

What If California Had a Foreign Policy? The New Frontier of States' Rights

When President Donald Trump announced his decision to withdraw the United States from the Paris agreement on climate change, the response from local and state officials was swift. The mayors of 61 U.S. cities quickly released an open letter promising to meet the commitments agreed to under the Paris framework. Twelve states and Puerto Rico announced the formation of the United States Climate Alliance, a coalition of state governments committed to upholding the Paris agreement. And Michael Bloomberg, the U.N. special envoy for cities and climate change, submitted to the U.N. a joint statement signed by more than one thousand business leaders, mayors, governors, and others prepared to quantify the emissions reductions that can be achieved in the United States without the federal government's help. Entitled, "We are Still In," the letter symbolizes an important phenomenon in U.S. foreign policy, one that is taking off in the age of Trump—the rise of assertive states and cities ready to act on their own on the international stage.

Leading the pack is California, led by Governor Jerry Brown who is in the home stretch of his more than forty years in public life. Even as President Trump spoke in the Rose Garden in June 2017, Brown was on his way to China, where a formal meeting with President Xi Jinping in the Great Hall of the People—an honor typically reserved for visiting Heads of State—signaled a budding partnership between California and China to battle carbon emissions. Brown eagerly positioned California at the forefront of global efforts to confront climate change, just as China seemed poised to assume the leadership role abandoned by President Trump.

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But this was not just symbolism, and it was only the most recent chapter in California's international climate policy. While the state's far-reaching fuel economy standards get the lion's share of attention, more than 170 jurisdictions, including Canada and Mexico, have embraced Brown's Under 2 Coalition—a nonbinding, global agreement launched in 2015, before the Paris agreement, that commits signatories to reduce their emissions to net-zero by 2050. Collectively, the signatories represent nearly 40 percent of the global economy.¹

Because California prides itself on its global reach, the idea of a distinctively Californian foreign policy has been kicking around for a while. Governor Arnold Schwarzenegger famously celebrated the state as the modern-day equivalent of Athens and Sparta in 2007, a “nation state” by virtue of its economic strength, population, and technological force.² Indeed, California is the world's sixth largest economy—larger than France or Brazil. Its 40 million residents make it the most populous state in the United States. And between Silicon Valley and Hollywood, California has almost unrivaled capability in terms of technological leadership and cultural influence.

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By virtually any measure, California would be a global powerhouse except for two fundamental constraints: it lacks many of the legal attributes and policy instruments of a nation-state, and the U.S. Constitution expressly reserves for the federal government responsibility for the conduct of foreign affairs. As a result, until recently, the enthusiasm for a Californian foreign policy far exceeded the reality. Before its climate leadership, California's foreign policy looked pretty parochial and a lot like any other state or province with a focus on export promotion, trade, and foreign investment.

Though some legal constraints remain, the Trump presidency has spurred, and will likely continue to galvanize, a range of new efforts by California—and other states and municipalities—to test the legal limits of federal power in foreign affairs. Californians are proud that their commitments to diversity, the environment, and human rights set them apart from what they see emanating from Washington D.C., while California's politicians will undoubtedly see the value in resisting Trump administration policies and distinguishing California from the United States as an actor in global politics. Among others, an ambitious governor—one who already ran for president three times—is seemingly prepared to see just how far California can get.

Whether these efforts succeed will depend, in part, on how much latitude the courts ultimately grant to the states. Historically, the answer has been not much. But these new state initiatives may be emerging at just the right time. In the midst

of a long-running transformation in how foreign affairs are conducted and an evolution in legal thinking about federalism's boundaries, the time to challenge federal foreign affairs powers may have finally arrived. Subfederal actors are building a legal case and infrastructure for their expanded role, while pressing forward on climate, human rights, and immigration. While the federal government could rely on the judiciary to referee this contest in an episodic fashion, the pace of expanded state and municipal activism is unlikely to slow. National policymakers would be wise to wake up to this new set of practices and think strategically about how to harness the opportunities while mitigating the risks.

Erosion of the Unitary State

It used to be the case that foreign policy was considered the sole province of diplomats and soldiers—agents of a national government pursuing its interests on the international stage. To understand foreign policy, one needed only to understand the power and interests of competing nation-states. National governments were seen to act as coherent units, making decisions that served the national interest and contending with one another to accumulate greater power and influence. This state-centric view of world affairs originated with the Peace of Westphalia in 1648, and is still taught to undergraduates as a first approximation of how international relations operate. For better or worse, it is also how our Constitution conceptualizes the appropriate roles of national and state governments in the conduct of foreign affairs.

