ARTICLES & ESSAYS

FOREIGN AS DOMESTIC AFFAIRS: RETHINKING HORIZONTAL FEDERALISM AND FOREIGN AFFAIRS PREEMPTION IN LIGHT OF TRANSLOCAL INTERNATIONALISM

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[*] All rights reserved, Judith Resnik, October 2007. This Article builds on my discussions in *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 INT'L J. CONST. L. (I·CON) 33 (2007); *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17 (2005); and *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619 (2001).

My thanks to those who made presentations at the symposium, *The New Federalism: Plural Governance in a Decentered World*, held at Emory University School of Law, February 23, 2007, as the Annual Randolph W. Thrower Symposium, and to that symposium's conveners, Robert Ahdieh, Robert Schapiro, Rebekah LeMon, and the *Emory Law Journal*. I have also benefited from exchanges with Seyla Benhabib, Paul Berman, Vicki Jackson, Karen Knop, Reva Siegel, Katherine Sklar, Linda Kerber, and Dennis Curtis, and from the engagement of several current and former students, including Laurie Ball, Joseph Frueh, Michelle Morin, Sue Meng, Chavi Keeney Nana, Elizabeth Brundige, Josh Civin, Paige Herwig, Johanna Kalb, Daphna Renan, Julia Schiesel, Julie Suk, and Bertrall Ross.

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I. THE JUDICIAL SAFEGUARDS OF NATIONALISM AND THE POLITICAL SAFEGUARDS OF FEDERALISM

What does federalism have to do with the question of what role "foreign" law does or ought to play in the United States? That issue frames this Article.

In the United States, a movement that I call *exclusive sovereigntism* seeks to buffer the United States from "foreign" influences. That approach takes shape through various efforts; the two in focus here are attempts to limit judicial reliance on "foreign" law in constitutional interpretation[1] and to constrain localities from aligning themselves with transnational efforts on human rights and global warming. Just as the expressions of exclusive sovereigntism are diverse, so are the political propositions that support it.[2] The facet explored here is the sovereigntist claim that the democratic structure of American federalism makes the turn to "foreign" law especially problematic. State autonomy and democracy are proffered as reasons to hold comparative and internationalist forays by judges and local officials at bay.

I appreciate and share sovereigntists' focus on law, its sources, and its speakers as important parts of the identity-building activity of nation-states.[3] The acts of pronouncing, reiterating, implementing, and internalizing legal obligations are ways in which to make certain rules and practices constituent of community membership. Moreover, given that judges are specially situated legal actors, the attention paid to their words is appropriate. Through the vividness of conflicts over specific cases, judges become highly visible speakers asserting the meaning of a nation's law.

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[1] One example of this position, discussed *infra* Part III.B, is a statute proposing to prohibit judges from relying on the law of "any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States" when interpreting or applying the Constitution of the United States. *See* Constitutional Restoration Act of 2005, S. 520, 109th Cong. (2005).

[2] *See* Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 INT'L J. CONST. L. (I·CON) (forthcoming 2007) [hereinafter Resnik, *Law as Affiliation*]. Further, as I detail there, sovereigntism can be *inclusive* as well, in that a country's national identity could be tied to its relationships and connections to other legal regimes. *See id.* South Africa's Constitution, discussed *infra* note 14, provides such an example.

[3] *See* Resnik, *Law as Affiliation*, *supra* note 2; Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17 (2005); *see also* Susan S. Silbey, *Talk of Law: Contested and Conventional Legality*, 56 DEPAUL L. REV. 639, 643 (2007) (analyzing "the variety of ways in which legality and the rule of law are performed in American culture, and the difference between contested, ideological law and conventional, hegemonic law").

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But to the extent that sovereigntists argue that their aims are to protect the democratic predicates of United States law and the authority of states, they miss how important state and local political leaders are in welcoming insights from abroad and in shaping American law. When articulating domestic policies, mayors, governors, and members of state and city legislatures often look beyond their own borders for guidance and sometimes choose to affiliate their localities with transnational initiatives.[4] Through such decisions, American federalism has served as a major route through which "foreign" law becomes domesticated.

These local leaders often do not act alone. Underappreciated thus far in the literatures on federalism and on social network theory is the role played by translocal organizations of public officials. These networks (such as the Conference of Mayors, the National League of Cities, the National Governors Association, the National Conference of State Legislatures, the National Association of Counties, and others) are national, but not federal. They both mirror the jurisdictional boundaries of the United States and cross them. Furthermore, these organizations also blur the line between nongovernmental organizations ("NGOs") and government organizations, for they are voluntary, quasi-private associations of public actors.

Several of these organizations were founded in the early part of the twentieth century in efforts to bring local actors together to protect their interests as the national government expanded. The local groups sought federal aid while aiming to avoid federal regulation. Over the course of that century, these translocal public/private organizations have broadened their own horizons, both in terms of the issues that they address and the borders that they cross. Seeking good will and new markets, these translocal actors have become transnational actors. Their agendas range from trade and self-promotion to human rights and climate control, and they coordinate with their counterparts around the world.

Through these activities, these translocal organizations serve as importers and exporters of ideas, some of which they help to turn into law. Sitting between the government and the private sector, these national organizations of state officials have become vital forces in a norm entrepreneurship that I term *translocal institutional transnationalism*. These interactions create a two-way

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[4] *See* discussion *infra* Part II.B–C; *see also* Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2006) (mapping the effect of the Vienna Convention on Consular Relations on American death penalty jurisprudence).

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street (or ocean) for both importation and exportation, and what passes through are a range of precepts, liberal and conservative, on an array of topics from human rights and national security to the organization of families and commerce.

One of the goals of this Article is to document some of this trade in ideas and laws and to analyze how translocal transnationalism relates to the presumed problem of "foreign" law within the American polity. I do so by two examples, one outlining local efforts to promote and to use the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),[5] and the other sketching the engagement of cities in the Kyoto Protocol to the United Nations Framework Convention on Climate Change ("Kyoto Protocol").[6] Both initiatives undermine the sovereigntist claim that a turn to "foreign" law intrinsically poses problems for majoritarianism and for federalism.

Moreover, the examples of CEDAW and of Kyoto also substantiate my arguments that the import and export of law over time is inevitable and that the categories of "local" and "national" and "international" are mutable rather than fixed. Topics once assumed uniquely subject to local governance are now matters taken up by transnational norms and laws. Thus, what falls within the realm of "foreign affairs" and "domestic affairs" has, will, and (in my view) should change over time. Rather than being exclusive sets, the overlap is substantial, as many issues are both "domestic" and "foreign." Moreover, while my discussion focuses on the United States, the phenomenon that I document is underway elsewhere. Around the world, localities have moved outside their own nation-states and affect intergovernmental relations as part of the "re-scaling" of governance (to borrow Saskia Sassen's term[7]) that reflects changes in population density and in migration which are facilitated by technologies and travel.[8]

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[5] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

[6] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol], *available at* http://unfccc.int/essential_background/kyoto_protocol/items/1678.php.

[7] *See* Saskia Sassen, *Globalization or Denationalization?*, 10 REV. INT'L POL. ECON. 1, 6, 14–15 (2003) [hereinafter Sassen, *Globalization or Denationalization?*].

[8] *See, e.g.*, Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); Nicole Bolleyer, *Federal Dynamics in Canada, the United States, and Switzerland: How Substates' Internal Organizations Affect Intergovernmental Relations*, 36 PUBLIUS J. FEDERALISM 471 (2006); Michele M. Betsill & Harriet Bulkeley, *Cities and the Multilevel Governance of Global Climate Change*, 12 GLOBAL GOVERNANCE 141 (2006); Michele M. Betsill & Harriet Bulkeley, *Transnational Networks and Global*

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But showing the *fact* of local import and export does not decide the *issue* of whether to try to regulate the trade in law, which is the second focus of this Article. Currently, efforts are underway to do just that through erecting barriers rather than having a laissez faire or "free-trade" approach. Below I examine in detail two mechanisms—one from Congress aimed at limiting judicial use of "foreign" law and the second, from federal courts, aimed at limiting localities' involvement with issues deemed "foreign." As to the first, I consider both congressional proposals seeking to prohibit federal judges from citing or relying on "foreign" law when interpreting the United States Constitution[9] and senatorial inquiries about judicial nominees' attitudes to the use of "foreign" law in federal courts. As to the second, I explore the contours of a cluster of precepts grouped under the doctrine of "foreign affairs preemption" that has been used by federal judges to invalidate some local legislative efforts related to issues that judges see as exclusively within national authority. Examples include courts holding illegal local bans on purchases from countries condoning forced labor and on investments in companies tied to the Sudan.[10]

How is one to reason about these regulatory efforts? Ought laws addressing the role of non-United States law in either federal courts or state and local decisionmaking be made at all? If so, by what institutions (legislatures, the executive, or courts, state or national), and with what content? What is the relationship between federalism and preemption?

Were one to seek answers to these questions from the text of the Constitution, disappointment would rapidly follow. Although referring to the word *state* more than one hundred times,[11] the United States Constitution never

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Environmental Governance: The Cities for Climate Protection Program, 48 INT'L STUDIES Q. 471 (2004); Franz Gress, *Interstate Cooperation and Territorial Representation in Intermestic Politics*, 26 PUBLIUS J. FEDERALISM, Winter 1996, at 53; *see also generally* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. (forthcoming 2007); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007).

[9] *E.g.*, Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005). In addition, section 6(a)(2) of the Military Commissions Act ("MCA"), which became law in 2006, purports to limit the ability of federal judges to use non-United States law when interpreting obligations under the Geneva Convention. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2632 (2006) (codified as amended at 28 U.S.C. § 2441); *see also* discussion *infra* note 148 (discussing the Military Commissions Act of 2006).

[10] *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Nat'l Foreign Trade Council v. Giannoulias, No. 06 C 4251, 2007 WL 627630, at *1 (N.D. Ill. Feb. 23, 2007), discussed *infra* Part III.B.

[11] An electronic search of the document finds that word mentioned 118 times in the text and its amendments, excluding its use as a verb and within terms such as *United States* and *foreign state*. *E.g.*, U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each *State*, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.") (emphasis added); *id.*

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even uses the word *federalism*, let alone terms like *foreign affairs preemption*. And while allocating power between state and national governments, the Constitution only sketches areas of competency without a specificity that would decide many of the questions posed today.

For example, the Constitution's text refers six times to the word *foreign*—including providing Congress with the power to "regulate Commerce with foreign Nations," to regulate the value of "foreign Coin" as well as prohibiting Congress from conferring titles from any "foreign state" and forbidding states from entering into compacts with "a foreign Power."[12] Further, Article I authorizes Congress to define and punish "Offenses against the Law of Nations,"[13] which could be read to authorize federal incorporation of non-United States law.

But unlike constitutions such as that of South Africa, which mandates that judges consider international law when interpreting the domestic bill of rights,[14] the United States Constitution does not expressly address what role government actors (state or federal) can play as importers of "foreign" law. Nor does the Constitution identify the role courts ought to play in protecting presidential agendas from decisions in Congress or by states and localities.

Moreover, if looking for guidance on the meaning of the category "foreign affairs" from historical "traditions" about the allocation of authority between state and federal governments, one finds that practices have not been uniform. For example, although the United States Constitution vested the power in Congress to develop "a uniform Rule of Naturalization,"[15] Congress relied on states to administer oaths and admit individuals to citizenship up through the early part of the twentieth century when the administration shifted to a

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§ 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several *States*, and with the Indian Tribes . . . .") (emphasis added); *id.* § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any *State*.") (emphasis added).

[12] *See* U.S. CONST. art I, § 8, cl. 3; *id.* cl. 5; *id.* § 9, cl. 8; *id.* § 10 cl. 3. The other two mentions of the word come in Article III and the Eleventh Amendment. *See id.* art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."); *id.* amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[13] *Id.* art. I, § 8, cl. 10.

[14] S. AFR. CONST. 1996, ch. 2, § 39 ("When interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."). These provisions are analyzed in Resnik, *Law as Affiliation*, *supra* note 2.

[15] U.S. CONST. art I, § 8, cl. 4.

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federally centered regime.[16] Further, during the nineteenth century, states played a role in admitting (or banning) immigrants.[17] Since the nation's inception, localities have been trading partners with countries around the world. Turning to the construction of the idea of the "federal," arenas of authority today within the federal bailiwick—including employment, drug laws, education, and spousal property rights to pensions—were once understood as particularly appropriate for state regulation.

If one question is *how* to decide the respective competencies or overlap between state and federal decisionmaking, another is *what* organs of government ought to make such rules. Over the last seventy years, conflict about the arenas of authority of state and national actors has been intense. A good many cases arise in the context of challenges claiming that the national government has overreached; the discussion has centered on what national institutions (the courts, Congress or the Executive) ought to arbitrate between state and national interests so as to "safeguard" (to borrow Herbert Wechsler's famous phrase[18]) state prerogatives.

Writing in the 1950s, Wechsler's view was that courts ought not to demur because Congress was well situated to provide "political" protections to states. Given that Congress is comprised of representatives from the states and each state has two senators, Wechsler reasoned that states had ample opportunity to press for protection of their interests in the national forum. Among his critics, Lynn Baker—writing in the 1990s—turned to horizontal comparisons across states and identified the variability of the political and economic resources of different states in protecting their own interests.[19] Hence, responding to the issue of whether the Supreme Court ought, in the name of federalism,

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[16] *See, e.g.*, The Naturalization Act of 1906, ch. 3592, §§ 1–4, 34 Stat. 596 (1906); DARRELL HEVENOR SMITH, THE BUREAU OF NATURALIZATION: ITS HISTORY, ACTIVITIES AND ORGANIZATION (1926).

[17] *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PENN. L. REV. 933, 941–43 (1995).

[18] *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). A significant literature followed thereafter. *See, e.g.*, Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000). More recently, Bradford Clark has focused on how separation of powers doctrine and the difficulties of making federal law preserve state prerogatives. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

[19] Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) [hereinafter Baker, *Putting the Safeguards Back*]; *see also* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 106 (2001).

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invalidate congressional legislation,[20] Baker argued that the national courts had a role to play in safeguarding state interests.

These debates reflect that, while the Constitution also does not speak of the *vertical* and the *horizontal* dimensions of federalism, the jurisprudence of the federal courts does. When focused on the so-called vertical axis, at issue is the relationship between the national government and the states. By virtue of constitutional text making federal law "supreme," state courts must enforce federal law,[21] and Congress can (in areas within its competency) legislatively preempt state law. If a conflict between state and federal law is claimed, the United States Supreme Court has interpretative authority to decide whether federal law requires that state rules be displaced.[22] Looking "horizontally," the legal literature considers the constitutional relationship among the states.[23] Here the focus is on issues such as the states' constitutional obligation to provide "full faith and credit" to each others' judgments, on the constitutional prohibition of states entering into "compacts" unless first obtaining statutory approval from Congress, as well as the obligations of the national government to respect that each state is on an "equal footing" with the others.[24]

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[20] The now-classic examples include *National League of Cities v. Usery*, 426 U.S. 833 (1976), and the line of cases that reversed it: *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992).

[21] *See generally* STATE SUPREME COURTS, POLICYMAKERS IN THE FEDERAL SYSTEM, at xix–xx (Mary Cornelia Porter & G. Alan Tarr eds., 1982).

[22] *See generally* Tom Merrill, *Preemption and Institutional Choice*, NW. U. L. REV. (forthcoming 2008) (on file with author); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) [hereinafter Gardbaum, *The Nature of Preemption*]. For an overview of a set of cases, the participants, and outcomes, see Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43 (2006). Reflective of the growing focus on preemption, the American Enterprise Institute published a volume of readings on it in 2007. *See* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve, eds. 2007).

[23] *See generally* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007). The term *horizontal federalism* is used sometimes to capture states' interactions and cooperation and other times to describe discord and competition. *See, e.g.*, Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RES. & THEORY 535 (2004); James N.G. Cauthern, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783 (2003). The term *horizontal federalism* may have come into U.S. parlance from comparative federalism analyses. *See* ARNOLD BRECHT, FEDERALISM AND REGIONALISM IN GERMANY: THE DIVISION OF PRUSSIA 47 (1945). On the interaction at the agency level, see Robert Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006).

[24] *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004).

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Translocal transnationalism complicates the tidiness of a grid that plots only the vertical and horizontal dimensions of the interaction between individual states and the national government.[25] Furthermore, the laws produced through such networks have generated a new pattern in the case law. During much of the second half of the twentieth century, localities and states went to federal court seeking protection from Congress. In cases such as *National League of Cities v. Usery*,[26] *Garcia v. San Antonio Metropolitan Transit Authority*,[27] *Seminole Tribe of Florida v. Florida*,[28] and *New York v. United States*,[29] representatives of states argued that either the Tenth or Eleventh Amendment or federalism itself required invalidation of national legislation obliging them to act in particular ways.

