

## SYMPOSIUM ON CLIMATE CHANGE LOCALISM

### TWO FACES OF FOREIGN AFFAIRS FEDERALISM AND WHAT THEY MEAN FOR CLIMATE CHANGE MITIGATION

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President Trump has done the impossible: he has made the international community enthusiastic about U.S. federalism. Even as they express dismay at Trump's plan to abandon the Paris Agreement, foreign leaders and internationalists have praised the efforts of U.S. states and cities to combat climate change mitigation in accordance with the Agreement's goals.<sup>1</sup> These leaders are responding to what I will call the *outer face* of foreign affairs federalism—the direct international engagement undertaken by U.S. states and cities. This outer face has gained visibility in recent years, spurred on not only by the exigencies of climate but also by developments in legal practice. Less noticed internationally but of great practical importance is the *inner face* of foreign affairs federalism—the ways in which U.S. states and cities interact with the federal government. In this contribution, I first describe these two faces of foreign affairs federalism as they relate to climate and then suggest some ways in which foreign leaders and internationalists could expand the outer face and respond to the inner face.<sup>2</sup>

#### *The Outer Face of Foreign Affairs Federalism: Progressive States and Cities Go to Paris*

After Trump announced the future U.S. withdrawal from the Paris Agreement, the leaders of various states, Indian tribes, counties, and cities publicly committed to “continue to support climate action to meet the Paris Agreement.”<sup>3</sup> This is not the first time that U.S. subnational leaders have taken on an international commitment that the federal government has declined. In the human rights context, some progressive cities have long pledged

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<sup>1</sup> See, e.g., Josh Lowe, [Donald Trump Might Not Agree with Michael Bloomberg and Jerry Brown on Climate Change, But Angela Merkel and Emmanuel Macron Do](#), NEWSWEEK (Nov. 15, 2017); The Elders, [Press Release Condemning US for Quitting Paris Climate Agreement: No One Country Can Dismantle It](#) (June 1, 2017).

<sup>2</sup> My focus here is on how state and local governments *interact* with other governments rather than on the underlying substance—the body—of what they are doing or not doing in terms of climate change mitigation and adaptation. The interactions and the underlying substance are of course closely connected. Cf. J.B. Ruhl & James Salzman, [Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away](#), 98 CALIF. L. REV. 59, 103-06 (2010) (remarking on the “overlapping federal and state (and, through states, local) jurisdictions” engaged in dealing with climate issues and noting benefits that can flow from this pluralist structure).

<sup>3</sup> [“We Are Still In” Declaration](#) (initially released June 5, 2017) (including some states, several tribes, and many cities and counties among its signatories, as well as many leading businesses). In this contribution, I do not discuss the role of business and focus on states and cities without separately discussing counties or Indian tribes.

support for human rights treaties that the United States has failed to ratify.<sup>4</sup> What has been distinctive about the Paris Agreement, however, has been the scope of the response—not just the number of states and cities responding, but also the depth of their responses and the extent to which they have interfaced directly with international actors. California is the leading example: it sent a significant delegation to the Paris negotiations, has entered into numerous international commitments with other countries and subnational governments, and has included trans-border coordination (in the form of cap-and-trade credit swapping with Canadian provinces) as part of its regulatory plan.<sup>5</sup>

Interestingly, the rise of this outer face shares legal roots with the rise of presidential power with respect to international commitments. Since at least the late 1990s, Congress has been largely moribund with respect both to international agreements and to climate. As to international commitments, the Senate has almost entirely stopped approving major treaties that are even slightly controversial. As to climate, Congress has failed to pass meaningful domestic legislation addressing climate change, thereby leaving the preexisting Clean Air Act as the primary source of federal regulatory power with respect to climate. These factors affected U.S. negotiating positions in the Paris Agreement, as I have written about elsewhere.<sup>6</sup> Among other things, the Obama Administration insisted that key portions of the Paris Agreement use aspirational rather than legally binding language, thus facilitating its ability to join this agreement without needing explicit approval from Congress or the Senate.<sup>7</sup>

Just as the use of nonbinding commitments has aided the executive branch vis-à-vis Congress, so have these kinds of commitments made it easier for U.S. states and cities to engage internationally. Pledges, memoranda of understanding, coalitions—these are the tools with which states and cities have made international commitments, such as the Under2 MOU spearheaded by California’s governor Jerry Brown and now joined by “over 200 governments, spanning six continents.”<sup>8</sup> They have thus benefitted from an international legal superstructure that permits and now even welcomes such soft law mechanisms.