The state-centric view of world affairs has never been fully compelling empirically.

But this perspective was never fully compelling as an empirical matter. It missed the diverse interests and competing power centers of the federal government. Cabinet agencies, Congress, the military, and the courts all shape how national interests are defined and what instruments are used to pursue them. It overlooked the network of domestic actors outside of government—corporations, non-governmental organizations, unions, religious institutions, unaffiliated billionaires, and others—that seek to influence the foreign policy priorities of the United States, shape the international environment in which foreign policy is conducted, and impact domestic politics in other countries directly, often acting autonomously in pursuit of their own interests. And it ignored the growing web of transnational governmental relations: networks of government officials (including policymakers, regulators, and enforcement agencies) that operate across borders to cooperate on issues as diverse as banking, transnational crime, corruption, taxation, and immigration, often without explicit direction from the president.

Over time, these realities have brought significant changes to the architecture of U.S. foreign policy. The emergence and growth of the National Security Council since the passage of the National Security Act of 1947 reflects a recognition that the management and coordination of competing power centers in the executive branch is key to articulating and implementing a coherent foreign policy. The proliferation of informal mechanisms for consultation, formal advisory committees, and public-private partnerships signal how seriously policymakers take the task of understanding, influencing, and channeling the attention and resources of non-governmental actors including NGOs, corporations, and philanthropies. Whereas it used to be the case that international diplomacy was conducted through the State Department, using a professional corps of trained diplomats, now almost every federal agency—from the Department of Agriculture to Health and Human Services and the Environmental Protection Agency—has its own office of international affairs, facilitating the kind of expert-led, transnational cooperation that is key to addressing global problems. The dispersal and fracturing of the international relations function across government has, no doubt, made life more difficult for State Department diplomats, and it has fundamentally challenged the notion of a single and unified U.S. government operating with a clear and coherent mandate.

The foreign policy activism of states and cities fits quite naturally in this increasingly complex network of actors that influence and make foreign policy. In one sense, they are like any other pressure group in the political system. In the bargaining process to determine U.S. foreign policy, states and cities can make their voice heard by advocating directly to senior policymakers in the executive branch, influencing elected officials in Congress, or leveraging their relationships with federal agencies. But states and cities differ in important ways as well. In particular, governors and mayors are elected representatives of a geographic constituency with a mandate to advance that state's or region's particular interests. When those interests are poorly served by the federal government's foreign

policy, the pressure to act in ways that challenge the federal government's preeminence can be irresistible.

Examples abound. In the 1970s and 1980s, hundreds of cities and states declared themselves nuclear-free zones to keep nuclear weapons production-related materials out of their jurisdictions during the Cold War. Today's resistance to federal immigration law has its roots in the "sanctuary" movement of

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the 1980s, when Wisconsin and a number of cities, including Berkeley—spurred by religious congregations—committed to provide safe-haven to refugees fleeing

conflicts in Central America. When the Reagan administration was embracing “constructive engagement” with South Africa’s apartheid regime in the 1980s, states and municipalities played a significant role in advancing the sanctions movement, prohibiting engagement with businesses investing in South Africa.³

The notion that foreign policy functions as a reflection of the interests of a “unitary state” has eroded in practice. Today, a huge diversity of actors—sometimes acting in unison, oftentimes acting in parallel, occasionally conflicting—shape how U.S. interests are defined and advanced on the world stage. Will the law adapt to this new reality? There are some reasons to think that California and others may have more room to play, as a result of a revolution in federalism that has challenged federal preeminence in a range of new areas.

“One Voice” in Foreign Policy?

If the “unitary state” has given way to a richer transnational vision of international relations, then it might follow that legal understandings have shifted as well. After all, the majesty of the law, as Justice Oliver Wendell Holmes said long ago, is its ability to adapt to changing circumstances. But legal change in the area of foreign affairs federalism, as it is sometimes called, has come more slowly. The growing disconnect between the law and ground-level realities of how foreign relations are actually conducted has put the two on a collision course. The result is a heady mix of legal risks and opportunities as California and other subfederal governments move onto the global stage.

The conventional view is that the Constitution makes foreign affairs the exclusive province of the federal government. While this view has many facets, much of it is built around a single and appealing turn of phrase: the United States must be able to speak with “one voice.” The idea, built out of multiple provisions of the Constitution and voiced by the Supreme Court as far back as the 1820s, is that sound foreign relations depend on clear and deliberate communication among sovereigns. It cannot be entrusted to a provincial and parochial chorus of states and localities.