In contrast, in the contemporary set of cases, nationally networked groups of businesses, sometimes joined by spokespersons for the federal government, go to federal courts arguing on behalf of the President or Congress, which they posit, needs judicial protection from state and local initiatives. Relying on legislation or agency regulations and executive statements, mixed with claims predicated on the Constitution, such plaintiffs argue that foreign affairs, war powers, the political question doctrine, or dormant commerce clause powers, as well as the President's prerogatives more generally, require preclusion of local actions that affect "foreign" or international activities.[30]

Thus far, the federal judiciary has been both deferential to such claims and generative in its own right, shaping a legal regime preferring the singularity of national power. Currently underway is the development of a body of case law loosely grouped under the moniker of *foreign affairs preemption*, which, I argue, generates "judicial safeguards of national power." These doctrines protect both Congress and the authority of the Executive from the "interventions" of local decisions that are the products of democratic initiatives championed by elected leaders as part of translocal networks of local government officials.

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[25] As Michael Greve, a "proud nationalist" worried about states' exportation of regulatory burdens, has noted, this coordination could enhance certain federalist values at the expense of others. *See* Michael S. Greve, *Federalism Values and Foreign Relations*, 2 CHI. J. INT'L L. 355 (2001) [hereinafter Greve, *Federalism Values*].

[26] 426 U.S. 833 (1976).

[27] 469 U.S. 528 (1985).

[28] 517 U.S. 44 (1996).

[29] 505 U.S. 144 (1992).

[30] Here, the examples, discussed *infra*, include at the Supreme Court level, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), and *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003).

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What ought courts to do? My argument, foreshadowed above through a brief reminder about what words lie within the constitutional text, is that judges have a wide range of interpretative choices to make. Like the analyses of both Wechsler and Baker, background presumptions about how the system is or ought to work inform responses to these litigation efforts. For me, the federated system within the United States—with its hundred-plus mentions of the word *state* in the Constitution and its tripartite division of federal power—entails aspirations for transparent, redundant debates about laws and policies. These multiple sites for conflicts about social norms are the opportunities provided by democratic federalism to permit problems to be argued in more than one forum and more than once. When city councils or state legislatures propose provisions incorporating foreign norms or shaping local action seeking either to import transnational precepts or to have extraterritorial effects, these measures are put forth in public and voted up or down. From immigration to same-sex marriage, from land mines to apartheid and genocide, those debates have enabled law to change—in directions that can be characterized as liberal and as conservative—through an iterative process.

I do not suggest that the outcomes of such contestation are either optimal or to my personal liking, nor that problems of aggrandizement, capture, cartels, and overreaching are absent. But the reiterated conflicts are desirable because they enable us to watch and to participate in struggles over the content of the law of the United States. Of course, and akin to the concerns raised by Professor Baker, that playing field is not even, and the rules are not fair. Yet, like Wechsler, when possible I take as a lesson from democratic federalism that battles over the meaning of federal law should presumptively be open to changes through legislation. Moreover, when laws are built through a multitude of local efforts (even as those efforts are produced through networks seeking to orchestrate them), the rules inscribed become more entrenched as localities embrace specific precepts and link their civic identity to them in a fashion that sovereigntists should admire.

Hence, I am a critic of the new preemption rules in which judges shape quasi-constitutional doctrines limiting federalism's iterative opportunities. I commend revisiting the growing presumption in favor of executive or congressional foreign affairs preemption, and flipping it in favor of local initiatives. Before finding that national action is the exclusive means of interacting with "the foreign," judges ought to require specific national legislative directives as well as the presentation of detailed factual information about how concurrent or overlapping rules (federal and state) do harm national

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interests. By insisting on "clear statement rules" from Congress and specific factual predicates about the harms of concurrency before preempting local initiatives, the courts would be letting the "political safeguards of federalism" (to return to Wechsler's phrase) serve as a primary mechanism to "safeguard nationalism." Judges ought to be leery of using their power to expand the unilateralism of executive authority. Rather than ignoring that issues are simultaneously "foreign" and "domestic" affairs, courts should find local initiatives invalid only when enough national representatives of states vote for federal legislation expressly depriving states and localities of the power to act in a particular arena, in a specific fashion, and that a state or local action falls within those parameters, or a factual record shows that legal actors cannot comply with the layers of state and national regulation.

But this Article's foray into translocal transnationalism entails a third agenda—which is aimed at engendering skepticism about the pastoral image of democratic processes at the local level and provoking research about both the potentially positive and negative aspects of the translocal institutions that I bring into focus. When citing to "local" activities on women's rights and on climate control (the examples here) or to other issues (including immigration, trade, and marriage), one needs to be aware that such initiatives are not indigenous democratic moments in which each locality spontaneously finds and then expresses its own internal commitments.

Rather, these efforts are part of a new form of translocal governance that does not (yet) have a niche in the vocabulary, jurisprudence, or theories of federalism. Despite the ideology of each state acting alone as one of fifty within the United States, the practice is increasingly coordinated, in part in response to translocal businesses and NGOs, lobbying across jurisdictions, and to a media similarly unleashed from territorial constraints. One of the challenges for the decade is to learn more about governmental networks so as to evaluate them in terms of the political values of transparency and accountability, as well as on welfarists' concerns about the quality and kinds of policies that they support. At issue for law is how to weave the fact of such joint action into legal theories that aspire to celebrate the diversity, the potential for redundancy, the distribution of power entailed in the potential singularity of each state, and the differences among states.[31] The *law* of federalism at this juncture does not correspond to the transformations in the

[31] *See, e.g.*, Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (2005) [hereinafter Greve, *Cartel Federalism?*]; Baker & Young, *supra* note 19.

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landscape of federalism, and that terrain in turn ought not to be perceived as a bucolic site in which democratic practices inevitably flourish.

Finally, to see the inevitability, the utility, the risks, and the democratic processes entailed in the import and export of law is not to ignore the attraction of using law to build communities of affiliation and calling them nations. Anxiety about the fragility of the nation-state is well founded, and those seeking to preserve its form are therefore looking for means to do so. One way in which to build national collective identity is for individuals to understand that shared laws are part of why and how they are in relationship to each other as, together, they form a nation. Yet, one can welcome learning from abroad while still insisting that certain behavior is constituent of national identity and therefore obligatory as a matter of "our law."[32]

The many conflicts about the meaning of "our" constitutional commitments ought to be understood as a positive facet of an ongoing democratic process in which social movements from across the political spectrum disagree about the application of a polity's legal precommitments. Those social movements are, in turn, framed by currents coming from within and from abroad. And within these currents, one can find an array of public and private sector actors, arguing that American law means what they hope it does.

II. TRANSNATIONAL LEGAL MOVEMENTS AND FEDERALISM

A. *Horizontal Federalism and the Institutions of Translocalism: National Organizations of Local Officials*

The analytic presumptions of much of the law on federalism posits each state as a single, isolated actor, always on an equal footing, and sometimes in competition, with other states. One can read a good deal about "races to the bottom"[33] but less about the many joint actions undertaken by states, either at the formal level of the Constitution's "Compact Clause" (requiring

[32] Inclusive sovereigntism—insisting that one's national identity is predicated on exchanges from abroad—is an option, as South Africa's Constitution exemplifies. *See supra* note 14 and accompanying text.

[33] *See, e.g.*, Richard L. Revesz, *Rehabiliting Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).

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congressional approval) or the more frequent coordinated initiatives, only some of which become formal multistate executive orders.[34]

Horizontal federalism—state-to-state interactions of a variety of kinds—is coming into view as a subject for the legal academy,[35] as is an interest in localism and regionalism.[36] But the role played by local officials working in concert, captured by my term *translocal institutionalism*, has drawn less attention.[37] These shared projects are the subject of the first point of this Article, focused on how these translocal networks produce law through America's federal model.[38] These various organizations, including the National League of Cities, the United States Conference of Mayors, the National Conference of State Legislatures, the National Governors' Association, the National Commissioners on Uniform State Laws, and the National Conference of Chief Justices of State Courts, are conduits for border crossings, both state-to-state and internationally.[39] These entities, which mirror the tiered structure of American federalism,[40] sit somewhat in between

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[34] A body of case law and a relatively small academic literature explores the Compact Clause. Felix Frankfurter and James Landis led the way as they analyzed trans-state creations. *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); *see also* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285 (2003) [hereinafter Greve, *Compacts, Cartels*]; Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997); Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465 (1996) [hereinafter Resnik, *Federalism's Options*].

[35] *See, e.g.*, Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007); McGuinness, *supra* note 4; Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006); Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289 (2003); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001) [herinafter Baker, *Spending Power*].

[36] *See, e.g.*, Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007); David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001); Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000).

[37] Professor McGuinness is interested in the role that international law plays domestically, with a focus on a "transnational network of human rights activists, NGOs, and defense lawyers" using what she terms "norm portals," defined as gateways that "through a formal procedural mechanism or substantive right," permit the importation of "external norms into a legal system." McGuiness, *supra* note 4, at 760–61; *see also* Janet Koven Levit, *A Tale of International Law in the Heartland:* Torres *and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163 (2004).

[38] For a parallel concern, that international efforts by local governments are paid too little attention by political scientists, see Terrence Guay, *Local Government and Global Politics: The Implications of Massachusetts' "Burma Law,"* 115 POL. SCI. Q. 353, 354 (2000).

[39] *See, e.g.*, GLOBAL NETWORKS, LINKED CITIES (Saskia Sassen ed., 2002).

[40] *See* Theda Skocpol, *The Tocqueville Problem: Civic Engagement in American Democracy*, 21 SOC. SCI. HIST. 455, 472 (1997); *see also* Theda Skocpol, Marshall Ganz & Ziad Munson, *A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States*, 94 AM. POL. SCI. REV. 527 (2000).

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the classic NGO and the state in that the political clout of such organizations comes from their serving as the collective voice of actors holding particular kinds of governmental positions.

In the literature on social movements, networks of activists are familiar actors, bringing parallel and coordinated initiatives across a spectrum of issues. But much of the discussion of such "norm entrepreneurs" assumes that they are nongovernmental organizations aimed at affecting civil society. Law professors have interjected that judges need to be understood as norm entrepreneurs as well, participating in networks and shaping doctrine.[41] Translocal organizations of government officials, which have political and social capital because of the identity of their members as public employees, should also be added to the mix.

These governmental "interest groups" were formed during the twentieth century to lobby local interests in states and to protect localities from national encroachments by forwarding municipal agendas in Washington. These groups also aimed to create working relationships for similarly situated individuals who could learn from each other as they responded to parallel challenges. With the nationalization and globalization of the economy, these groups have broadened their horizons. They are entering into accords and forging links with other subnational entities around the world in a fashion that one commentator argued went beyond the ability of the national government to "control, supervise, or even monitor."[42] Through what Saskia Sassen described as the "re-scaling"[43] of inter-governmental relationships and what I have discussed in the context of the United States as examples of "federalism's options,"[44] a myriad of opportunities for import and export are presented.

Much of the local work is aimed at promoting trade and tourism, but a subset reaches a wider array of issues, including human rights. Further, while many of the international activities involve officials going abroad to enhance a locality's economic opportunities, some entail the development of policy agendas addressed either horizontally toward other localities or states or

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[41] *See* Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

[42] EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 128 (1998) [hereinafter FRY, THE EXPANDING ROLE].

[43] Sassen, *Globalization or Denationalization?*, *supra* note 7, at 6, 14–15.

[44] Resnik, *Federalism's Options*, *supra* note 34, at 465.

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vertically towards the national government or transnationally.[45] As will be detailed below, some of these initiatives are *expressive* and hortatory, calling for a shift in national policy, while others are *programmatic* in the sense that they generate internal obligations by incorporating transnational precepts into local law.

Specifying exactly what work is ongoing is challenging—in part because the differential resources of states make for varied databases and episodic information, and in part because translocal institutions are in the midst of reformulating their own agendas as they consider shifting toward international activities.[46] One method of quantifying these efforts is to assess bills proposed or enacted by state legislatures. For example, in the first six months of the calendar year of 2007, state legislatures considered 1,404 bills related to immigration. The provisions ranged from efforts to sanction employers of undocumented immigrants to limiting access to driver licenses and public benefits.[47]

By way of comparison, another analysis of activities in legislatures between 2001 and 2002 concluded that state legislatures were "taking on the world," as researchers found 886 bills and resolutions that had "significant international content."[48] According to this database, about a third of the almost 900 proposals related to what the researchers coded as "international" issues became local law. The subject matters ranged from national defense to human rights, from trade to immigration.[49] The researchers also identified a trend, in that the number of state bills within the category of the "international" had increased over the decade. Their content had also changed, in that security

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[45] *See infra* Part II.B–C.

[46] For example, the National Conference of Commissioners of Uniform State Laws (NCCUSL) has convened a subcommittee to consider whether that body ought to participate in negotiations about international agreements affecting courts, because the Conference is "increasingly impacted by global jurisprudential developments." *See* JOHN A. CHANIN, NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, SUB-COMMITTEE REPORT REGARDING CRITERIA FOR DETERMINING POSSIBLE NCCUSL INVOLVEMENT IN INTERNATIONAL LEGAL DEVELOPMENTS 1 (2005), *available at* http://www.nccusl.org/nccusl/Docs/Rpt_Criteria%20for%20NCCUSL%20Involvement_072405.pdf.

[47] 2007 Enacted State Legislation Related to Immigrants and Immigration, Immigration Policy Project (Nat'l Conference of State Legislatures, Washington, D.C.), Aug. 6, 2007, http://www.ncsl.org/programs/immig/2007immigrationupdate.htm; *see also* Julia Preston, *Immigration Is at Center of New Laws Around U.S.*, N.Y. TIMES, Aug. 6, 2007, at A12.

[48] Timothy J. Conlan, Robert L. Dudley & Joel F. Clark, *Taking On the World: The International Activities of American State Legislatures*, 34 PUBLIUS J. FEDERALISM, Summer 2004, at 183, 186. The research itself was sponsored by the Council of State Governments and received federal funding through the U.S. Agency for International Development. *Id.* at 183 (authors' note).

[49] *See id.* at 186–88.

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issues rose to the fore after 9/11, while global warming bills declined—in part because many had been put into place earlier.[50] In terms of interstate comparisons, while the number of bills or resolutions introduced averaged around eighteen, some states had no legislative proposals and others, such as Texas, had ninety-three.[51]

Some of this legislative activity entailed creating new institutional structures within states to respond to international issues. For example, by means of a survey of state legislatures, researchers learned about the "Alaska Senate Special Committee on World Trade and State/Federal Relations," and the "Oklahoma Joint Special Committee on International Development."[52] Attempting to model the variables, the researchers identified the value of a state's exports as the "most powerful predictor of the number of internationally related bills."[53] Also relevant was the input from translocal institutions because many legislators are part of networks (such as the "nonpartisan" Council of State Governments and National Conference of State Legislatures) or organizations which run the gamut from "conservative" to "the left" (such as the American Legislative Exchange Council, the Center for Policy Alternatives, and the State Environmental Resource Center).[54] Thus, while some state actors are motivated by trade concerns and others by human rights, and some want to impose barriers while others want eased access to commodities from abroad, their combined energies take issues once cast as "foreign" and make them "domestic" as well.

The development of the National League of Cities (NLC) provides another illustration. That organization emerged in 1964 from what had been called the American Municipal Association, formed in 1924 by representatives of ten cities.[55] Prompted in part to overcome state barriers to "special legislation"

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[50] *See id.* at 189–91.

[51] *Id.* at 191.

[52] *Id.* at 188.

[53] *Id.* at 194. Other variables explored were the professionalization of the legislators and the percent of the population that was foreign born. *See id.* Motivations for transnational action include lobbyists, the media, and international travel. *Id.* at 196–97.

[54] *Id.* at 196.

[55] NAT'L LEAGUE OF CITIES, 75 YEARS: OPPORTUNITY, LEADERSHIP, GOVERNANCE: FROM LAWRENCE, KANSAS TO THE 21ST CENTURY 1 (1999). The movement to generate "leagues" of American municipalities began in the 1890s, with a Conference of State Leagues of Municipalities meeting in 1917. *Id.* at 8–9. In 1977, the NLC changed its membership rules to permit entry from any city, regardless of population size. Inside NLC, http://www.nlc.org/inside_nlc/about_nlc/792.aspx (last visited Nov. 4, 2007); *see also* Bertram Johnson, *Associated Municipalities: Collective Action and the Formation of the State League of Cities*, 29 SOC. SCI. HIST. 549 (2005); DONALD L. JONES, STATE MUNICIPAL LEAGUES: THE FIRST HUNDRED YEARS (1999); Clifford W. Ham, *State*

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that gave aid to particular cities, local governments began to work together during the nineteenth and early twentieth centuries, first within states and thereafter crossing state lines.[56] As a consequence, a "nation-wide network of policy entrepreneurs" has developed to exchange information, deal with collective action problems, and in turn generate new affiliations.[57]

Moving from the national to the international arena, Cold War concerns prompted the creation of the Sister Cities Program. That project began during the second half of the Eisenhower Administration as "people-to-people" diplomacy to promote affection for democratic institutions. More recently, and with funding through federal grants (exemplifying aspects of cooperative federalism), the organization became Sister Cities International (albeit with its home office in Washington and an entirely American board of directors). It links 126 countries and 2500 communities worldwide.[58]

But NLC agendas are framed around more than trade and good will. The organization also seeks to bring attention to a host of challenges for cities, including providing adequate housing and education, enhancing "opportunity and inclusiveness," respecting diverse cultures,[59] and responding to the problems of "inequalities in our cities."[60] Thus, while "*National League of Cities*" has become shorthand in the jurisprudence of the federal courts for a (short-lived) Supreme Court decision recognizing a locality's Tenth Amendment exemption from federal regulation,[61] we should also learn to associate that name with energetic support for network-building, both local and global.[62]

Leagues of Municipalities and the American Municipal Association: An Experiment in Cooperation Among Municipal Officials, 31 AM. POL. SCI. REV. 1132 (1937).

