international agreement is simply an agreement between nations that is not governed by international law. Such an agreement imposes no

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27 Different terms have been used to capture what we call “nonbinding international agreements,” including “political commitments,” “informal agreements,” “informal arrangements,” “nonbinding arrangements,” “nonbinding documents,” “nonbinding instruments,” “nonbinding arrangements,” “soft law agreements,” and (in an earlier era) “gentlemen’s agreements.” See, e.g., ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 18 (3d ed. 2013); Robert Dalton, Asst. Legal Adviser for Treaty Affairs, International Documents of a Non-Legally Binding Character, State Department, Memorandum (Mar. 18, 1994) (copy on file with authors). Although some observers might think that the word “agreement” connotes bindingness, we use “nonbinding agreements” because it best reflects the role that these documents play in the international system. The term has, moreover, been used in recent international discussions of the topic. See infra Part III.

28 Vienna Convention on the Law of Treaties, supra note 4, art. 2(1)(a) (emphasis added). Under international law, all international agreements that are governed by international law, including “executive agreements,” are considered treaties.

29 See, e.g., AUST, supra note 27, at 315-17.

30 It is also not governed by domestic law. States make contracts—for example with corporations concerning investment matters and sometimes with other states—that are governed by
international legal duty to comply with its terms, and breach or non-compliance with the agreement implicates no international legal consequences. This does not mean that nonbinding agreements lack any relationship to binding international law. To the contrary, nonbinding agreements can serve as the basis for or precursor to binding instruments made later;\(^31\) provide interpretive guidance for binding agreements;\(^32\) clarify or expand upon the requirements of binding obligations;\(^33\) be embedded or incorporated into a binding obligation or instrument;\(^34\) and influence the development of customary international law.\(^35\) But nonbinding agreements do not create direct legal obligations and the attendant consequences.\(^36\)

The difference between a binding and a nonbinding agreement is easy to articulate in theory but distinguishing between the two in practice can be challenging because there is no universally accepted test for drawing the distinction. One test


32 For example, investment tribunals “rely on non-binding rules . . . to establish procedures through which to adjudicate disputes in a binding fashion,” and in legally binding decisions the tribunals sometimes use “non-binding instruments to fill gaps in international investment agreements.” Tim Meyer, *Alternatives to Treaty-Making—Informal Agreements*, in *The Oxford Guide to Treaties* 59, 64 (Duncan Hollis ed., 2d ed. 2020).

33 For example, “space-faring states have favored legally nonbinding principles and technical guidelines that are layered on top of . . . preexisting treaties” related to outer space. Koh, *supra* note 8, at 15. Similarly, in the environmental context, “decisions of treaty bodies, such as a Conference of the Parties (COP), are often non-binding but can supplement or expound on binding obligations.” Meyer, *supra* note 32, at 64.

34 In differing ways, this was true of both the Paris Agreement on climate change and the Iran nuclear deal. See *infra* text accompanying notes 96-102.

35 *See* International Law Commission, Draft conclusions on identification of customary international law with commentaries (2018), A/73/10, Conclusions 6, 9, and 10. Some scholars claim that a nonbinding commitment might bind a country under the principle of estoppel, but the point is not established in national practice. *See* OAS Report, *supra* note 30, at 126.

36 *See* OAS Report, *supra* note 30, at 123 (noting that nonbinding agreements do not “trigger pacta sunt servanda nor any of the secondary international legal effects that follow treaty-making (e.g., the law of treaties, State responsibility, specialized regimes).”)
looks predominantly to the intent of the parties.\textsuperscript{37} However, intent is not always easy
to discern. Some nonbinding agreements expressly state that they are nonbinding.
But many do not, in which case intent must be inferred from the language of the
agreement, the circumstances under which it was made, and other contextual
factors.\textsuperscript{38} A second test turns on objective factors. On this view, “the agreement’s
subject-matter, text, and context determine its binding or non-binding status
independent of other evidence as to one or more of its authors’ intentions.”\textsuperscript{39}

The intent and objective tests often lead to the same conclusion about the
bindingness of an agreement. But uncertainties in the application of each test,
combined with the fact that different nations follow different tests, mean that nations
sometimes disagree about whether an agreement between them is binding or not.
Several prominent international tribunal cases involved disputes about whether
certain agreements were binding or not.\textsuperscript{40} In the 1990s, the United States considered
certain defense-related memoranda of understanding to be binding agreements, but
its partners (Australia, Canada, and the United Kingdom) regarded them as
nonbinding political commitments.\textsuperscript{41} Similarly, the United States viewed the nuclear
deal with Iran in 2015 as a nonbinding agreement, but Iran insisted that it was a

\textsuperscript{37} The intent test was embraced by the International Law Commission in its important mid-
century study of the law of treaties, see, e.g., II Yearbook of the International Law Commission 189
(1966), and by the delegates to the Vienna Convention on the Law of Treaties, U.N. Conference on
13. It is the approach used by, among other countries, the United States, see Dalton, supra note 27,
and the United Kingdom, see AUST, supra note 29, at 31.

\textsuperscript{38} See, e.g., Dalton, supra note 27 (noting that the test for legal bindingness is “the intent of
the parties, as reflected in the language and context of the document, the circumstances of its
conclusion, and the explanations given by the parties”).

\textsuperscript{39} See OAS Report, supra note 30, at 80-81 and notes 127-134; Meyer, supra note 32, at 59.

\textsuperscript{40} See, e.g., Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar
v. Bahrain), 1994 I.C.J. 112, ¶¶ 20–22 (Jurisdiction and Admissibility); Agean Sea Continental Shelf
Case (Greece v. Turk.), 1978 I.C.J. 3, ¶¶ 97–100 (Dec. 19); Delimitation of the Maritime Boundary in
the Bay of Bengal (Bangladesh/Myanmar), Case No. 16, Judgement of Mar. 14, 2012, ITLOS Rep. 4,
¶¶ 61–69.

\textsuperscript{41} See John H. McNeill, International Agreements: Recent US-UK Practice Concerning the
binding agreement.\textsuperscript{42} And more recently, the United States and Mexico disagreed about the bindingness of an agreement concerning migration.\textsuperscript{43}

The final definitional point is that, for our purposes, the fact that an agreement is nonbinding does not necessarily mean that it is “soft law.” The two concepts are sometimes used interchangeably, especially in scholarly discussions.\textsuperscript{44} But soft law is often used as a broader term to capture agreements and international policies that impose weak or uncertain obligations through some combination of nonbindingness, vague or hortatory terms, shallow obligations, and a lack of enforcement mechanisms.\textsuperscript{45} For purposes of this Article, a nonbinding international agreement is simply one that is not governed by international law, and it can include agreements with vague or precise terms, shallow or deep obligations, and enforcement mechanisms or no such mechanism.

B. Nonbinding International Agreements in U.S. Law

This section reviews how nonbinding agreements fit within the framework of U.S. domestic law. It begins with a brief description of the history of such agreements in the United States, and it then turns to the president’s domestic


\textsuperscript{43} See Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, Mex.-U.S., June 7, 2019, T.I.A.S. No. 19-607; Rachel Withers, Mexico Releases the Full Text of Trump’s Immigration “Deal,” Vox, June 15, 2019, https://www.vox.com/2019/6/15/18680129/us-mexico-immigration-deal-release-trump-tariff. In response to a query from Senator Menendez, the State Department declared the agreement binding. Letter from Mary Elizabeth Taylor, Assistant Secretary, Bureau of Legislative Affairs, U.S. Department of State, to Robert Menendez, Ranking Member, Committee on Foreign Relations, United States Senate (Sept. 9, 2019). Yet, according to a U.S. government lawyer, “the Government of Mexico considers it non-binding.” Email from U.S. Government Lawyer to Oona A. Hathaway (June 5, 2021).

\textsuperscript{44} See, e.g., Andrew T. Guzman & Timothy L. Meyer, International Soft Law, 2 J. Legal Analysis 171, 201-21 (2010); see also Dinah L. Shelton, Soft Law, in Routledge Handbook of International Law 68 (David Armstrong ed., 2008).

authority to make them, their status in the domestic legal system, and their lack of domestic regulation.

1. A Brief History of Nonbinding Agreements. The history of nonbinding international agreements in the United States is murky. Diplomatic letters and other papers effectuated informal agreements with other nations since the Founding. But a distinct category of what we today mean by nonbinding international agreements did not clearly emerge until the twentieth century. Before then, the executive branch made hundreds of agreements on its own authority. But there appears to have been little discussion of whether these agreements were binding or nonbinding under international law.

The issue became more salient in the early twentieth century as the Senate began to complain about the executive branch’s increasingly ambitious use of the executive agreement power. The executive branch defended some agreements on the ground that they lasted only as long as the executive branch chose to enforce them and did not bind future administrations or the nation as a whole. Theodore Roosevelt invoked this theory to justify the 1905 agreement he made with the Dominican Republic for administering customs houses in Santo Domingo. William Howard Taft made a similar argument, when he was Roosevelt’s Secretary of War, to justify an agreement that defined the relative jurisdictions in cities at both ends of the Panama Canal. Taft described the agreement as a modus vivendi (or temporary agreement) that was “revocable at will,” but it lasted beyond the Roosevelt administration because subsequent administrations continued to enforce

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46 There were concepts akin to nonbinding agreements much earlier. See, e.g., EMER DE VATTELL, THE LAW OF NATIONS 355 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2012) (1797) (distinguishing a “personal alliance” or “personal treaty,” which “expires with him who contracted it,” from a “real alliance” or “real treaty,” which “attaches to the body of the state, and subsists as long as the state, unless the period of its duration has been limited”).

47 For example, the Senate reacted testily to President McKinley’s use of an executive agreement to “arrange[] the Spanish withdrawal from Puerto Rico, Cuba, and other former possessions” at the termination of the Spanish-American war, and to early twentieth century presidents’ agreements establishing U.S. policy in the far east, including the Open Door Policy, the intervention in the Boxer Rebellion, and several agreements with Japan. See Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 HARV. L. REV. 799, 818 (1995). See generally Michael D. Ramsey, The Treaty and Its Rivals: Making International Agreements in U.S. Law and Practice, in SUPREME LAW OF THE LAND? DEBATING THE CONTEMPORARY EFFECTS OF TREATIES WITHIN THE LEGAL SYSTEM OF THE UNITED STATES (Paul Dubinsky, Gregory Fox & Brad Roth eds., 2017) (describing “enormous changes in U.S. foreign relations” by end of nineteenth century that led to “new forms of agreement-making,” including “the rise of nonbinding agreements”).

48 See THEODORE ROOSEVELT, THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 551 (1913).

49 See WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 112 (1916).
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it. Similarly, Secretary of State Robert Lansing explained that the 1917 Lansing-Ishii agreement—which resolved various U.S.-Japan issues relating to China—lacked “any binding force” on the United States, and was “simply a declaration of . . . the policy of this Government, as long as the President and the State Department want to continue that policy.”

Despite these early precedents, commentators in the first third of the twentieth century disagreed about which of hundreds of other agreements made by the executive branch were binding on the nation rather than simply a policy of a particular administration. Quincy Wright’s influential 1922 book, The Control of American Foreign Relations, argued that executive agreements that settled claims and possibly agreements made under the Commander in Chief power were binding on the nation under international law. Wright maintained that other types of executive agreements—which he variously labeled protocols, modus vivendi, “gentlemen’s agreements,” administrative agreements, or agreements that define executive policy—are “binding only on the president that makes them.” He noted that “presumably the foreign government would have no ground for objection if a subsequent President discontinued such an executive agreement.”

Wright’s assessment was influential, but other commentators reached different conclusions.

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50 Investigation of Panama Canal Matters: Hearing Before the S. Comm. on Interoceanic Canals, 59th Cong. 2590 (1907) (cable of Secretary of War William Howard Taft to Secretary of State John Hay); see also id. at 2741-42 (Senator Morgan noting that the jurisdictional boundaries are “settled here temporarily and provisionally by a modus vivendi”).

51 Treaty of Peace with Germany: Hearing Before the S. Comm. on Foreign Rel., 66th Cong. 219 (1919) (testimony of Secretary of State Robert Lansing). President Harding later described the “so-called Lansing-Ishii agreement” as an “exchange of notes [that], in the nature of things, did not constitute anything more than a declaration of Executive policy.” Green Haywood Hackworth, 5 Digest of International Law 431 (1943). President Wilson said it was “an understanding,” not an agreement.

52 Quincy Wright, The Control of American Foreign Relations 240-44 (1922).

53 Id. at 238; see also id. at 54, 235, 237, 243. It appears from context in these passages that Wright was not using the term “binding” to suggest that international law governed these agreements, but rather to suggest that whatever political or moral obligation they imposed applied only to the administration that made them.

54 Id. at 238.

55 See, e.g., George Sutherland, Constitutional Power and World Affairs 120-21 (1919) (distinguishing executive agreements binding on the nation from those that “constitute[e] only a moral obligation”); Charles Henry Butler, Treaty-Making Power of the United States 463 (1902) (concluding that “protocols,” Butler’s term for many executive agreements, “are binding in a moral sense upon the Executive department of the administration making them,” but do not bind the legislature, and “[i]t is doubtful if they are binding even morally upon any administration other than that which entered into them”); Harry Swain Todd, The President’s Power to Make International Agreements, 11 CONST. REV. 160, 162 (1927) (noting that the “question as to the binding force of an
The wide range of positions was possible because the executive branch was rarely clear, beyond the few precedents mentioned above, about which agreements were binding on the nation. The U.S. Supreme Court never addressed the issue.\(^{56}\)

The meaning and scope of nonbinding international agreements within U.S. practice began to clarify in the middle decades of the twentieth century. The increased use and importance of executive agreements starting in the 1930s sparked a scholarly debate that highlighted the massive number and array of agreements made on the President's authority alone and raised anew questions about which were binding.\(^{57}\) In the 1940s, Presidents Roosevelt and Truman announced the Atlantic Charter and the Yalta and Potsdam agreements (concerning aims and principles relating to World War II and its aftermath) on their own authority. The United States claimed that all three were nonbinding under international law, but some countries and scholars disagreed about the latter two.\(^{58}\) In 1949, the International Law Commission began work on the law of treaties that would result in 1969 in the Vienna Convention on the Law of Treaties. That Convention's definition of a treaty as “an international agreement . . . governed by international law” aimed to exclude nonbinding international agreements.\(^{59}\)

The question of which U.S. international agreements were binding and which were nonbinding assumed new importance with the passage of the Case-Zablocki Act in 1972. That Act required the Secretary of State to transmit to Congress “the

\(^{56}\) The closest case we have found is *United States ex rel Angarica v. Bayard*, 127 U.S. 251, 261 (1888), where the Court assumed that an exchange of letters between the Secretary of State and the Mexican equivalent was not binding on successors.

\(^{57}\) Compare Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 197-99, 198 nn.15 & 17, 318-23 (1945) (maintaining that with a few exceptions, all executive agreements are presumptively binding on the United States under international law), with Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 678-80 (1944) (suggesting that most executive agreements bind only the administration that makes them). This debate was also influenced by the Supreme Court’s decisions in *United States v. Pink*, 315 U.S. 203 (1942) and *United States v. Belmont*, 301 U.S. 324 (1937), which made clear that some sole executive agreements could be binding and supreme federal law.


text of any international agreement . . . other than a treaty, to which the United States is a party.60  Disagreement immediately arose about what types of agreements were included within this obligation. In 1976, the Legal Adviser to the State Department established a five-part test for resolving this issue, the “central requirement” of which was whether the parties to the agreement intended it to be binding under international law.61  These criteria were reflected in federal regulations beginning in 1981.62  At least since that time, party intent has been the primary touchstone in U.S. practice in determining whether an agreement is binding or nonbinding under international law.63  The State Department has issued modest guidance about “formal, stylistic, and linguistic features” that an agreement should include and exclude to ensure that it is nonbinding.64  But the executive branch has never explained in a comprehensive way which executive agreements are binding and which are nonbinding.

2. Domestic Authorization to Make Nonbinding Agreements. In practice the executive branch appears to assert the authority to make nonbinding agreements with other countries on practically any topic. While few observers in modern times have questioned this practice,65 there is no settled account of the constitutional basis for it. The text of the Constitution does not speak directly to the issue, and neither the Supreme Court nor the Justice Department’s Office of Legal Counsel has addressed it.

60 1 U.S.C § 112b(a).

61 Foreign Relations Authorization Act: Hearing on S. 1190 Before the Subcomm. on Int’l Operations of the S. Comm. on Foreign Rel., 95th Cong. 294 (1977) (memorandum by Legal Adviser of Dep’t of State Monroe Leigh to key department personnel) [hereinafter Leigh Memorandum]. The secondary requirements were significance, specificity, two or more parties, and form. Id. at 293-94.

62 The regulations were promulgated pursuant to a 1979 amendment to the Case-Zablocki Act and are codified today at 22 C.F.R. § 181.2(a)(1).

63 See Dalton, supra note 27 (providing examples from the 1970s and 1980s).

64 See U.S. Department of State, Guidance on Non-Binding Documents, https://2009-2017.state.gov/s/l/treaty/guidance/index.htm [hereinafter State Department Guidance]. To take one of several examples, the guidance states that “we advise that negotiators avoid terms such as ‘shall’, ‘agree’, or ‘undertake’ [in nonbinding agreements, and] ‘we have urged that terms such as ‘should’ or ‘intend to’ or ‘expect to’ be utilized in a non-binding document.”