The “one voice” idea is a convenient shorthand, but the legal case in its favor is hardly ironclad. Begin with the text of the Constitution itself. True, the Framers plainly prohibited certain state actions. States may not engage in war or make treaties, and they may not enter into compacts or agreements with other states, whether domestic or foreign, without Congress’s permission. But the textual case for the “one voice” concept otherwise lacks much punch. To begin, the Constitution sprinkles foreign affairs powers across both the legislative and executive branches. Congress gets to regulate foreign commerce, define offenses under international law, declare war, and raise and regulate the military, while the president is

the commander in chief, makes treaties, and nominates ambassadors (the latter two with Senate concurrence). From the start, then, the Constitution's commitment to separation of powers has meant multiple federal voices on foreign affairs, not a single one. More importantly, on foreign affairs the Constitution is, as a leading scholar put it, a "strange, laconic document."⁴ It carefully specifies many foreign affairs powers but omits mention of others. Where, to cite a few examples, is the power to recognize other governments, open consulates in other countries and admit foreign consulates, or acquire or cede territory?

The Supreme Court has tried to fill gaps by fleshing out the "one voice" concept, but questions remain as to just how far the concept stretches. In cases of direct conflict between federal and state policies, all agree that state policy must yield. The Supremacy Clause, which says that federal law trumps state law, is clear on that score. But that leaves myriad situations in which federal and state law do not formally conflict, where the case for "one voice" is more complicated and only a small handful of Court decisions light the way.

A standard concern about multiple voices is that, even where there is no direct conflict between federal and state law, state actions can still create big federal problems. Indeed, an ill-considered state tax on foreign commerce, the Court has said, might benefit the particular state but risk retaliation—whether economic, military, or otherwise—against the whole nation. Here, the "one voice" doctrine can be seen as a curb on a kind of free-rider behavior by states, but it is not always obvious which state actions are rogue enough to count. The Court has further suggested that it is not just state interference with concrete and continuing federal action, but also *potential* federal action, which can impair the federal government's solo voice. For instance, state action can, by removing a potential "bargaining chip," deprive the federal government of needed leverage in its dealings with other nations. Thus, when Massachusetts moved in 1996 to sanction Myanmar by refusing to enter into procurement contracts with companies that did business with its repressive government, the Court held that the Bay State's refusal to deal was preempted by a federal law that imposed similar sanctions but gave the president flexibility to raise or lower them in nudging the regime toward better behavior. The Massachusetts law thus stood as an "obstacle" to federal policy because it took away "levers of influence" that the federal government might wish to hold in reserve for future use.⁵

On this expansive version of the "one voice" idea, even seemingly symbolic state-level slights can muffle the federal government's voice. In a key case from the 1960s, the Court confronted an Oregon law that, in a jab against Communist countries, barred foreign nationals from collecting inheritances in Oregon unless an Oregonian would have the same rights in the other country. The Court struck down application of the law, but it did so not because of a direct conflict between federal and state law—the Nixon administration told the Court the

Oregon law did not affect its conduct of foreign affairs.⁶ Rather, the Oregon law fell because it would require judges to sit in judgment of foreign nations—and gauge their “democracy quotient,” as Justice William Douglas put it.⁷ This, the Court said, was a task for the feds alone—a move in the Cold War’s ideological chess match that was far too important to leave to the state-level rabble.

Weaving together multiple threads of the “one voice” concept, we can imagine current legal doctrine as creating a defensive halo that radiates out from any particular area of federal foreign policymaking. This halo is brightest near its center, where federal and state policies directly conflict. But its light grows progressively dimmer as it moves outward and touches state actions that pose a less direct conflict with federal law. The million-dollar questions as California and other subfederal governments move onto the global stage are: Just how far out does the defensive halo extend as the degree of federal-state conflict weakens—or, in the current context, where the federal government has left the field altogether and has no policy at all? And how, in determining the halo’s reach, should the Court weigh other factors, such as the importance and pedigree of the state interest, the state’s motive in pursuing it, or the level of competence the state brings to the table?

Just how far does the defensive halo of federal foreign policymaking extend?

Because the Court has only sporadically addressed these questions over time, and as states and localities steadily move onto the global stage in the new and more dynamic world of foreign relations, the foundation of the “one voice” idea suddenly seems full of fissures and cracks. It is these fissures and cracks that states and other subnational governments will have to exploit as they pursue opportunities for global leadership.