During the Obama Administration, the relationship between the executive branch and the outer face of foreign affairs federalism was mutually reinforcing. In its press release celebrating the negotiation of the Paris Agreement, the Obama Administration expressed appreciation for the “complementary actions outside of the [Paris] Agreement by sub-national governments” and specifically mentioned the Under2 MOU.<sup>9</sup> With the Trump Administration, by contrast, the relationship between the Administration and the outer face of foreign affairs federalism is adversarial, reflecting how foreign affairs federalism can be either “cooperative” or “uncooperative.”<sup>10</sup> Explaining at the UNFCCC 2017 conference in Bonn how states and cities are “filling the gap left by Donald

<sup>4</sup> Columbia Law School, Human Rights Institute, [Bringing Human Rights Home: How State and Local Governments Can Use Human Rights to Advance Local Policy](#) 9-23 (Dec. 2012).

<sup>5</sup> Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2149 (2017) (describing these and other aspects of California’s efforts).

<sup>6</sup> Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1731-44 (2017).

<sup>7</sup> *Id.* at 1735-37.

<sup>8</sup> See The Climate Group, [Under2 Coalition](#) (including among its signatories twelve U.S. states and several cities, as well as subnational governments around the world and some nations that have “endorsed” it). This use of soft law also reduces the risk of unconstitutional behavior under the Compact Clause. See Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 743-44 (2010) (noting that nonbinding commitments are less likely to trigger constitutional concern than binding ones, although questioning the appropriateness of this distinction).

<sup>9</sup> White House, Press Release, [U.S. Leadership and the Historic Paris Agreement to Combat Climate Change](#) (Dec. 12, 2015).

<sup>10</sup> See generally Galbraith, [supra note 5](#).

Trump’s statement that he was to pull out of Paris,” Governor Brown likened the Trump Administration to “Saturday Night Live or a comedy program.”<sup>11</sup>

The techniques honed by states and cities with respect to climate are now being put to use elsewhere. Days after the Trump Administration decided to stop participating in negotiations over the nonbinding Global Compact for Migration, leading cities got in on the action. Eighteen U.S. cities joined with numerous international counterparts to request “a seat at the table” at the Compact’s negotiation.<sup>12</sup> As such outward facing federalism becomes commonplace, it shows to the world that, notwithstanding the Trump Administration, there is considerable support on the ground in the United States for U.N. initiatives.

*The Inner Face of Foreign Affairs Federalism: Heterogeneity at Home*

The outer face of foreign affairs federalism is progressive, aspirational, and internationalist. It is also the product of selection bias. The states and cities that want to engage internationally are typically the ones that identify with underlying globalist values. The inner face of foreign affairs federalism is far more heterogeneous. As states and cities engage with the federal government, they do so in ways that pressure the executive branch to resist climate change mitigation as well as to address it.

Litigation is an obvious tool, used by states on both sides of the debate. Twenty-four states sued to block the Environmental Protection Agency’s (EPA’s) Clean Power Plan,<sup>13</sup> which was the centerpiece of the Obama Administration’s plan for implementing the Paris Agreement. To date, they have achieved their end—a Supreme Court stay blocked the Clean Power Plan from ever going into effect, and the Trump Administration is now seeking to roll it back.<sup>14</sup> President Trump’s first EPA Administrator, Scott Pruitt, came out of Oklahoma state government, where he “sued the EPA more than a dozen times during the Obama Administration.”<sup>15</sup> On the progressive side, states are comparably seeking to pressure the federal government to address climate change. Numerous states and cities have filed public comments asking the EPA not to repeal the Clean Power Plan,<sup>16</sup> and some will no doubt sue if the EPA does issue a final rule repealing it. Eighteen states have already sued to block the EPA’s proposed rollback of Obama-era fuel-efficiency rules.<sup>17</sup>