65 Hollis & Newcomer, supra note 16, make normative arguments against the conventional wisdom, see id. at 575, as does (briefly) Michael D. Ramsey, Executive Agreements and the (Non)treaty Power, 77 N.C. L. REV. 133, 143 (1998). But see Michael D. Ramsey, Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements, 11 FIU L. REV. 371, 375-76 (2016) (concluding that the “Constitution’s text and practice thus appear to allow Presidents to make nonbinding agreements” but adding that “the President has a constitutional obligation to assure that a purportedly nonbinding agreement is clearly and unequivocally nonbinding under international law”).
The chief constitutional foundation for nonbinding agreements is the president’s power to conduct the nation’s diplomatic relations and to speak on behalf of the United States in the conduct of these relations.\(^{66}\) This power derives in part from the president’s textual authority (notably with Senate consent) to “make Treaties” and to “appoint Ambassadors . . . and Consuls,” from the president’s power to “receive Ambassadors and other public Ministers,” from the president’s status as chief executive, and, sometimes, from the president’s duty to “take care to faithfully execute the Law.”\(^{67}\) The power has also been recognized in practice since the Founding and flows from what Professor Louis Henkin described as the president’s “control of the foreign relations ‘apparatus’”—the diplomatic machinery that includes the State Department and other executive departments, U.S. ambassadors, consuls, and ministers, and the president’s personal agents.\(^{68}\) These sources of authority—the implications of constitutional text, longstanding historical practice, and control over the diplomatic machinery—provide the foundation for a number of the president’s most important foreign relations powers.\(^{69}\) The power to make nonbinding international agreements is arguably best understood to flow from these sources as well.

One way to view a nonbinding agreement is as a statement of U.S. foreign policy, in coordination with other governments, that any party can opt out of unilaterally. Viewed this way, the power to make such agreements falls within the president’s power to announce U.S. foreign policy positions. Indeed, some nonbinding international agreements might be viewed as a form of diplomatic speech between the United States and foreign governments about how the parties intend to act on matters that they have competence to execute. Such speech occurs countless times every day in numerous contexts and in manifold forms. The president and his or her subordinates could not exercise their diplomatic powers or meet their

\(^{66}\) See, e.g., Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) (president has “a unique role in communicating with foreign governments”); United States v. Louisiana, 363 U.S. 1, 35 (1960) (president is “the constitutional representative of the United States in its dealings with foreign nations”).

\(^{67}\) U.S. CONST. art. II, § 1, cl. 1; id., art. II, § 2, cl. 2; id., art. II, § 3; Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., 2009 WL 2810454 (June 1, 2009) (describing various sources for the President’s authority to conduct diplomatic relations).

\(^{68}\) LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 41 (2d ed. 1996). A fourth possible basis is the Article II Vesting Clause. See Ramsey, Evading the Treaty Power, supra note 65.

\(^{69}\) These powers include the power to announce U.S. foreign policy positions, to state the U.S. interpretation of rules of customary international law, to assert rights on behalf of the nation and its citizens and to claim reparations, and to recognize foreign governments and their territories. See HENKIN, supra note 68, at 41-45.
diplomatic responsibilities without communication of this sort. This communication can be highly informal and unimportant (such as an email agreeing to meet to discuss a small matter). It can be more formal and more important, such as a joint communique stating common positions and aims on certain policy issues. And, at the opposite end of the spectrum from the casual email, it can be a formal, complicated, and important but nonetheless nonbinding agreement signed by heads of state. The entire spectrum is encompassed by the president's power over diplomatic communications for the United States.\footnote{70}

3. Nonbinding Agreements and Domestic Law. Nonbinding agreements do not have the status of domestic federal law. They are by definition not “law.” And they do not fit within the instruments identified in the Supremacy Clause—the Constitution, treaties, or “laws of the United States . . . made in pursuance” of the Constitution.\footnote{71} The Supreme Court has recognized that some “sole” executive agreements operate as federal law that preempts state law.\footnote{72} But these decisions to date have been limited to legally binding executive agreements.\footnote{73} And the Court has emphasized, in the context of the president’s long-established power to settle claims via executive agreement, that the power to make binding domestic law via executive agreements is “narrow and strictly limited.”\footnote{74} The Court has also more generally emphasized that the president in our system is not a lawmaker.\footnote{75} Given that the scope of the president’s power to make nonbinding agreements is practically limitless, it would be an unfathomable expansion of presidential power, and disruption of the domestic legal system, if these instruments also had the status of domestic law. These are some of the reasons why no one has ever seriously suggested that nonbinding agreements have that status.

\footnote{70 The president has sometimes even been described as the “sole organ of the federal government in the field of international relations.” United States v. Curtiss-Wright Export Corp., 288 U.S. 378, 319 (1936). This description is now generally regarded as an overstatement. See Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015) (noting that “[i]t is not for the President alone to determine the whole content of the Nation’s foreign policy”).}

\footnote{71 U.S. CONST. art. VI, cl. 2.}

\footnote{72 See United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).}

\footnote{73 For example, the Litvinov agreement that was at issue in both the \textit{Pink} and \textit{Belmont} decisions was a binding sole executive agreement. See \textsc{Congressional Research Library, Treaties and Other International Agreements: The Role of the United States Senate 88} (2001) [hereinafter CRS Study].}

\footnote{74 Medellín v. Texas, 552 U.S. 491 (2008).}

\footnote{75 See, e.g., Medellín v. Texas, 554 U.S. 759 (2008); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).}
Nonbinding agreements can, however, influence or become part of domestic law. First, executive branch officials often implement or comply with nonbinding agreements within the executive branch bureaucracy. Second, Congress can incorporate nonbinding agreements into binding domestic legislation. For example, Congress in the Clean Diamond Trade Act implemented the Kimberley Process Certification Scheme, a nonbinding agreement that aims to remove conflict diamonds from the global supply chain. Third, administrative agencies can through rulemaking and other instruments implement nonbinding agreements domestically. For example, the international banking rules reflected in the nonbinding Basel Accords “are the basis for binding domestic regulations of the banking industry.” Fourth, it is conceivable that some elements of nonbinding agreements might preempt state law under the theory of executive branch foreign policy preemption suggested in *American Insurance Ass’n v. Garamendi.*

4. Lack of Domestic Regulation. Another remarkable characteristic of nonbinding international agreements is that, despite their prevalence and importance, they are not currently subject to any of the statutory or regulatory requirements that apply to binding agreements. Congress long ago imposed transparency and accountability requirements on the executive branch with respect to binding international agreements. Under the Case-Zablocki Act, the executive must report to Congress “any international agreement . . . other than a treaty” within sixty days after it takes effect. There is also a statutory obligation to publish important agreements

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78 Meyer, *supra* note 39, at 64; *see also* Galbraith & Zaring, *supra* note 22.


80 1 U.S.C. § 112b(a).
on the State Department’s website within 180 days after they take effect.\footnote{1 U.S.C. § 112a(d). For additional discussion of the reporting and publication obligations, see Hathaway, Bradley & Goldsmith, \textit{supra} note 2, at 645-54. Classified agreements are reported to congressional committees but not published.} As we have documented elsewhere, there are a number of deficiencies in this regime,\footnote{See \textit{generally} id.} and Congress is currently considering legislation that would bolster it.

Regulations adopted by the State Department to implement the requirements make clear that they apply only if the parties to an agreement “intend their undertaking to be legally binding, and not merely of political or personal effect.”\footnote{22 C.F.R. § 181.2(a)(1). Even before the adoption of the regulations, the State Department had taken the position that the Case-Zablocki Act reporting obligation did not apply to nonbinding agreements. \textit{See Schachter, \textit{supra} note 14, at 302 (1977) (quoting from a memorandum by the State Department Legal Adviser to “Key Department Personnel” dated March 12, 1976 on “Case Act Procedures and Department of State Criteria for Deciding What Constitutes an International Agreement”).} The regulations further state that “[d]ocuments intended to have political or moral weight, but not intended to be legally binding, are not international agreements,” and they give as an example the Helsinki Accords. More than twenty years ago, the Congressional Research Service noted that “some believe these kinds of [nonbinding] arrangements could represent a large loophole” in the reporting regime.\footnote{CRS Study, \textit{supra} note 73, at 231.} Since then, the phenomenon of nonbinding agreements has grown significantly.

Within the executive branch, the usual standards for approving and keeping track of executive agreements do not apply to nonbinding agreements. The State Department’s “C-175” process, named after a circular issued in 1955, is designed to “facilitate[] the application of orderly and uniform measures to the negotiation, conclusion, reporting, publication, and registration of U.S. treaties and international agreements, and facilitate[] the maintenance of complete and accurate records on such agreements.”\footnote{11 U.S. Dep’t of State, \textit{Foreign Affairs Manual} § 721, https://fam.state.gov/fam/11fam/11fam0720.html.} Pursuant to this process, before negotiating an agreement, an executive agency must obtain pre-approval from the State Department.\footnote{Congress has similarly directed in the Case-Zablocki Act that “[n]otwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.” 1 U.S.C. § 112b(c).} After the agreement is negotiated, the agency must receive additional C-175 approval from State to conclude the agreement. Furthermore, after conclusion of the agreement, the
agency is supposed to transmit a copy to State for central collection. But this centralized approval and collection process applies only to binding agreements.

In sum, even though nonbinding agreements can be as consequential as binding agreements and often resemble them in form and enforcement, they are not subject to any of the legal regulations that apply to binding agreements.

C. The Modern Forms of Nonbinding International Agreements

Nonbinding international agreements arise in a wide variety of institutional settings and come in a wide variety of forms. A major challenge to analyzing them is defining their scope. One cannot hope to be comprehensive, since nonbinding agreements can include all manner of informal diplomatic communication, including emails, phone calls, and everyday cables that foster relatively trivial forms of international cooperation and coordination, including about lunch dates and future communications.

For purposes of the analysis in this Article, we consider three of the most consequential forms of nonbinding agreements: (1) high-level formal agreements; (2) joint statements and communiques issued by state representatives; and (3) nonbinding agreements between U.S. administrative agencies and their foreign counterparts that promote various forms of international regulatory cooperation. While these categories capture three distinctive types, there is variation within them, the lines between them are not always sharp, and they leave out less formal and less consequential forms of nonbinding agreements. Nonetheless, these categories provide a framework for understanding the main forms of nonbinding agreements concluded by the United States.

1. High-Level Formal Agreements. The first category involves formal and often elaborate agreements, usually about important matters agreed to by senior governmental officials, that commit the nation (as opposed to an agency or other subunit) to a course of action. These agreements often have many of the trappings of

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87 See 22 C.F.R. § 181.3(b).

88 See State Dep’t, Office of the Legal Adviser, Circular 175 Procedure, https://2009-2017.state.gov/s/l/treaty/c175/index.htm (“The Circular 175 procedure does not apply to documents that are not binding under international law. Thus, statements of intent or documents of a political nature not intended to be legally binding are not covered by the Circular 175 procedure.”); see also 22 C.F.R. § 181.4. If there is a question about whether an agreement is binding, agencies are supposed to submit the agreement to State no later than twenty days after signing it for a determination. See 22 C.F.R. § 181.3(c). But it is unclear how this obligation is enforced.

89 For example, our three categories exclude oral agreements, exchanges of letters that do not result in a joint text, and standard-setting rules of international organizations.
binding international agreements, such as content organized by articles, entry into force and termination provisions, and sometimes even dispute resolution provisions. But the parties nonetheless do not intend the agreements (or significant parts of the agreements) to be binding under international law. They can be either bilateral or multilateral.

While these types of nonbinding agreements have become more prevalent, they are far from new. For example, the 1975 Helsinki Accords, which tempered Cold War animosities between West and East and became a focal point for dissident groups in the Soviet Union and its satellite nations that many believe were an important cause of the fall of the Soviet Union, were nonbinding.90 Recent examples of important nonbinding high-level agreements include a multilateral agreement known as the Artemis Accords that concerns the conditions for the safe and peaceful exploration of space,91 the OECD/G20 agreement on global tax reform,92 and the nonbinding agreement with the Taliban calling for the United States to withdraw all forces by the end of May 1, 2021 (later extended to August 31).93 This latter agreement underscores the practical importance of nonbinding agreements even though they are not enforceable under international law. President Biden explained that the agreement protected U.S. persons during the withdrawal and emphasized that if the United States missed the August 31 deadline, the Taliban likely would have carried out attacks on U.S. troops.94


93 See Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which is Not Recognized by the United States as a State and is Known as the Taliban and the United States of America (Feb. 29, 2020), at https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf.

Two high-level agreements concluded during the Obama administration—the Iran nuclear deal and the emissions reduction pledge in the Paris Agreement on climate change—generated controversy. These agreements provoked controversy in part because of the novel mechanisms the executive branch used to circumvent the need for congressional consent. Many commentators argued that both agreements required congressional approval because they were so consequential and because they could not be fully justified by prior congressional authorization. Congressional consent was a high hurdle to the deals, however, because there was significant opposition in Congress. The agreements posed additional challenges because both made pledges that required domestic implementation. The United States in the Paris Agreement agreed to undertake economy-wide emission reduction targets, and in the Iran deal it agreed to eliminate certain sanctions against Iran.

The Obama administration took two innovative steps in concluding these agreements. First, it made the Iran deal and the emissions pledge in the Paris Agreement nonbinding. This allowed the administration to conclude the agreements without seeking congressional approval. Second, it changed domestic law to meet the commitments in these agreements by invoking pre-existing authority delegated from Congress. For the Iran deal, the administration exercised the power that Congress had given it to waive the sanctions in accordance with the national interest. And for the Paris Agreement, it made new regulations pursuant to authority granted earlier in several domestic statutes.

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95 The Paris Agreement itself was a binding agreement that was likely made pursuant to a prior treaty—the United Nations Framework Convention on Climate Change (UNFCCC). See Curtis A. Bradley & Jack L. Goldsmith, Presidential Control Over International Law, 131 HARV. L. REV. 1201, 1267-69 (2018). However, while the UNFCCC plausibly authorized most portions of the Paris Agreement, it likely did not authorize the president to pledge binding emissions targets. Id. at 1268-69. The Obama administration insisted that the emissions reduction targets in Article 4.4 of the Paris Agreement be made nonbinding, which avoided the need for congressional or Senatorial approval. Id. at 1251 & n. 232, 1268-69.

96 Majorities in both houses of Congress voted against approval of the Iran deal but were unable to stop the agreement from taking effect under the terms of the Iran Nuclear Agreement Review Act. See Jennifer Steinhauer, Democrats Hand Victory to Obama on Pact with Iran, N.Y. TIMES, Sept. 11, 2015, at A1. For evidence of congressional opposition to the Paris Agreement, see David M. Herszenhorn, Votes in Congress Move to Undercut Climate Pledge, N.Y. TIMES (Dec. 1, 2015).

97 See Kenneth Katzman, Cong. Research Serv., Iran Sanctions (2021). In addition, the agreement was the basis for, and incorporated by reference into, a U.N. Security Council resolution that terminated the international sanctions against Iran. See U.S.S.C. Resolution 2231 (20 July 2015).

2. Joint Statements and Communiques. A second category of nonbinding agreements are statements issued following high-level international meetings or conferences that memorialize what the national representatives agreed to, their intended subsequent courses of action on matters of mutual concern, or their common positions growing out of the meeting. We will refer to these statements as “joint statements and communiques.”

We define this category as follows: Often after a meeting or conference, the representatives of at least two sovereign states issue a joint text (that text may be issued jointly or separately, simultaneously or non-simultaneously) that does not purport to create a legal obligation, although it may (indeed, often does) suggest a promise or intention to carry out future action. Such a text may also be issued by an international organization that represents a group of sovereign states. Like high-level agreements, joint statements and communiques are generally very visible—indeed, joint statements and communiques are almost always specifically intended for public consumption. Unlike high-level agreements, however, joint statements and communiques tend not to have many of the trappings of binding international agreements, such as content organized by articles, entry into force and termination provisions, or dispute resolution provisions. They often read more like press statements than international agreements.

A notable example of a joint statement or communique is the Atlantic Charter, the 1941 “joint declaration” about postwar aims issued by Franklin

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99 Such statements may also be referred to as “joint statement,” “joint declaration,” “joint communiqué,” “ministerial statement,” “summit statement,” or “statement of intent.”

100 There are instances where states issue non-identical, but coordinated, press statements. In 2015, for example, President Obama and President Xi concluded a nonbinding agreement on cybersecurity cooperation, announced by the White House in a “Fact Sheet.” Fact Sheet: President Xi Jinping’s State Visit to the United States, WHITE HOUSE: OFF. SEC’Y (Sept. 25, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states. China announced the same agreement in a read-out of President Xi’s visit. We do not include such statements in this category, but the underlying agreement, still undisclosed, is likely best categorized as a high-level agreement.


