

## SYMPOSIUM ON CLIMATE CHANGE LOCALISM

### ON LOCALISM AND THE PERSISTENT POWER OF THE STATE

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On June 1, 2017, President Trump declared that the United States would “cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country.”<sup>1</sup> The United States’ de facto withdrawal from the Paris Agreement represented an important inflection point for conceptualizing the role of nonstate actors in addressing climate change. President Trump’s announcement was met with an outpouring of resistance and widespread and concerted efforts to mobilize substate, nonprofit, and private actors to step into the void created by his announcement and to help keep the United States on track to pursue domestic and international commitments to address climate change despite federal recalcitrance. Within the leadership void created by the Trump Administration and amidst the increasingly extensive body of sub- and nonstate climate efforts, it is tempting to decenter the role of the state or to underestimate the persistent power of the state to shape the approach and effectiveness of nonstate actions. Failing to recognize that the state retains significant power in this field undermines efforts to understand the realities within which nonstate actors operate. This creates a set of heightened expectations for these actors that defies the reality of the political, economic, and social resources available to them and masks the challenges inherent in relying upon a fragmented, shifting, and differently accountable set of actors to effect pervasive change.

This essay situates the current up-swelling of nonstate climate actions in the United States within the context of state power and presidential leadership. It first identifies the implications of the shift from the Obama Administration to the Trump Administration on international and domestic efforts to address climate change. It then offers a perspective on the implications of this shift for the evolving interplay between the state and nonstate actors in the United States. The Trump Administration’s approach to climate change demonstrates simultaneously the continuing, emphatic power of the state to enable or to cripple large-scale change, and the increasingly diverse and sophisticated range of nonstate actors that operate individually and collectively in interstitial spaces to effect change in response to perceived deficiencies of the state. Ultimately, while the state remains a dominant and indispensable actor within this arena, nonstate actors are finding new and creative ways to push the boundaries of the interstitial spaces within which they operate in such a way as to influence the state’s willingness and ability to respond to climate change in the long term.

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<sup>1</sup> The White House, [Statement by President Trump on the Paris Climate Accord](#) (June 1, 2017).

### *The Trump Era As an Inflection Point*

Through initiatives such as We are Still In<sup>2</sup> and the Climate Alliance,<sup>3</sup> “more than 2,500 non-federal actors representing more than half the U.S. economy ... have pledged their support for the Paris Agreement goals.”<sup>4</sup> The scale of these commitments is significant; “the combined Gross Domestic Product (GDP) of U.S. states and cities that have stated they remain committed to action in line with the emissions reductions goals of Paris Agreement would be larger than 195 out of 197 Parties to the Framework Convention.” These commitments are further bolstered by the “more than 1,300 businesses with U.S. operations, representing \$25 trillion in market capitalization and accounting for 0.9 gigatons (Gt) carbon dioxide equivalent (CO<sub>2</sub>e) of GHG [greenhouse gas] emissions per year” that have voluntarily adopted GHG targets.<sup>5</sup>

The burgeoning nonstate climate movement builds on a long history of cooperative environmental federalism and grassroots environmental movements. The scale of the effort, however, is unparalleled. Consequently, President Trump’s announcement and the ensuing response raise fundamental questions not only about the future of the Paris Agreement, but also about the promise and perils of sub- and nonstate actors<sup>6</sup> stepping up to fill gaps created when the state abdicates power or changes course in an area over which it exercises pervasive influence and legal authority.

### *The Continuing Centrality of the State*

Nonstate actors play an ever-expanding role in the development, implementation, and enforcement of domestic and international law. Within the context of international climate change law, states have recognized the centrality of nonstate actors in addressing climate change since they first adopted the United Nations Framework Convention on Climate Change (UNFCCC) in 1992. Indeed, the UNFCCC specifically called for nongovernmental actors to participate in addressing climate change.<sup>7</sup> Over the ensuing two decades, nonstate actors emerged as critical forces in influencing the development of local, regional, and private climate actions and, at times, playing a role in shaping state responses to climate change. When states adopted the Paris Agreement in 2015, they directly called upon the parties “[t]o incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities” and to “[e]nhance public and private sector participation in the implementation of nationally determined contributions.”<sup>8</sup>

<sup>2</sup> We are Still In is an alliance that brings together “mayors, county executives, governors, tribal leaders, college and university leaders, businesses, faith groups, and investors” to declare their intent to continuing efforts to implement the United States international climate pledge. See [WE ARE STILL IN](#).