In addition to litigation, states can negotiate with the federal government over the implementation of federal climate policy. The structure of the Clean Air Act builds in a healthy respect for federalism, relying considerably on states in the implementation process. During the Obama years, some states passed legislation signaling their disapproval of the EPA’s attempts to regulate climate and urging maximum flexibility for states.<sup>18</sup> Now, in the Trump Administration, considerable negotiation has apparently gone on between the EPA and California, which has the

<sup>11</sup> Sonya Angelica Diehn, *California’s Jerry Brown on How to Beat Trump on Climate Change*, DEUTSCHE WELLE at USA TODAY (Nov. 13, 2017).

<sup>12</sup> Metropolis World Ass’n of Major Metropolises, Position Paper Submitted as a Contribution to the United Nations Global Compact for Safe, Orderly and Regular Migration, and to the Global Compact on Refugees 5 (Dec. 12, 2017) (on file with author); see also Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 311 (2018) (providing additional details).

<sup>13</sup> State of West Virginia et al. v. Environmental Protection Agency, Case No. 15-1363, *Complaint* (U.S. Court of Appeals for the District of Columbia Circuit, 2015).

<sup>14</sup> Juliet Eilperin, *EPA’s Pruitt Signs Proposed Rule to Unravel Clean Power Plan*, WASH. POST (Oct. 10, 2017).

<sup>15</sup> Brady Dennis, *Scott Pruitt, Longtime Adversary of EPA, Confirmed to Lead the Agency*, WASH. POST (Feb. 17, 2017).

<sup>16</sup> William Petroski, *Iowa AG Müller Opposes Trump Administration’s Repeal of Clean Power Plan*, DES MOINES REGISTER (Apr. 27, 2018) (noting that a coalition of nineteen states, one county, and the District of Columbia joined in objecting to the repeal).

<sup>17</sup> Chris Mooney, *California, 17 Other States Sue Trump Administration to Defend Obama-era Climate Rules for Vehicles*, WASH. POST (May 1, 2018).

<sup>18</sup> Nat’l Conference of State Legislatures, *Climate Change: State Policy Update 2012–2014* (May 1, 2014) (listing legislation).

option under the Clean Air Act of setting automobile standards that are stricter than the federal standards, conditional on the receipt of a waiver from the executive branch.<sup>19</sup>

States and to a lesser extent cities thus have levers for engaging in federal climate policy. At the same time, however, they are subject to federal law. Thus, “subnational action on climate change in the United States needs to be crafted and coordinated carefully, both to maximize its substantive impact and to manage the undisputed litigation risks associated with such regulation.”<sup>20</sup> If states or cities wish to develop their own climate policies, as California has done, then they must do so in ways that are not preempted by the Clean Air Act or other federal law, not in violation of the dormant commerce clause, and consistent with the constitutional limits on states’ engagement in foreign affairs.<sup>21</sup> Where the scope of federal law is unclear, as it is in some of these spaces, then states must decide how willing they are to push the boundaries.

### *The View from Outside the United States*

As the Trump Administration ignores the catastrophic threat of climate change, it is only reasonable that other nations should look to the choices of U.S. states and cities rather than wait for the next presidential election. What is more surprising is that these nations seemed focused mainly on the “blue” states and cities that are already actively pursuing international engagement and are not devoting energy to less engaged (and typically redder) states and cities. In what follows, I describe how, in other areas of foreign relations law, foreign nations use additional approaches to target subnational actors and suggest that these approaches might also be useful in the climate context. I discuss three approaches.

The first of these approaches is the simplest: communication with states and cities that are not currently engaging internationally on the issue of climate. Foreign nations and international actors can seek to grow the outer face of foreign affairs federalism by talking directly not only with unengaged blue state leaders but also with red state leaders about climate change. This can be done despite the absence of ideological alignment. Governor Greg Abbott of Texas and Mexican President Enrique Peña Nieto are probably not fellow travelers on most subjects, but they have met to discuss cross-border energy issues.<sup>22</sup> At such meetings or through outreach focused specifically on climate change, foreign leaders could emphasize the importance of mitigation. The effect of such communications probably would be modest at best, but that is still worth something. The more state and local leaders internalize that opposing climate change mitigation puts them on the wrong side of history, the more they may be willing to address mitigation or at least not oppose efforts to address it.