102 Some joint statements, however, do have the trappings of more formal agreements. See, e.g., U.S.-EU Joint Declarations and Annexes (Nov. 3, 2009), at https://obamawhitehouse.archives.gov/the-press-office/us-eu-joint-declaration-and-annexes (containing three detailed annexes).
Roosevelt and Winston Churchill following a series of meetings. Another famous example is the 1972 Shanghai Communique, in which the United States and China pledged to work towards normalization of relations and to conduct relations on the principles of respect for sovereignty, nonaggression, noninterference in internal affairs, equality and mutual benefit, peaceful coexistence, and peaceful settlement of disputes. This paved the way for normalization of relations between the two countries during the Carter administration, marked by the issuance of another joint communique. More recently, the United States, Israel, and the UAE used a joint statement to announce the normalization of relations between Israel and the UAE in 2020. And in 2021, the United States and China issued a “Joint Glasgow Declaration on Enhancing Climate Action in the 2020s,” which sets out a plan for the two countries to work together to address climate change.

Most joint statements and communiques are not particularly momentous. It is standard practice for the White House, the State Department, and other agencies to issue a joint statement announcing points of agreement and cooperation following a meeting between the President or a high-level State Department official and a high-level foreign official. The United States is also a regular party to nonbinding joint


104 See Joint Communique, P.R.C.-U.S., Feb. 28, 1972, 66 DEP’T ST. BULL. 435, reprinted in 10 I.L.M. 443. The Communique also contained numerous unilateral pledges in addition to cooperative ones. For example, and famously, the United States also stated that it was not challenging the existence of one China and said that it “reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.” Id.


statements or communiques following multilateral diplomatic conferences, such as the Group of Seven, the Group of Twenty, and the North Atlantic Council.\footnote{See, e.g., G7 Foreign and Development Ministers’ Meeting: Communiqué, EUR. EXTERNAL ACTION SERV. (May 5, 2021), https://eeas.europa.eu/headquarters/headquarters-homepage/97842/g7-foreign-and-development-ministers%E2%80%99-meeting-communiqu%C3%A9_en (G7); G-8 Leaders Communiqué, WHITE HOUSE: OFF. SEC’Y (June 18, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/06/18/g-8-leaders-communique (G7, formerly known as G8); Communiqué: Second G20 Finance Ministers and Central Bank Governors Meeting, G20 (Apr. 7, 2021), https://www.g20.org/wp-content/uploads/2021/04/Communique-Second-G20-Finance-Ministers-and-Central-Bank-Governors-Meeting-7-April-2021.pdf (G20); London Declaration, NATO (Dec. 4, 2019), https://www.nato.int/cps/en/natohq/official_texts_171584.htm (NATO).}

There are likely many thousands of joint statements and communiques currently in effect; we therefore did not attempt to develop a comprehensive database. We did, however, gather over seven hundred documents that we obtained primarily through public sources.\footnote{We primarily gathered the documents from the Public Papers of the President of the United States, https://www.govinfo.gov/app/collection/ppp/, and from the State Department online archives. We obtained a small number through our FOIA requests to the agencies.} With the help of a team of research assistants, we coded key features of the statements. We found that the content of these joint statements varies widely, in terms of length, tone, specificity, and significance of the commitments. Some merely state a shared understanding of a situation, shared values, or general goals,\footnote{See, e.g., G8/Africa Joint Declaration: Shared Values, Shared Responsibilities (May 27, 2011), https://obamawhitehouse.archives.gov/sites/default/files/uploads/g8_africa_joint_declaration_final_eng.pdf.} whereas others contain concrete and measurable pledges, including pledges about how the parties will implement obligations under prior binding agreements, or a framework to continue to ensure mutual compliance (for example, an action plan on the ministerial level or a follow-up meeting to assess progress).\footnote{See, e.g., U.S.-China Joint Statement Addressing the Climate Crisis (April 17, 2021), https://www.state.gov/u-s-china-joint-statement-addressing-the-climate-crisis/.} In some of the statements, the U.S. executive branch pledges to seek congressional action, such as appropriations. Strikingly, some of these statements entail bold new commitments to future action,\footnote{These include the date on which the statement was concluded, participating countries, title, subject area, short description, future plans or commitments, and whether it was signed or not. This dataset will be made public on Dataverse upon publication of this Article.} and, as Table 1 shows, they often use language recommended against by the State Department for nonbinding agreements.\footnote{See Guidance on Non-Binding Documents, supra note 67. See, e.g., Joint Statement by President George W. Bush and Prime Minister Junichiro Koizumi: Partnership for Security and Prosperity (June 30, 2001), https://www.govinfo.gov/content/pkg/PPP-2001-book1/pdf/PPP-2001-}
fifty percent use “agreement.” It is possible that the informality of the format—they generally read more like press releases than international agreements—frees the parties to make bold declarations of intent and use terms that might otherwise signal a binding agreement.\textsuperscript{115}

| TABLE 1: USE OF TERMS IN JOINT STATEMENTS RECOMMENDED AGAINST BY DEPARTMENT OF STATE FOR NONBINDING AGREEMENTS |
|--------------------------------------------------|---------------------------------------------------|
| will | 564 | 79.66% |
| agree | 557 | 78.67% |
| agreement | 415 | 58.62% |
| parties | 181 | 25.56% |
| treaty | 134 | 18.93% |
| undertake | 89 | 12.57% |
| shall | 83 | 11.72% |
| party | 60 | 8.47% |
| entry into force | 40 | 5.65% |
| concluded | 36 | 5.08% |
| undertaking | 24 | 3.39% |
| agreeing | 14 | 1.98% |
| done in | 4 | 0.56% |
| enter into force | 3 | 0.42% |
| done at | 1 | 0.14% |

Such statements appear to serve multiple purposes: For example, they are a signaling device to the world of a plan of cooperative action between states. They can also be used to signal a united front in the face of potential conflict, likely as a form of deterrence.\textsuperscript{116} And they can establish mechanisms for ongoing dialogue,

\textsuperscript{115} Occasionally, documents labeled as joint statements are intended to be binding. For example, the executive branch treated a 2012 joint statement with Afghanistan as a binding agreement and reported it under the Case-Zablocki Act. See Joint Statement—Enduring Strategic Partnership Agreement Between the United States of America and the Islamic Republic of Afghanistan (May 12, 2012), at https://www.govinfo.gov/content/pkg/PPP-2012-book1/xml/PPP-2012-book1-doc-pg553.xml; White House, Fact Sheet—The U.S.-Afghanistan Strategic Partnership Agreement (May 1, 2012), at https://obamawhitehouse.archives.gov/the-press-office/2012/05/01/fact-sheet-us-afghanistan-strategic-partnership-agreement.

including agency-level working groups. They are a commitment tool, as states not legally bound to live up to the commitments in the statements may still suffer reputational harm for turning back on a bold public declaration. And they serve the purpose of providing internal signaling and agenda setting for domestic actors.  

Once the leaders of their nations have committed to specific goals, that likely informs and empowers those within their own governments to take steps to make those commitments a reality.

3. Agency Nonbinding Agreements. The third category involves agreements between government agencies. The agreements contain a wide variety of commitments, including commitments to exchange information, cooperate on enforcement measures, consult with the other party prior to taking certain actions, and align regulatory standards. The growth of nonbinding agreements that foster regulatory cooperation is in part a response to the increasing globalization of goods, services, and persons. One sign of the increased importance of these agreements is a 2012 Executive Order entitled Promoting International Regulatory Cooperation, which through various means encouraged agencies to engage in international regulatory cooperation “consistent with domestic law and prerogatives.”

Unlike high-level nonbinding agreements and joint statements and communiques, such agreements often are concluded out of public view. While the


119 Another type of nonbinding instrument increasingly used by agencies is nonbinding agency guidance. See Nicholas R. Parrillo, Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, 36 YALE J. REG. 165 (2019) (describing the use of nonbinding guidance). Some of the transparency and rule of law issues presented by nonbinding agency guidance may overlap with the issues presented by nonbinding international agreements, although the latter are distinct in that they involve commitments to other nations rather than merely domestic directives.


121 We emphasize that, as noted above, nonbinding agreements can assume countless forms and do not always fall neatly into one of our three organizing categories. For example, the U.S.-E.U. Privacy Shield, which governs global digital data flows, is a nonbinding agreement but is constituted in an unusual form. The U.S. Commerce Department unilaterally issued a policy after negotiations
text of high-level nonbinding agreements is not always available to the public or Congress, the fact of the agreement is generally public. And joint statements and communiques are designed for public consumption. Agency nonbinding agreements, meanwhile, are a significant part of U.S. nonbindings practice, but they are generally not public. Even when they are, they are scattered across the internet, making comparisons and generalizations difficult. Agency nonbinding agreements appear to play a significant and growing role in U.S. diplomacy and foreign policy, as well as in U.S. regulatory policy, and they appear to sometimes serve as substitutes for binding agreements. For these reasons, we devote Part II of this Article to an extensive empirical study of them.

II. AGENCY NONBINDING AGREEMENTS: AN EMPIRICAL ANALYSIS

Agency nonbinding agreements are notable both for their growing importance and for their lack of public transparency. This Part seeks to bring agency nonbinding agreements out of the shadows. It begins by examining why agencies conclude nonbinding agreements, based primarily on extensive interviews with agency personnel who conclude them. It then outlines the features of nonbinding agreements concluded at the agency level based on an analysis of a new—and, we believe, the first—general database of U.S. nonbinding agreements.

A. Why Agencies Conclude Nonbinding Agreements

Nonbinding and binding commitments often can serve similar purposes. Moreover, the officials that conclude nonbinding agreements are generally the same ones that conclude binding executive agreements. To understand why they choose to conclude a particular agreement as a nonbinding agreement rather than as a binding one, we conducted a series of interviews with officials in several executive agencies. While the reasons for making nonbinding agreements varied across agencies, agency officials consistently referenced five key considerations. There may of course be other important reasons that were not mentioned in the interviews—and considerations offered by officials in one agency do not necessarily apply in the same way in other agencies or in different contexts. The observations offered by

with the European Union and in contemplation of an agreement, see EU-U.S. Privacy Shield Framework Principles, at https://www.privacyshield.gov/servlet/servlet.FileDownload?file=01500000004qAq, and the European Commission issued a decision that included the Commerce principles and deemed them “adequate” under E.U. privacy law. See Commission Implementing Decision of July 12, 2016 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the EU-US Privacy Shield, 2016 O.J. (L 207). We also remind the reader that, as noted above, governments and their agencies engage daily in informal exchanges that may include nonbinding agreements of various sorts that are excluded from our analysis altogether.
officials nonetheless provide rare insight into why nonbinding agreements have become increasingly common.

1. The Nature of the Commitment. Agency choice of whether to conclude an agreement as a binding or nonbinding agreement can turn on the kind of commitments the agreement entails. In particular, three key considerations came up repeatedly in interviews: whether the type of commitment is required by law to be done as a binding agreement; whether the agreement includes terms that suggest an intent to create a binding commitment; and whether the agreement has enforcement aims that require a binding agreement.

First, agency officials indicated that there are certain types of agreements where an agency may be obligated under domestic law to conclude a given agreement as a binding agreement. For example, certain forms of international defense cooperation, including “personnel status, classified technology, property rights and the like,” require a binding agreement. At the FAA, if an agreement requires an exchange of money or of personnel, then agency legal guidance provides that it must always be concluded as a binding agreement with reimbursement of costs. As the Deputy Director of International Affairs at the FAA explained, “If we want to go to Rwanda and do a 1-week workshop on civil aviation safety, that would come under one of these [binding] agreements. It provides that we’ll do this seminar, this is what it will cost, and you can invite everyone from the region.” Such an agreement, he explained, is done as a binding agreement both because of the exchange of money and because the government requires binding liability waivers and other protections for FAA personnel traveling to the country. By contrast, an agreement to engage in coordinated research and development, where there is no exchange of money, can be done as a nonbinding agreement.

Second, nearly every agency official with whom we spoke made clear that they take account of whether the agreement includes terms that suggest an intent to create a binding commitment. For this, they look to the State Department guidance regarding what terms should be avoided in nonbinding agreements to avoid confusion about the intended nature of the commitment. If an agreement contains terms that convey intent to create a binding commitment, it has to be changed or done as a binding agreement. Indeed, many agencies have binding and nonbinding agreements that differ primarily in that the nonbinding versions avoid the terms that

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122 McNeill, supra note 41, at 823 (“By law the United States is authorized to carry out certain forms of international defense cooperation only pursuant to international agreement.”).

123 Interview by Oona Hathaway with David S. Burkholder, Deputy Director, International Affairs, U.S. Federal Aviation administration (July 20, 2021).

124 See supra note 64.
are indicative of binding commitments. A negotiator in the Antitrust Division of DOJ, for example, noted that nonbinding agreements must say “‘intend to,’ rather than ‘shall,’ ‘will,’ or ‘agree.’”\textsuperscript{125}

Third, sometimes the choice of binding versus nonbinding agreement turns on enforcement aims. For example, early antitrust agreements with foreign partners, such as with Germany in 1976 and Australia in 1982, sought to provide assistance with U.S. enforcement of the United States’ distinctive antitrust rules. These agreements were done as binding agreements, because this was seen as giving the United States greater leverage to insist on cooperation in law enforcement.\textsuperscript{126} Today, however, many countries have antitrust laws that are similar to those in the United States. The main purpose of the agreements today is to facilitate joint enforcement cooperation in antitrust, consumer protection, and data protection. For this, the FTC uses nonbinding agreements. The agency personnel “just want to be able to talk to colleagues” and to “have a basis to cooperate with them on enforcement.”\textsuperscript{127} For that, nonbinding agreements work well. Agreements that allow parties to share confidential, protected information in their files, however, are done as binding agreements.\textsuperscript{128} Indeed, agency officials consistently reported that if there were penalties of any kind in an agreement, then the agreement was always done as a binding agreement (though binding agreements need not necessarily include penalties or other enforcement measures). Binding agreements that obligate the United States to assist in law enforcement by other nation states—whether through providing information or otherwise—are made only with states that agency officials trust to provide adequate rule of law protections.

One interviewee noted that the State Department prefers binding agreements where the United States is concerned about performance by the foreign partner. When an agency is providing money to a foreign partner, for example, it generally prefers to do so as part of a binding agreement. That is because the receiving country is considered more likely to “pay attention to the agreement”—which usually places specific conditions on the use of the money—if it is binding.\textsuperscript{129}

\textsuperscript{125} Interview by Oona Hathaway with Caldwell Harrop, Assistant Chief International Section, Antitrust Division, Department of Justice (April 16, 2021) [hereinafter Harrop Interview].

\textsuperscript{126} Interview by Oona Hathaway with Randy Tritell, Director of the Office of International Affairs, FTC (Jan. 21, 2021) [hereinafter Tritell Interview].

\textsuperscript{127} Id.

\textsuperscript{128} The International Antitrust Enforcement Act requires antitrust mutual assistance agreements when conducting this sort of cooperation.

\textsuperscript{129} Interview by Oona Hathaway with Former U.S. Government Lawyer (June 11, 2019).
Other agency officials indicated that the absence of legally enforceable obligations is often not a drawback. The Director of the Office of International Affairs at the FTC explained that while the agency’s nonbinding agreements have no formal enforcement mechanism, neither do many of the agency’s binding executive agreements. “Of course, hopefully, governments feel compelled to honor them anyways.” But, he added, the FTC does not “go around pointing out to other governments that they’ve failed to follow this provision or that provision. If there’s a problem, we will talk about it.” A negotiator in the Antitrust Division of DOJ echoed this view: “Some say it’s not binding because if they don’t do what they say they will do, we can’t do anything about it. But for all of these—even those that we call [binding] agreements—we don’t have any enforcement.”

Indeed, the absence of enforceable obligations can be a feature rather than a bug, especially if an agency is uncertain of its capacity to meet its commitments. The Deputy Director of the Office of International and Tribal Affairs for the EPA noted that most of the agreements the EPA makes with foreign partners are nonbinding. She explained, “That is usually because don’t have dedicated funding or a legislative mandate. . . . We prefer to do it as a nonbinding because if we can’t proceed because our funding is cut, for example, we aren’t bound to carry it out.” She further explained that the agency does not see much substantive benefit to concluding binding agreements: “Our partners basically act in good faith. If there was some sort of agreement where we needed assurances, then we may need it to be binding. . . . Most of the time, we are planning to share information on best practices or see how we can develop common standards, or engage in research. In those cases, we don’t need to do a binding . . . . If, however, we did a joint research project where we need to know how it was done or make sure that certain procedures are followed, then we might do it as a binding.”

2. Foreign Counterpart Preferences and Requests. Agencies sometimes rely on nonbinding agreements to accommodate foreign counterparts’ preferences or constraints. An official at the Office of International Programs at the Nuclear Regulatory Commission explained that her office generally prefers to conclude information sharing arrangements as binding agreements, because that “provides greater emphasis on the commitment.” Yet the Commission often relies instead on a nonbinding agreement, because the other country requests it.