Testing Constitutional Limits

Will California and other states and cities seeking a place on the global stage be able to move the law? The answer, as good lawyers know, is as much logistical as it is legal. Two examples highlight some of the legal opportunities a state like California might seize under current doctrine. The first surfaces most cleanly in a 2003 case in which the Supreme Court invalidated a California law that required insurance companies to disclose details of insurance policies held by Jews during the Holocaust and, further, made it illegal for insurers to refuse to pay claims on those policies. The problem was that the law conflicted with an executive agreement, signed by President Clinton and the leaders of several other countries, that took a purely voluntary approach to the problem, cajoling insurers rather than commanding them. Echoing its earlier decision in the Myanmar case, the Court

invalidated California's law because, while the federal approach used "kid gloves," California's used an "iron fist," thus undermining the president's "diplomatic discretion."⁸

But tucked in the decision was a sleeper. In striking down the law, the Court said its analysis might be different where a state was acting within its "traditional competence" and, further, that analysis of federal-state conflict would turn, at least in part, on "the strength or the traditional importance of the state concern asserted."⁹ For a state like California that is fast moving into the climate space, this is manna from heaven. Indeed, the Supreme Court said more recently in a 2007 case that Massachusetts, as both a sovereign and landowner, has a powerful and longstanding interest in protecting its own shorelines against the rising sea levels that come with climate change.¹⁰ Of course, this argument may not wash, so to speak, in land-locked Oklahoma. But for coastal states like California, it provides a ready-made defense to a "one voice" challenge to state action. As states and

Expect states and cities to frame their efforts as local ones to protect their people and property.

cities move onto the global stage and attack global problems, expect them to frame their efforts as local efforts to protect people and property—the core of a state's traditional, time-tested police powers. As they do so, the distinction between what is foreign and domestic will blur—and could fall away entirely—further undermining the "one voice" idea in the climate space and perhaps even beyond, in areas like immigration or human rights, wherever states can plausibly point to concrete interests.

The second opportunity states can seize might be the Constitution's bar on state-level compacts with foreign nations. Though the Constitution prohibits foreign-state compacts absent congressional consent, in reality states have entered into them on myriad issues, from trade and firefighting cooperation to transboundary bridges and water diversion. States are entering such compacts at a growing clip—there have been 340 agreements since the 1950s, and some 200 of them in the last ten years alone.¹¹ Few of these, however, have suffered invalidation. Part of the reason is explicit or implicit congressional authorization. But the Court has also been quick to read congressional silence on compacts and agreements as acquiescence and, thus, approval.¹² If the current trend continues and the number of foreign-state agreements continues to rise, Congress will face an unsavory choice: bluntly disallow entire categories of agreements and thereby risk the ire of friends and foes alike, or spend valuable time and energy sifting good and bad ones on a case-by-case basis. Either approach brings costs. And in the current

era of partisan gridlock and political paralysis, one wonders just how often Congress will be able to muster action at all.

In seeking to exploit these and other legal opportunities, California will also be aided by the shifting political tides of federalism. Throughout much of American history, federalism and states' rights have been a conservative war cry—a needed check on a liberal, overweening federal government. The most recent wave arose in decisions throughout the 1980s and 1990s, as the Supreme Court, with Chief Justice William Rehnquist leading the charge, trimmed federal power and strengthened the states' position across numerous policy areas, often to deregulatory effect. But last November's election and the recent wave of state-level activism has flipped federalism's political valence, making states the hope of pro-government progressives.

Will this matter? To be sure, as cases testing the boundaries of foreign affairs federalism reach the Court, the decisions might prove, once and for all, that federalism is just a political football. But so far, at least, the smart money seems to be that the commitment to state autonomy at the core of the Rehnquist Court's federalism revolution will continue to enjoy significant sway in the Roberts Court. At the very least, a more forward-leaning state role on climate, trade, and other problems with a global cast will create uncomfortable dissonance for conservative justices who have long laced their opinions with encomiums to federalism's virtues.

The other reason to believe California will be able to exploit available legal opportunities is logistical. Legal revolutions are not built on ideas alone. They also require an infrastructure—and a set of institutional actors with the will and capacity to advance novel legal claims and make them stick. The most significant development here is the dramatic rise in recent decades of state attorneys general—and their steady acquisition of resources and topflight legal talent. Notable as well is California's recent high-profile retention of former Attorney General Eric Holder to quarterback the state's strategizing on federalism matters.¹³ Even local governments have built impressive litigation shops and staffed them with some of the best and brightest young lawyers. During yesteryear, San Francisco might have buckled in response to Trump administration threats to cut off federal funding if the city does not assist federal immigration authorities. So might have nearby Santa Clara County. Today, both have sued the Trump administration on the issue and, so far at least, are winning.¹⁴

To this point, much of this new subfederal legal infrastructure has been given over to what might be called defensive legal efforts. Think here of state-led opposition to the Trump administration's travel ban, or—as just noted—litigation challenging the federal government's effort to pull federal funding from sanctuary jurisdictions unwilling to play ball with federal immigration authorities. Both have a clear defensive posture—an effort to push back against federal policies. But the growing and increasingly sophisticated legal infrastructure can also be

deployed to defend more affirmative policymaking efforts as California and other subfederal governments move onto the global stage.