<sup>3</sup> The Climate Alliance consists of “a bipartisan coalition of governors committed to reducing greenhouse gas emissions consistent with the goals of the Paris Agreement.” [UNITED STATES CLIMATE ALLIANCE](#).

<sup>4</sup> Kristin Ugusky & Kevin Kennedy, *By the Numbers: America’s Pledge Shows How US Is Taking Climate Action Without Trump*, WORLD RESOURCES INSTITUTE (Nov. 11, 2017).

<sup>5</sup> See, e.g., [America’s Pledge: Phase 1 Report—States, Cities, and Businesses in the United States are Stepping up on Climate Action](#) 14 (Bloomberg Philanthropies, 2017).

<sup>6</sup> For simplicity, this essay refers collectively to substate actors, including U.S. states and cities, and nonstate actors, including a range of private sector and nongovernmental actors, as nonstate actors. This generic term should not be understood to mask the varied roles that these different actors play.

<sup>7</sup> [UN Framework Convention on Climate Change](#) arts. 4(1)(i) & 7(2)(1), *opened for signature* June 4, 1992, 31 ILM 849 (1992) (entered into force Mar. 21, 1994).

<sup>8</sup> [Paris Agreement](#) arts. 64(b) & 6(8)(b), Dec. 13, 2015, *in* UN Framework Convention on Climate Change, Report of the Conference of the Parties on its Twenty-First Session, Addendum, at 21, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

At the international level, then, nonstate actors are viewed as vital to the development of more effective and equitable responses to climate change. The same transformations are visible at the domestic level, with subfederal, nongovernmental, and private sector actors playing expanding roles in shaping national approaches to climate change, through efforts to fill legal and political gaps, pressure public and private actors from the local to the federal level, and shape public perceptions about climate change.

The influence of nonstate actors on the development of climate change law reflects a broader trend toward the deformalization of international law and the accompanying increase in hybrid public-private partnerships. This deformalization is accompanied by a parallel conversation about the disaggregation, or decentering, of the state. There is a rich body of literature exploring the increasingly pervasive role of private actors, nongovernmental organizations, specialized government agencies, and international organizations in shaping systems of international governance.<sup>9</sup> Yet, as vividly highlighted by the success of populist movements worldwide, the impact of President Trump's election, and the Brexit vote, the state remains the locus of power and the principal actor in international affairs. Hence, while the shape and functioning of the state are increasingly contoured and influenced by a diverse mix of nonstate actors, the state itself remains "the constituent unit of the international system."<sup>10</sup>

While nonstate actors cannot replicate the systemic impact of the state, they are playing an ever-expanding role in filling substantive and procedural gaps, stimulating normative change, facilitating new modes of cooperation, experimenting with different tools and techniques for change, and, perhaps most importantly, applying pressure to state actors. This influence is most evident when key state actors abdicate authority or make dramatic political course changes, as with President Trump's approach to climate change. The role and efforts of nonstate actors in the United States illustrate this point.

### *The Constructive and Destructive Power of the State*

In contrast to President Trump's stance on climate change, President Obama is generally portrayed as a champion of climate policy. He ran for office on a platform that committed to prioritizing efforts to address climate change, expended significant political capital to structure a complex domestic political and regulatory response to climate change, and carved out a reputation as an international climate leader. Over the course of his eight years in office, he laid the foundations for an ambitious, economy-wide strategy for addressing climate change and combatted a paralyzed Congress by using executive and regulatory authority "to take a remarkable variety of steps to reduce greenhouse gas emissions."<sup>11</sup> Despite great successes, President Obama's climate legacy is more complex and the results more fragile than are often depicted.