130 Tritell Interview, supra note 126.
131 Harrop Interview, supra note 125.
132 Interview by Oona Hathaway with Inga Barnett-Owens, Deputy Director of Office of International & Tribal Affairs, Environmental Protection Agency (April 9, 2021).
133 Interview by Oona Hathaway with Susan Wittick, Office of International Programs, Nuclear Regulatory Commission (May 25, 2021) [hereinafter Wittick Interview].
Many foreign experts and officials we surveyed expressed a growing preference in their countries for nonbinding agreements. They cited efficiency, speed, flexibility, and avoidance of legal and political constraints that apply to binding agreements as key reasons. For many foreign partners, binding agreements are more difficult to conclude because they cannot be made at the agency level. As the NRC official explained, “There are a lot of partners that cannot negotiate binding agreements agency-to-agency. A lot of our partners can only sign a nonbinding arrangement at the agency level. That’s true of all the common law countries—for example Canada, Australia, India.” In such cases, concluding a binding agreement “means elevating it and a lot more process, which can take years.” To conclude a binding agreement with Colombia, for example, “they have to go to the highest authority in their nation to get approval to sign it. It effectively takes an act of Congress. So with them we do it as a nonbinding.” Another interviewee agreed: “A lot of it is driven by what our partner wants.”

This is a growing phenomenon, according to several agency employees with whom we spoke. As the NRC official explained, “[T]he preference for nonbinding agreements] seems to be broadening around Europe.” In short, as foreign partners increasingly request nonbinding agreements to accommodate their own legal frameworks (and perhaps to avoid their own legal and regulatory constraints), the United States finds itself relying more heavily on such agreements. We heard this point echoed in our discussions with foreign counterparts, as described in Part III below, although we also heard that other countries sometimes use nonbinding agreements because the United States has requested them.

3. The Potential for Trust-Building. In varying ways, trust plays a role in decisions to rely on nonbinding agreements. As noted above, binding agreements may be favored by a U.S. agency when it has concerns about whether the partner country will live up to its commitments. For this reason, insisting on a binding agreement can sometimes be perceived as reflecting a lack of trust. In the early 1990s, for example, the United States insisted on using binding agreements in defense arrangements with UK, Australian, and Canadian defense counterparts.

134 Id.
135 Id.
136 Id.
137 Interview by Oona Hathaway with Stacey Nathanson, Attorney-Advisor, NOAA Office of the General Counsel, Fisheries and Protected Resources Section (July 14, 2021).
138 Wittick Interview, supra note 133.
Concerned about U.S. motives, the partners initially responded by suspending negotiations.\(^\text{139}\)

Nonbinding agreements may also be used in some circumstances to build trust, perhaps with the goal of ultimately concluding a binding agreement. This is particularly an issue where the agreement requires specific performance by the United States, not just by the foreign partner. At the Department of Justice’s Antitrust Division, for example, binding agreements may include collaboration in law enforcement. Agreements where the United States agrees to assist in law enforcement tend to be made with countries with which there are longer-standing connections, collaboration, and trust.\(^\text{140}\) Nonbinding agreements, which allow for but do not obligate the United States to assist in enforcement, are more likely to be used with newer partners or those it is less clear share the same substantive antitrust and rule of law commitments. As a DOJ Antitrust official put it, “Nonbindings can be thought of as trust-building exercises.”\(^\text{141}\) He added, “We tend to use MOUs with China, India, Russia or other countries newer to the business of antitrust enforcement or where we have a less developed relationship. Usually you develop a relationship, trust with each other, then you might later want to memorialize that relationship with a binding agreement.”\(^\text{142}\) In recent years, the United States has used more nonbinding agreements in the antitrust context, because it is working with more partners than in the past. “Increasingly today we are using MOUs. That’s because we are concluding more agreements with countries that we have less well-established relationships with.”\(^\text{143}\) Sometimes the binding agreements are more detailed than nonbinding agreements, but that is not always the case. Indeed, the two may be nearly identical.

4. *Simpler Process.* While none of our interviewees stated that they concluded nonbinding agreements to evade the legal and regulatory requirements that apply to binding agreements, they did note that concluding nonbinding agreements is simpler. To conclude a binding executive agreement, an agency needs to request and receive approval from the State Department to initiate negotiations. It then must submit the concluded agreement to the State Department. At each stage, lawyers at the State Department may offer input—and the process of review may

\(^{139}\) McNeill, *supra* note 41, at 822-23.

\(^{140}\) The United States currently has binding competition agreements with Australia, Brazil, Canada, Germany, Israel, Japan, and Mexico. See Email from Michael Shore, Federal Trade Commission, to Oona Hathaway (Jan. 29, 2021).

\(^{141}\) Harrop Interview, *supra* note 131.

\(^{142}\) *Id.*

\(^{143}\) *Id.*
take time. The final agreement must then be reported to Congress. While it is rare for Congress to raise concerns, it could do so. None of these regulatory requirements apply to nonbinding agreements.

Even those agencies that voluntarily share nonbinding agreements with the State Department find that the consultation process is simpler. The Associate Director of the Office of International Affairs of the FTC explained that the review process itself “is pretty simple. We send an email to [the Office of Treaty Affairs], and they sent an email back saying it’s ok, or maybe saying change ‘shall’ to ‘intend to,’ and we go ahead.”

5. A Tool for Regularized Interaction, Collaboration, and Leadership. Nonbinding agreements are often focused on ongoing cooperative activity—for example, regular information sharing and regulatory cooperation. Not only do the agreements themselves create mechanisms for collaboration, but their negotiation—and renegotiation—also serves to strengthen collaborative ties. Indeed, nonbinding agreements frequently expire after a set period—often five years. Such expiration dates appear to be more common than they are for binding agreements. At least one agency uses these expiration dates as a mechanism to ensure ongoing collaboration between agency personnel and their counterparts abroad. An official at the Nuclear Regulatory Commission explained that the Commission uses the renewal process as an opportunity to connect with other nuclear-power states: “The arrangements provide for information exchange and allows us to have personnel exchanges, as well. . . . It helps us establish thick relationships with our counterparts. The five-year renewal requirement establishes relationships and high-level engagements.”

The signing ceremony provides an opportunity for engagement at the leadership level, but staff-level engagement begins almost a full year in advance. As one staff member put it, “There are people I still exchange Christmas cards with because we spent a year talking about these issues.” These relationships are valuable and ensure that if there were a crisis, the countries would have ties at all levels of the agency that would allow a quicker and more effective response.

Nonbinding agreements are often concluded, moreover, as part of a package that may ultimately include both binding and nonbinding agreements. For example, a Department of Defense official described a practice of concluding a binding

\[144\] Interview by Oona Hathaway with Russell Damtoft, Associate Director, Office of International Affairs, FTC (Jan. 21, 2021).

\[145\] See infra Subsection II.B.3.

\[146\] Interview by Oona Hathaway with Brett Rini, Nuclear Regulatory Commission (May 25, 2021).

\[147\] Wittick Interview, supra note 133.
umbrella agreement that forms the foundation for subsequent nonbinding agreements.\textsuperscript{148} Such a “Chapeau Agreement” can satisfy legal requirements for matters such as logistical support, liability, and property rights, allowing subsequent agreements to be done as nonbinding agreements.\textsuperscript{149} Sometimes, however, the umbrella agreement is itself nonbinding. At the Federal Aviation Agency, for example, the agency frequently concludes an umbrella nonbinding agreement, usually called a “Memorandum of Cooperation.” This MOC provides a structure for ongoing cooperation. When a joint opportunity for research emerges, it is then specified in an “annex” underneath the MOC. Then there is usually an “appendix” under the annex that provides even more detail on how the agreement will be carried out. The Deputy Director of International Affairs at the FAA explained: “We do annexes underneath those MOCs. So if we wanted to do collaboration on aircraft de-icing with Canada, for example, we’ll have an annex establishing an R and D program on de-icing, and then we’ll have an appendix under that annex that says we’ll commit to spend $200,000 and you will commit to spend $200,000 and then we are going to share the information.”\textsuperscript{150}

\textbf{B. Analyzing Agency Nonbinding Agreements}

It is difficult for observers to come to informed conclusions about agency nonbinding agreements because of the general lack of transparency. We have been critical about the lack of government transparency in its use of binding executive agreements, but public information about binding agreements is much more accessible than it is for nonbinding agreements.\textsuperscript{151} Indeed, there is not only no public repository of nonbinding agreements, there is no nonpublic repository either.

This Section draws on data analysis of a collection that we have developed of over 1400 agency nonbinding agreements—which represents the only general database of such agreements currently in existence.\textsuperscript{152} We built the database as


\textsuperscript{149} See McNeill, supra note 41, at 825.

\textsuperscript{150} Interview by Oona Hathaway with David S. Burkholder, Deputy Director, International Affairs, U.S. Federal Aviation Administration (July 20, 2021) [hereinafter Burkholder Interview]. The FAA also concludes MOUs, but it generally does so as one-off arrangements: “The MOU doesn’t have annexes and appendixes underneath it.” Id.

\textsuperscript{151} See Hathaway, Bradley & Goldsmith, supra note 2.

\textsuperscript{152} Nine hundred and twelve of these agreements were collected from public online sources. In addition, we submitted Freedom of Information Act requests to twenty-three agencies, departments,
follows: We began by examining eighty-two government agencies or offices of agencies that we thought might conclude nonbinding agreements. We found that eleven agencies have substantial online collections of their nonbinding agreements.\textsuperscript{153} Not every agency is so transparent, however. For several agencies, we found indications that they conclude nonbinding agreements, but few or none were publicly available. For example, NASA’s Advisory Implementing Instruction indicates that NASA signs at least eight different types of “non-agreements,” but none are published online.\textsuperscript{154} We filed FOIA requests with twenty-three separate agencies or departments between December 2020 and April 2021. By January 2022, fourteen had produced documents, and nine had not yet done so.\textsuperscript{155} Of these, only or divisions thereof. We then checked all the nonbinding arrangements against the database of binding agreements that we had compiled for Hathaway, Bradley & Goldsmith, supra note 2.


\textsuperscript{155} The agencies that produced documents or were otherwise responsive to our FOIA request were the Department of the Treasury; Federal Trade Commission; Department of Justice (Antitrust Division, Civil Rights Division & Tax Division); Department of Transportation (FAA); Department of Labor; Department of Commerce (National Oceanic and Atmospheric Administration); US Agriculture Department; Environmental Protection Agency; the Export-Import Bank; the Food and Drug Administration; NASA; and the Nuclear Regulatory Commission. The unresponsive agencies (as of January 9, 2021) are the Department of Commerce; Department of Defense, Department of Homeland Security; Department of Justice (Criminal Division); Office of Management and Budget (OIRA); State Department (Office of Information Programs and Services & Legal Adviser’s Office); and USAID. All but the Department of State, Department of Defense, and Department of Homeland
one—DHS—claimed that records were exempt from FOIA (though as of this writing it has not identified the applicable exemption). We sued three of the least responsive agencies—the U.S. Department of State, the Department of Defense, and the Department of Homeland Security. That litigation is ongoing, and we will add to the database any responsive documents we receive as a result (as well as those received from the other outstanding requests).

With a team of research assistants, we coded all the nonbinding agreements in our database to identify a range of characteristics. Unless otherwise noted, the data below is based on this coding. Although our database is the first of its kind, it is important to emphasize that it is not comprehensive. Agencies vary a great deal in whether they post the agreements online and in their responsiveness to our FOIA requests. While we requested agreements back to 1989 in order to allow comparisons to the database of binding agreements that we built for earlier work, agency records are less accessible and comprehensive the further back in time we go. Indeed, older agreements are less likely to be digitized, which may affect their availability.

Nevertheless, as we will explain, there are reasons to believe that the picture, which encompasses a wide variety of agencies, is generally indicative of the patterns and trends in this area. Moreover, to the extent that our empirical account suggests some reasons for concern (such as about lack of coordination and transparency), the agreements not within our dataset would almost certainly, if known, heighten the concerns. After all, the agencies that either already publicly disclose their agreements or that were cooperative in the FOIA process are likely the agencies with the least to hide. If we had access to the full range of nonbinding agreements that agencies conclude, the case for reform would likely be stronger, not weaker. It is our hope that the publication of this Article will help prompt greater transparency for nonbinding agreements, either voluntarily by the executive branch or through legislative mandate, which would in turn allow researchers to develop a more complete account of this important government practice. But the account below is much more extensive than anything previously published.

Security provided responses to queries and indicated that the requests were in progress, but they nonetheless did not produce any documents as of January 2022. The requests sought all unclassified nonbinding agreements and any internal agency guidance relating to such agreements from January 1, 1989 to December 31, 2019. To assist agencies in identifying non-binding agreements, the request referenced the State Department Guidance, supra note 64, and specified that any agreement reported under the Case-Zablocki Act was not included.

The dataset and codebook will be made available on Dataverse when this Article is published.

See Hathaway, Bradley & Goldsmith, supra note 2.
1. The Agencies that Conclude Nonbinding Agreements. As noted above, we determined that forty-one agencies had concluded nonbinding agreements. Figure 1 represents the agencies in our database. Some rely heavily on these agreements, especially the Department of Energy (308 agreements); Health and Human Services (198); Export-Import Bank (148); Department of Transportation (125); Department of Commerce (123); SEC (106); and Commodities Futures Trading Commission (103). There are, moreover, a number of agency collaborations (for example, the DOJ and FTC frequently collaborate on antitrust agreements). Absence from this chart, however, does not mean that an agency does not use nonbinding agreements. We filed a lawsuit against the Department of Defense for its failure to respond to our FOIA request. In response, the Department identified over 6000 documents it claims are responsive to our request—documents it has not yet disclosed. The Department of Homeland Security, which we have also sued, has not yet identified how many documents are responsive to our request.

2. Foreign Partners. Agency nonbinding arrangements are widely used, but they are particularly concentrated with several key states. Table 2 shows the top partners for binding agreements, agency nonbinding agreements, and joint statements and communiques.\textsuperscript{158} There is significant overlap across the three types of agreements, though the ordering is not identical. China, for example, is the second

\textsuperscript{158} Only bilateral agreements are included in a country’s total. Agreements with more than one country are included as Multilateral.
most significant partner for agency nonbinding arrangements, but the 20th most frequent partner for binding executive agreements. Moreover, several commonwealth countries—Canada, United Kingdom, India, and Australia—are higher on the ranking for nonbinding agency agreements than they are for binding agreements. This supports the observation of several interviewees that the commonwealth countries are increasingly requesting nonbinding arrangements. Although our separate dataset of Joint Statements and Communiques is smaller, and thus we are cautious about drawing broad conclusions from it, they appear to mirror more closely the patterns found in binding agreements—particularly in the dominance of multilateral over bilateral statements.

**Table 2: Top 20 Foreign Partners**

<table>
<thead>
<tr>
<th>Binding</th>
<th>Agency Nonbinding Agreements</th>
<th>Joint Statements &amp; Communiques</th>
</tr>
</thead>
<tbody>
<tr>
<td>Multilateral</td>
<td>533</td>
<td>Multilateral</td>
</tr>
<tr>
<td>Japan</td>
<td>256</td>
<td>Russia</td>
</tr>
<tr>
<td>Russia</td>
<td>233</td>
<td>Japan</td>
</tr>
<tr>
<td>Panama</td>
<td>200</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Mexico</td>
<td>199</td>
<td>Mexico</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>190</td>
<td>India</td>
</tr>
<tr>
<td>International Organization</td>
<td>179</td>
<td>Australia</td>
</tr>
<tr>
<td>Canada</td>
<td>175</td>
<td>France</td>
</tr>
<tr>
<td>South Korea</td>
<td>165</td>
<td>South Korea</td>
</tr>
<tr>
<td>Ukraine</td>
<td>124</td>
<td>Japan</td>
</tr>
<tr>
<td>Australia</td>
<td>123</td>
<td>Germany</td>
</tr>
<tr>
<td>Egypt</td>
<td>120</td>
<td>Multilateral</td>
</tr>
<tr>
<td>Israel</td>
<td>102</td>
<td>Russia</td>
</tr>
<tr>
<td>France</td>
<td>102</td>
<td>Italy</td>
</tr>
<tr>
<td>Germany</td>
<td>98</td>
<td>Brazil</td>
</tr>
<tr>
<td>Colombia</td>
<td>97</td>
<td>European Union</td>
</tr>
<tr>
<td>Indonesia</td>
<td>97</td>
<td>Spain</td>
</tr>
<tr>
<td>Jordan</td>
<td>96</td>
<td>Israel</td>
</tr>
<tr>
<td>Philippines</td>
<td>95</td>
<td>South Africa</td>
</tr>
<tr>
<td>China</td>
<td>93</td>
<td>Netherlands</td>
</tr>
</tbody>
</table>

3. Substantive Commitments Across Nonbinding Agreements. We identified nine types of trans-substantive commitments that appear in nonbinding
agreements. The results appear in Table 3. The most common substantive commitments—(1) regulatory cooperation and coordination and (2) information exchange—are often intertwined. For many agencies, nonbinding agreements serve as a vehicle for working with foreign partners to gather information required to carry out their regulatory missions. Many of these agreements, moreover, include confidentiality requirements. These nonbinding agreements allow for information to be shared between agencies to help them perform their regulatory tasks, and the agreement provides assurances that shared information will not be divulged. (Most agreements included more than one type of commitment, hence the total sums to well over 100%.)