[56] *See* Johnson, *supra* note 55, at 550–51.

[57] *Id.* at 569.

[58] *See* Sister Cities International: Frequently Asked Questions, http://www.sister-cities.org/sci/aboutsci/faqs (last visited Nov. 4, 2007). NLC ran the Sister Cities Program until a separate organization was created. *See* James Brooks, *NLC, Sister Cities Enhancing Ties*, NATION'S CITIES WKLY., Mar. 26, 2001, at 6.

[59] WILLIAM B. STAFFORD, GLOBALLY COMPETITIVE REGIONS: WHAT SEATTLE IS LEARNING FROM THE REST OF THE WORLD 6–9 (1999).

[60] *See* FY 2004 STRATEGIC PLAN UPDATE (Nat'l League of Cities, Washington, D.C.), 2004, at 2, *available at* http://www.nlc.org/ASSETS/F1F9EA5BDCFD45E2A5F1A07AC11DB8C0/stratplanfy2004.doc (listing this as priority number eight for the NLC in fiscal year 2004).

[61] *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[62] *See* FRY, THE EXPANDING ROLE, *supra* note 42; Earl H. Fry, *State and Local Governments in the International Arena*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 118 (1990); *see also* U.S.-ASIA ENVTL. P'SHIP, FEDERAL RESOURCE GUIDE FOR SUPPORTING STATE INTERNATIONAL ENGAGEMENT: COPING, COMPETING, AND

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The NLC further sharpened its global focus by becoming active in what is now the United Cities and Local Governments (UCLG), an international organization that resulted from the merger of the International Union of Local Authorities, the World Federation of United Cities, and Metropolis.[63] The UCLG describes local governments as "key" forces for promoting human rights[64] and identifies itself as the "main source of support for . . . local government" to work with the United Nations, as well as an entity committed to protecting local governments' authority.[65]

Moving from the work of state legislatures and cities to translocal efforts more generally, those activities both have a long pedigree and span a range of concerns.[66] Examples run from the nineteenth-century American Anti-Slavery Society campaign (which relied on "mass-produced" petitions for local organizations to send to Congress)[67] to a host of twentieth-century initiatives seeking to alter the conduct of the Vietnam War, the Gulf War, and the conflicts in Northern Ireland and in the Middle East, as well as promotion of nuclear disarmament,[68] protection against land mines, the end of apartheid in South Africa,[69] restitution for holocaust victims,[70] gun control,[71] and stopping

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COOPERATING IN A GLOBAL ECONOMY (2002), *available at* http://pdf.usaid.gov/pdf_docs/PNACR090.pdf (outlining where localities can find funds for such work).

[63] *See* Donald J. Borut, *Stepping Up to the International Agenda*, NATION'S CITIES WKLY., Jan. 19, 1998, at 2; United Cities and Local Governments, 2004 Founding Congress, http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=103 (last visited Nov. 4, 2007).

[64] Guy Kervella, *Unification of IULA and UTO Creates Largest International Local Government Association*, City Mayors, http://www.citymayors.com/orgs/unitedcities.html (last visited Nov. 4, 2007); United Cities and Local Governments, About Us, http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=2 (last visited Nov. 4, 2007); *see also* United Cities and Local Governments, Promoting Women in Local Decision-Making, http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=23 (last visited Nov. 4, 2007) (discussing the UCLG coordination of local governments' contribution to the U.N. Women's Conference on Beijing +10); Donald J. Borut, *Local Officials from Around the World Meet in China*, NATION'S CITIES WKLY., June 27, 2005, at 5, *available at* http://www.nlc.org/ASSETS/0CBB3F88F94F42329985740768513 24F/ncw062705.pdf.

[65] Kervella, *supra* note 64.

[66] *See generally* BRIAN HOCKING, LOCALIZING FOREIGN POLICY: NON-CENTRAL GOVERNMENTS AND MULTILAYERED DIPLOMACY (1993); Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1032–40 (2001).

[67] BETTY FLADELAND, MEN AND BROTHERS: ANGLO-AMERICAN ANTISLAVERY COOPERATION 177 (1972) (noting that in the 1820s and 1830s, more than 200 antislavery societies sent hundreds of petitions to the British Parliament to abolish slavery).

[68] *See* Shanna Singh, Note, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT'L L. REV. 537, 548–49 (2005).

[69] *See* JANICE LOVE, THE U.S. ANTI-APARTHEID MOVEMENT: LOCAL ACTIVISM IN GLOBAL POLITICS (1985).

[70] *See* MICHAEL J. BAZYLER, HOLOCAUST JUSTICE 128–35 (2003).

[71] *See* Sewell Chan, *52 Mayors Unite in Washington to Curb Illegal Firearms*, N.Y. TIMES, Jan. 24, 2007, at B6.

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the war in Iraq,[72] genocide in Sudan,[73] sweatshop labor,[74] and the importation of wildlife products.[75] Given the range, one commentator forecast that "[u]nless America becomes a police state, municipal foreign policies are here to stay."[76]

Translocal organizations of local officials exist for the various branches of government and for many different kinds of actors, including judges, attorneys, police, correction officers, governors, mayors, and legislators. The nature of the work of those different officials and their structural positions within states may well alter the kinds of networks they generate, the range of issues they engage, the positions taken, the level of expertise and knowledge, the resources available, the quality of the policies promoted, and how law might treat them.[77]

My focus in this Article is limited to the work of governors, city councils, and of mayors, sometimes in individual states and sometimes through translocal action who, as popularly elected officials, engage with transnational conventions or affiliate with transnational human rights efforts.[78] Below, I provide two examples of such work—the first, promoting CEDAW, is aimed at enhancing the substantive equality of women while the second, on climate control, underscores that opposition predicated upon the exclusive sovereign identity of the United States is by no means limited to projects aimed at human rights.

B. Engendering Equality by Gender Mainstreaming: The Example of CEDAW

> States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including

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[72] *See* Jennifer Steinhauer, *Democrats in State Capitols Push Antiwar Resolutions*, N.Y. TIMES, Feb. 16, 2007, at A14; Singh, *supra* note 68, at 545.

[73] *See, e.g.*, Save Sudan, http://www.savesudan.org; *see also infr* notes 203–30 and accompanying text.

[74] *See* Adrian Barnes, Note, *Do They Have to Buy from Burma?: A Preemption Analysis of Local Antisweatshop Procurement Laws*, 107 COLUM. L. REV. 426 (2007); Guay, *supra*, note 38 at 357 (as of 2000, four states and twenty-six municipalities had enacted economic sanction laws aimed at Burma, Nigeria, or other countries).

[75] *See* Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc., 162 P.3d 569 (Cal. 2007) (upholding a state statute banning the importation of products made from kangaroos against a challenge that state law was preempted by the federal Endangered Species Act).

[76] Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, 65 FOREIGN POL'Y 154, 171 (1987).

[77] *See, e.g.*, Greve, *Cartel Federalism?*, *supra* note 31 at 110–11, 121–22 (raising concerns about the agreement entered into by forty-six state attorneys general with tobacco manufacturers).

[78] *See, e.g.*, Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380 (2006); Nat'l League of Cities, *Briefing Paper: Local Governments Making a Better World* (Nov. 2006), http://www.nlc.org/ASSETS/A01725B9717044FEA9F963FFA80106AF/ipissuepaperbetterworld112206.pdf (detailing worldwide humanitarian and activist initiatives in which U.S. and international cities participate).

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> legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 3, The Convention on the Elimination of All Forms of Discrimination Against Women (1981)[79]

> WHEREAS, There is precedent in the City of Philadelphia, as the home of the Liberty Bell and Independence Hall, to take a strong stand against all forms of discrimination, ...
> WHEREAS, state and local governments have an appropriate and legitimate role in affirming the importance of international law in our communities as a universal norm and to serve as guidelines for public policy . . . .
> BE IT RESOLVED BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That we hereby call on the United States Senate to [ratify CEDAW].

Resolution of the Council of the City of Philadelphia (1998)[80]

> The Board of Supervisors of the City and County of San Francisco hereby finds and declares as follows: [CEDAW], an international human rights treaty, provides a universal definition of discrimination against women and brings attention to a whole range of issues concerning women's human rights . . . . The City shall work towards integrating gender equity and human rights principles into all of its operations, including policy, program and budgetary decision-making . . . .

Resolution of the City and County of San Francisco (1998)[81]

The enactment of the Nineteenth Amendment in 1920 provided women with the right to vote.[82] Over the eighty years thereafter, rights to serve on juries, to enter various professions, and to more equal opportunity as wage earners followed.[83] When these new laws are placed within a comparative international frame, the American experiences can be seen as a piece of a large international project about women's equality. On the specific issue of the

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[79] CEDAW, *supra* note 5, art. 3.

[80] City Council, Res. 980148 (Phila., Pa. Mar. 12, 1998).

[81] City and County of San Francisco, Local Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, § 12.K.1 (Apr. 13, 1998).

[82] U.S. CONST. amend. IXX.

[83] *See generally* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND OBLIGATIONS OF CITIZENSHIP (1998).

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franchise, women gained voting rights in some nations—such as Finland in 1809 and New Zealand in 1893—and in some states—such as Wyoming in 1869 and Utah in 1870—decades before they became eligible in the United States to vote in national elections.[84]

But the United States was not the last country to recognize women as political participants. A few other countries, such as France and Switzerland, did not authorize women to vote until decades later (1944 and 1971, respectively).[85] Switzerland's federated form endowed so much authority to cantons that one canton refused to enfranchise women until 1990.[86]

The vote, however, proved itself to be only one piece of what equality requires. As Virginia Woolf commented in the late 1920s—around the time when women were gaining franchise rights in England[87]—between 500 pounds a year (a guaranteed income which had come, to her, via a legacy from an aunt) and the right to vote, the 500 pounds seemed "infinitely the more important."[88] That money could be used to secure safety ("a lock on a door") and education by which to gain skills to earn a living and enable self-sufficiency.

Mirroring Woolf's concerns, equality activists on the international stage sought to protect women's rights to education, to physical safety, to health care, to national citizenship independent of that of their marital partner, to broader political participation, and to full access to wage work. Those aspirations became enshrined in the Convention on the Elimination of All Forms of Discrimination Against Women, or CEDAW as it has come to be known, which entered into force in 1981.[89]

As the brief excerpt quoted at the beginning of this subsection illustrates, CEDAW requires signatory states to take action in political, social, economic, and cultural fields to "ensure the full development and advancement of

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[84] John Markoff, *Margins, Centers, and Democracy: The Paradigmatic History of Women's Suffrage*, 29 SIGNS J. WOMEN CULTURE & SOC'Y, 85, 90–101 (2003).

[85] *Id.* at 101–04.

[86] *Id.* at 101.

[87] In 1918, women who were thirty and met other qualifications became entitled to vote in England. *Id.* at 96. In 1928, the age of eligibility became twenty-one. *See id.* at 110.

[88] VIRGINIA WOOLF, A ROOM OF ONE'S OWN 37 (Harvest Books 1989) (1929). The money was more important, Woolf wrote, because "five hundred a year stands for the power to contemplate, [and] a lock on the door means the power to think for oneself." *Id.*

[89] *See* CEDAW, *supra* note 5; *see also* Division for the Advancement of Women, *Short History of CEDAW Convention*, http://www.un.org/womenwatch/daw/cedaw/history.htm (last visited Nov. 4, 2007).

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women" to enable them to have "human rights and fundamental freedoms on a basis of equality with men."[90] Implementation occurs through reports, made periodically by member states to CEDAW's twenty-three person committee, which discharges its monitoring function by engaging in a public exchange about a reporting nation's achievements and problems.[91]

This form of norm elaboration provides a mechanism to integrate transnational premises of equality into the very different contexts of nation-states. CEDAW delineates categories of analyses but (aside from the potential of a recently added optional protocol) cannot exercise coercive power to alter a given nation's legal regime.[92] Rather, CEDAW becomes the basis for self-analyses and has been, in some countries, an impetus to reconfigure legal rules.

Many changes in national law are ascribed to making this transnational commitment to CEDAW.[93] Japan, for example, describes its work on women's rights as part of its effort to be CEDAW-compliant.[94] This

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[90] CEDAW, *supra* note 5, art. 3. Nancy Fraser's delineation of "rights of recognition" and of "redistribution" and how the project of gender equality encompasses efforts to obtain both forms of rights, at times through reifying gender distinctions and at times by their diminution, helps to capture both the ambitions of CEDAW and some of the tensions it entails. NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 41–66 (1997).

[91] *See* CEDAW, *supra* note 5, arts. 17–18. The CEDAW committee issues interpretive recommendations as well as comments on reports. *See, e.g.*, Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19*, U.N. GAOR, 11th Sess., Supp. No. 38, U.N. Doc. A/47/38 (Jan. 29, 1992) (specifying the role that violence directed at women plays as a form of discrimination to be redressed by ratifying states). Countries are supposed to submit detailed reports, followed by in-person presentations to respond to the committee's questions posed at hearings held at the United Nations. *See* Sally Engle Merry, *Constructing a Global Law—Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 954–74 (2003) (discussing the operations and impact of the CEDAW committee).

[92] This "optional protocol" permits individuals or groups, after exhausting national remedies, to file complaints directly and authorizing the CEDAW. As of February 2007, 85 countries have joined the optional protocol. *See* G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (Oct. 15, 1999).

[93] *See Treaty Doc. 95-53: Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: Hearing Before the S. Comm. on Foreign Relations*, 107th Cong. 17 (2002) [hereinafter *2002 CEDAW Hearings*] (statement of Sen. Boxer) (citing effects in Colombia, Uganda, Costa Rica, Australia, and Mexico, inter alia); *id.* at 19 (statement of Sen. Dodd) (citing CEDAW's effects on "citizenship rights in Botswana and Japan, inheritance rights in the United Republic of Tanzania," and domestic violence laws in "Turkey, Nepal, South Africa, and the Republic of Korea"); *see also* CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN 46–48 (Leila Rassekh Milani, Sarah C. Albert & Karina Purushotma eds., 2004) [hereinafter CEDAW: THE TREATY RIGHTS FOR WOMEN] (attributing to CEDAW changes in laws and practices relating to violence, education, and security); UPDATED INFORMATION ON CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN 2–10 (Supp. 2007) [hereinafter CEDAW: UPDATED INFORMATION] (identifying additional countries that subscribed to the principles of CEDAW and discussing effects in those that were already participants).

[94] *See* Committee on the Elimination of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of*

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dialectical transnationalism[95] enables one nation to interrogate its own understandings of equality by comparing its rules and practices to those of others and to talk with a diverse group of experts (selected to be representative of different regions of the world) about what equality means in context.[96]

More than 180 countries have ratified the basic provisions of CEDAW, albeit sometimes with reservations on particular aspects.[97] President Jimmy Carter signed CEDAW for the United States in 1980,[98] but subsequent administrations either have not succeeded or have not tried to secure Senate ratification.[99] Opposition in the United States is couched in the language of sovereigntism. As one of the senators opposing ratification argued, to do so

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Discrimination Against Women: Fifth Periodic Report of States Parties: Japan, 9, U.N. Doc. CEDAW/C/JPN/5 (Sept. 13, 2002). According to that report, Japan promulgated a "Basic Law for a Gender-Equal Society" in June of 1999, and in December of 2000, the Government approved a plan to implement it, which included the establishment of the Council for Gender Equality and the Gender Equality Bureau, within the Cabinet Office. *See id.* at 12. Several laws, ranging from creating a role for women in farm management to changing employment insurance laws, were enacted. *See* Id.; *see also* Ministry of Foreign Affairs of Japan, Initiative on Gender and Development (GAD) (March 2005), *available at* http://www.mofa.go.jp/policy/oda/category/wid/gad.html (detailing the compliance with CEDAW and efforts to improve women's economic status); Dr. Yoriko Meguro, Rep., Japan, 51st Sess. Commission on the Status of Women (Feb. 28, 2007), *available at* http://www.mofa.go.jp/announce/speech/un2007/un0702-6.html (describing efforts in Japan to continue to "promote activities that contribute" to the elimination of violence against the Girl Child and discussing Japan's Second Basic Plan for Gender Equality); *see also generally* Merry, *supra* note 91.