New Frontiers of State Action

In what policy areas are California and other jurisdictions most likely to push the envelope? Top of the list is climate policy, as recent headlines attest. Yet while Governor Jerry Brown's Beijing sit-down with President Xi Jinping dramatized California's global ambitions and bolstered Brown's status as a *de facto* envoy for the United States on climate issues, the actual conversation was mostly benign—little different from the assurances aired when state trade delegations make nice in foreign countries. Even the Under 2 Coalition's memorandum of understanding promises only "coordination and cooperation" on emission reductions, with signatories to pursue "their own strategies."¹⁵ However, bolder state initiatives are afoot, in California and elsewhere, and may soon crest as legal issues.

The best example is regional cap-and-trade programs for reducing carbon emissions that reach across international borders, linking American states with foreign governments. The idea dates back to well before Trump. In 2007, California spearheaded an effort to create a cap-and-trade program among five western states, following in the footsteps of a more limited effort among New England and Mid-Atlantic states. But the western version soon took on a novel international flavor when four Canadian provinces climbed aboard. Reaching across borders

Cap-and-trade linkage may be the best way for California to expand into climate change policy.

is good: more territory brings scale economies, a thicker market for trading carbon permits, and a reduced threat of "leakage" when industry picks up and moves outside the system. That was the initial attraction of a multi-state approach, even before Canadian provinces got involved. But when the Great Recession and turnover at governor's mansions sent all the other American states to the exits, California suddenly found itself pursuing Canadian-only linkages, beginning with Quebec in 2013.

The problem is that linkage involves lots of paperwork—and a set of written understandings between sovereigns that looks far meatier than the oral statements that passed between Governor Brown and President Xi in Beijing. To be sure, the linkage document inked in 2013 by California's Air Resources Board and Quebec's government is a skinny 14 pages, and its preamble contains plenty of hedging language that it does not limit either government's "sovereign right and authority."¹⁶ But the rest of the document belies

such claims, including its formal styling as an “agreement” and its parade of “shall” clauses. Most worrying from a legal perspective are termination and withdrawal provisions requiring participants to remain in the agreement for a year after serving notice to the other side.

These details present legal challenges and opportunities. The main challenge is that much of the agreement has a binding feel and so might be said to deprive the federal government of a potential “bargaining chip” or otherwise impair its ability to speak with “one voice” in its dealings with Canada. But there is an equally big opportunity, too. Cap-and-trade linkage may be the best way for California to expand the beachhead the Supreme Court provided in 2007 when it recognized Massachusetts’s sovereign interest in safeguarding its own shorelines against the effects of climate change. That view explicitly connects climate policy to a “traditional state concern” that the Court has said must be weighed in assessing federal-state conflict around foreign affairs.

Cap-and-trade linkage may also test Congress. Despite its power to disapprove state agreements under the Compacts Clause, Congress never objected to the Quebec linkage. But California recently finalized a second Canadian linkage, to Ontario. Doing so has provided a focusing event that could raise congressional antennae. But do climate-denying Republicans in landlocked states have the stomach to disallow climate policy in a distant state, particularly one that may help, rather than hinder, their own states’ efforts to attract mobile capital and industry? Continued congressional silence would go a long way toward entrenching a norm in favor of cross-border state action, paving the way for other state efforts to step onto the global stage on climate issues and beyond.

State-Led Human Rights Advocacy

Affirmative efforts to confront human rights violations and other egregious behavior by foreign governments—including repression, corruption, and human trafficking—represent another area ripe for action. The evidence so far suggests that the Trump administration is advancing a narrow conception of American self-interest, deemphasizing the universal values of freedom and opportunity that have occupied a central place in the foreign policies of Democrats and Republicans for decades. In particular, Trump’s embrace of leading autocrats and proposed budget cuts for the federal agencies that lead on these issues—the State Department and USAID—put the administration on a collision course with activists around the country who want to maintain American leadership on human rights.

The experience with apartheid provides an important precedent in human rights policy.