**Table 3: Substantive Commitments Across Agency Nonbinding Agreements**

<table>
<thead>
<tr>
<th>Substantive Commitment</th>
<th>Percent of all Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulatory cooperation and coordination</td>
<td>78%</td>
</tr>
<tr>
<td>Information exchange</td>
<td>63%</td>
</tr>
<tr>
<td>Confidentiality of information</td>
<td>54%</td>
</tr>
<tr>
<td>Assistance and development</td>
<td>41%</td>
</tr>
<tr>
<td>Future meetings, communications, and consultations</td>
<td>38%</td>
</tr>
<tr>
<td>Inspections</td>
<td>31%</td>
</tr>
<tr>
<td>Securing or encouraging compliance with laws or regulations</td>
<td>28%</td>
</tr>
<tr>
<td>Research and technical cooperation</td>
<td>11%</td>
</tr>
<tr>
<td>Training and education</td>
<td>6%</td>
</tr>
<tr>
<td>None of the above</td>
<td>10%</td>
</tr>
</tbody>
</table>

Information-sharing agreements may be particularly well suited to a nonbinding commitment. After all, if a state fails to live up to its side of the commitment—by, say, failing to provide information as promised or by divulging a piece of information that is supposed to be kept confidential—the counterpart can

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159 For each type of commitment, we identified common terms of reference. We then searched the text of all of the agreements and identified the number of unique agreements with at least one of the relevant terms. For information exchange, for example, the terms were: “information exchange; information exchanges; provide information; providing access to information; exchange of technical information; providing the information; transmit the information; provide technical information; information sharing; information-sharing; requests for information; sharing information; sharing relevant nonproprietary information; sharing of information; transfers of personal data; share knowledge; knowledge exchange; provision of information; information shall be provided; information is shared in confidence; collect and share information; exchanging information; exchange technical, commercial and financial information; exchanging knowledge; exchange of ideas and information; exchange of publicly available scientific and technical information; exchange of data and information; exchange information; exchange of information; exchanges of information; exchange of scientific and technical information; exchange information.”
simply cease its own performance in response. Though we found no agreement that specified this informal enforcement measure, it is implicit in the nature of the agreement. Neither side is bound to comply; hence if one side ceases to comply the other state needs no justification to reciprocate.

This built-in informal enforcement measure is implicit in nearly all the substantive commitments that cross subject areas. Consider, for example, nonbinding agreements relating to research and technical cooperation. These agreements often involve parallel research and development programs in which two countries agree to invest roughly similar amounts of funding into a particular research topic (for example, the best kind of asphalt for airport runways)\(^\text{160}\) and then promise to share the information that the research program produces. If one side fails to live up to its commitment—by failing to invest or failing to share the resulting information—the other side can respond by doing the same or by refusing to cooperate going forward. In short, the nonbinding agreement may be particularly well suited, and perhaps even preferred, in cases where formal enforcement tools are unnecessary because each side benefits from ongoing joint performance. Simple reciprocity serves to provide sufficient incentive for states to perform as promised.

The performance covered by nonbinding agreements, moreover, tends to be ongoing cooperative activity—for example, regular information sharing. Hence, one side does not risk making a large investment that is lost if the other side fails to perform. (While characteristic of nonbinding agreements, this structure is not exclusive to them.) If one state ceases providing information, the other side suffers a minor loss. It is likely that where there is staged performance—one side gives a large sum of money and then the other side performs an agreed task, for example, it may be preferable for the agreement to be binding—because the state that performs first loses leverage and requires some external tool to ensure performance by the second party. Finally, failure to comply with these substantive commitments is not subject to runaway effects that legally binding treaties often seek to restrict—such as, for example, restrictive trade policies that can quickly spiral out of control in a system that permits tit-for-tat responses.\(^\text{161}\)

4. Nonbinding Agreements Over Time. Based on the agreements in our database, it appears that the number of nonbinding agreements has grown over time. Given the partial nature of the data, we are cautious about drawing conclusions based

\(^{160}\) Burkholder Interview, supra note 150 (offering a joint research program into the best asphalt to use on airport runways as an example of a topic on which the FAA might conclude a nonbinding agreement with another country).

on these results alone. Nonetheless, there is good reason to think that this reflects a real trend. Nearly all interviewees indicated that their agencies were relying more heavily on nonbinding agreements. All but one of the surveys of comparative scholars and practitioners (described below in Part III) similarly affirmed that they had witnessed an increase in reliance on nonbinding agreements.

Figure 3 shows a gradual increase in nonbinding agreements in the database over time, accelerating in the late 2000s. The spike in 2013 is due to jumps in nonbinding agreements concluded by three agencies: the Department of Energy (which concluded 49 nonbinding agreements in 2013, compared to 20 in 2012 and 22 in 2014); the CFTC (which concluded 30 nonbinding agreements in 2013, compared to 0 in 2012 and 4 in 2014); and the SEC (which concluded 27 nonbinding agreements in 2013, compared to 5 in 2012 and 1 in 2014). There does not appear to be any precipitating cause for this bump, although it is possible that it was prompted by the 2012 Executive Order that encouraged agencies to engage in international regulatory cooperation “consistent with domestic law and prerogatives.” The dip at the end of the graph may represent a lag in posting agreements online, although it is also possible that there has been a recent drop-off in the conclusion of agency agreements, including during the Trump administration. The key point for our purposes is that there has been an overall increase over time in the conclusion of agency nonbinding agreements.

**Figure 3: Agency Nonbinding Agreements by Date Concluded**

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162 See Executive Order 13,609, supra note 120.
Interestingly, nonbinding agreements concluded by agencies appear to have become more common even as binding executive agreements have become less common. Figure 4 compares binding agreements over time to nonbinding agreements from 1989-2016.\(^{163}\) (Notably, we are confident that our set of binding agreements is fairly complete, as it represents all agreements reported to Congress by the State Department; the set of nonbinding agreements, however, is not complete, for reasons explained earlier.) Binding executive agreements peaked in 2006 and began a gradual decline, whereas nonbinding agreements have continued to show overall growth.\(^{164}\) It is difficult to determine whether the rise of nonbinding agreements is offsetting what would have otherwise been binding executive agreements, but a general rise of nonbinding agreements during a decline in binding executive agreements suggests that there may be some degree of substitution.

**FIGURE 4: AGREEMENTS, BY DATE CONCLUDED**

The fall of binding agreements and concomitant rise of nonbinding agreements is even more apparent if we eliminate agreements in just two subject areas (either primary or secondary) where we have had less success obtaining nonbinding agreements from agencies—defense (as noted, we have sued the Department of Defense for nonresponsiveness) and humanitarian (USAID has yet to produce documents). The results, in Figure 5, demonstrate that in recent years the

\(^{163}\) For data on binding arrangements, we rely on the database we compiled for Hathaway, Bradley & Goldsmith, *supra* note 2. Links to the data can be found at Hathaway, Bradley & Goldsmith, *supra* note 2, https://harvardlawreview.org/executive-agreements-visualizations. Figure 3 ends in 2016, because our data on binding executive agreements end in 2016.

\(^{164}\) Peake likewise finds that binding agreements plateaued in 2005-06. See Peake, *supra* note 4.
number of agency nonbinding agreements in the database is close to, and sometimes even exceeds, the number of binding agreements, even though the database of agency nonbinding agreements is less complete than the database of binding ones. While the number of joint statements in our database remains comparatively small, they, too, have grown and, together, the two forms of nonbinding agreements have begun to overshadow binding ones.

**Figure 5: Agreements, by Date Concluded, Excluding Defense and Humanitarian**

5. **Subject Areas.** The agency nonbinding agreements in our database are used in a variety of subject areas, but, as Figure 6 shows, they are particularly concentrated in Finance, Trade, and Investment (485, or 34% of the total); Environment, Conservation, and Energy (440, or 31%); and Science, Space, and Technology (171, or 12%). It is difficult to know to what degree this reflects real differences in practice and how much it instead reflects differences in transparency. As noted below, it is likely a product of both. Joint statements largely conform to this same ordering, though there are far more joint statements than agency nonbinding agreements in the areas of Defense and Humanitarian—the very two areas in which the agencies have so far refused to produce nonbinding agreements.

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165 All of these figures are based on the primary subject area identified.
Table 4 shows the distribution of binding executive agreements by subject area relative to disclosed agency nonbinding agreements and joint statements. The greatest disparity between binding agreements and agency nonbinding agreements is in Defense. (Notably, joint statements reflect an ordering that matches binding agreements perfectly, with defense the leading subject.) It is almost certain that this reflects a difference in what is public rather than a difference in propensity to conclude binding versus nonbinding agreements. A U.S. government employee told us that the Department of Defense does “many hundreds and hundreds” of nonbinding agreements, and, indeed, the Department has identified 6000 responsive documents in our FOIA litigation. The use of nonbinding agreements is a large and growing model for the DoD, despite its current absence from our agency nonbinding agreement database.

Some agencies, by contrast, are transparent precisely because they want the coordination between agencies to be publicly known. In the field of antitrust, for example, making public the nonbinding agreements signals a level of cooperation that regulatory authorities consider potentially helpful in encouraging companies to
adhere to regulatory requirements. The larger number of nonbinding agreements in our database on Finance, Trade, and Investment may therefore reflect not just reliance on nonbinding agreements but willingness to disclose them.

### Table 4: Primary Subject Areas

<table>
<thead>
<tr>
<th>Subject Area</th>
<th>Binding Executive Agreements</th>
<th>Agency Nonbinding Agreements</th>
<th>Joint Statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense</td>
<td>25%</td>
<td>1%</td>
<td>31%</td>
</tr>
<tr>
<td>Finance, Trade, and Investment</td>
<td>14%</td>
<td>34%</td>
<td>19%</td>
</tr>
<tr>
<td>Environment, Conservation, and Energy</td>
<td>9%</td>
<td>31%</td>
<td>13%</td>
</tr>
<tr>
<td>Humanitarian</td>
<td>9%</td>
<td>1%</td>
<td>12%</td>
</tr>
<tr>
<td>Science, Space, and Technology</td>
<td>9%</td>
<td>12%</td>
<td>9%</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>8%</td>
<td>8%</td>
<td>6%</td>
</tr>
<tr>
<td>Transportation and Aviation</td>
<td>6%</td>
<td>7%</td>
<td>5%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>4%</td>
<td>0%</td>
<td>2%</td>
</tr>
<tr>
<td>Nonproliferation</td>
<td>4%</td>
<td>3%</td>
<td>2%</td>
</tr>
<tr>
<td>Educational Exchanges and Cultural Cooperation</td>
<td>3%</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>Taxation</td>
<td>3%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Diplomacy and Consular Affairs</td>
<td>2%</td>
<td>3%</td>
<td>0%</td>
</tr>
<tr>
<td>Maritime</td>
<td>2%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

6. Clarity About the Nonbinding Commitment. One concern about nonbinding agreements is whether they clearly reflect the intent of the parties. Many nonbinding agreements either specifically state that they are nonbinding or have language that makes clear the intent not to create a binding agreement (e.g., “This Memorandum of Understanding does not impose any legally binding obligation on the Authorities or supersede domestic law”). Figure 7 shows that a growing portion of agency nonbinding agreements are expressly nonbinding in this way.

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166 Interview by Oona Hathaway with Russell Damtoft, Elizabeth Kraus, Stacy Feuer, Michael Shore, and Randy Tritell, FTC (Jan. 14, 2021).
Nonetheless, as can be seen in Table 5 below, most of the nonbinding agreements also use terms commonly associated with binding agreements—terms the Department of State’s Guidance specifically cautions against:167 treaty, agreement, parties, shall, agree, undertake, entry into force, is to come into operation, activities are to commence, done at, concluded at, and will.168 These recommendations are frequently ignored. This suggests that the United States is not observing guidance meant to avoid misunderstandings with foreign partners. It also indicates that coordination within the U.S. government is imperfect. The Guidance states, “The Office of Treaty Affairs encourages agencies and offices to share the texts of proposed non-binding documents with the office, which is responsible by law for determining whether a particular document is a binding ‘international agreement’ for purposes of reporting to Congress.” Some of the agencies with which we spoke indicated that they did so, but the failure of so many agreements to comply with the Department’s Guidance suggests that this may not be generally true.

167 This table was constructed by using optical character recognition (Amazon Textract) to extract the text of all the agreements. This enabled us to search the text of the agreements for the terms in the table. Whether the agreement is “expressly nonbinding” or not is based on a coding of the agreement by research assistants after reading the entire agreement.

168 State Department Guidance, supra note 64.
Many nonbinding agreements also have other features normally associated with binding agreements. As seen in Table 6, a significant percentage of nonbinding arrangements reference implementation, provide for some form of dispute resolution, designate a process for amending or revising the agreement, or include a termination or withdrawal provision. While none of these features makes an agreement binding, each has the potential to create some confusion about the nature of the agreement. Interestingly, with just one exception (dispute resolution), these features are more common in agreements that are expressly nonbinding. Perhaps agencies consider express disclaimers to be sufficient to meet the State Department’s concerns.
## III. A Comparative Perspective

Nonbinding agreements have become more important not just in U.S. practice, but around the globe. The practice of other nations is relevant to the analysis of U.S. practice for several reasons. These nations are potential partners with the United States in concluding both binding and nonbinding agreements, and how the United States approaches nonbinding agreements will affect its relations with these nations, and vice-versa. Moreover, other nations may pursue reform strategies concerning nonbinding agreements that are relevant to the United States as it considers how best to address this growing phenomenon. This Part therefore describes comparative practice in this area, with a focus on the practice of prominent constitutional democracies. In addition to taking account of publicly available materials, we have solicited information from government officials and scholars in over a dozen countries, both through detailed written surveys of the practice in their countries and through their participation in an online conference.\(^{169}\)

### A. The Global Rise of Nonbinding Agreements

The rise in nonbinding agreements is not limited to the United States. Based on accounts from scholars and practitioners from around the world, it appears to be a

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\(^{169}\) See University of Chicago Law School, Conference on “Non-Binding International Agreements: A Comparative Assessment,” https://www.law.uchicago.edu/events/non-binding-international-agreements-comparative-assessment. The surveys addressed the laws and practices of Argentina, Austria, Canada, the European Union, Finland, France, Germany, Mexico, Israel, the Netherlands, Spain, the United Kingdom, South Africa, and Switzerland, and they are on file with the authors. We also draw upon a survey conducted in 2019 by Canada’s treaty department in which eight nations (including Canada) were asked to describe their laws and practices relating to both binding and nonbinding agreements. In addition, the OAS Report, *supra* note 30, includes information on the practices of thirteen OAS members.
The Rise of Nonbinding International Agreements

widespread—indeed global—phenomenon. For example, the Legal Adviser to Germany’s Federal Foreign Office has noted that “[a]s seemingly everywhere else, the significance of non-legally binding agreements has consistently been rising in our practice” and that “[i]ssues that would have formerly been the subject of a binding treaty under international law are nowadays addressed through Joint Declarations of Intent.” A survey respondent from Canada reported that “[t]here has been significant growth in the use of [nonbinding] arrangements” and that “Canada now concludes hundreds of arrangements per year.” Mexico has reported that 70% of the agreements now submitted to its foreign ministry for review are nonbinding. A prominent British authority on treaties who formerly worked in the British Foreign and Commonwealth Office has observed that “the use of MoUs is now so widespread, some officials may see the MoU as the norm, with a treaty being used only when it cannot be avoided.” When asked to explain why there has been an increase in these agreements, our survey respondents attributed it to factors such as increased international cooperation by regulators, the ease and speed by which such agreements can be concluded, the greater flexibility offered by nonbinding agreements, and the desire for confidentiality.

Perhaps not surprisingly, governments and international organizations are increasingly turning their attention to this phenomenon. In 2016, the Inter-American Juridical Committee of the Organization of American States launched an initiative to identify state practices in the Americas regarding both binding and nonbinding

170 Countries use a variety of terms to describe what we are calling nonbinding international agreements. In some countries, there is an effort to avoid using the word “agreement” in this context because that word might suggest a binding commitment.

171 Eick, supra note 12.

172 Gib van Erp, Law—Ottawa and Vancouver, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (submitted Aug. 11, 2021). Most of our survey respondents reported seeing an increase. Some indicated that they thought there had been an increase but that it was difficult to know for sure given the lack of publication of the agreements. The respondent from the Netherlands reported that she had not seen an increase in nonbinding agreements. See Noortje van Rijssen, Legal Office, Netherlands Ministry of Foreign Affairs, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (submitted July 28, 2021). In an earlier survey conducted by Canada of the practices of eight countries, all respondents reported an increase in both the frequency and importance of nonbinding agreements. See Treaty Law Division, Global Affairs Canada, Working Group on Treaty Practice, Survey on Binding and Non-Binding International Instruments 13, 31 (Sept. 18, 2019) (on file with authors) [hereinafter Working Group Survey].

173 See Alejandro Rodiles, ITAM School of Law, Mexico, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (submitted Sept. 1, 2021); see also Working Group Survey, supra note 172, at 31.

174 AUST, supra note 29, at 29.
agreements. As the rapporteur (Duncan Hollis) explained, the initiative “found its impetus in the rising number of non-traditional international agreements, including non-binding agreements among States as well as agreements in both binding and non-binding form concluded by government ministries and sub-national territorial units.”  