While President Obama tackled climate change aggressively during his second term, his failure to successfully pursue federal legislative or comprehensive regulatory action during his first term,<sup>12</sup> coupled with his extensive reliance on vulnerable executive and regulatory measures, undermine the weight and permanency of his leadership on climate change. Even if President Trump continues to chip away at pieces of Obama's climate strategy, however, President Obama fundamentally altered the nature of the domestic policy conversation around climate change. Similarly, he reasserted U.S. leadership on climate change at the international level in a way that enabled more fruitful bilateral and international negotiations that ultimately proved instrumental to the adoption of the Paris Agreement.

<sup>9</sup> See, e.g., Jose E. Alvarez, *Governing the World: International Organizations As Lawmakers*, 31 SUFFOLK TRANSNAT'L L. REV. 591 (2008).

<sup>10</sup> Mohamed S. Helal, *The Crisis of World Order and the Constitutive Regime of the International System*, FLA. STATE L. REV. (forthcoming).

<sup>11</sup> David Bookbinder, *The Obama Climate Legacy*, NISKANEN CENTER (April 11, 2017) (quoting Cass Sunstein).

<sup>12</sup> Legislative defeats and comparative inaction during President Obama's first term are largely attributable to the ongoing economic crises. See, e.g., Cass R. Sunstein, *Changing Climate Change, 2009-2016*, 42 HARV. ENVTL. L. REV. 231, 245-47 (2018).

The simultaneously sweeping nature and fragility of President Obama's leadership on climate change aptly demonstrates the constituent power of the state. President Obama's election to the U.S. presidency resulted in a relatively rapid and dramatic influence on the primary and secondary rules of law at the international and domestic level. His predecessor, President George W. Bush, opposed U.S. participation in the Kyoto Protocol and worked assiduously to avoid the creation of any enforceable domestic climate change rules. During President Bush's presidency, the United States did not merely abdicate leadership on the development of international climate change law, but it also actively opposed the Kyoto Protocol, leading to significant delays in its entry into force. The domestic legal vacuum and the international leadership vacuum that President Bush created, however, was filled by President Obama at a pace and to a degree that could only be achieved through the vehicle of the state. State power, of course, can be wielded to constructive or destructive ends, and with the transition from President Obama to President Trump, we are witnessing the power of the state to dismantle domestic rules and to derail international cooperation and commitments.

*The Essential but Constricted Role of Nonstate Actors*

Each shift in presidential leadership demonstrates the decisive and impactful role that the state plays in shaping climate law and policy. Upon closer inspection, however, these shifts also reveal the increasing influence of nonstate actors on the shape and effectiveness of state policies.

An extensive, well-organized, and established collection of nonstate actors whose organizational roots were laid during President Bush's Administration advocated for and enabled President Obama's climate strategy. The perceived failings of the state during the Bush Administration prompted an outpouring of activity on the part of nonstate actors, who attempted to use every possible legal tool and political pressure point to prompt a more progressive federal response to climate change.<sup>13</sup> The burst of litigation, state and local lawmaking, and public-private partnerships that occurred between 2001-09 was more widespread, coordinated, and extensive than previous efforts to influence federal environmental policy. With the shift from the Bush Administration to the Obama Administration, the role that nonstate actors played in shaping climate policy changed, but the momentum and influence persisted.

During the Obama Administration, while the state asserted authority and leadership on climate change, the efforts of nonstate actors both facilitated and limited state efforts. Obama's leadership on climate change largely obviated the need for aggressive regulatory litigation designed to force the federal government's hand. Instead, his leadership created an enabling environment for key substate actors, such as California, to develop increasingly sophisticated subfederal legal regimes and innovative public and private partnerships that pushed the boundaries of federalism.<sup>14</sup> Equally, with the Executive leading efforts to develop an expansive Clean Air Act regime to limit emissions from coal-fired power plants and automobiles and a suite of additional climate policies that focused on everything from quantifying the social costs of carbon to developing energy efficiency programs, environmental NGOs could dedicate greater resources to challenging federal policies in complementary areas (e.g., fracking and the Keystone Pipeline). Similarly, subfederal governmental actors were able to focus on local adaptation needs and mitigation opportunities. Meanwhile, within the private sector, hundreds of companies began "taking action to reduce their exposure to the financial risks of climate change, quantify and control their greenhouse gas emissions, and adapt to impacts either now occurring or just over the horizon."<sup>15</sup> The relationship between the Obama Administration and many of these nonstate actions were mutually supportive. Burgeoning nonstate efforts to

<sup>13</sup> See generally CINNAMON CARLARNE, [CLIMATE CHANGE LAW AND POLICY: EU AND US APPROACHES](#) chs. 3 & 4 (2010).