The experience with apartheid provides them with an important precedent. While the Reagan administration chose quiet dialogue and cooperative engagement with South Africa—prioritizing instead the fight against communist insurgencies in the developing world—dozens of states and cities across the United States embraced an aggressive divestment campaign that some say played a key role in ending the apartheid system.¹⁷ The result was a web of subnational laws limiting the extent to which state and local governments could contract with companies doing business in South Africa and authorizing public pension funds to divest from companies working with the apartheid state. Moved at least in part by this subnational mobilization, the federal government adopted comprehensive sanctions against South Africa of its own, over President Ronald Reagan's veto. At the time, the authority of states and cities was never challenged in the courts.

The enthusiasm for state and local action using procurement sanctions and investment/divestment policies has not waned, though the legal basis for doing so has narrowed. Since the Court held in 1996 that federal law preempted Massachusetts' procurement sanctions against Myanmar, most state-level sanction regimes have been trained on Iran and Sudan pursuant to explicit authorization by Congress. But as states pursue a more global role, they will find firmer legal ground when it comes to divestment actions. Procurement sanctions prohibit the state government from conducting business with private corporate entities, either U.S. companies doing business in a human rights-abusing country or companies based in the targeted country. These companies and their dealings with targeted countries may also be the subject of federal regulation. Divestment statutes arguably sit closer to the exercise of purely state power: states' management of their own investment funds. And because state public pension funds have a fiduciary obligation to protect their members' investments, divestment can be framed as a strategy of managing investment risks that flow from repressive and politically unstable regimes. The potential impact is significant, with nearly \$3 trillion of investment capital available in state pension funds in 2015.

Beyond divestment, look for states to test-drive new policies in areas where traditional state competence is beyond question: state-chartered banks and local real estate markets. For example, New York has long been at the forefront of efforts to strengthen regulatory oversight of state-chartered banks. Because every major international bank is chartered in New York, the state has a powerful platform to police efforts by repressive autocrats to keep their regimes afloat by laundering the proceeds of corruption and bypassing sanctions programs. States are also well positioned to help clean up the U.S. real estate market, where human rights abusers and kleptocrats use a lack of transparency or anonymous shell companies to launder and store money. With pressure mounting against such practices, state governments can use their authority over real estate markets to impose higher standards for customer due diligence and transparency around beneficial

ownership. With these kinds of regulations in place, it would be far more difficult for corrupt and repressive regimes to stash wealth in the United States.

States' Role in Immigration Policymaking

A third area where states and localities are carving out a more global role and pushing the legal envelope is immigration. As already noted, much of the headline-grabbing action here is defensive, with sanctuary jurisdictions like San Francisco and Chicago pushing back against the federal government in lawsuits invoking constitutional doctrines that protect them against federal coercion. But in the shadow of this litigation is a longer and deeper record of subnational action that has put states like California on the front lines of immigration policymaking. As with so much else in the world of foreign affairs federalism, Trump's election last November was not so much a sudden, seismic event as a punctuation point for trends long in the making.

Viewed at a distance, immigration federalism can look different from other policy areas that implicate foreign affairs. First, the case for exclusive federal authority is stronger in the immigration area. This is because the "one voice" doctrine is bolstered by the Constitution's grant of power to Congress to "establish an uniform Rule of Naturalization."¹⁸ The Supreme Court has consistently held that this clause confers exclusive federal authority over admission, deportation, and naturalization of noncitizens.

This makes the second distinctive feature of immigration federalism something of a paradox: State and local policymaking around immigration is far thicker than in other policy areas that implicate foreign affairs. In fact, the last decade has seen an explosion of legislative activity in statehouses on immigration matters—so much so, that it is not a stretch to say the United States has already undertaken "immigration reform," just not at the federal level.¹⁹

Some states have taken a restrictionist approach, pledging state and local support for federal enforcement efforts—and some, like Arizona, have gone beyond mere cooperation and engaged in more rigorous enforcement than federal law does, drawing a rebuke from the Supreme Court in 2012 for a state law that imposed additional sanctions on undocumented persons and authorized arrests beyond what federal law provides.²⁰ Other states' laws, by contrast, are integrationist. Some of these, like the current litigation efforts, are defensive and aim to secure sanctuary at home, work, and school by, among other things, expressly prohibiting state and local officials from cooperating with federal enforcement efforts. But a raft of other

The last decade has seen an explosion of legislative activity in statehouses on immigration.

measures in California and elsewhere take a more affirmative approach to integration, granting immigrant access to education, medical care and other public benefits, and driver's as well as professional licenses.