In 2020, the Committee published a Final Report on Binding and Non-Binding Agreements, as well as a set of Guidelines and Commentary relating to these agreements. The OAS Guidelines suggest that nations adopt a number of legal reforms, some of which we describe below. In addition, Canada’s treaty department circulated a survey in 2019 in which eight nations (including Canada) were asked to describe their laws and practices relating to both binding and nonbinding agreements. More recently, the Concept Note for a March 2021 meeting of the Council of Europe’s Committee of Legal Advisers on Public International Law (CAHDI) stated that nonbinding agreements “are of increasing prevalence in international relations” and cautioned that, although these instruments “present a number of advantages for states as compared to treaties,” “the usage of non-binding agreements is not without dangers.”

In some countries, recent events triggered increased attention to nonbinding international agreements. There was significant controversy in Switzerland, for example, over the government’s support for the Global Compact for Migration, a nonbinding multilateral instrument endorsed by the UN General Assembly that sets forth a variety of “guiding principles” and “objectives and commitments” relating to migration. The Switzerland constitution expressly gives the parliament a right to participate in decisionmaking about foreign relations, and it requires parliamentary approval of most treaties, and sometimes makes treaties subject to popular referenda. Critics argued that unilateral executive branch approval of the Migration Compact would be inconsistent with these requirements, despite the Compact’s nonbinding status. In response to the controversy, the Swiss government decided to submit the

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175 OAS Report, supra note 30.

176 See id.

177 See Working Group Survey, supra note 156.


Migration Pact to the parliament for approval, while emphasizing that it was not required to do so under the Constitution.

In considering the phenomenon of nonbinding agreements, nations and the EU have been grappling with three basic issues: (1) How to ensure that there is sufficient coordination within the executive with respect to the making of nonbinding agreements, through mechanisms such as foreign ministry review and centralized collection.  (2) Whether and to what extent the transparency rules that apply to binding agreements should also apply to nonbinding agreements—in particular, whether these agreements should be made available to the public.  (3) The extent to which the legislature should be involved in or notified of these agreements. The following sections describe national laws and practices in prominent constitutional democracies relating to these three issues.

B. Coordination

Many nonbinding international agreements are made not by heads of state or foreign ministries but rather by other departments and agencies of the executive branch. Governments have found that this disaggregation of the practice presents challenges with respect to the management of national foreign policy. The foreign ministry might not know what commitments are being made on behalf of the country, and it might not approve of them if it did know. In addition, some of those commitments might unintentionally create binding obligations if not drafted carefully. Moreover, without coordination, a commitment made by one department or agency might conflict with a commitment made by another department or agency. 180

Many foreign ministries have provided general guidance to executive ministries and agencies about the drafting of nonbinding agreements—for example, about terms that should be avoided to help ensure that the agreement will not be considered binding. Some nations have gone further and have instituted centralized foreign ministry review and approval of nonbinding agreements. In the UK, for example, the Foreign Commonwealth and Development Office (FCDO) has issued a guidance document emphasizing that, “[a]s with treaties, all draft MoUs should be sent to the relevant FCDO department for clearance by their legal adviser, and

180 See generally OAS Report, supra note 30, at 114 (“When it comes to non-binding agreements, States currently suffer from an information deficit. Both the number and contents of a State’s political commitments, whether labeled as MOUs or otherwise, are often unclear.”).
foreign language versions should be checked. Moreover, there should be the same level of inter-departmental consultation as for treaties.\footnote{181}

Similarly, in Canada all departments and agencies are supposed to notify the Treaty Section of the Department of Foreign Affairs, Trade and Development before beginning agreement negotiations with another nation or an international organization, in part so that “a proper distinction between treaties and other international instruments that are not binding in public international law can be maintained.”\footnote{182} All departments and agencies are directed “to avoid situations where instruments that could reasonably be viewed as treaties . . . are not mistakenly classified as non-binding instruments.”\footnote{183} In addition, nonbinding agreements concluded by departments or agencies in Canada require centralized government approval—usually through the Ministry of Foreign Affairs, although approval must come from the Cabinet if the nonbinding agreement “would result in a major shift in Canadian policy.”\footnote{184} In Canada’s Treaty Law Division, two lawyers are responsible for reviewing nonbinding agreements and one of them serves as an “MOU Coordinator.”\footnote{185}

The Australian government has a less formal process, but it also encourages centralized coordination. Its Guidance Note states that any agency that intends to enter into a nonbinding agreement should consult with the Treaties Section of the Department of Foreign Affairs and Trade when drafting and negotiating the text, and it has set forth guidelines about the appropriate language to be used and avoided, along with a model MoU.\footnote{186} The Guidance Note also states that all nonbinding agreements should be sent to the Treaties Section for clearance prior to signature. It directs agencies to retain the texts of these agreements, but it does not itself maintain

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\begin{itemize}
\item \footnote{183}{Id., Sec. 8.}
\item \footnote{184}{Id., Annex C.}
\item \footnote{185}{Working Group Survey, supra note 173, at 12. See also Survey by van Ert, supra note 155 (“The [Canadian] foreign ministry’s Treaty Law Division–MOU Unit must be consulted for review of all non-legally binding instruments prior to their conclusion.”); OAS Report, supra note 30, at 70, 103-04 (describing centralized review in Ecuador and Peru).}
\item \footnote{186}{See Australian Government, Department of Foreign Affairs and Trade, Guidance Note: Australia’s Practice for Concluding Less-Than-Treaty Status Instruments, https://www.dfat.gov.au/international-relations/treaties/australias-practice-concluding-less-than-treaty-status-instruments.}
\end{itemize}
any central collection of them. Administrative agencies in Germany follow a similar process: they are supposed to send proposed nonbinding agreements to a division of the Foreign Ministry for review and approval.\(^\text{187}\) When reviewing agreements, the Ministry “will look for trigger words usually used only in international treaties, and ‘soften’ them down to a non-legally binding alternative.”\(^\text{188}\) The agreements, once concluded, are supposed to be stored in the archives of the Foreign Ministry. In other countries, such as Austria and Argentina, centralized foreign ministry review is encouraged but not required.\(^\text{189}\)

Some countries have adopted registries of nonbinding agreements, though most do not make them public. The Czech Republic, for instance, has recently established a central, non-public registry within the executive branch for nonbinding agreements, although the Czech Legal Adviser has noted that “not all MoUs in practice reach my department and get registered.”\(^\text{190}\) He also expressed support for the idea of a public registry for nonbinding agreements, noting: “In most States, there is an official register of published treaties (an official gazette), nevertheless, there is a gap when it comes to MoUs, so such register makes sense.” Israel also has centralized foreign ministry review of nonbinding agreements and maintains an internal executive branch registry of nonbinding agreements.\(^\text{191}\) In Finland, the government is developing a new document management system that “could make all Governmental soft law instruments available in one archive.”\(^\text{192}\) South Korea’s foreign ministry manages a central database of agency-to-agency agreements and each agency is encouraged to input their agreements into the database.\(^\text{193}\) Starting in 2014, Germany started storing nonbinding agreements in a central archive.\(^\text{194}\)


\(^{188}\) Eick, supra note 12, at 3.


\(^{190}\) Petr Valek, Director of the International Law Department, Ministry of Foreign Affairs, Czech Republic (Mar. 26, 2021), https://rm.coe.int/1-3-p-valek-presentation-mous/1680a23585.

\(^{191}\) See Naomi Elimelech Shamra, Director, Treaties Department, Ministry of Foreign Affairs, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (submitted July 25, 2021) (on file with authors).

\(^{192}\) Kaija Suvanto, Director General, Legal Service, Ministry for Foreign Affairs for Finland, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (submitted July 7, 2021) (on file with authors).

\(^{193}\) See Working Group Survey, supra note 156, at 27.

\(^{194}\) Id.
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Canada reported in 2019 that its Treaty Law Division was “in the process of developing a digital database of these [nonbinding] instruments” and was “reaching out to lead divisions, department and agencies to ensure all signed instruments are included in the database.” 195 The database is not public. Ecuador similarly has a practice of central executive branch recording of nonbinding agreements. 196

While most of the above registries have been established through informal or regulatory means, since 2014 a registry has been required by law in Spain. The “Treaties and Other International Agreements Act” provides that when agencies conclude nonbinding international agreements (which the Act refers to as “non-normative agreements”), they must submit them to the Ministry of Foreign Affairs for inclusion in a central, public registry. 197 As of 2021, however, this registry still had not been established. 198

C. Transparency

Even if a country’s executive branch monitors and collects nonbinding international agreements, the public does not necessarily have access. Yet these agreements sometimes entail significant commitments by the government that can affect national policy, or at least the interests of particular stakeholders.

Some nations make at least some nonbinding international agreements available to the public. But as in the United States, publication is usually done voluntarily rather than pursuant to a legal mandate, and it is typically not comprehensive. For example, New Zealand maintains a public database that includes its treaties as well as “a record of some of New Zealand’s legally binding arrangements,” although it does not include “[m]inor or technical arrangements and financial or commercially sensitive arrangements.” 199 Similarly, although there is no legal requirement in Japan to publish nonbinding agreements, many such agreements are apparently published. 200

195 Id. at 9.
196 See OAS Report, supra note 30, at 114 n.193.
200 Email from Ryo Fukahori, Director, Treaties Division, International Legal Affairs Bureau, to Curtis Bradley (Feb. 28, 2021) (on file with authors).
In the 1990s, Australia adopted various reforms designed to increase the transparency and accessibility of its treaties, but those reforms apply only to binding agreements. Professor Andrew Byrnes has observed that, even though many nonbinding agreements made by Australia are important, “the publication of these agreements is sporadic and unsystematic, and the text of many such agreements is not available to the public on government websites.”201 Other nations, such as the United Kingdom, apparently do not routinely publish nonbinding agreements.202

Although Finland currently has no public registry system for nonbinding agreements, the government is required by statute to provide public notice of important foreign relations actions, and the legal adviser for its foreign ministry has suggested publication “of non-legally binding instruments considered to be of importance that are made between Governments.”203 She also has observed that establishing a more general public registry for nonbinding agreements would serve a number of useful functions:

It is clear that this kind of a registry comparable to a treaty register would make access to these political commitments easier and make them more visible. This is positive from the point of view of democracy, and transparency as well. Public access to non-legally binding instruments could also serve the goal of using political instruments only when they are an appropriate tool to reach the intended purpose and when there is no need for legally binding obligations. It could make the practice of using non-legally binding instruments more coherent in an individual state as well as between states. In the name of transparency, it would also be interesting to collect the practice of different countries of publishing these instruments, such as MoUs, e.g. in their treaty series.204


203 Suvanto, supra note 192.

As noted above, the Czech Legal Adviser has expressed similar sentiments. In France, although there is no publication system currently in place for nonbinding agreements, a proposal has been made to require publication of such agreements except where publication would be incompatible with “secret national defense” or foreign policy requirements. In South Africa, the government publishes both binding and nonbinding agreements that have recently been concluded, although it is unclear how comprehensive this is. The OAS Guidelines recommend that “States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.”

D. Legislative Participation

Nations vary in the extent to which they involve their legislatures in treaty-making. Commonwealth countries normally do not require legislative approval, although a number of these countries (and other countries, such as Israel) as a matter of custom or statutory mandate inform the legislature about treaties before they are ratified. In many countries outside the Commonwealth, formal legislative approval is required for some or all treaties. In countries in which parliamentary approval is required, treaties typically can operate in some circumstances as domestic law; by contrast, when parliamentary approval is not required, treaties typically must be implemented by the legislature before they have domestic effect.

These requirements of parliamentary notice and approval, however, typically apply only to binding agreements. For example, the UK statute that requires that agreements be laid before Parliament for at least 21 days prior to ratification applies only to binding agreements. Noting this fact, the European Union Committee of the British House of Lords observed in 2019 that “[a]ny future Treaties Committee

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207 OAS Report, supra note 30, at 113.


209 See Verdier & Versteeg, supra note 191, at 140.

210 See id.

211 See Lang, supra note 192, at 41.
may wish to consider proportionate means to remedy the resulting scrutiny gap.”

More recently, the International Agreements Committee of the House of Lords urged the executive to report significant nonbinding agreements to parliament, and it suggested some criteria for what would qualify as significant.

In Finland, the Constitution prescribes the process for concluding binding agreements (which requires legislative approval for some but not all treaties) but is silent about nonbinding agreements. Finland’s Legal Adviser recently noted that “there could be merit to inform Parliament of the most significant non-legally binding instruments,” but she indicated that this happens only on an ad hoc basis in her country.

In some countries, there have recently been calls for more legislative involvement in nonbinding agreements. For example, in the wake of the controversy in Switzerland over the Migration Compact, the Foreign Policy Committee of the Council of States in Switzerland asked the government to report on the “growing role of soft law in international relations” and “the resulting creeping weakening of Parliament’s democratic rights.” Switzerland’s Federal Council (a seven-member executive council) responded by agreeing to increase parliamentary involvement in the development of soft law, including in the conclusion of nonbinding agreements. It noted, though, that “[g]iven that there are a large number of soft law instruments and that they are usually issued under tight deadlines, it would be unfeasible for Parliament to participate in the creation of these instruments across the board.” But it made a commitment to the legislature that “members of Parliament are to be consulted more frequently and provided with better documentation and regular reports on relevant soft law projects,” something that it indicated would not require a

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212 House of Lords, European Union Committee, 42nd Report of Session 2017-19, Scrutiny of International Agreements: Lessons Learned 23 (June 2019), https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/387/387.pdf. The Committee also concluded that, for a variety of reasons, the 2010 law was not well designed to promote parliamentary scrutiny of binding agreements.

213 See House of Lords, International Agreements Committee, 7th Report of Session 2021-22, Working Practices: One Year On paras. 73-88 (Sept. 17, 2021), https://publications.parliament.uk/pa/ld5802/ldselect/ldintagr/75/7502.htm (calling for reporting of a nonbinding agreement if it either “(a) is politically or economically important; (b) imposes material obligations on UK citizens or residents; (c) has human rights implications; (d) is directly related to a treaty; or (e) would give rise to significant expenditure”).

214 Suvanto, supra note 204.

change in the law.\textsuperscript{216} A Swiss parliamentary subcommittee continues to focus on how to adapt existing procedures and practices in light of the increasing role of nonbinding agreements.\textsuperscript{217}

Concerns about evasion of legislative prerogatives appear to be growing in other countries as well. In Australia, Professor Byrnes has argued before a committee in Parliament reviewing the issue that, “because [non-binding agreements] involve formal arrangements for the exercise of public power, their texts should as a matter of principle be made public and thus subject to Parliamentary and public scrutiny.”\textsuperscript{218} Another commentator has observed that the Australian government sometimes uses nonbinding agreements to avoid political constraints and has argued for “some kind of accountability regime.”\textsuperscript{219} Similar questions are being raised with respect to the effect of the EU’s conclusion of nonbinding agreements on that institution’s separation of powers.\textsuperscript{220}

\textit{E. Summary}

The above account of comparative practice on nonbinding agreements, while not comprehensive, shows that other nations are grappling with many of the same regulatory questions faced by the United States. Around the globe, there is

\begin{itemize}
\item \textsuperscript{216} Id.
\item \textsuperscript{217} See Roland Portmann, Swiss Federal Department of Foreign Affairs, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (submitted Aug. 1, 2021).
\item \textsuperscript{220} See Ramses A. Wessel, \textit{Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements}, 44 W. EUR. POL. 72 (2021); see also Mario Mendez, Written Evidence (June 8, 2020), House of Lords, EU International Agreements Subcommittee, https://committees.parliament.uk/writtenevidence/6561/pdf/ (“In the EU concerns are also being raised about increasing recourse to political agreements given that they are not channeled through the Article 218 TFEU framework that applies to legally binding agreements.”). Other international organizations also face issues relating to the rise of nonbinding agreements. See, e.g., Statement by Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel (Feb. 26, 2021), https://rm.coe.int/0-2-cahdi-expert-workshop-statement-mss-22march2021/1680a23544 (“[M]y office – as the centralized legal service of the Organization – regularly reviews legally binding and non-legally binding draft agreements submitted by the various United Nations Secretariat Departments, Offices, and Regional Commissions, including to avoid misunderstandings and legal uncertainties.”).}
\end{itemize}
increasing awareness of a regulatory gap: the laws and practices that states have in place to ensure coordination, transparency, and legislative involvement in the making of international agreements are typically focused only on binding agreements, but their executives increasingly are using nonbinding instruments.

The nations that have to date addressed these issues have mainly focused on internal coordination. In the countries we surveyed, the foreign ministry has provided some general guidance to ministries and agencies with respect to the drafting of nonbinding agreements. These countries differ, however, on the extent to which they centralize foreign ministry review of nonbinding agreements before they are concluded, and over whether to have centralized collection of nonbinding agreements. A number of countries are considering reforms to further improve internal coordination. As for transparency, most of the nations that we surveyed do not have any systematic publication of nonbinding agreements, although legal advisers in some of these countries have stated that such publication might be desirable. A number of countries are considering whether and how to provide public access to nonbinding agreements. In most countries surveyed, there is little legislative involvement with nonbinding agreements, and only a few countries are entertaining proposals to change this.

IV. LEGAL REFORM

As we have shown throughout this Article, nonbinding agreements are increasingly important and prevalent and are often used as a substitute for binding agreements. They are also completely under the control of the executive branch, entirely unregulated, and increasingly controversial. As discussed in the last Part, this development has prompted concerns not only in the United States but also in a number of constitutional democracies.