[95] I adapt this phrase from that used by Robert M. Cover & T. Alexander Aleinikoff, in their article, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

[96] *See generally* Jennifer Nedelsky, *Communities of Judgment and Human Rights*, 1 THEORETICAL INQUIRIES L. 245 (2000).

[97] *See* Division for the Advancement of Women, United Nations, CEDAW: States Parties, http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Nov. 4, 2007) (reporting 185 member-states); *see also* Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006).

[98] *See* 126 Cong. Rec. 29, 358 (1980) (recording the signing on July 17, 1980; the Senate received the Convention on November 12, 1980); Convention on the Elimination of All Forms of Discrimination Against Women, Message to the Senate Transmitting the Convention, 16 WEEKLY COMP. PRES. DOC. 2715, 2715–16 (Nov. 12, 1980).

[99] Resolutions to do so remain pending. *See* H.R. Res. 101, 110th Cong. (2007) (expressing the "sense" of the House that "the full realization of the rights of women is vital to the development and well-being of people of all nations;" and calling on the Senate to ratify CEDAW). That resolution was sponsored by ninety-six Democrats, lead by Representative Lynn Woolsey of California. *See* Library of Congress: Thomas, http://thomas.loc.gov/cgi-bin/bdquery/D?d110:101:./list/bss/d110HE.lst:@@@L&summ2=m&fTOM:/bss/110search.html|.

In February of 2007, the Bush Administration informed the Senate that it was not supportive of ratification. *See* Luisa Blanchfield, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Congressional Research Service Report for Congress, RL33652 (Dec. 14, 2006) at CRS-6. The position of the Bush administration is also reported by advocates for ratification. *See* CEDAW: The Treaty for Women's Rights, The Role of the United States, http://www.womenstreaty.org/facts_usrole.htm (last visited Nov. 4, 2007).

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would be "surrendering American domestic matters to the norm setting of the international community."[100]

What national- or state-based norms are put at risk? At hearings before a Senate subcommittee in 2002, one speaker explained that CEDAW posed a threat to America's culture because it was part of a "campaign to undermine the foundations of society—the two-parent married family, the religions that espouse the primary importance of marriage and traditional sexual morality, and the legal and social structures that protect these institutions."[101] Those charges rely in part on CEDAW's call for both women and men to take responsibility for the "upbringing and development of their children."[102] From this perspective, CEDAW's critics have correctly identified (albeit through provocative attacks)[103] CEDAW's challenge to a conception of women as obliged first to their households, as well as CEDAW's presumption that no state-party (including the United States) would be immune from having to explain to twenty-three experts what efforts were undertaken to achieve substantive equality for women.

Further, CEDAW's opponents understand that CEDAW's aspirations surpass the current requirements of federal constitutional law on gender equality.[104] Included within CEDAW's call for taking "all appropriate measures to eliminate discrimination" are "temporary special measures," aimed at accelerating substantive equality between men and women.[105] Not only is affirmative action appropriate under CEDAW, but the definition of what constitutes inequality differs from current American constitutional law.

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[100] *2002 CEDAW Hearings*, *supra* note 93, at 14–15 (statement of Sen. Michael Enzi).

[101] *Id.* at 127 (statement of Patrick Fagan, Fellow, The Heritage Foundation); *see also id.* at 143 (submission by the Family Research Council) (arguing that "CEDAW calls for an absolute leveling of every kind of distinction between men and women at every level of society" and that it was an effort by "radical feminists" intending to enshrine "their radical anti-family agenda into international law"). These statements reiterate an earlier argument, provided in a 2001 Heritage Foundation publication. *See* Patrick F. Fagan, *How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty*, THE HERITAGE FOUNDATION BACKGROUNDER: EXECUTIVE SUMMARY, FEB. 5, 2001, http://www.heritage.org/Research/InternationalOrganizations/upload/95496_1.pdf.

[102] CEDAW, *supra* note 5, art. 5.

[103] *See, e.g.*, Press Release, Brett Schaefer & Patrick Fagan, The Heritage Foundation, *U.N. Treaty Targets Motherhood* (May 13, 2002), http://www.heritage.org/Press/Commentary/ed051302a.cfm.

[104] Opponents have argued that CEDAW is the Equal Rights Amendment "on steroids." *See* Press Release, Catholic Family & Human Rights Inst., *US Pro-Life/Pro-Family NGOs Flood White House Switchboard Against CEDAW* (June 7, 2002), http://www.c-fam.org/index2.php?option=com_content&do_pdf=1&id=135.

[105] CEDAW, *supra* note 5, arts. 2(e)–(f), 4. When equality is achieved, the remedial measures are to be discontinued. *Id.* art. 4.

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CEDAW focuses on the purpose and effect on women of laws or actions rather than on the intent of a particular legal rule.[106] In addition, CEDAW applies to private as well as public actors, as CEDAW aspires to reach all aspects of one's life, from households to labor markets to governments, from early education to old age.[107] The conflict about ratification in the Senate is thus based on differences about whether to support efforts aiming to alter American equality precepts in light of understandings elsewhere about what substantive equality entails.[108]

But despite its formal authority over treaties, the Senate is not the only arena in which that issue is being decided, and looking only to the Senate, one would miss much of the action around CEDAW. Some 190 civic, religious, educational, environmental, and legal organizations have built a coalition that provides model resolutions for localities to "recognize" equal rights and to endorse efforts to obtain U.S. ratification.[109] That work has been shaped by a national movement, lead by the General Federation of Women's Clubs and the Women's Institute for Leadership Development for Human Rights (WILD), along with Amnesty International, many church groups, and other NGOs, all encouraging states and localities to focus on CEDAW.[110]

As of 2004, forty-four cities, eighteen counties, and sixteen states have passed or considered legislation relating to CEDAW,[111] with yet others

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[106] *See* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 259–60 (1999) (providing a comparative analysis).

[107] *See* CEDAW, *supra* note 5, art. 5 (calling for modification of "social and cultural patterns of conduct of men and women" to eliminate stereotypes); *id.* art. 7 (seeking women's equal participation in the formulation of government policy and equal employment possibilities); *id.* art. 16 (eliminating discrimination against women in all matters relating to marriage and family relations).

[108] The idea that United States law might take in as well as export constitutional precepts was identified by Anthony Lester, as he asked "Is America listening?" and urged the importance of this form of "trade." *See* Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 558–61 (1988).

[109] *See* CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN, *supra* note 93, at 16–17, 67–72.

[110] The National Committee on the United Nations Convention on the Elimination of Discrimination Against Women, chaired by Billie Heller, was formed, and a manual drafted. *See* ROBIN LEVI, LOCAL IMPLEMENTATION OF THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) (Krishanti Dharmaraj ed., 1999), *available at* http://www.wildforhumanrights.org/pdfs/cedawlocalimplement.pdf. Included in the materials distributed was a model version, proposed by the Working Group on Ratification of CEDAW, for localities to adopt.

[111] CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN, *supra* note 93, at 73–74. Iowa City was the first to adopt such a resolution, doing so on August 1, 1995. *See* City Council, Res. 95-222 (Iowa City, Iowa Aug. 12, 1995); *see also* Telephone Interview with Billie Heller, Chair, Comm. for Ratification of CEDAW (July 8, 2005); Telephone Interview with Ellen Dorsey, Board Member, Amnesty Int'l (Feb. 23, 2006) . In addition, efforts were made to use "international law . . . as universal norms and to serve as guides for public policy" there. City Council, Res. 95-222 (Iowa City, Iowa Aug. 12, 1995); *see* CEDAW: THE TREATY FOR THE

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contemplating action. Many localities responded with expressive, hortatory provisions, calling for the United States to ratify CEDAW. Some local adaptations do so by proudly identifying this transnational effort with their particularly American heritage.[112] Like the City of Philadelphia's Resolution

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RIGHTS OF WOMEN, *supra* note 93, at 73–74. Many municipalities' resolutions are not in databases, but to enable access to some of these materials, those cited in this footnote are on file with the Yale Law Library.

Localities on record with resolutions supporting United States ratification of CEDAW and/or its underlying principles include (grouped alphabetically by state): Bd. of Supervisors, Res. 99/551 (Contra Costa County, Cal. Oct. 26, 1999); City Council, Res. The Los Angeles Commission on the Status of Women (L.A., Cal. Mar. 15, 2000); City Council, Proclamation: Convention in Support of Women's Rights (Redlands, Cal. Jan. 19, 1999); Mayor & Common Council, Res. 2000-50 (San Bernardino, Cal. Mar. 8, 2000); City Council, Res. R-98-964 (San Diego, Cal. Mar. 17, 1998); City Council, Res. No. 68921 (San Jose, Cal. June 15, 1999); Committee on Human Relations, United States Senate Urged To Ratify "Convention on the Elimination of All Forms of Discrimination Against Women" (Chi., Ill. May 12, 1999); City Council, Res. 41-R-97 (Evanston, Ill. Aug. 18, 1997); City Council, Res. R10-99 (Highland Park, Ill. Aug. 9, 1999); City Council, Order No. 242 (Portland, Me. March 15, 1999); Council Chamber, Res. 99-28 (Berea, Ohio June 7, 1999); City Council, Res. 69-1999 (Cleveland Heights, Ohio May 17, 1999); City Council, Res. 2000-46 (Mayfield Heights, Ohio June 13, 2000); City Council, Res. 1999-71 (Middleburg Heights, Ohio June 24, 1999); City Council, Res.1999-141 (Strongsville, Ohio July 6, 1999); City Council, Res. 980148 (Phila., Pa. Mar. 12, 1998); City Council, Res. Supporting the Ratification or Accession by the United States to the Convention on the Elimination of All Forms of Discrimination Against Women (Pittsburgh, Pa. Apr. 29, 1997); City Council, Res. Relating to the Adoption of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Burlington, Vt. Apr. 28, 1997); City Council, Resolution Endorsing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Montpelier, Vt. Feb. 26, 1997); City Council, Res. 00-4 (Spokane, Wash. Jan. 24, 2000); City Council, Res. 7050 (Fond du Lac, Wis. Sept. 22, 1999); Mayor & Common Council, Res. 26625 (Madison, Wis. Nov. 30, 1999); Common Council, Res. Recognizing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Milwaukee, Wis. July 7, 1998).

Several states have introduced or passed resolutions calling for ratification. Included are: S.J. Res. 30, 1992 Gen. Assemb., Feb. Sess. (Conn. 1992) (introduced); H. Con. Res. 23, 140th Gen. Assemb., 1st Sess. (Del. 1999) (introduced); H. Res. 351, 147th Gen. Assemb., Reg. Sess. (Ga. 2003) (introduced); H. Con. Res. 15., 20th Leg. (Haw. 1999) (passed both houses); S. Res. 0437 & H. Res. 0739, 94th Gen. Assemb. (Ill. 2004) (passed both houses—the Illinois House of Representatives had adopted a CEDAW-supportive resolution more than a decade earlier as well, *see* H. Res. 1399, 87th Gen. Assemb. (Ill. 1992)); S. Con. Res. 14, 74th Gen. Assemb. (Iowa 1991) (passed both houses); Res. Relating to the Ratification of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, 177th Gen. Court (Mass. 1991) (passed both houses); H. Con. Res. 12, 1997 Reg. Sess. (N.H. 1998) (passed both houses); H. Res. 1416, 216th Gen. Assemb. (N.Y. 1993) (passed House); H. Res. 388, 1999–2000 Gen. Assemb. (N.C. 1999) (passed House); S. Con. Res. 10, 49th Leg., 1st Sess. (Okla. 2003) (introduced); H. Res. 144, 187th Gen. Assemb., 2003–04 Reg. Sess. (Pa. 2003) (passed House); H. Res. 7100, 2000 Gen. Assemb., Jan. Sess. (R.I. 2000) (passed House); H. Con. Res. 1006, 68th Leg. Sess. (S.D. 1993) (passed both houses); S.J. Res. 16, 64th Leg. Sess. (Vt. 1997) (passed both houses); S.J. Mem. 8008, 56th Leg., Reg. Sess. (Wash. 1999) (introduced); S.J. Res. 37, 94th Reg. Sess. (Wis. 1999) (introduced). The Territory of Guam also issued a proclamation endorsing ratification. Proclamation No. 98-37, Territory of Guam (Apr. 23, 1998).

According to the 2007 CEDAW update, since 2004 three more cities, one more county, and two more states had supported CEDAW in votes of local councils or one or both houses of their legislatures. *See* CEDAW: UPDATED INFORMATION, *supra* note 93, at 5–6.

[112] *See, e.g.*, H. Con. Res. 23, 140th Gen. Assemb., 1st Sess. (Del. 1999) (calling for ratification and citing America as a "leading advocate for human rights").

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quoted at the outset of this section, many underscore the "importance of international law in our own communities as a universal norm and to serve as guides for public policy."[113] Further, some such as Burlington, Vermont, link this effort to those begun in the 1950s that connected cities through a "Sister Cities" program. Noting "the greatly increased interdependence of the people of the world," the Burlington Resolution insisted that its "responsibilities" extended "beyond the boundaries of our city, state, and nation, as demonstrated through [the] Sister Cities Program."[114]

Some resolutions go beyond expressive statements calling for ratification and take a different tack by turning "transnational" law into "local" law. While the United States has not ratified CEDAW, San Francisco has enacted some of its precepts by obliging itself to deploy the CEDAW techniques of lawmaking through self-interrogation about the effects of equality norms across all of its domains. As illustrated by the opening quote from San Francisco's Resolution, the City now requires reports on the role women play in departments responsible for public works, adult probation, arts, environment, and juvenile probation.[115] In a 2003 action plan,[116] the City committed to reviewing federal, state, and local laws and public policies to identify systematic and structural discrimination against women and girls so as to "[i]ntegrate gender into every city department to achieve full equality for men and women through the city-wide budgeting process," as well as to undertake a host of other measures, from changing work-life policies to increasing protection for women's "bodily integrity," safety, and "well-being."[117] In 2007, San Francisco released a report which noted that its work had drawn the attention of the National Association of Counties (NACO), "the

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[113] City Council, Res. 980148 (Phila., Pa. Mar. 12, 1998).

[114] City Council, Res. Relating to the Adoption of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Burlington, Vt. Apr. 28, 1997).

[115] *See* S.F., CAL., ADMIN. CODE § 12K.1–6 (2005). Information and reports are available at SFGov, http://www.sfgov.org/site/dosw_index.asp (last visited Nov. 4, 2007). In April of 2007, the Department on the Status of Women issued its Gender Analysis Report. *See generally* Martha F. Davis, *International Human Rights from the Ground Up: The Potential for Subnational, Human Rights-Based Reproductive Health Advocacy in the United States*, *in* WHERE HUMAN RIGHTS BEGIN: HEALTH, SEXUALITY AND WOMEN IN THE NEW MILLENNIUM 235 (Wendy Chavkin & Ellen Chesler eds., 2005).

[116] *See* SAN FRANCISCO COMMISSION ON THE STATUS OF WOMEN, CEDAW ACTION PLAN (2003), *available at* http://www.sfgov.org/site/cosw_page.asp?id=17146.

[117] *Id.*

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only national organization that represents county governments," which commended the work upholding "the human rights of women and girls."[118]

These goals have a name in transnational parlance; they are what the United Nations, the Council of Europe, and the Commonwealth Secretariat call *gender mainstreaming*, aimed at ensuring that all social policy decisions are made with attention to their effects on women and men.[119] The spread of that approach comes in part through transnational efforts, promoted by the United Nations, to bring attention to women into focus. That work has succeeded, if success is measured by the creation of new "national machineries for the advancement of women," of which one hundred were created between 1975 and 1997.[120]

Returning to the United States, efforts akin to those of San Francisco are underway in Los Angeles, which, in 2003, enacted an ordinance acknowledging the "continuing need . . . to protect the human rights of women and girls by addressing discrimination, including violence, against them and to implement, locally, the principles of CEDAW."[121] Los Angeles launched "gender analyses, to determine what, if any, City practices and policies" could be improved.[122] Moving east, in the spring of 2005, the New York City Council considered an ordinance that would bring aspects of CEDAW and the

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[118] *See* CITY AND COUNTY OF SAN FRANCISCO, DEP'T ON THE STATUS OF WOMEN,.GENDER ANALYSIS REPORT at 17 (Apr. 2007), http://www.sfgov.org/site/uploadedfiles/dosw/programs/CEDAW/Gender_Analysis_Reports/reports/Final%20DOSW_gender_analysis_final_report_031307.doc.