A lesson here is that, even if the federal government holds exclusive power over admission, deportation, and naturalization, states can do much to modulate immigrant flows via policies that either foil or foster settlement and permanency. This may prove once and for all that the current era of rapid globalization has rendered the line between what is foreign and domestic, in the immigration area and beyond, more apparent than real. And this is part of why many integrationist laws—unlike Arizona's harsh restrictionist approach—have survived legal challenges. Without a clear way to distinguish laws designed to shape immigration flows and those performing the traditional state functions of protecting the welfare of persons within state borders, the Court has instead reached a rough equilibrium granting states and localities latitude to regulate immigrants and immigrant services so long as they leave regulation of *immigration* to the feds.

But two further examples of subnational action may test this equilibrium. The most dramatic is state efforts to advance more inclusive constructions of state citizenship. A bill first put forward in New York in 2014 would grant citizenship to state residents regardless of immigration status, granting them full access to public benefits and—reviving a practice common earlier in American history—entitling them to vote in state and local elections.²¹ More recently, Utah passed a law establishing a state guest worker program for noncitizens. Though implementation has since stalled under the threat of a Department of Justice lawsuit, a key point here is that Utah is only the most visible actor in a long-running and increasingly tense drama: More than a dozen other states, frustrated by chronic shortages of workers in the agriculture, energy, construction, and tech sectors, have proposed measures by which Congress would grant state and local control over federal guest worker visas. If Congress continues to punt on immigration—or, as the Trump administration recently suggested, the feds take a more restrictive line even as to *legal* immigration—look for more assertive, boundary-pushing action by states that could chip away at plenary federal power.

The second type of boundary-pushing state action on immigration may lack the diplomatic feel of a Brown-Xi summit, but nonetheless has states and localities carving out a global role: the increasingly dense web of relations between state and local officials and the fifty-plus U.S.-based Mexican consulates. This is evident in the proliferation of memoranda of understanding between states and localities and consulates on deportation defense and legal proceedings involving Mexican children. Harder to see, but no less important, is an increasingly rich and routinized system of communication around other key issues impacting immigrant communities, including notario fraud, in which non-lawyers falsely represent themselves as qualified to offer immigration-related legal services, and the

Ventanilla de Salud (literally, “windows of health”) system, a Mexican program run through its U.S. consulates to provide Mexican nationals with health counseling and referrals.

This dense web of consular agreements and communications is important, and not just because it sits at the center of a shadow system of subnational diplomacy on immigration matters. If we squint hard enough, we can also see in it a much wider process of capacity-building as state and local governments draw in talent and expertise that can drive a new, more global role. This process began long ago in big states like California, where many state officials have done time in the federal foreign policy apparatus. But it is becoming visible in other places as gridlock in Washington, on immigration and more generally, has moved smaller states and a growing corps of self-styled “global cities” to reach beyond the water’s edge.

Just the Beginning

Trump’s election and his administration’s major shifts in policy on the environment, human rights, and immigration have thrust a wide range of subfederal initiatives into near-daily headlines. Undoubtedly, these efforts will serve the political interests of progressive policymakers in Democratic-leaning states looking to challenge the policies of the Trump administration at every turn, and they are sure to find a receptive audience overseas where long-standing U.S. allies are looking for ways to continue making progress on shared priorities and to stand up to President Trump. They will also test the boundaries of federal foreign affairs power, raising the question of whether the Justice Department is preparing for a fight.

But it is also important to note that the enthusiasm of states and cities to exercise leadership on the global stage has been long in the making; it will not go away when Trump does. Nor is it limited to hot button, highly politicized areas like climate, human rights, and immigration. Exhibit A is cyber security, where a patchwork federal presence has moved states to the front lines of policymaking despite the fact that cyber-regulation’s frequent extraterritoriality—think here of a Parisian bookseller who fails to safeguard a Massachusetts customer’s online data—would seem to make it an ideal candidate for federalization. Most arresting of all, some say state-level cybersecurity efforts to combat botnets and other malware could soon involve countermeasures—that is, malware that goes the other way and attacks the perpetrator’s systems—that look a lot like state-led warfare.

Is U.S. foreign policy enabled or hobbled by growing subfederal activism in foreign affairs? This is not an easy question to answer, even if the trend is difficult to reverse. Two of the central virtues of federalism—its potential to spur

policy innovation and the ability to bring the locus of policy choice closer to voters—are in direct tension with the view that U.S. power depends on policy coherence and the leverage that comes from acting in unison. In an environment of strong bipartisan agreement on major national security priorities, few were concerned about activist states and municipalities; with a shared sense of direction, the energy of subfederal actors was seen as a virtue, opening up new tools and channels for advancing U.S. interests. But with the loss of that bipartisan consensus, the likelihood that the federal government and states may act at cross-purposes is increasing, and the incentives for pushing the boundaries even stronger.