A second approach is pressure. When President Trump announced his intention to impose world-wide steel and aluminum tariffs, the European Union responded by stating that it would retaliate with tariffs on Harley-Davidson motorcycles, Levi jeans, and Kentucky bourbon—products tied to the seats of key members of Congress.<sup>23</sup> When Arizona passed a controversial law targeting undocumented immigrants, Mexico responded in a targeted way,

<sup>19</sup> Hiroko Tabuchi, *Quietly, Trump Officials and California Seek a Deal on Car Emissions*, N.Y. TIMES (Apr. 5, 2018).

<sup>20</sup> Cary Coglianese & Shana Starobin, *After a Federal Climate Policy Retreat, States Should Proceed with Caution*, THE REGULATORY REVIEW (Feb. 22, 2018).

<sup>21</sup> For an interesting series of exchange on this subject, see *Series of Essays on State and Local Regulation of Climate Change*, THE REGULATORY REVIEW (posting five essays published between September 2017 and February 2018, three by academics Cary Coglianese and Shana Starobin and two by practitioners Craig Segall and David Hults (both involved in California’s regulatory program)).

<sup>22</sup> Office of the Texas Governor, Press Release, *Governor Abbott Meets with Mexican President Enrique Peña Nieto* (Feb. 22, 2016).

<sup>23</sup> Max Greenwood, *EU Weighs Tariffs on Bourbon, Blue Jeans, Harley-Davidson*, THE HILL (Mar. 2, 2018).

including by issuing a “travel alert” specific to Arizona.<sup>24</sup> In the climate context, foreign nations could issue travel alerts about particularly recalcitrant states, decline to offer tax incentives to U.S. companies headquartered in these states (unless these companies have voluntarily adopted strong mitigation practices),<sup>25</sup> and encourage their own companies not to establish production facilities in these states. Such policies would carry their own costs and challenges, including the need for calibration with regard to climate-mitigating cities located within resistant states, but there is nonetheless room for the use of pressure as a tool.

A third approach is to be attuned to the inner face of foreign affairs federalism in negotiating with the federal executive branch. No matter what administration is in power, it is always going to be engaged in both international conversations and federalism conversations with respect to climate. In other areas of law related to foreign relations, it has long been obvious that federalism may limit the ability of the executive branch to fulfil commitments, as when the George W. Bush Administration proved unsuccessful in forcing Texas to comply with a ruling of the International Court of Justice with respect to a death row inmate.<sup>26</sup> Foreign nations and international actors need to be conscious of such limits in the climate context even where sympathetic presidents are concerned, as the Supreme Court stay of the Clean Power Plan makes all too clear. And when unsympathetic presidents are in power, foreign actors might consider linking their persuasive efforts aimed at these presidents to the efforts being exerted by progressive states and cities through the inner face of federalism. If nations interested in climate mitigation have any clout to encourage the federal government not to put roadblocks in the way of California’s automobile emissions standards, they should be using it.

### *Conclusion*

In the end, supportive states and cities are a third-best alternative to those hoping for vigorous climate efforts from the United States. They will not fill all of the gaps left by the Trump Administration, and even a sympathetic president like Obama cannot do as much as Congress could, if it would only legislate and do so wisely. If the wry statement attributed apocryphally to Winston Churchill is correct, then the United States will do the right thing in the end—but only after exhausting all possible alternatives. In the meantime, the levers of federalism will do what they can.

<sup>24</sup> Barbara Grijalva, *Mexico Issues Travel Alert for Arizona*, TUCSON NEWS NOW (Apr. 2010). For a detailed discussion of targeted pressure, including examples of past usage, see Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 691-93 (2002).

<sup>25</sup> Cf. Spiro, *supra* note 24, at 692 & n.170 (describing the United Kingdom’s use of targeted retaliation through the withholding of tax incentives to U.S. companies based in states with certain tax practices).

<sup>26</sup> See generally *Medellin v. Texas*, 552 U.S. 491 (2008).