This Part considers several possibilities for legal reform in the United States. In light of recent controversies over certain high-profile agreements such as the Iran nuclear deal and the emissions pledge in the Paris climate change agreement, this Part first considers how Congress might influence or check presidential uses of nonbinding agreements that depend on pre-existing delegations of congressional authority to implement the agreements. Moving to the more common (but less well known) agency-level agreements, this Part then considers accountability mechanisms and makes the case that the nonbinding agreements should be treated—in terms of internal executive branch coordination, and external reporting and transparency—largely like binding agreements. Finally, this Part examines whether the United States should work with partner nations to develop international best practices for the drafting of nonbinding agreements.
We explained above how the executive branch—most notably in the Iran Deal and the emissions reduction pledge in the Paris Agreement—has used nonbinding commitments in combination with domestic regulations to forge consequential international cooperation without the contemporary approval, or even involvement, of Congress.\textsuperscript{221} While controversial, this mechanism is generally lawful. It merely combines two lawful presidential functions—making nonbinding agreements and exercising statutorily-delegated regulatory authority—in novel ways.\textsuperscript{222}

Nevertheless, there are reasons why Congress might want to regulate this process more closely. First, it is unlikely that Congress contemplated that its delegated authority to the president in these contexts would be used as the basis to implement international agreements. Second, when a president relies on pre-existing domestic delegations to implement new nonbinding international commitments, Congress can block the agreement only by enacting a new statute, which in many if not all cases would require it to overcome a presidential veto. Third, the use of domestic delegations to implement nonbinding agreements portends a potentially broad shift of agreement-making power to the president since there are no limits on the president’s power to make nonbinding agreements, and since Congress has delegated regulatory authority to the president in broad terms across a range of topics. These three points taken together underscore that Congress is at a significant structural disadvantage in the face of novel uses of extant delegated authority to implement nonbinding agreements.

But Congress is not powerless. It can, if it wishes, and if it can overcome possible vetoes, curb this presidential power through legislation that alters the prior delegations. First, it can narrow or clarify discrete delegations to make them less susceptible to use as the basis for implementing a nonbinding agreement. If Congress were truly concerned about the Paris Agreement, for example, it could amend the Clean Air Act to specify that it could not be the basis for the carbon reduction elements of the Clean Power Plan, the primary regulatory vehicle for implementing the emissions reduction pledge in the Paris Agreement. Second,

\textsuperscript{221} See supra text accompanying notes 95-98.

\textsuperscript{222} It is lawful, that is, as long as the agreement is in fact nonbinding and the president properly exercises the authority delegated by Congress. Cf. Samuel Estreicher & Steven Menashi, Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers, 86 FORDHAM L. REV. 1199, 1203, 1204 (2017) (arguing that the Iran nuclear agreement exceeded presidential authority because “it is not clear that the [agreement] is a nonbinding political commitment” and because “the President’s across-the-board exercise of waiver authority contradicts the expressed intent of Congress in the sanctions statutes”).
Congress could specify that particular delegations of authority cannot be the basis for implementing a nonbinding international agreement without new congressional approval. This is precisely the power that Congress leveraged when it passed the Iran Nuclear Agreement Review Act, which suspended authority that Congress had previously delegated to the president to waive U.S. sanctions on Iran while Congress reviewed the draft nonbinding Iran Nuclear Deal. Third, and most aggressively, Congress could enact a statute that made clear that none of its domestic delegations to the president could be the basis for implementing a nonbinding international agreement.

The last option obviously has the broadest implications; its practical impact would depend on the unknowable extent to which future presidents wanted to build on the Obama administration’s innovations to implement consequential nonbinding agreements through domestic regulations. The policy desirability of the first two options is similarly impossible to assess divorced from the particular application. Our point is simply that if Congress decides that it wants to regain some of the authority claimed by novel uses of nonbinding agreements, it has legally available options. None of these options would interfere with the president’s power to make nonbinding international agreements, or to conduct negotiations in connection with those agreements, or to implement or enforce nonbinding agreements through exercises of the president’s Article II power. Rather, they would simply alter the terms of domestic statutory delegations that clearly fall within Congress’s Article I powers. Congress is not required to delegate these various forms of regulatory authority in the first place and thus almost certainly has the authority to restrict the uses to which the delegated authority is put.

B. Accountability Issues: Coordination, Reporting, Transparency

Despite their increasing importance, and in sharp contrast to binding agreements, nonbinding agreements—especially agreements concluded at the agency level—lack formal coordination or review within the executive branch, are not regularly reported to the State Department, need not be reported to Congress or

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223 They thus would not run afoul of the executive branch’s contestable claims of a very broad exclusive power to conduct the nation’s diplomatic relations. See generally Jean Galbraith, The Runaway Presidential Power over Diplomacy, 108 VA. L. REV. (forthcoming 2022) (analyzing and criticizing this asserted power). Of most relevance here, congressional changes to the terms of domestic law delegations would in no way interfere with the executive branch’s assertion of “exclusive authority to determine the time, scope, and objectives of international negotiations or discussions.” Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act (June 1, 2009), Memorandum from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, to Acting Legal Adviser, Department of States, Regarding Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, at 8 (June 1, 2009), https://www.justice.gov/file/18496/download.
published, and are not always recorded and organized even within the agency that makes them. As in other countries, U.S. law has simply not caught up with how the executive branch now makes most of its international commitments, including many of its most important ones.224

This Section makes the case for bringing the regulatory regime for nonbinding agreements closer to the one that applies to binding agreements. The analysis that follows focuses on what we see as the two biggest problems in this area: (1) the lack of coordination of nonbinding agreements within the executive branch; and (2) the inapplicability of the accountability mechanisms that apply to binding agreements and the opportunity this gap creates for evading oversight by characterizing an agreement as nonbinding.

1. Internal Coordination. This Subsection argues for greater internal coordination of nonbinding agreements, then explains how the rules for internal coordination should operate, and then discusses the difficult problem of how to define the scope of nonbinding agreements for purposes of regulation.

a. Coordinating Nonbinding Agreements. As noted above, the State Department’s “C-175” process that applies to binding agreements requires an executive agency to (i) seek and obtain approval from the State Department before negotiating an agreement, (ii) seek and obtain State Department approval before concluding the agreement, and (iii) transmit a copy of the finalized agreement to the State Department for central collection. These requirements serve many aims. Among other things, they “facilitate the application of orderly and uniform measures and procedures” for the negotiation and conclusion of binding agreements,225 ensure complete and accurate records of these agreements,226 ensure that the agreements are “carried out within constitutional and other appropriate limits” and do not conflict

224 Legislation was recently proposed that, if adopted, would implement various proposals that we made in earlier work with respect to the transparency of binding agreements, see Hathaway, Bradley & Goldsmith, supra note 2, and would also require reporting and publication of some nonbinding agreements that either “could reasonably be expected to have a significant impact on the foreign policy of the United States” or are “the subject of a written communication from the Chair or Ranking Member of either of the appropriate congressional committees to the Secretary [of State].” See S. 1260, § 3310 (approved by Senate on June 8, 2021). The fate of this proposed legislation is unclear and, in any event, we argue in this Part for the adoption of broader accountability and transparency measures. Nevertheless, the fact that the issue is being taken seriously in Congress suggests that meaningful reform may be possible in this area.


226 Id.
with other agreements or U.S. law; and ensure that they can be properly reported to Congress and published, as required by statute.

Despite their growing prevalence and importance, none of these rules apply to nonbinding agreements. The State Department notes that nonbinding agreements “may carry significant moral or political weight” in international relations and urges executive branch agencies to avoid “ambiguity as to whether or not a document is legally binding.” To this end, as noted above, the Department provides recommendations about how to draft nonbinding agreements to avoid ambiguity, which can cause confusion about the nature of agreements and the consequences for non-compliance, among other things. As also noted above, the State Department encourages but does not require agencies to share the texts of proposed nonbinding agreements with the State Department before making them.

Our database and interviews provide reason to believe that these thin suggestions by the State Department are often ignored and are thus not serving their goals. For instance, as noted above, almost 65% of the nonbinding agreements in our database use the term “will” even though the State Department counsels against doing so. The absence of mandatory terminological practice across agencies can cause confusion among U.S. agreement partners. In addition, this uncertainty can make it difficult for the State Department to ensure that the executive branch is complying with its obligations under the Case-Zablocki Act to report binding agreements. All of these problems are likely worse than described in Part II, because the agencies that make available public information about their nonbinding agreements and respond on time to FOIA requests are likely those with less to hide. Indeed, some of the most troubling insights have come with regard to the most nontransparent and recalcitrant agencies—particularly the DoD and DHS. Indeed, in response to the complaint we filed against the DoD, it identified over 6000 documents that it believed may be responsive to the FOIA request, but it was unsure whether the agreements it had identified were binding or nonbinding. In short, what we have learned is suggestive of many more pathologies.

Nonbinding agreements are too important and too prevalent to justify their radically differential treatment compared to binding agreements when it comes to internal coordination. Nonbinding agreements entail foreign policy commitments to other countries, and there should be some way to ensure that they are consistent with the executive branch’s policy goals and with each other. We note, too, that, as we

227 Id. at § 722(1)-(2).
228 Id. at § 722(9); see also id. at § 711(a).
229 State Department Guidance, supra note 64.
discussed in Part III, other countries are increasingly adopting internal registries of nonbinding agreements for similar reasons. Indeed, according to our surveys, this is the most prevalent reform currently under discussion abroad.

More formal coordination within the executive branch would serve many of the most important aims of the coordination regime for binding agreements, including ensuring uniformity in U.S. nonbinding agreements; facilitating a complete and accurate record of these agreements, so that the executive branch knows what it has committed to and can ensure that it is not undertaking problematic or inconsistent commitments; ensuring that the nonbinding agreements are consistent with U.S. binding obligations and with domestic U.S. law; ensuring that agencies do not unintentionally create binding agreements; and creating a central repository of nonbinding agreements so that the government can meet any reporting or publication requirements that Congress might impose on nonbinding agreements, an issue we discuss below. Importantly, internal coordination would also serve Congress’s aims in the Case-Zablocki Act, since some under-reporting under the Act is likely a result of incorrect assumptions by departments and agencies about whether an agreement is binding.\footnote{See Hathaway, Bradley & Goldsmith, supra note 2.}

These coordination goals can be achieved with a less robust scheme than the one that applies to binding agreements. First, the State Department’s guidance on suggested terminology and form for ensuring that agreements are not binding should, going forward, be made mandatory. This will help make nonbinding agreements uniform across the government and help avoid the problem of uncertainty within the government about whether an agreement is binding or not. If the State Department’s guidance is made mandatory, we think it unnecessary to require that the State Department conduct pre-negotiation and pre-conclusion review, as it does for binding agreements. The resource demands for such review would be enormous given the high number of nonbinding agreements. And the need for such review is not nearly as great for nonbinding agreements as for binding agreements, given that nonbinding agreements do not raise the same complex legal issues about whether binding agreements are supported by congressional authorization or fit within the narrow constitutional scope of binding executive agreements. Of course, voluntary review, especially in cases where there is uncertainty about whether an agreement is binding or not, should continue to be an option.

Second, agencies should report nonbinding agreements to the State Department upon conclusion of the agreement. This is so for reasons just stated: one entity in the government, the same entity that is the repository for binding agreements, should have a comprehensive eye on the international commitments.
made by various corners of the executive branch in order to ensure that they are consistent with U.S. foreign policy aims and with one another. We recognize that many agencies will resist this requirement, because they do not want to invite State Department involvement. But the benefits of internal coordination outlined above outweigh bureaucratic self-interest in this instance.

b. Defining Nonbinding Agreements. One of the major challenges for accountability reform for nonbinding agreements is how to define the category of nonbinding agreements subject to regulation. Nonbinding agreements share characteristics with other forms of diplomatic speech by the executive—for example, a president’s oral commitments to a foreign leader in a phone call—that it would be inappropriate to regulate. What is needed is a definition that captures the nonbinding agreements that are akin to binding ones in function and form.

Before moving to our proposed definition, it is important to note that this problem is not unique to nonbinding agreements. A similar definitional problem arises with respect to the regulation of binding agreements. The line between the binding agreements that under current law must be reported to the Congress and in some instances published, and nonbinding agreements of various sorts, is not always clear. To ensure proper internal coordination of binding agreements, and in order to report and publish those agreements, the State Department has established five criteria, plus other considerations, “to provide guidance” for identifying binding U.S. agreements reportable to the State Department. One criterion is the “significance” of the arrangement, a judgment that is based on “the entire context” of the agreement, and that excludes “minor or trivial undertakings.” The 1976 State Department memorandum that established these criteria noted that “difficult judgments will have to be made in many cases.” The same will be true of nonbinding agreements. But as with binding ones, this objection should not be fatal, and definitional problems can be worked out though practice and regulation.

Our experience with the FOIA process suggests that it is possible to define a category of nonbinding agreements that is clear and meaningful. Initially, the absence of an adequately clear definition of a “nonbinding agreement” was an issue for some of our FOIA requests to the agencies. Several agencies asked for additional

231 We propose that these internal coordination mechanisms be implemented regardless of whether the accountability steps proposed below are enacted.

232 See 22 CFR § 181.2(a). The five criteria are: the identity and intention of the parties; the significance of the arrangement; the precision and specificity of the language; the existence of two or more parties; and considerations relating to the form of the agreement. Id. at (1)-(5).

233 Id. at § 181.2(a)(2).

234 Leigh Memorandum, supra note 61.
information on the ground that our initial requests were not sufficiently specific.\textsuperscript{235} In every case where an agency gave this response, we provided clarification that allowed the agency to find and report the agreements we hoped to receive. Our proposed definition builds on this clarified request to the agencies.\textsuperscript{236}

Any definition of regulable nonbinding agreements should seek to capture our first and third categories of nonbinding agreements: high-level formal agreements and nonbinding agreements concluded by administrative agencies.\textsuperscript{237} The definition should contain the following elements:

First, the agreement must be reduced to writing. In other words, there must be a shared written text.

Second, the agreement must have at least two parties or participants, at least one of which is the U.S. federal government or one of its departments, agencies, or sub-entities (e.g., a federal agency or office within an agency), and at least one of which is a sovereign state or sub-entity, or an international organization.

Third, if a document has been reported to Congress as an international agreement under the Case-Zablocki Act, it is excluded.

\textsuperscript{235} See, e.g., Roberta Parsons, Acting Deputy Chief FOIA Officer and Acting Deputy Director for FOIA/PA operations, Office of Privacy and Open Government, U.S. Department of Commerce, to Oona A. Hathaway (Feb. 11, 2021) (“Specifically, we need more description about what constitutes a non-binding arrangement or understanding for purposes of this request that provides guidance for conducting a search, so that the level of effort required to locate responsive documents is reasonable.”). The initial requests provided a background statement describing nonbinding agreements and then requested “any and all unclassified nonbinding understandings or arrangements with foreign countries or international organizations actually in” the agency’s possession. The requests specified that they included “Any and all understandings or arrangements that are nonbinding based on the text or drafting history, as described in the Background statement above, or that comply with the definition set forth in the MOU Guidance document.” They also included “Any and all understandings or arrangements transmitted to the Department of State and determined to be nonbinding and therefore not reportable to Congress as an international agreement under the Case-Zablocki Act.” The requests specifically excluded agreements reported to Congress under the Case-Zablocki Act and agreements solely in oral form.

\textsuperscript{236} The clarifications included additional information such as common title language, the presence of formal signature lines together with common accompanying language, common phrases indicating the agreement is meant to be nonbinding, the presence of a date and common accompanying language, and links to illustrative examples of nonbinding agreements.

\textsuperscript{237} What we have called category two agreements—joint statements and communiques—are typically coordinated within the executive branch, and they are by definition transparent. As a result, they do not need additional regulation.
Fourth, the agreement must contain formal elements normally associated with binding agreements, such as:


**Body:** The document is divided into “sections,” “articles,” or other numbered or lettered parts.

**Date:** The document contains a date, sometimes expressly identifying an “effective date,” date of “entry into force,” or something similar.

**Signature Line:** The document contains a signature line or similar indication of conclusion:

- The phrase “Signed in,” “Signed at,” or “Done on,” or “Done at” preceding a location and a date, such as “Signed in Washington, D.C. on July 31, 2009,” “Signed in duplicate at Washington, D.C., the 1st day of September, two thousand and sixteen,” “Signed at Washington, D.C., in duplicate, this 19th day of August, 2014,” or “Done on the 23rd Day of November, 2009,” or similar term.
- The signature line or similar indication of conclusion includes two or more signature lines, including a signature line featuring “For the Government of the United States of America”, “For the U.S. Department of Commerce”, “For the Department of Commerce of the United States”, or “For the Office of the General Counsel of the U.S. Department of Commerce,” or similar term.

These criteria are far from determinant. But neither are the criteria for identifying binding agreements that have governed for decades for purposes of internal coordination and external reporting and publication. These criteria suffice to capture the vast majority of nonbinding agreements for which there is currently no regulation, and which should be coordinated with the State Department and possibly, as we now turn to discuss, reported to Congress or published.
2. Accountability and Evasion. The second major problem with the non-regulation of nonbinding agreements is that they lack any regular accountability outside the executive branch. This is so even though, as noted throughout this article, nonbinding agreements are often as important as binding ones, and sometimes more so. Neither Congress nor the public has any firm sense of what nonbinding agreements the executive branch makes, or whether they are actually nonbinding as opposed to binding, or whether they serve the national interest. The accountability deficit is most severe in those instances where the executive branch exploits the blurry line between binding and nonbinding agreements to avoid its statutory reporting and publication duties under extant law. We have cited several instances of this phenomenon in this Article, and such regulatory evasion through the making of nonbinding agreements has been a repeated subject of concern on Capitol Hill.