[119] *See* Secretary-General, *Review and Appraisal of the Implementation of the Beijing Platform for Action*, ¶¶ 11–15, U.N. Doc. E/CN.6/2000/PC/2 (Jan. 19, 2000), *available at* http://www.un.org/womenwatch/daw/csw/ecn6-2000-pc2.pdf (discussing the United Nation's commitment to this approach); *see also* CHRISTINE CHINKIN, GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS: A REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS (2001); GROUP OF SPECIALISTS ON MAINSTREAMING, COUNCIL OF EUR., GENDER MAINSTREAMING: CONCEPTUAL FRAMEWORK, METHODOLOGY AND PRESENTATION OF GOOD PRACTICE 4–5 (1998). This approach is not without its critics. *See* Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005) (arguing that the dominant methods of gender mainstreaming substitute bland approaches that deflect attention from inequality).

[120] *See* Jacqui True & Michael Mintrom, *Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming*, 45 INT'L STUDIES Q. 27, 30 (2001).

[121] L.A., CAL., ORDINANCE 175735 (Dec. 24, 2003), *available at* http://clkrep.lacity.org/councilfiles/00-0398-S2_ORD_175735_02-08-2004.pdf. Like CEDAW, the city's definition of gender discrimination seeks to respond to the challenges of combining parental obligations with "work responsibilities and participation in public life." *Id.*

[122] *Id.* Berkeley has a resolution putting its Board of Supervisors on record as supporting "local implementation of the underlying principles" of CEDAW. City Counsel, Res. 62,617 (Berkeley, Cal. July 20, 2004).

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Convention on the Elimination of Racial Discrimination (CERD) into the local law regime.[123]

C. *Translocal-Transnational Environmentalism: Kyoto and Beyond*

> "[T]he sovereign right [of nations] to exploit their own resources" is stated along with a commitment to protect the "natural resources of the earth . . . for the benefit of present and future generations," and "the responsibility to ensure that activities within our jurisdiction . . . do not cause damage" to the environment.
>
> ***Declaration of the United Nations Conference on the Human Environment, Stockholm (1972)***[124]

> The Mayors of cities in the United States develop their Program to "meet or exceed the Kyoto Protocol targets . . . in their own operations and communities," encouragement of federal and state governments to meet Kyoto targets, and commendations to Congress to pass bipartisan legislation to create an emissions trading system.
>
> ***The U.S. Mayors' Climate Protection Agreement (2005)***[125]

To focus on international human rights alone would be to obscure how varied translocal transnational work is. On topics ranging from economic development and immigration to land mines, local activists seek to alter policies both near and far. My example here is environmental regulation, for which the 1972 Stockholm Conference, resulting in the Stockholm Declaration, is a touchstone.[126] As in the U.N. Charter and the Universal Declaration of Human Rights, this Declaration includes recognition of both transnational concerns and the interests of individual nations. "[T]he sovereign right [of nations] to exploit their own resources"[127] is stated along with a

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[123] A CEDAW/CERD initiative was introduced in December of 2004. *See Intro 512–Human Rights GOAL: Hearing Before the Governmental Operations Comm., N.Y. City Council* (Apr. 8, 2005) (statement of Emily M. Murase), *available at* http://www.nychri.org/documents/Murase.pdf (discussing the proposed initiative). As of the spring of 2007, the 2004 bill had not been enacted and another was to be reintroduced. E-mail from Ejim Dike to Judith Resnik (May 9, 2007) (on file with author); *see also* Gen. Assemb. Res. 144, 183rd Leg. (Pa. 2003) (calling for hearings on how to review its laws to integrate "human rights standards").

[124] *See* U.N. Conference on the Human Env't, June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF. 48/14, princs. 2, 21 (June 16, 1972) [hereinafter *U.N. Conference on the Environment*].

[125] *See* U.S. Conference of Mayors, Endorsing the U.S. Mayors Climate Protection Agreement (2005), *available at* http://usmayors.org/uscm/resolutions/73rd_conference/en_01.asp.

[126] *See U.N. Conference on the Environment, supra* note 124.

[127] *Id.* princ. 21.

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commitment to protect the "natural resources of the earth . . . for the benefit of present and future generations."[128] Such provisions are common in their insistence on the coexistence and interdependency of national and transnational action.

In December of 1997, a group of nations came together in Kyoto, Japan, to address global warming. Their agreement, called the Kyoto Protocol, created a framework, relying on certain timetables, to reduce greenhouse gas emissions.[129] In 1998, President William J. Clinton signed the Protocol.[130] But, like the conflict over CEDAW, opposition to participation by the United States was nested in claims about how doing so would undermine the sovereignty of the United States. In the same year that President Clinton signed the Protocol, the Committee to Preserve American Security and Sovereignty (COMPASS), comprised of a group of former government officials who were mostly affiliated with Republican administrations and apparently functioning together specifically to oppose the Kyoto Protocol, issued its report which is called *Treaties, National Sovereignty, and Executive Power: A Report on the Kyoto Protocol.*[131]

COMPASS objected to the treaty as wrongly imposing limits on the United States as a sovereign.[132] Further, the report argued that the Protocol attempted to "convert decisions usually classified as 'domestic' for purposes of U.S. law and politics into 'foreign,'"[133] thus limiting the powers of Congress, local governments, and private entities. In addition, COMPASS charged that Kyoto opened the door to the use of courts, empowered through customary international law, to create a new "super-national source of binding legal rules."[134] Consistent with sovereigntists' reliance on themes of democratic processes, COMPASS complained that the Kyoto Protocol emerged through the influence of NGOs which were "not politically accountable."[135] These arguments resonated with George W. Bush who, in 2001, withdrew American

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[128] *Id.* princ. 2.

[129] *See* Kyoto Protocol, *supra* note 6; *see also generally* Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451 (1993); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1535–38 (1999).

[130] Kyoto Protocol, *supra* note 6.

[131] COMM. TO PRESERVE AM. SEC. & SOVEREIGNTY, TREATIES, NATIONAL SOVEREIGNTY, AND EXECUTIVE POWER: A REPORT ON THE KYOTO PROTOCOL (1998), *available at* http://jamesvdelong.com/articles/environmental/kyoto.html.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

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support of the Kyoto Protocol.[136] About four years later, in February of 2005, the Kyoto Protocol went into effect with a group of 141 countries that had ratified it.[137] But as is the case with CEDAW, one must look beyond the Senate to understand the relationship between the United States and efforts to stem global warming.

Many local officials in the United States do not share President Bush's views regarding the Kyoto Protocol. Several cities, including Seattle and Salt Lake City, have enacted ordinances aimed at conforming to the Protocol's targets for controlling local utility emissions. In March 2005, a small group of mayors agreed to their own climate protection program,[138] which was approved by the United States Conference of Mayors in June 2005. By the fall of 2007, more than 700 mayors, representing towns and cities with combined populations of over sixty-seven million people, endorsed that program,[139] which includes efforts to "meet or beat the Kyoto Protocol targets in their own communities,"[140] encouragement of federal and state governments to meet Kyoto targets, and commendations to Congress to pass bipartisan legislation to create an emissions trading system.[141]

In addition, and again paralleling the local work on CEDAW, some localities have enacted expressive resolutions calling for national action. For example, in 2007, of "234 incorporated cities and towns in New Hampshire," 180 voted on whether "to support a resolution asking the federal government to address climate change" and to call "for state residents to approve local solutions for combating climate change." [142] As of March of 2007, 134 had passed such initiatives.[143]

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[136] *See, Contemporary Practice of the United States Related to International Law, U.S. Rejection of Kyoto Protocol Process*, 95 AM. J. INT'L L. 647, 647–49 (2001); Remarks on Global Climate Change, 1 PUB. PAPERS 634, 634 (2001) (offering as an explanation that "[t]he Kyoto Protocol was fatally flawed" because relevant scientific information was lacking and that exemptions for certain countries undermined the agreement).

[137] *See* U.S. Conference of Mayors, Endorsing the U.S. Mayors Climate Protection Agreement (2005), *available at* http://usmayors.org/uscm/resolutions/73rd_conference/en_01.asp.

[138] Office of the Mayor of Seattle, Wash., Homepage for the U.S. Mayors Climate Protection Agreement, http://www.seattle.gov/mayor/climate [hereinafter Mayors Agreement] (last visited Nov. 4, 2007).

[139] The U.S. Conference of Mayors Website, http://usmayors.org/uscm/home.asp (last visited Nov. 4, 2007).

[140] Mayors Agreement, *supra* note 138.

[141] *See id.*

[142] Katie Zezima, *In New Hampshire, Towns Put Climate on the Agenda*, N.Y. TIMES, Mar. 19, 2007, at A8.

[143] *Id.*

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III. REGULATING THE IMPORT/EXPORT TRADE OF LAW

> In interpreting and applying the Constitution of the United States, a court of the United States may not rely on any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law up to the time of the adoption of the Constitution of the United States.
>
> ***Constitutional Restoration Act of 2005***[144]

> Notwithstanding any other provisions of law, any State may adopt measures to prohibit any investment of State assets in the Government of Sudan or in any company with a qualifying business relationship with Sudan . . . .
>
> ***Sudan Divestment Authorization Act of 2007***[145]

A. *Laissez Faire or Regulated Internationalism?*

As the multiple ports of entry created through the federated structure of the United States come into view, one must learn not to equate "the foreign" with democratic deficits because democratic iterations are a regular route by which "the foreign" becomes domestic. This process helps to clarify that sovereigntists opposed to "foreign" law are putting forth a political position distinct from theories grounded in the democratic practices of federalism. Neither premises intrinsic to democracy nor to federalism dictate when and how American law should borrow from abroad. Rather, democratic federalism is, repeatedly, a source of importation that has transformed the nation's self-understanding of its own legal commitments.[146]

Through this overview of facets of *horizontal federalism's translocal internationalism*, one can see that, as a political theory, sovereigntism has no special relationship to majoritarianism. Sometimes, sovereigntist positions win popular initiatives to try to erect formal boundaries, and other times, such attempts fail. As a practice, sovereigntists have a dismal track record in that

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[144] S. 520, 109th Cong. § 201 (2005).

[145] S. 831, 110th Cong. § 5 (2007).

[146] Thus, I do not share the view that one can make a general claim that the "popular culture" of America is "hostile" to relying on "foreign" law to shape understandings of our constitutional precepts or that justices on the Supreme Court are far removed from cultural trends. *Cf.* Stephen G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1410–14 (2006).

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American law is constantly being made and remade through exchanges, some frank and some implicit, with normative views from abroad. Laws, like people, migrate. Legal borders, like physical ones, are permeable, and seepage is everywhere.

But once sovereigntism is untangled from majoritarianism and federalism, a core premise of an exclusivist sovereigntism—that a nation-state's law ought to aspire, self-consciously, to be contained or to channel its relationships with other nations through certain specified routes—can be evaluated on its own terms (in isolation if you will). To argue that sovereigntism cannot succeed as a practice ought not lead one to ignore the important questions raised through a sovereigntist stance—to wit: (1) whether this trade in the import and export *of* law ought to be regulated *by* law and, if so by national actors, such as Congress, the courts, the Executive, or agencies; (2) whether in doing so, national actors (be they executive, legislative, or judicial) should be specially privileged as the principal agents of trade; and (3) whether judge-to-judge transfers are distinctive, and if so, distinctively in need of regulation.

A second purpose of this Article is thus to invite engagement with the questions raised by sovereigntists. To do so requires considering whether the issues are to be decided by reference to the Constitution. Does any branch of government hold the constitutional power to try to discourage certain actors from importing or exporting law? If the Constitution is silent, how should a democratic nation-state decide how much to welcome, facilitate, or chill comparative legal excursions by any of the government's branches? And what is the relationship of these questions to the identity formation of a nation-state, to decisions about what its normative commitments will be, and about how it will provide services and enforce laws for those who reside within it? How might democratic federalists, attentive to majoritarianism yet mindful of rights-protection through courts, reason about the trade in law? Should non-sovereigntists be concerned about the potential for the national boundaries to erode as local entrepreneurs shape initiatives across an array of issues? Ought one worry that the policies made will be unworkable in practice or do systematic harm to certain interests?

The stakes in forming answers to these questions are significant. As localities and states expand the reach and range of their interactions to engage in a robust multi-faceted discourse with localities and nations abroad, they do compete with and lessen the hegemony of the national government. Moreover, to the extent that sovereigntists succeed in conflating challenges to judicial

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review with objections to the use of foreign legal premises, additional pressure is placed on judicial independence.[147]

Categorization of the kind of questions now on the table is in order. One set falls within the purview of legal doctrine, such as whether as a matter of constitutional law, or of constitutional common law, or statutory interpretation, federal or state judges, as well as federal or state legislators, are authorized to or disabled from interacting across borders in certain ways. Undergirding that interpretative process are questions of separation of powers and judicial role as well as questions about the degree to which states ought to be centers of robust authority and potential sites of experimentation and variation.

Another set of issues (often associated with the terrain of political scientists and sociologists) is about institutional competency, efficacy, efficiency, and utility. As a matter of policy and practice, how are wise decisions forged, commitments made, changed, or reaffirmed? Ought one have a preference that multiple forms of engagement are desirable or that operating as a nation with "one voice" is a better modality, and if so, for whom—those within this country or humankind more generally? Were one a utilitarian, are certain forms of organization better than others to generate policies maximizing social welfare? And what role do commitments to democratic practices play in responding to these questions?

For American constitutional lawyers, a starting point is the allocation of authority. For example, the issue of whether legislators ought to direct judges to limit their use of source materials—by banning citation of "foreign" law or for that matter forbidding the use of law reviews or Wikipedia—is a problem about separation of powers. Similarly, the ability of a court to strike state provisions regulating foreign corporations depends on one's views on judicial review, on the scope of national government powers and the respective roles of Congress, the President, and agencies, on the definition of "foreign affairs," and on the degree of deference to be accorded state and local officials in this federation. For liberal political theorists and moral philosophers, these questions require consideration of which interpretations of a constitutional scheme will enable reflections of majoritarian will, tempered with protection of human rights and the enhancement of the values of transparency and accountability. For those focused on policy and good governance, these

[147] Some are more sanguine than others about the durability of judicial authority. *See, e.g.*, Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006).

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questions may turn on the practicality and feasibility of multiple layers and sources of rules.

B. Congressional Constraints on Judicial Importation

One kind of sovereigntist barrier is an effort to limit the ability of courts to turn to non-United States sources of law. Discussed below are two techniques to do so, one through legislation and the other by generating norms through public inquiries made of proposed nominees to the courts.

In terms of legislation, proposals like the Constitutional Restoration Act of 2005, quoted at the outset of this section, have been put into the hopper and produced hearings on the question of limiting judges' use of non-United States law. After Democrats gained a measure of authority in Congress in the 2006 election, activity related to the Constitutional Restoration Act stalled. Nonetheless, provisions within the Military Commissions Act of 2006 do impose limits on the use of "foreign sources" when judges interpret United States' obligations under certain provisions of the Geneva Convention.[148] Moreover, like the "ghost of Senator Bricker" (to borrow Louis Henkin's phrase describing the impact of the 1950s proposal by that senator to amend the United States Constitution to prevent international treaties from affecting domestic obligations[149]), these congressional bills have, in conjunction with other events, had an effect.

The change in the membership of the Supreme Court after the death of Chief Justice Rehnquist and the resignation of Justice O'Connor shifted attention away from the issue of "foreign" law to the durability of "domestic" doctrines in a variety of arenas, including such high-visibility questions as the

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[148] Military Commissions Act of 2006, Publ. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of titles 10, 18, and 28 of the United States Code). One provision within that act provides that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States" when those courts interpret the country's obligations to comply with the Third Geneva Convention to provide "effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character." 120 Stat. 2632, 18 U.S.C. § 2441. Section 5(a) of the MCA further states that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or its territories." 120 Stat. 2631, 28 U.S.C. § 2241. Section 948b provides that "[n]o alien unlawful enemy combatant subject to trial by military commission . . . may invoke the Geneva Conventions as a source of rights." 120 Stat. 2602, 10 U.S.C. § 948b.

[149] Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

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legality of affirmative action and of restrictions on abortions.[150] Moreover, while Chief Justice Rehnquist had expressed some support for international exchanges (and created a committee on the Judicial Conference of the United States to facilitate that activity),[151] his successor, Chief Justice John Roberts, testified in his confirmation hearings that he thought it wrong to turn to "foreign" law.

The question about the use of "foreign" law came from Senator Jon Kyl of Arizona. Senator Kyl stated his concern that "[o]ur Constitution was drafted by the Nation's Founders" and ratified through "constitutional processes that involve both Federal and State legislators," and was at risk of being "determined by reference to foreign law."[152] He then asked the nominee: "[w]hat, if anything, is the proper role of foreign law in U.S. Supreme Court decisions? . . . [in] cases such as those that would involve interpretations of the U.S. Constitution?"[153]

Then-Judge Roberts replied that, "as a general matter . . . [there are] a couple of things that cause concern on my part about the use of foreign law as precedent . . . ."[154] His first concern was about "democratic theory," that "judges . . . are not accountable to the people," and that borrowing law from

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[150] For example, in *Gonzales v. Carhart*, 127 U.S. 1610 (2007), the Court ruled 5-4 that a federal statute that banned partial birth abortions but provided no express exception for a woman's health or reproductive safety was constitutional. Justice Kennedy wrote the majority opinion over a dissent penned by Justice Ginsburg and joined by Justices Stevens, Souter, and Breyer.