Whether the courts will allow the most forward-leaning state policy efforts to proceed is anyone's guess at this stage, but it is not clear that judges are best positioned to help policymakers navigate this new terrain. Judges will encounter these issues only episodically, in a subset of policy domains, and without the expertise to identify the conditions under which a more expansive subfederal role advances U.S. policy goals. Policymakers, on both sides of the aisle, would be wise to get ahead of the courts on this one. While it may be too late to turn back the clock, the challenge of harnessing all the instruments of American power involves figuring out how to lead this diverse network of players in a common direction with a shared goal—a significant organizational task for any president, and one made far more difficult when views on policy are so polarized.

Notes

1. Information about the membership and operation of the Under 2 Coalition is available at: <http://under2mou.org/>.
2. Adam Tanner, "Schwarzenegger: California Is 'Nation State' Leading World," *Washington Post*, January 9, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/09/AR2007010901427.html>.
3. See, for example, Donald R. Culverson, "The Politics of the Anti-Apartheid Movement in the United States, 1969-1986," *Political Science Quarterly* 111, no. 1 (1996). For a critique of the legality of state and city efforts, see Peter J. Spiro, "State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs," *Virginia Law Review* 5, no. 1(1986): 813-850.
4. Louis Henkin, *Foreign Affairs and the U.S. Constitution* (Oxford University Press, 2nd ed. 1996), 13-14.
5. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 376 (2017).
6. *Zschernig v. Miller*, 389 U.S. 429, 434 (1968) ("In its brief amicus curiae, the Department of Justice states that: 'The government does not ... contend that the application of Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.'").
7. *Ibid*, 435.
8. *American Insurance Association v. Garamendi*, 539 U.S. 396, 423 (2003).

9. Ibid, 419 n.11 & 420.
10. *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007).
11. Duncan Hollis, "Unpacking the Compact Clause," *Texas Law Review* 88 (2009): 741, 744.
12. The key case here, though trained on interstate rather than foreign-state compacts, is *Virginia v. Tennessee*, 148 U.S. 503, 521–22 (1892). The key modern case, also concerning interstate compacts, is *New Hampshire v. Maine*, 426 U.S. 363 (1976). Only one decision of the Supreme Court, *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840), has examined the Constitution's conditional bar on foreign-state compacts, but offers little guidance.
13. Adam Nagourney, "California Hires Eric Holder as Legal Bulwark Against Donald Trump," *New York Times*, January 4, 2017, <https://www.nytimes.com/2017/01/04/us/california-eric-holder-donald-trump.html>.
14. Vivian Yee and Rebecca R. Ruiz, "Sessions Once Again Threatens Sanctuary Cities," *New York Times*, July 26, 2017, <https://www.nytimes.com/2017/07/26/us/politics/sessions-sanctuary-cities.html>; Thomas Fuller, "San Francisco Sues Trump Over 'Sanctuary Cities' Order," *New York Times*, January 31, 2017, <https://www.nytimes.com/2017/01/31/us/san-francisco-lawsuit-trump-sanctuary-cities.html>.
15. A copy of the Under 2 Memorandum is available at <http://under2mou.org/wp-content/uploads/2015/04/Under2-MOU-with-Addendum-English-US-Letter.pdf>.
16. A copy of the agreement is available on the website of the California Air Resources Board at https://www.arb.ca.gov/cc/capandtrade/linkage/ca_quebec_linking_agreement_english.pdf.
17. Although the precise contribution of sanctions to the demise of apartheid remains a contested issue, for one insider's account of the impact of U.S. and international sanctions see: Les De Villiers, *In Sight of Surrender: The U.S. Sanctions Campaign against South Africa, 1946-1993* (Praeger Publishers, 1995).
18. United States Constitution, Article I, Section 8, available at <https://constitutioncenter.org/interactive-constitution/articles/article-i>.
19. Peter L. Markovitz. "Undocumented No More: The Power of State Citizenship," *Stanford Law Review* 67 (2015): 869, 871 (documenting the "explosion" of state legislation).
20. *Arizona v. United States*, 567 U.S. 387 (2013).
21. The bill, styled the New York Is Home Act, would extend state citizenship to any individual who can establish proof of identity, residency and tax payment for three years, and a commitment to abide by New York law and perform the obligations of citizenship, such as jury service. For the complete text, see: <https://www.nysenate.gov/legislation/bills/2013/S7879>.