<sup>14</sup> See, e.g., DANIEL A. FARBER & CINNAMON P. CARLARNE, [CLIMATE CHANGE LAW](#) ch. 7 (2018); Ca.Gov, [Collaboration on Climate Change](#).

<sup>15</sup> J. Kevin Healy & Bryan Keyt, [The Case for Corporate Action on Climate Change](#), 48 ENVTL. L. REP. NEWS & ANALYSIS 10381, 10381-82 (2018).

address climate change were enabled by the executive branch and, in turn, facilitated the Administration's efforts to structure domestic and international climate regimes.

At the same time, federal and nonstate actors hindered President Obama's climate leadership. During his second term, a paralyzed Congress rendered legislative action on climate change virtually impossible and constrained the Administration's negotiating ability at the international level, since any agreement requiring Senate ratification was doomed from the outset. The continuing political power of the fossil fuel lobby, powerful nonstate actors such as the Koch Foundation, and vocal and litigious states such as Texas and Alabama further constrained the President's climate agenda.

With the election of President Trump, the dramatic reversal in the position of the state has shifted more of the burden for climate action to nonstate actors, while also creating more barriers to nonstate actions. State opposition to existing climate commitments simultaneously heightens the importance of nonstate actors by putting the onus on them to maintain progress towards climate goals while also making the achievement of those goals much more difficult. Nonstate climate efforts now lack the support and facilitation of the state and face greater pushback at every step, including through inevitable challenges to the constitutionality of subfederal laws and regional or foreign partnerships, deep budget cuts to climate-related programs, aggressive assaults on climate rules, and the general diffusion of nonstate actor resources as the suite of unaddressed environmental challenges grows.

It is against this backdrop that we must view the current efforts of nonstate actors. The scale and intensity of efforts by groups such as We are Still In and the Climate Alliance juxtaposed against over a decade of efforts at the subfederal level to develop strategies for addressing climate change creates an increasingly weighty and meaningful base upon which the state could build to achieve long-term and effective change if it chose to do so. Many of these efforts are locally focused and may thrive with minimal disruption in response to state policy changes. Crucial efforts to achieve large-scale decarbonisation and to address pervasive and intensifying adaptation needs in the United States, however, can only be achieved through a combination of diversified, nonstate efforts coupled with complementary and supportive state policies, with state support and leadership being indispensable to the large scale, lasting change needed to effectively address climate change in the long term.

Equally, at the international level, the Paris Agreement and corresponding developments in the international climate regime suggest that the international community is doubling down on the essential role that nonstate actors can and must place in addressing climate change globally. Nevertheless, in common with the broader international system, the international climate regime remains inherently state-centric, constraining the ability of nonstate actors to influence and implement the underlying goals of the system. Within this persistent state-centric context, U.S. leadership on climate change has been fleeting and is increasingly limited by the emerging power and influence of China and other rapidly developing economies.

As demonstrated by President Obama's engagement with international climate negotiations, however, even domestically constrained U.S. leadership can facilitate international cooperation. Similarly, as exemplified during George W. Bush's administration, active U.S. opposition to international cooperation and advancement of shared climate goals can derail progress. Despite important advances in international cooperation and the proliferation of supportive nonstate networks, President Trump's hostile approach to international climate change law is unprecedented and threatens to undermine ongoing efforts to advance collective, state-based action on climate change.

### *Conclusion*

For more than two decades, subfederal, nonprofit, and private sector actors have steadily increased their climate-related activities and incrementally influenced federal and international climate policy. Regardless of how diverse, plentiful, and substantive the actions of nonstate actors become, however, the state remains the ultimate source of power and arbiter of influence. In the long term, effective and sustainable climate responses require active and consistent state engagement undergirded by a network of supportive and diverse nonstate actors.