[151] *See* William H. Rehnquist, *Foreword* to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, at vii, viii (Vicki C. Jackson & Mark Tushnet eds., 2002) (reprinting remarks made in 1999). Further, the Chief Justice chaired the Judicial Conference of the United States when, in 1993, it established the Standing Committee on International Judicial Relations of the Judicial Conference of the United States. *See* Michael M. Mihm, *International Judicial Relations Committee Promotes Communication, Coordination*, 1 INT'L JUD. OBSERVER 1 (1995). In 2006, the federal judiciary provided "briefings for 53 international delegations, including 460 judges, court administrators, and other officials from 60-plus countries." ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 2006 19, *available at* http://www.uscourts.gov/library/annualreports/2006/2006_annualreport.pdf.

[152] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 109-158, 109th Cong. 200 (2005) [hereinafter *Roberts Hearing*]. Senator Kyl stated that something had "been bugging" him; that the Court in *Roper v. Simmons*, 543 U.S. 551 (2005), had "not only, in [his] view, engaged in questionable analysis of American law, it spent perhaps 20 percent of its legal analysis discussing the laws of Great Britain, Saudi Arabia, Yemen, Iran, Pakistan, Nigeria and China." Senator Kyl found the "trend" toward attentiveness to the laws of other nations "greatly troubling" and continued: "It's an American Constitution, not a European or an African or an Asian one. And its meaning, it seems to me, by definition, cannot be determined by reference to foreign law." *Id.* at 199–200. *See also* Mark Tushnet, *When is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006).

[153] *Roberts Hearing*, *supra* note 152, at 200.

[154] *Id.*

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another country would be to give jurists from that country "a role in shaping a law that binds the people in this country."[155] Further, the nominee stated his view that "foreign precedent doesn't confine judges," but rather "[i]t allows the judge to incorporate his or her own personal preferences, cloak them in the authority of precedent—because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution."[156]

A few months thereafter, Samuel Alito appeared before the Senate at his confirmation hearings to become an Associate Justice.[157] The nominee also rejected a robust role for "foreign" law as he explained it was not "helpful in interpreting the Constitution" because the structure of the United States government was "unique," with "our own traditions" and "our own precedents."[158] Thereafter, Justice Alito replaced Justice O'Connor, who has been one of the leading spokespersons for learning from abroad through a process she termed "transjudicialism."[159]

The exchanges at the hearings of Chief Justice Roberts and Justice Alito fit within a tradition of using confirmation hearings as a venue to develop legal norms. The transcripts of hearings provide windows into the constitutional culture of a particular moment, as lines of questions highlight issues that are salient or contested. The debate about the use of "foreign" law is of relatively recent vintage, as can be seen by contrasting the hearings on Roberts and Alito with earlier confirmation discussions in which parallel questions were not posed. Scanning the transcripts of the confirmation hearings of Justices Kennedy, Souter, Thomas, Ginsburg, and Breyer,[160] one cannot find such

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[155] *Id.* at 200–01.

[156] *Id.* at 201. When pressed in subsequent questioning by Senator Tom Coburn, then-Judge Roberts disagreed with the proposition that judges who cited foreign law were "violating their oath" of office. *Id.* at 293. While they might be "getting it wrong" they would presumably be "operating in good faith." *Id.* For a discussion of why considering non-binding foreign law is not arbitrary, see H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 264–90 (1987).

[157] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S.. Comm. on the Judiciary*, S. Hrg. 109-277, 109th Cong. (2006) [hereinafter *Alito Hearing*]. Again, Senator Kyl asked the question, prefacing it with his view that "reliance on foreign law is contrary to our constitutional traditions," "undermines democratic self-government," is "utterly impractical" and "needlessly disrespectful of the American people." *Id.* at 370.

[158] *Id.*

[159] *See* Sandra Day O'Connor, Remarks at the 79th Annual Meeting of the American Law Institute (May 15, 2002) *in* 79 A.L.I. PROC. 245, 247–49 (2002).

[160] To search for this issue, we looked for the terms "foreign law" and "international law" in the transcripts. Statements during Justice Ginsburg's confirmation hearings did refer approvingly to her expertise in international and comparative law. *See Confirmation Hearing on the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the*

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inquiries. Elsewhere, I detailed a comparable shift in questioning, as the issue of a nominee's attitude toward women's rights made its way during the 1970s and 1980s into the confirmation process.[161] The question of a nominee's views of the constitutional protections afforded to women moved from the periphery to becoming important when the nomination of Robert Bork was before the Senate. The exchanges in the last few years on "foreign" law substantiate the point that nomination hearings are a place to debate and to develop norms, as well as to expose what questions appear settled and not appropriately contested. Further evidence of the use of hearings for those purposes comes from the fact that both Chief Justice Roberts and Justice Alito were asked questions about their views on women's rights.[162]

In analyzing the development of senatorial interest in nominees' attitudes towards women's rights, I argued that senators, who are constitutionally obliged to give advice and consent to a nomination, were appropriately gathering information about nominees' views on matters of import and simultaneously speaking to their own constituencies and to judges in general about their aspirations for what America's law entailed. And, of course, senators were looking to find nominees whose views accorded with their own. Questioning nominees is a permissible vehicle to develop or to contest norms.

In contrast, proposed bills such as the Constitutional Restoration Act of 2005 directing judges not to "rely" on "foreign" law cross the line from expressive efforts to unwise (and arguably impermissible) congressional oversight of judicial decisionmaking. My objection does not lie only in the

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Judiciary, S. Hrg. 103-482, 103d Cong. 553 (1993) (Statement of Carlos G. Ortiz, Hispanic National Bar Association) (praising then-Judge Ginsburg's comparative law scholarship and background). But neither those hearings nor those of Justices Kennedy, Souter, Thomas, or Breyer included questions focused on "foreign" law as were addressed to then-Judges Roberts and Alito. *See Confirmation Hearing on the Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, S. Hrg. 100-1037, 100th Cong. (1987); *Confirmation Hearing on the Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, S. Hrg. 101-1263, 101st Cong. (1990); *Confirmation Hearing on the Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, S. Hrg. 102-1084, 102d Cong. (1991); *Confirmation Hearing on the Nomination of Stephen G. Breyer to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, S. Hrg. 103-715, 103d Cong. (1994). Full transcripts of all of these confirmation hearings are available at http://www.gpoaccess.gov/congress/senate/judiciary/scourt.html.

[161] Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 631–36 (2005).

[162] *See Roberts Hearing*, *supra* note 152, at 310–12. Further, several women testified that the nominee was respectful of women as employees and supportive of their careers. *See, e.g.*, *id*, at 476–77 (statement of Maureen Mahoney); *see also Alito Hearing*, *supra* note 157, at 384–85.

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prohibition on "foreign" law, for I would find it equally offensive for Congress to direct judges not to consider or cite law reviews or Wikipedia. Such provisions are ill-advised because judges in a democracy ought to explain in detail the processes, facts, norms, law, legal arguments, and sources that brought them to the legal judgments rendered.[163] Further, American judges have much to learn from foreign jurists—in particular because they also struggle to give meaning to obligations that parallel some of those found in the United States Constitution. How to use those insights is complex, but the risk of misuse of information and precedent exists throughout the enterprise of judging. Yet, as I have explained elsewhere, I can both imagine and endorse judges who decide that, because their core premises emerge from the American legal tradition, forays abroad to citations from other legal systems would distract the litigants and the readership more broadly from the core principles they are explicating as intrinsic to the law of the United States.[164]

The 2005 Constitutional Restoration Act, worded as a directive followed by a threat of impeachment, is not only unwise but ought also to be understood as unconstitutional.[165] Those familiar with federal legislation relating to courts know well the many statutes that direct judges on what factors to consider when determining liability, on what remedies to prefer, in which order, and when. But many of these statutes have escape clauses, prioritizing but not prohibiting specific decisions.[166] In contrast, a statute that seeks both to control the sources of judicial interpretation and to sanction judges for

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[163] *See* Jeremy Waldron, "Partly Laws Common to All Mankind": Foreign Law in American Courts, Storrs Lectures at the Yale Law School (Sept. 10–12, 2007) (on file with author).

[164] *See* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1612–26 (2006) [hereinafter Resnik, *Law's Migration*].

[165] *See Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing before the H. Comm. on the Judiciary*, 108th Cong. 33–40 (2004) (statement of Vicki. C. Jackson, Prof. of Law, Georgetown U. L. Center), *available at* http://commdocs.house.gov/committees/judiciary/hju92673.000/hju92673_0f.htm. Whether Justice Scalia's objection to the provision sounds in constitutional or policy terms is not clear from newspaper reports of his discussion, but apparently after stating that "no one is more opposed to the use of foreign law than I am," he also thought that it was not "up to Congress to direct the court how to make its decisions." Charles Lane, *Scalia Tells Congress to Mind Its Own Business*, WASH. POST, May 19, 2006, at A19.

[166] *See, e.g.*, Miller v. French, 530 U.S. 327 (2000) (upholding aspects of the Prison Litigation Reform Act); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 327–28 (1938) (upholding aspects of the Norris-LaGuardia Act); *see also* Tax Injunction Act, 28 U.S.C. § 1341 (2006) (prohibiting federal courts from enjoining state tax assessments or collections as long as a "plain, speedy and efficient remedy" is available in state court); Anti-Injunction Act, 28 U.S.C. § 2283 (2006) (prohibiting federal courts from enjoining pending litigation in state courts absent specified exceptions).

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violating that mandate violates the judiciary's protected independence and potentially litigants' due process right.[167]

C. *Judicial Constraints on Importation: Protecting the Executive from Local Decisionmaking*

If one expression of sovereigntism is an effort by some members of Congress to control judges, another is the judicial imposition of limits on the role of localities in relation to issues placed under the umbrella of "the foreign." This issue is now on the litigation front-burner as the Supreme Court has, over the last decade, developed a doctrine called *foreign affairs preemption*. The Court has used this doctrine to prohibit the State of Massachusetts from banning its own expenditures on imports made with forced labor,[168] and the Court relied on this principle when invalidating a California statute that required companies offering insurance to disclose their dealings during the Holocaust.[169] The underlying idea is that state decisions could affect foreign affairs in a way detrimental to the national interest, and that the country is presumptively better off when its interactions with other countries come from a unitary source exercising "one voice"—that of the executive speaking for the national government.

The many scenarios in which this doctrine has been deployed render the nomenclature of "foreign affairs preemption" insufficient, such that judges at times rely on or create doctrines that could be termed "war powers preemption,"[170] or "foreign commerce preemption,"[171] or "political question preemption."[172] Further, the phrase "foreign affairs preemption" entails a legal puzzle, in that preemption is a term often used when a *federal statute* precludes

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[167] *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

[168] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[169] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

[170] *See, e.g.*, Deutsch v. Turner Corp., 317 F.3d 1005, *amended and superseded on denial of reh'g en banc*, 324 F.3d 692 (9th Cir. 2003).

[171] *See, e.g.*, Nat'l Foreign Trade Council, Inc. v. Giannoulias 2007 U.S. Dist. LEXIS 13341 (N.D. Ill. Feb. 23, 2007). For the interaction among genres of preemption law, see Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, Nos. 2:05-CV-302, 2:05-CV-304, 2007 WL 2669444, at *85–90 (D. Vt. Sept. 12, 2007); Cent. Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160, 1175–87 (E.D. Cal. 2006); Cent. Valley Chrysler-Jeep v. Witherspoon, 2007 U.S. Dist. LEXIS 3002 (E.D. Cal. Jan. 12, 2007).

[172] *See, e.g*, Deutsch v. Turner Corp., No. CV 00-4405 SVW(AJWX), 2000 WL 33957691, at *1–3 (C.D. Cal. Aug. 25, 2000), *aff'd on different grounds*, 324 F.3d 692 (9th Cir. 2003); California v. Gen. Motors, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing a suit by California seeking damages against car manufacturers based on a common law global warming nuisance tort claim on the grounds that the issues were non-justiciable political questions).

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application of a state statute dealing with the same issue. For example, the Supreme Court recently held that some, but not all, aspects of state tort law could be preempted by federal statutes regulating the labeling of pesticides.[173] In some of the cases involving foreign affairs, the claim of exclusive national authority is similarly predicated on a federal statute.

But in other instances, the claim for preemption rests on executive action rather than on legislative directives. Moreover, the argument is sometimes based on a potential, but inchoate, conflict with a national policy. Entwined is a general notion that the Constitution could directly preclude state involvement in problems categorized as "foreign." Arguments thus run from an actual incompatibility based on comparing local laws and federal statutes to instances when the conflicts are "dormant."[174] And, rather than having a presumption against preemption and in favor of concurrency, some judges have relied on a presumed special federal authority over areas related to foreign affairs, including immigration, to find local initiatives illegal.[175]

Therefore, before considering the wisdom of foreign affairs preemption as a policy, one needs to attend to the kind of legal questions there entailed. In the area of foreign affairs preemption, constitutional considerations sometimes leak into statutory interpretation through the assumption that the Constitution allocates exclusive power to the national government in areas of "foreign affairs." Yet, as I have shown, categorization of an issue as about "foreign" rather than "domestic" affairs is problematic. Because issues are often both foreign and domestic, the decision to affix one label or another is an act entailing a good deal of discretionary decisionmaking.[176]

One can thus see that the judicial justifications for national exclusivity based on constitutional mandates are court-made doctrines to mediate federalist problems. In my view, they are appropriately categorized with other jurisprudential doctrines such as abstention. Hence, Congress may direct courts not to block local decisions, and the courts can rework their own

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[173] *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005); Joseph Frueh, Comment, *Pesticides, Preemption, and the Return of Tort Protection*, 23 YALE J. ON REG. 299 (2006).

[174] *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968), discussed *infra* notes 179–85 and accompanying text.

[175] *See, e.g.*, Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 517–30 (M.D. Pa. 2007). This decision is an example of the use of federal law to strike a local anti-immigrant effort, called the "Illegal Immigration Relief Act Ordinance" (which included an amendment called the "Official English Ordinance"). In contrast, the court held that, under current federal equal protection law, the ordinance was permissible. *Id.* at 538–46.

[176] That discretion and the interaction between constitutional and statutory interpretation are not unique to foreign affairs preemption but can be found in other preemption analyses. *See* Merrill, *supra* note 22.

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doctrine to direct less deference. But some opinions on foreign affairs preemption contain text creating a doctrine of "constitutional dimensions," akin to some of the decisions on standing, political question, and state secrets. If this doctrine is characterized as constitutional common law or constitutional law itself, foreign affairs preemption is not so readily revised by Congress. Thus this doctrine could serve as a powerful means by which judges protect presidential and congressional power from local democratic forces.

Turn then to understand more about when questions of "foreign affairs" are understood to be present. What kinds of actions by localities trigger the application of these doctrines? One can create typologies of different kinds of local actions to determine how courts might respond, ranging from efforts to promote local trade to those aimed at influencing the practices of either the United States or other countries.[177] Here, I explore the answers by applying that question to the examples used thus far in this Article. Is San Francisco's incorporation of CEDAW "legal"? What about the Mayors' agreements on Kyoto?[178]

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[177] *See, e.g.*, Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647 (2007).

[178] In terms of case law, insofar as I am aware, no challenges have been brought to local adoption of CEDAW precepts. In contrast, one can find a few reported cases raising objections to local programs related to climate control. For example, one group successfully challenged Seattle's program of paying public and private entities to reduce emissions; the Supreme Court of Washington concluded that the public utility did not have the power under state law to use ratepayers' money for offsets. *See* Okeson v. Seattle, 150 P.3d 556 (Wash. 2007).

Another group of cases, decided in 2006 and 2007, considered challenges by automobile dealers to California's Air Resources Board, which had issued regulations on greenhouse gas emissions that were subsequently adopted in Vermont—spawning litigation in federal district courts in both states with somewhat different outcomes. In the California litigation, a district judge considered pretrial motions on the preemption issues. *See* Cent. Valley Chrysler-Jeep v. Witherspoon, 456 F.Supp.2d 1160, 1167–88 (E.D. Cal. 2006). The district judge concluded that the California regulations were preempted, absent an EPA waiver, by the Clean Air Act. *Id.* at 1174–75. The district court also concluded that the regulations were not preempted under another federal environmental statute, the Energy Policy and Conservation Act, nor under the Dormant Commerce Clause. *Id.* at 1167, 1186. Further, the district court held for the defendants that no preemption existed based on federal anti-trust law. In contrast, the district court held that the car dealers had stated a claim under foreign affairs preemption but did not then decide its merits. *Id.* at 1187. Thereafter, on January 16, 2007, the judge stayed the ruling pending the decision by the Supreme Court in *Massachusetts v. EPA*, which was subsequently decided on April 2, 2007. *See* Cent. Valley Chrysler-Jeep v. Witherspoon, 2007 U.S. Dist. LEXIS 3002 (E.D. Cal. Jan. 16, 2007); Massachusetts v. EPA, 127 S. Ct. 1438 (2007). In contrast to the California ruling, the district court in *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 2007 WL 2669444 (D. Vt. Sept. 12, 2007), held that Vermont's regulations that used California's greenhouse gas emission standards for new cars were not preempted under either the Clean Air Act or the Energy Policy and Conservation Act or the doctrine of foreign affairs preemption.