Our experience with seeking nonbinding agreements through the FOIA process highlights the inaccessibility of these materials through ordinary accountability tools. Under the current system, the public has little to no practical access to information about nonbinding agreements.

We consider two possible reforms to reduce the accountability deficit and, especially, the use of nonbinding agreements to evade the legal and regulatory framework for binding agreements: (1) an ex post reporting requirement of defined nonbinding agreements to Congress that tracks the requirement for binding agreements; and (2) an ex post publication requirement of nonbinding agreements that tracks the requirement for binding agreements.\textsuperscript{238}

\textit{a. Ex Post Reporting to Congress.} The argument for an executive branch duty to report to Congress all defined nonbinding agreements after they are concluded is straightforward. When it enacted the Case-Zablocki Act in 1972 and strengthened its provisions several times during the years since, Congress demonstrated concern about secret international agreements made on behalf of the United States that were not subject to any scrutiny outside the executive branch. It believed that such scrutiny was needed to make sure that the agreements were lawful and in the national interest, and that it would have disciplining effects on executive officials making such agreements. And Congress believed that knowledge of such agreements

\textsuperscript{238} It may be that ex ante review of nonbinding agreements would be warranted in a narrow set of circumstances where the President seeks to evade congressional prerogatives, but if robust ex post reporting and publication rules are adopted, such instances should be rare. If that prediction proves wrong, Congress may consider targeted ex ante reporting mechanisms, as it has in related contexts. \textit{See} Hathaway, Bradley & Goldsmith, \textit{supra} note 2, at 656-67 and accompanying notes. Such mechanisms raise constitutional issues that we think can be overcome but that would require careful consideration.
agreements was necessary to carry out its constitutional duties related to foreign relations and national security.

This logic now applies to nonbinding agreements as well. An ex post reporting requirement would impose discipline on the making of nonbinding agreements, for the agreement makers would know that Congress would potentially be scrutinizing their work. It would allow Congress to know about what the executive branch is doing in this area and hold hearings or draft legislation within Congress’s authorities if it disagreed with executive branch policy. And it would allow Congress to better ensure that the executive branch is meeting its reporting and publication duties for binding agreements, for Congress would have full insight into where and how the executive branch draws the line between binding and nonbinding agreements, and whether it sometimes inappropriately crossed that line.

The costs of reporting nonbinding agreements to Congress would be relatively modest if the State Department (or Congress) mandates that agencies report defined nonbinding agreements to the State Department in accordance with the definitions and criteria outlined above, a process that will be similar to the existing one under the Case-Zablocki Act for binding agreements. The agency offices that conclude binding agreements are nearly always the same ones that conclude nonbinding ones—hence the agency officials are accustomed to the Case-Zablocki Act reporting process. Indeed, eliminating the binding/nonbinding distinction for internal reporting could lower decision costs for agencies. Agencies would no longer have to puzzle over whether they are required to report a given agreement to the State Department—and they no longer would have to tie up State Department lawyers’ time with helping them determine whether an agreement is binding or not. Offices that conclude binding and nonbinding agreements could simply report them all to the State Department.

b. Ex Post Publication. A more aggressive accountability step would be to require the executive branch to go beyond mere reporting to Congress and instead publish all defined nonbinding agreements. Any such publication duty for nonbinding agreements, we contend, should in material respects mirror the publication duties for bindings.\(^{239}\) Accordingly, the duty to publish would extend only to nonbinding agreements as defined above, and, as with binding agreements,

\(^{239}\) In prior work we have called for broader publication duties for binding agreements that would eliminate all carveouts other than for classified agreements. See Hathaway, Bradley & Goldsmith, supra note 2, at 701-04. If these proposals were adopted, the same logic for the expanded duty would apply to nonbinding agreements.
would further exclude classified nonbinding agreements or those that the State Department determines, with regulatory guidance, lack sufficient public interest.\footnote{For a detailed explanation of the publication rules for binding agreements, including an explanation for these carveouts, see Hathaway, Bradley & Goldsmith, supra note 2, at 646-47.}

The case for such publication begins with the case for publishing binding agreements. There is currently a statutory duty to publish relatively important binding agreements. In a prior article, we proposed that the Department of State should publish all non-classified binding agreements. The arguments for doing so rested on instrumental and noninstrumental grounds. The main instrumental argument was accountability: public scrutiny on top of congressional scrutiny was needed to ensure that the United States was making lawful international agreements in the national interest. Public scrutiny was especially appropriate, we argued, because Congress alone lacked the resources to examine the mass of agreements made by the executive, and public scrutiny by journalists and interest groups could identify and bring to light problematic nonbinding agreements.\footnote{See Hathaway, \textit{id.} at 701-04.} The main noninstrumental argument was that the publicity of law is a core requirement of the rule of law, and secret law demands special justification.

Many of the same instrumental reasons for reporting binding agreements to Congress—namely, scrutiny of the agreements by an entity outside the executive branch to ensure that they serve the national interest and are truly nonbinding—apply equally to nonbinding agreements. Public scrutiny of nonbinding agreements is especially appropriate because Congress alone lacks the resources to examine the mass of nonbinding agreements made by the executive, and public scrutiny by journalists and interest groups can identify and bring to light problematic ones.\footnote{For additional discussion of the potential benefits of publication of nonbinding agreements, for both domestic accountability and international relations, see OAS Report, \textit{supra} note 30, at 115.}

But we acknowledge that there are differences between binding and nonbinding agreements related to publication. First, nonbinding agreements are by definition not law, so they cannot count as secret \textit{law} if not published. Traditionally, the U.S. legal and foreign policy system has tolerated secret foreign policies more than secret legal agreements. On the other hand, the State Department itself has, as noted earlier, acknowledged that “[w]hile not binding under international law, a non-binding instrument may carry significant moral or political weight.”\footnote{State Department Guidance, \textit{supra} note 64.} In addition, as we have also explained, nonbinding agreements can have a variety of indirect legal effects as a matter of both domestic and international law. Indeed, these effects
are part of what make nonbinding agreements attractive alternatives to binding ones. Allowing these nonbinding agreements to remain hidden can be seen as a form of secret law even though they do not create direct binding obligations, because of the significant indirect effects these agreements can have on both domestic and international law.

Second, one important justification for nonbinding agreements in the scholarly literature and in some of our interviews with domestic and foreign officials is that they, in contrast to binding agreements, are easier to keep secret. There is a general presumption in international law, reflected in the U.N. Charter and other instruments, that binding international agreements should be published, or at least not kept secret. There is presently no such international presumption for nonbinding agreements (although, as noted in Part III, the issue of transparency for nonbinding agreements is a matter of current debate in many countries). Imposing a publication requirement on nonbinding agreements might change both their effectiveness and import. Publicity after the fact might make some nonbinding agreements harder or impossible to make, therefore diminishing their effectiveness as a tool for cooperation. It might also lead nonbinding agreements to be treated more seriously than if they were secret, thus diminishing another element of their flexibility.

There would also be resource costs associated with extending reporting and publication duties on a large class of additional instruments, including the costs associated with determining which ones qualify. It is difficult to know how large these costs would be. Several other nations have more centralized review of such agreements than in the United States, so it is presumably feasible. Moreover, as we have noted, the same bureaucratic personnel who would be responsible for collecting, reporting, and publishing these agreements are already engaged in similar tasks with respect to the binding agreements, so there would be an economy of scale.

Despite the tradeoffs, we conclude that there is no persuasive argument for blanket exclusion of nonbinding agreements from transparency requirements, as is presently the case. We acknowledge that there may be instances where

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244 Article 102 of the U.N. Charter states that “Every treaty or international agreement, whatever its form and descriptive name, entered into by one or more Members of the United Nations … shall as soon as possible be registered with the Secretariat in accordance with these regulations.” This provision has been interpreted to apply to binding but not nonbinding agreements.

245 There are already a few isolated instances in which Congress has regulated U.S. participation in nonbinding arrangements, at least indirectly. For example, for U.S. participation in the Codex Alimentarius—which sets nonbinding international food safety standards—Congress has required the FDA to give notice and an opportunity to comment on U.S. negotiating objectives. See Jean Galbraith, From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law, 84 U. CHI. L. REV. 1675, 1693 (2017).
confidentiality of nonbinding agreements is warranted for appropriate diplomatic purposes. For binding agreements, Congress has accommodated the executive branch’s desire for confidentiality by allowing it to report some agreements only to the Senate Committee on Foreign Relations and the House Committee on International Relations, under an injunction of secrecy, when “the immediate public disclosure of [the agreement] would, in the opinion of the President, be prejudicial to the national security of the United States.” 246 A similar accommodation should be made for nonbinding agreements. 247

While additional exceptions to the defined class of nonbinding agreements might be sensible, the burden should be on the executive branch to explain why they are necessary. Currently, all nonbinding agreements are exempt from both reporting and publication, even though the vast majority of them do not appear to raise any serious confidentiality concerns. In short, the same basic rules regarding publication should apply to nonbinding agreements as apply to binding ones. This will provide better public accountability as well as reduce the incentives for the executive to use nonbinding agreements merely to avoid legal and regulatory rules that apply to binding agreements.

c. The Possibility of Circumvention. One advantage of our proposed reforms is that they reduce the danger of executive-branch circumvention of the regulatory regime that currently governs binding agreements. This invites the question, however, whether these reforms too might be circumvented. Perhaps agencies will resort to telephone calls, unexchanged bullet points, and other informal means so that their agreements fall outside our definition, and thus outside of the regulations?

This sort of danger of circumvention is inherent in any regulatory regime in this area, but we think that the danger is not significant here, for several reasons. First, and most importantly, agencies derive substantial benefits from memorializing their agreements in common written texts. This gives them, their staff, and their successors—and those of their counterparts—a common reference for cooperation on an ongoing basis. Moreover, the contractual form likely helps give the agreements more normative force, which promotes compliance, especially within a bureaucracy. Second, based on our interviews of agency officials, the lack of transparency is often due to the lack of any legal structure in place to mandate or provide a process for

246 1 U.S.C. § 112b(a).

247 Indeed, Congress could provide more categorical carveouts from publication. If it does so, the agreements should nonetheless be reported, confidentially, to the Senate Foreign Relations Committee and House Foreign Affairs Committee. Congress might also require that there be made public some general information about confidential nonbinding agreements—for example, how many have been concluded and on what topics.
disclosure, not a conscious effort at secrecy. Third, the more informal arrangements that could be adopted to evade the new transparency requirements on nonbinding agreements are less likely to have the many indirect domestic and international legal effects that make nonbinding agreements of particular concern.

Last, while we recognize that this transparency regime is a modest reform, it will give rise to a great deal more information than currently exists regarding the use of nonbinding agreements. That, in turn, will provide information on which Congress could base further regulatory reforms, if warranted.

C. International Best Practices

The information on comparative practices described in Part III demonstrates that many states are struggling with many of the same issues as the United States when it comes to nonbinding agreements. Moreover, we uncovered some clearly inconsistent assumptions about nonbinding agreements among foreign partners that could give rise to misunderstandings about the nature of an agreement. To take one example, Mexican negotiators avoid using the title “Memorandum of Understanding” for nonbinding agreements, because for them it connotes that the agreement is binding, whereas many other states have the opposite view. Such differences can lead to misunderstandings and diplomatic tension. Indeed, we have documented several instances where the United States and its partners did not have a common understanding with its partners about whether an agreement is binding, and of course there may be many examples that we are unaware of due to the lack of transparency of these agreements.

To address these concerns, the U.S. government should consider working with other nations to develop a set of international best practices for the drafting of nonbinding agreements. Indeed, the Inter-American Juridical Committee of the OAS has recently suggested some best practices, including with respect to the terminology that should be used and avoided when drafting nonbinding agreements. As rapporteur Duncan Hollis noted, “[w]ithout further clarifications and elaboration, there are legitimate concerns that existing agreement practices may lead to inconsistent understandings, unaligned expectations, and even disputes among OAS Member States, to say nothing of the international community as a whole.” The OAS guidelines could potentially serve as a foundation for future discussions on drafting practices that extend beyond that region. At a recent meeting of the Council

248 See supra text accompanying notes 41-39.
249 See OAS Report, supra note 30, at 28-29.
250 Id. at 10.
of Europe’s Committee of Legal Advisers on Public International Law (CAHDI), the Director General of the Legal Service of Finland’s Ministry of Foreign Affairs expressed the view that “uniform state practice in the field of non-legally binding instruments [is] desirable,” and she expressed the “hope the OAS guidelines will pave the way for a similar process” in Europe.251 Many nations have their own internal drafting guidance, and it might make sense as a first step to compile examples of this guidance from around the world to identify commonalities and differences. Indeed, this was one of the suggestions made at the CAHDI meeting.252

In the absence of an international agreement on best practices, some countries are borrowing from the guidelines developed in other countries. The director of the international law department in the Czech foreign ministry has reported, for example, that he borrows from guidance developed in the UK’s Foreign and Commonwealth Office.253 Therefore, another reason for the United States to become involved in discussions of international best practices would be so that its own views, such as those reflected in the current State Department Guidance,254 can potentially influence the resulting international standards.

To be sure, there may be instances in which the United States desires ambiguity about whether an agreement is binding—perhaps for domestic political reasons either in the United States or in the partner country. We have identified some potential examples in this Article—for example, the Iran nuclear deal and the migration agreement with Mexico, where the different positions about bindingness may have stemmed more from domestic political considerations than from ambiguities in drafting.255 But the adoption of best practice guidelines would not eliminate the possibility of such strategic ambiguity; in those instances, the United States could simply decide not to follow the best practices. We acknowledge, however, that ambiguity will be harder to maintain if best practices are widely followed. In the vast majority of cases, including in essentially all of the agency-to-agency agreements that have been a particular focus of this Article, it is in the interest of the United States to have a common understanding with its partners about whether an agreement is binding.

251 Suvanto, supra note 192.

252 See Eick, supra note 12 (suggesting this as a first step towards standardization).

253 See Valek, supra note 190.

254 See State Department Guidance, supra note 64. As we have noted, this guidance is strangely located only in the archived portions of the State Department’s website.

255 See supra text accompanying notes 42-43.
The current domestic legal framework for international agreements is a product of the 1970s, when the central issue was how to address the shift from Article II treaties to executive agreements. We are in the midst of another fundamental change in how the United States makes international agreements. While executive agreements remain an important part of U.S. foreign relations, they are increasingly being eclipsed by nonbinding agreements—agreements that are often identical in form and function to binding agreements, but not subject to any legal regulation. As in other countries, it is time for the United States to begin considering legal reforms that will ensure sufficient coordination, transparency, and legislative oversight for this vital mechanism for making international commitments.

It is also time to reorient the field of international law to take account of the rise of nonbinding agreements. The growing use of these agreements has potentially profound implications for the future of the international legal system. Both the teaching and study of international law need to be updated to more accurately reflect how nations today are making commitments, and core assumptions underlying the field—including most fundamentally the assumption that international law is operating as law in constraining the behavior of nations—need to be revisited in light of what appears to be an increasing shift toward nonbinding agreements in international cooperation.

There are a range of changes to the field that should be prompted by the rise of nonbinding agreements: First, the teaching of international law courses should be updated to contain more emphasis on these agreements. At present, nonbinding agreements are treated as an afterthought in most international law casebooks, if they are discussed at all. Not only should nonbinding agreements be taught, but there should be more attention to the ways in which such agreements interact with binding agreements—and more generally to the ways in which law and diplomacy intersect.

Second, these agreements should receive significantly more scholarly attention. We hope that the information in our databases of nonbinding agreements will motivate scholars to further analyze them and the uses to which they are put. There is a great deal of terrain still to explore. This Article has focused on the nonbinding documents that are most akin to binding international agreements, but there is a wide range of other nonbinding documents concluded during international cooperation that remain to be documented and explored. This includes unilateral statements, exchanges of notes or letters, and oral arrangements, to name a few. Exploring and documenting this wider range of nonbinding documents would deepen the field’s understanding of how such documents shape international diplomacy.
Third, theories about international law and international cooperation need to be revised to take account of nonbinding agreements. While there has been some scholarship on why states choose to conclude nonbinding agreements over binding ones, that scholarship remains sparse, and relatively little has been written on the subject in recent years. There are a range of questions waiting to be answered, including: Are their contexts or subject areas that are more (or less) amenable to nonbinding agreements? To what extent are nonbinding agreements substitutes for binding agreements, and to what extent do they pave the way to binding agreements? Are states more likely to enter into nonbinding agreements with certain countries and, if so, why? In addition, there are deeper theoretical issues to be explored. What effect does the legal bindingness of a commitment have on the nature of the commitment? Does the presence of a legal commitment affect state behavior in some way that a nonlegal commitment (such as that in a nonbinding agreement) does not?

In short, the rise of nonbinding international agreements opens up a vast range of new questions for international law teachers, scholars, and practitioners to explore.