The question remains whether the posture of such litigation will shift as car manufacturers redefine their concerns to focus on global warming. *See, e.g.*, Micheline Maynard, *Mulally Names an Environmental*

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1. *Foreign Affairs Preemption: The Confused Doctrinal Predicates*

Before seeing the choices to be made in answering, an understanding of the contours of three of the major Supreme Court decisions relating to foreign affairs preemption's shape is needed. The first is *Zschernig v. Miller*,[179] decided in 1968. In *Zschernig* an Oregon resident had died intestate. Oregon courts denied her heirs, who were residents of the "Soviet Zone of Germany" (East Germany), distribution of the property based on an Oregon statute that required reciprocity from a country of an alien before that alien could inherit property probated in Oregon.[180] In reaching that decision, the Supreme Court of Oregon had relied on a 1947 U.S. Supreme Court case involving the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany; the Oregon Court understood that case as permitting aliens to inherit real, but not personal, property under a particular treaty with Germany.[181]

In the Supreme Court, the United States as amicus curiae argued that it was time to interpret the provisions of the 1923 Treaty with Germany in light of subsequent events (the partition of Germany and a separate treaty governing rights of West Germans in the Federal Republic of Germany) to permit the alien to inherit both real and personal property.[182] Further, the United States government argued that applying the state's statute would not constitute "an undue interference with the conduct of the foreign relations of the United States."[183] But the Supreme Court disagreed, determining for itself that Oregon intruded on the "field of foreign affairs which the Constitution entrusts to the President and the Congress."[184] As a consequence and based on what eventually would be termed the "dormant foreign affairs" power,[185] the Court held the Oregon statute invalid. The issue was "dormant," in that no actual

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Executive for Ford, N.Y. TIMES, Apr. 24, 2007, at C3 (describing the appointment of a new vice president for "sustainability, environment, and safety engineering").

[179] 389 U.S. 429 (1968).

[180] *See* Brief of the United States as Amicus Curiae, Zschernig v. Miller, 389 U.S. 429 (1968), 1967 WL 113577, at *3 [hereinafter US Amicus Brief, Zschernig].

[181] That case, *Clark v. Allen*, 331 U.S 503 (1947), had interpreted the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany.

[182] US Amicus Brief, Zschernig, *supra* note 180, at *7–8 & n.10.

[183] *Id.* at *8 n.10. The government argued that earlier federal precedents had improperly construed federal treaties to distinguish rights to inherit personal and real property and that foreign nationals ought to be able to inherit both forms of property. *Id.* at *6.

[184] *Zschernig*, 389 U.S. at 432.

[185] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 439 (2003) (referencing *Zschernig* as an example of this form of preemption). For an excellent analysis of the issues, see Sam Walsh, Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877 (2006)

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conflict with American foreign policy had been claimed nor were facts specified that the decision would cause a specific problem.

The two, more recent, Supreme Court decisions arose not because a state court was trying to implement its understanding of a federal treaty but because state legislatures had concluded that they are opposed to practices of other countries that affect their locality. Seeking to promote or protect human rights, some states have conditioned the spending of their tax dollars or permission to do business within their borders on compliance with specific obligations. The Supreme Court has struck down those local efforts. In a challenge to Massachusetts's decision not to do business with or spend its own money on goods from Burma (Myanmar) because of forced labor, the Supreme Court ruled in *Crosby v. National Foreign Trade Council*[186] that the state's edicts violated the exclusivity of national authority to decide how to impose sanctions on that country. A variation of the foreign affairs preemption doctrine was presented in *American Insurance Ass'n v. Garamendi*[187] when the Court struck California's requirements that insurance companies which had done business in Europe during the Holocaust disclose information about that work as a condition of doing business in the state.

Formally, under preemption doctrine, the default rule is one of concurrency. Absent an express congressional directive on preemption, or evidence of a congressional decision to "occupy the field," or a demonstrable conflict between state and federal provisions, both state and federal regimes are supposed to co-exist. Yet in *Zschernig*, *Crosby*, and *Garamendi*, the Supreme Court insisted on the exclusivity of national power based on general assertions of the risk of potential harms—thereby shaping a judicial doctrine to protect national interests from state decisions. That result is especially striking in *Zschernig*, in which the Court rejected the executive branch's submission that alien inheritance was not a problem of international proportions. Instead, in the middle of the Cold War, the justices themselves concluded that the issue of alien inheritance could affect how the United States managed its interaction with other nations. The Court therefore banned that state's legislation not

[186] 530 U.S. 363 (2000). The legislation prohibited state agencies from signing contracts with companies doing business in Burma and, as of November of 1997, the "restricted purchase list named 48 U.S. companies and 205 non-U.S. companies that could not do business with the state of Massachusetts." *See* Guay, *supra* note 38, at 355. The measure was supported by those within Burma who opposed the governing regime, just as Nelson Mandela and the African National Congress (ANC) had supported sanctions against South Africa. *Id.*

[187] 539 U.S. 396 (2003).

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because of an actual conflict with federal law or based on evidence of a real disruption in international relations but because of the Court's own assessment of the potential (but dormant) possibilities.

In both *Crosby* and *Garamendi*, the executive pressed the Court for preemption and got it. And in both cases, the Court did not insist on clear congressional directives before setting aside state law making. For example, in *Crosby*, the only relevant federal legislation was a general congressional authorization for the President to impose sanctions, but which made no mention of what effect such authorization ought to have on state sanctions.[188] Yet, the Court concluded that Massachusetts' decision not to spend state tax dollars on certain products produced by companies investing in Burma breached the prerogatives of the executive under that legislation.[189]

In *Garamendi*, the Court went further in the sense that no national legislation addressed the question of sanctions against companies that had done business in Germany during the Holocaust. Rather, the Court relied on Executive representations that California's legislation would affect the settlement efforts.[190] Moreover, Justice Souter's opinion positioned the settlement of Holocaust victims' claims as concerning foreign affairs when he spoke about "field preemption." One might, instead, have characterized the relevant "field" as insurance law, over which the states have had control for decades.[191] This "[j]udicial protection of the President's bargaining chips"[192]

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[188] *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 570(b), 110 Stat. 3009-166 (1996) ("The President is hereby authorized to prohibit, and shall prohibit United States persons from new investment in Burma, if the President determines and certifies to Congress that, after the date of enactment of this Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed largescale repression of or violence against the Democratic opposition.").

[189] *See* Brief of the United States as Amicus Curiae Supporting Affirmance, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000), 2000 WL 194805 (Feb. 14, 2000), at *10 (citing the federal legislation related to the Uruguay Round trade agreements and federal procurement guidelines as establishing the national policy with which the Massachusetts regulations conflicted).

[190] *See* Brief of the United States as Amicus Curiae Supporting Petitioners, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003), 2003 WL 721754, at *5 (Feb. 24, 2003) (describing the federal government's encouragement of the "use of voluntary, non-adversarial mechanisms for resolving Holocaust victims' claims" and contrasting that approach with California's statutory obligations and arguing that the state laws "directly interfere with the national government's authority over foreign affairs and foreign commerce"). The brief argued that the California legislation "impermissibly intrudes" into the conduct of both "diplomatic and commercial relations with other nations—that is exclusively reserved to the President and the Congress." *Id.* at *8.

[191] One can similarly characterize many kinds of federal legislation relating to bankruptcy, immigration, pensions, and federal benefits, as "federal laws of the family," and thus one should be leery of "categorical" claims of exclusive competence. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619, 644–46 (2001).

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has reshaped the doctrine to bring more local actions into question through what many commentators understand to have been an expansion of "foreign affairs preemption,"[193] just as the Court has done in other preemption cases not involving foreign affairs.[194]

What impact would this doctrine have on local initiatives related to CEDAW and Kyoto? Formal differences can readily be found between all three of the Supreme Court cases and either San Francisco's CEDAW provision or the mayors' agreements on climate controls. First, the CEDAW and Kyoto resolutions are local actions imposing new ("foreign") obligations on domestic government actors. Second, Congress has not directly and affirmatively legislated specifically on these particular issues. Third, neither the CEDAW nor Kyoto initiatives are attempts to prevent support for a specific foreign nation with particular oppressive policies, but instead impose inward-looking rules affected by insights from abroad.[195]

Yet, both of these examples touch arenas in which federal legislation relates, in some respects, to the issues taken up by local actors. Further, given the growing breadth of foreign affairs preemption, one could argue that both examples signal to actors abroad an internal disagreement about how to respond to CEDAW and Kyoto and therefore ought to be silenced because of the need to speak in "one voice."[196] While hortatory resolutions calling for

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[192] *Foreign Affairs Preemption*, *supra* note 185 at 1883.

[193] *See, e.g.*, Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption of Foreign Affairs*, 46 WM. & MARY L. REV. 825 (2004).

[194] *See* Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007). That decision exemplifies what is called "agency preemption." *See* Merrill, *supra* note 22. In *Watters*, fifty states had joined together to file a brief arguing that they had a traditional role in consumer protection that ought not to be dispossessed through agency action. *See* Brief for New York et al. as Amici Curiae Supporting Petitioner, Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007) (No. 05-1342), 2006 WL 2570992. As the dissent by Justice Stevens explained, the majority gave deference to the Office of the Comptroller of the Currency's decision that local regulations were incompatible, thereby creating a new genre of preemption that further enhanced the power of the federal executive. *Watters*, 127 S. Ct. at 1573 (Stevens, J., dissenting).

[195] *See* Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 974–75 (2003) (arguing for preemption).

[196] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("[The] negative Foreign Commerce Clause protects the National Government's ability to speak with 'one voice' in regulating commerce with foreign countries.") (internal citation omitted). Whether state-based emissions regulations would affect international efforts is a question analyzed in Walsh, *supra* note 185, at 1890–98. The author argued that the provisions ought to be permitted because the state interest was strong, the national government commitments both unclear and not reduced to controlling law, and predictions of effects indeterminate. That commentator proposed that the foreign affairs preemption presumption ought to be confined to state interactions that "speak directly to foreign governments, foreign nationals, or their business partners." *Id.* at 1897.

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federal legislation are unlikely to be challenged or, if challenged, are likely to be protected by the First Amendment, implementation efforts that impose obligations would not be so shielded. But the courts cannot reach the question without a challenger, and it is a pattern in the case law that most challenges arise because a local action affects the commercial interests of a person or an entity, in some instances of a network of entities; that is the topic to which I turn next.

2. *Networked Corporate Interests Challenging Local Initiatives: USA*Engage, NFTC, and Darfur*

Local government officials are not the only ones involved in translocal networks. They have their counterparts in groups of commercial entities which have also banded together. Some of these organizations are relative newcomers while others, like the municipalities that formed the National League of Cities more than a century ago, have a longer pedigree. An example of a corporate network is "USA*Engage," formed in the late 1990s in response to waves of proposals to impose economic sanctions limiting trade with particular nations. As USA*Engage explains, before 1997, "no organized voice" existed to urge "careful examination of sanctions proposals," and no entity ensured that "America's economic, diplomatic and strategic interests" were not "compromised by the imposition of unilateral economic sanctions for foreign policy reasons" without "full consideration" of the costs imposed to the national economy, to competitiveness, and to the "security, commercial, and human rights objections."[197]

USA*Engage, in turn, is related to the National Foreign Trade Council (NFTC)[198] which, as a plaintiff in the *Crosby* case, succeeded in halting the Massachusetts prohibition on purchasing goods from Burma.[199] Founded in 1914, the NFTC describes itself as the "oldest and largest U.S. association of businesses devoted to international trade matters,"[200] that its membership

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[197] *See* USA*Engage, About Us, http://www.usaengage.org/MBR0088-USAengage/default.asp?id=110 (last visited Nov. 4, 2007).

[198] *See* Guay, *supra* note 38, at 374 (referring to NFTC as "USA Engage's parent organization"); Eric Thomas, National Foreign Trade Council Names Jake Colvin as New Director of USA*Engage, Aug. 16, 2005, *available at* http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=1737&Category=All (last visited Nov. 4, 2007). A review critical of USA*Engage is provided by the Center for Media and Democracy. *See* http://www.sourcewatch.org/index.php?title=USA_Engage (last visited Nov. 4, 2007).

[199] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[200] *See* USA*Engage, Profile of the National Foreign Trade Council, http://www.usaengage.org/archives/background/nftc.html (last visited Nov. 1, 2007).

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consists of some 550 companies, including "most of the 50 largest U.S. banks,"[201] and that it is the "premier business organization advocating a rules-based world economy."[202]

The NFTC has sparred not only with Massachusetts but also with the Genocide Intervention Network, formed to encourage "targeted Sudan divestment campaigns" in an effort to bring attention to and stop the genocide in Darfur.[203] That divestment effort has produced legislation in California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, New Jersey, Oregon, and Vermont.[204] Illinois, for example, enacted the 2005 Act to End Atrocities and Terrorism in the Sudan, which restricted the depositing of state funds in financial entities whose customers have certain connections with the Sudan and which prohibited the placement of state pension funds in such entities.[205]

In March of 2007, the NFTC succeeded in convincing a lower federal court judge to enjoin that act on the grounds of foreign affairs preemption. Although the group of corporate plaintiffs had agreed that they could comply with both state and federal regulations, the district court concluded that, in light of federal executive orders and the 2000 Trade Sanctions Reform and Export Enhancement Act, some of the state regulations "took a different tack" from

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201 *See id.*

202 *See* NFTC, About Us, http://www.nftc.org/default.asp?Mode=DirectoryDisplay&id=93 (last visited Nov. 1, 2007). The objections raised by the NFTC include expanding exports, protecting foreign investments and enhancing competitiveness. *Id.*; *see also* O.K. Davis, *The National Foreign Trade Council*, 94 ANNALS AM. ACAD. POL. & SOC. SCI. 118 (1921). Guay argued that concern about consumer boycotts is the reason. Guay, *supra* note 38, at 369.

203 *See* Sudan Divestment Task Force, Home Page, http://www.sudandivestment.org/home.asp (last visited Nov. 4, 2007).

204 *See* Sudan Divestment Legislative Chart, http://sudandivestment.org/legislative_chart.asp; Sudan Divestment Task Force's Model Targeted Divestment Proposal, *available at* http://sudandivestment.org/position.asp#model (last visited Nov. 4, 2007). The proposal is designed for use by any institution, primarily by U.S. companies, and calls for divestment from those businesses that have a business relationship with the government of Sudan, who lack a "substantial corporate governance policy regarding the Darfur situation," and whose work in Sudan "impart[s] minimal benefit to the country's underprivileged." *Id.* The Task Force reported that its proposal followed failed efforts to convince companies to change their policies. Sudan Divestment Task Force, Targeted Divestment at a Glance, *available at* http://sudandivestment.org/position.asp#model (last visited Nov. 4, 2007).

205 *See* The Act to End Atrocities and Terrorism in the Sudan, Public Act 094-0079 (June 27, 2005, effective Jan. 27, 2006). This legislation is somewhat broader than provisions enacted elsewhere, including California, Colorado, Iowa, and Vermont, which track more closely the model of the Sudan Divestment Task Force, *supra* note 203. *See* Legislative Action Map, http://www.sudandivestment.org/home.asp#map (last visited Nov. 4, 2007).

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the federal policy and were therefore preempted based on foreign affairs preemption and on the power of Congress to regulate foreign commerce.[206]

3. *Congressional Protection of Local Divestment Initiatives: A New Iteration of the Political Safeguards of Federalism*

In March of 2007, one day after the district court opinion was rendered, Senator Richard Durbin of Illinois introduced the Sudan Divestment Authorization Act of 2007 ("SDAA").[207] Co-sponsors included fellow Illinois Senator Barack Obama, Connecticut Senator Joseph Lieberman, and Republican Senators Arlen Specter from Pennsylvania and John Cornyn from Texas.[208] The proposal states that the "sense of Congress" is that state and governmental entities should be able to divest assets "within their jurisdiction as an expression of opposition to the genocidal actions and policies of the Government of Sudan"; that the divestiture does not violate the Constitution because it is not preempted by the Supremacy Clause nor does it impose "an undue burden on foreign or interstate commerce" or "intrude on, or interfere with, the conduct of foreign affairs of the United States."[209]

Earlier that year, in January of 2007, another bill, the Darfur Accountability and Divestment Act ("DADA"), had been proposed in the House of Representatives. DADA requires that, upon consultation with other branches and notice to those affected, the Secretary of the Treasury is to create lists of those with "direct investment" in the Sudan or conducting "business operations" of certain kinds.[210] In addition to obliging the federal government to generate the list, the bill also requires that companies so listed report to the

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[206] *See* Nat'l Foreign Trade Council v. Giannoulias, No. 06 C 4251, 2007 U.S. Dist. LEXIS 13341 (N.D. Ill. Feb. 23, 2007). The NFTC's suit, filed as a § 1983 action, was joined by eight municipal pension funds in the state and by beneficiaries of pension funds. While the NFTC prevailed on some of its preemption claims, the NFTC's objection to the provision's bar of investments in securities that do business with the Sudan was rejected as posing nothing "more than a hypothetical impact on the national government's conduct of foreign affairs." *Id.* at *38–42.

[207] Sudan Divestment Authorization Act of 2007, S. 831, 110th Cong. (March 8, 2007) [hereinafter SDAA]. That bill came after related measures had been introduced in the House. *See* Darfur Accountability and Divestment Act of 2007, H.R. 180, 110 Cong. (Jan. 4, 2007) [hereinafter DADA], discussed *infra* note 210 and accompanying text.

[208] *See* Library of Congress: Thomas, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00831:@@@P.

[209] SDAA, *supra* note 207, § 3.

[210] DADA, *supra* note 207, § 3. Its legislative sponsor was Barbara Lee, a Democrat from California. *See* Library of Congress: Thomas, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00180:@@@X. A companion bill was introduced in the Senate on August 1, 2007. H.R. 180 RFS, 110th Cong. (Aug. 1, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h180rfs.txt.pdf.

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SEC which in turn would publish that list. Under the proposed legislation, federal contracts could not be awarded to such companies. Further, DADA states that the "policy of the United States [is] to support the decision of any State or local government to divest" their assets from entities so listed (as well as specified others), providing that notice and opportunities to respond are given to the companies subject to sanctions.[211] In July, that bill passed the House 418-1,[212] and in the fall of 2007, the Senate Committee on Banking, Housing, and Urban Affairs held hearings on DADA.[213]

Appearing before the legislators were the same set of actors who disagree about these issues in court. Testifying in opposition to the legislation was the President of NFTC, who was also identified as the Co-Chairman of USA*Engage.[214] He argued that the Act's approach was not likely to be effective but would have "serious foreign policy, Constitutional and compliance concerns."[215] Characterizing the "governor and legislature of Texas, Illinois, or California" as not "competent bodies" to implement foreign policy, he stated that he was "baffle[d] . . . why Members of Congress would want to take foreign policy out of their and the President's hands and subcontract it to local government."[216] Further, he argued that compliance would involve "enormous . . . difficulties for companies, as each state and local law is different," impose "compliance costs on businesses," and was not "free for retirees." Moreover, he opined that DADA was "unconstitutional," citing *Crosby v. NFTC*, and likely a violation of the World Trade Organization's rules.[217]

The Executive Branch shared in that opposition by providing objections that overlapped with those leveled by the NFTC. The Director of the Office of Foreign Assets Control of the U.S. Department of the Treasury stated that the Bush Administration "opposes proposals to authorize divestment by state and local governments, which impair the ability of the president to act on behalf of

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[211] DADA, *supra* note 207, § 4.

[212] *See* 153 CONG. REC. H9210-01 (July 31, 2007); *see also* Genocide Intervention Network, Victory! Important Legislation Passes House, http://www.genocideintervention.net/node/1060 (last visited Nov. 4, 2007).

[213] *See Combating Genocide in Darfur: The Role of Divestment and Other Policy Tools: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. (Oct. 3, 2007), http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=282.

[214] *See id.* (statement of William A. Reinsch, President, National Foreign Trade Council), http://banking.senate.gov/_files/reinsch.pdf.

[215] *Id.* at 1.

[216] *Id.* at 2.

[217] *Id.* at 2–3.

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the nation as a whole and risk creating a multiplicity of foreign policies."[218] Another representative of the United States Government, speaking for the Bureau of Economic, Energy and Business Affairs, stressed that the President needed "maximum flexibility" because "[t]iming is everything."[219]

In contrast, the voices of states were heard through testimony from the Treasurer of Rhode Island, charged with managing that state's pension funds. He insisted that "divestment from Sudan represents a choice by the state to invest its money in concert with the values of its citizens," and that each state possessed the "right and the capacity to invest based on social, humanitarian and financial values," as long as they were financially prudent.[220] "[W]e will not allow genocide to occur on our watch, nor will we allow genocide to occur on our dollar."[221] Those sentiments were echoed by Senator Sam Brownback of Kansas who, along with Senator Durbin, was a co-sponsor of the bill.[222] Also joining in support was a vice president of a "socially responsible" mutual fund company, expressing the fund's view that targeted divestment is both fiscally responsible and effective if undertaken in conjunction with other actions.[223]

The sequence that produced the proposed Darfur legislation and the groups arrayed in support and opposition exemplifies the idea of a "democratic iteration,"[224] through which policies are debated by the backs and forths of public actions, as some activists seek divestment, others object, the courts opine, and the legislature is asked to weigh in.[225] States, joining a network of NGOs, have gone to Congress to seek protection from both the Executive and

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[218] *Id.* (statement of Adam J. Szubin, Director, Office of Foreign Assets Control, Department of the Treasury), http://banking.senate.gov/_files/ACF848E.pdf, at 9.

[219] *Id.* (statement of Elizabeth L. Dibble, Principal Deputy Assistant Secretary for International Finance and Development, Department of State), http://banking.senate.gov/_files/dibble.pdf, at 4.

[220] *Id.* (statement of Frank T. Caprio, General Treasurer of the State of Rhode Island), http://banking.senate.gov/_files/caprio.pdf, at 4–5.

[221] *Id.* at 6.

[222] *See id.* (statement of Sen. Sam Brownback), http://banking.senate.gov/_files/brownback.pdf.

[223] *See id.* (statement of Bennett Freeman, Senior Vice President for Social Research and Policy, Calvert Investment), http://banking.senate.gov/_files/freeman.pdf, at 1.

[224] *See* SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 171–212 (2004).

[225] Another example of the turn to courts as a part of democratic differences comes from the challenge, brought by the Mayor of the City of New York, to a New York City Counsel provision requiring workers, whether in the United States or abroad, to be paid above the poverty rate by limiting city procurement to only "responsible manufacturers" who paid non-poverty wages. *See* New York, N.Y. Local Law 20 of 2001, codified at N.Y. ADMIN. CODE tit. 6, ch. 1, §§ 6–124 (effective Jan. 20, 2002). This section was found to be invalid under state, rather than federal law. Mayor of New York v. Council of New York, 789 N.Y.S.2d 860 (Sup. Ct. 2004).

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Judicial Branches of the federal government. For constitutional lawyers, one of the bills, the SDAA, returns us to questions outlined above—about whether the doctrine of foreign affairs preemption is of constitutional dimensions protected from congressional alteration or a court-made policy of deference, subject to correction from Congress as that Act proposes to do.

Were either of these proposed bills authorizing Sudan divestiture to be enacted, under contemporary constitutional interpretive practices, federal judges would be authorized independently to "review" the congressional "findings" (but less clearly the "sense" of the Congress) about the impact of divestiture on foreign affairs and commerce.[226] Legal questions posed by the SDAA include whether it, like the proposed Constitutional Restoration Act of 2005, impermissibly impinges on judicial independence by directing a rule of decision if applied retrospectively.[227] Further, both the SDAA and DADA raise questions about whether the legislation impermissibly imposes on the Executive's power over foreign affairs. Under my approach to foreign affairs preemption law, which locates it as a judge-made doctrine, legislation such as the proposed Sudan Divestment Act is a permissible exercise of congressional authority, for it does not "direct" a rule of decision in a specific case.[228] And, under my approach to "foreign affairs" in this federated structure, that term ought not be used to try to divest Congress or the states from participating in the development of policy relating to events beyond our borders.

To understand why courts ought not to interfere, it is useful to explore the parallels and distinctions between today's question of local legislative efforts and foreign affairs preemption and twentieth-century concerns that framed

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[226] The Court has taken different approaches to facts found by Congress. In *Gonzales v. Carhart*, 127 S. Ct. 1610, 1637 (2007), the Court stated that "[a]lthough we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight to Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." In contrast, in *Board of Trustees v. Garrett*, 531 U.S. 356, 369–72 (2001), when finding unconstitutional the imposition of liability on states for discrimination against the disabled, the Court reconsidered the findings of Congress and concluded that the record of evidence was insufficient to sustain the legislation. Similarly, in *United States v. Morrison*, 529 U.S. 598, 614–16 (2000), the Court also revisited congressional findings and found them wanting when it invalidated the civil right remedy of the Violence Against Women Act.

[227] *See* United States v. Klein, 80 U.S. 128 (1871); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Miller v. French, 530 U.S. 327 (2000).

[228] *See* Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998). My focus here is the shape of domestic law. When trade sanction issues are at stake, restrictions on purchasing can be challenged as failures to comply with World Trade Agreements that require open and competitive procurement contracts. *See* Guay, *supra* note 38, at 359–61 (also noting that Massachusetts's efforts to impose sanctions on Burma affected European policies).

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Wechsler's preference for the "political safeguards of federalism."[229] Wechsler's view was that courts ought to be reluctant to overturn federal legislation at the behest of states because states have avenues to be heard directly in Congress. One example substantiating that claim came after the Supreme Court held, in the 1980s, that localities were not immune from federal legislation on wages and hours.[230] Thereafter, localities went back to Congress and obtained distinctive treatment for how they, unlike other employers, are permitted to compensate employees for overtime.[231]

In contrast, in SDAA and DADA, the 2007 proposals related to Sudan divestment, states are seeking *congressional protection* from the courts, which—in the name of nationalism—have given exclusive license to the President and somewhat to Congress. Should judges insulate the national government's political branches from local efforts aimed at shifting policies about how to deal with genocide in Darfur, or with forced labor in Burma, or with equal rights for women and men? Return to the categorization of the local initiatives that I discussed earlier. Some of the enactments are *expressive*, advocating that the federal government adopt a particular policy or stating a commitment to certain aims. Litigation comes, in contrast, from those initiatives which I categorized as *programmatic*, implementing a policy by changing a local law. While some of these initiatives have externalities (imposing obligations on national or transnational businesses), many place burdens or constraints on governmental actors within their jurisdiction. The actual impact on national policy is often unclear ("dormant"). Yet, in the muddy situations, judges are stepping in (contra Wechsler's suggestion) to foreclose local political judgments. When doing so, courts broaden their own authority to decide when national interests require preemption of state and local legislation.

One puzzle is why courts have been so expansive in this arena. A review of foreign affairs preemption cases suggests that judges are easily impressed by the invocation of the "foreign," fearful of the risk that a court's judgment could have an effect on international relations, and eager to extract themselves and lower courts from adjudicating such questions. This posture dates back

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229 *See* Wechsler, *supra* note 18.

230 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

231 As a result of the Supreme Court's 1985 decision in *Garcia*, Congress passed amendments permitting state and local governments to compensate their employees for overtime hours worked with compensatory time off in lieu of overtime pay. *See* Pub. L. No. 99-150, § 6, 99 Stat. 787 (codified as amended 29 U.S.C. § 203 (1985)).

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decades, as can be seen from the Court's elaboration in the 1960s of the "act of state" doctrine, addressing the import on litigation in the United States of a decision made by another nation. In *Banco Nacional de Cuba v. Sabbatino*,[232] a case filed in federal court under diversity jurisdiction and thereby presumptively governed under the *Erie* doctrine by New York law, Justice Harlan insisted on the Court's power to shape its own federal common law rule, halting the effort to recover funds expropriated by a financial agency of Cuba.[233] Moreover, in that case, as in the 1968 decision in *Zschernig*, the Executive had not itself insisted that the national interest required that national law displace state rules.[234] Rather, in *Sabbatino*, the government had declined to "make any statement bearing" on the litigation.[235]

In both *Sabbatino* and *Zschernig*, anxiety about the Cold War resulted in rulings reflecting judges' concerns that decisions could have effects of some unspecified dimensions that would or could do harm. That judicial posture continued to be expressed, as evidenced in *Crosby*, and has intensified as terrorist threats have become acute. However, as I have argued elsewhere, such an expansionist view of "the foreign" and of national power is unduly intolerant of variation and unduly empowering of national prerogatives and of the Executive in particular.[236] Lost in this approach is a premise of this democratic federation that local efforts to effectuate protection of rights have a presumptive validity. As illustrated by the back-and-forth amongst courts and legislatures in the context of the Sudan, local action has invited democratic contestation about how to respond to the horrors there.

As noted in the opening discussion of these questions, Wechsler's approach has been criticized on the grounds that he overestimated Congress as a forum

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[232] 376 U.S. 398 (1964).

[233] *Id*; *see generally* Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805 (1964); *see also* Austria v. Altmann, 541 U.S. 677, 700–01 (2004); W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., 493 U.S. 400 (1990). The act of state doctrine is a defense on the merits, in addition to the immunities conferred by the Foreign Sovereign Immunity Act of 1976, codified at 28 U.S.C. § 1330. Further, it is distinct from the doctrine of "international comity," according respect to acts of foreign nations, whether on their own soil or in the United States, if consistent with United States policy. *See generally* Christopher C. Wheeler & Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 STAN. J. INT'L L. 253 (2003).

[234] *Sabbatino*, 376 U.S. at 420. Further, the American Bar Association filed a brief arguing the merits on the assumption that that the Supreme Court, "like the courts below, will not regard itself as barred by the act of state doctrine from considering the asserted violations of international law," and then argued that international law made the expropriation illegal. Brief for the Am. Bar Ass'n as Amicus Curiae Supporting Petitioners, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (No. 16), 1963 WL 105635, at *3.

[235] *Sabbatino*, 376 U.S. at 420 & n.19.

[236] *See* Resnik, *Law's Migration*, *supra* note 164, at 1652–53.

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that fairly represents the divergent interests of different states. Commentators have argued that the courts ought to step in, at the behest of states, and at times invalidate congressional legislation because Congress is not a level playing field.[237] The argument is that population and wealth allocations across the country make the two-senators-per-state system democratically unfair. Further evidence comes from data that senators from different states bring vastly different amounts of money home to their constituents.[238]

But the paradigm proffered here—state and local enactment of legislation and resolutions—is the outgrowth of interactions at the horizontal level resulting in individual localities or states adopting specific measures. Non-uniformity is a predicate of federalist systems, which can impose a national norm but which ought to be dedicated to local divergence whenever tolerable. Moreover, as different localities generate various provisions, one can interrogate one's own norms through a comparative exercise.[239] Furthermore, the proposed federal legislation on Darfur offers an amalgam, in which federal legislative action is sought to reduce problems of disuniformity and yet to enable (within boundaries) local decisionmaking on divestment. When the democratic qualities of local action are coupled with the worrisome efforts by the Executive to enhance its authority over many arenas, the result ought to be reluctance by the Judiciary to set aside local provisions based on speculative and diffuse claims of potential harms to national interests.[240]

Of course, that presumption is subject to revision if one were to find systematic evidence of local action that undermines democratic opportunities. For example, Michael Greve has raised concerns about a "cartel" in which state officials, acting in concert, monopolize forms of authority.[241] Another

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[237] All three of the articles by Lynn Baker, *supra* notes 19 & 35, make this point. She argued, for example, that Congress "regularly uses fiscal redistribution among the states and conditional federal spending to impinge" on state autonomy and that states "cannot protect themselves through the federal political process against" various exercises of congressional power. Baker, *Spending Power*, *supra* note 35, at 198.

[238] A recent example of the differences among senators is a chart ranking the "earmarked" money that each state received through congressional appropriations. California ranked at the top, with Alaska placing sixth, giving about $1,000 per capita in contrast to $25.05 per capita allocations for those in North Carolina. *See* Matt Kelley, *Congress Slated $5.6b in Bills for Private Sector*, USA TODAY, Apr. 26, 2007, at A5 (providing a chart of "earmarks per state").

[239] *See* Jennifer Nedelsky, *Communities of Judgment and Human Rights*, 1 THEORETICAL INQUIRIES L. 245 (2000).

[240] One can view the desirability of constraining judicial power in this context or as part of a broader view of appropriate limits, for which Larry Kramer's work stands as a contemporary landmark. *See, e.g.*, Larry D. Kramer, *"The Interests of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697 (2006) (published as the Seeger Lecture).

[241] *See* Greve, *Cartel Federalism?*, *supra* note 31; Greve, *Compacts, Cartels*, *supra* note 34.

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possibility would be that certain states could be systematically excluded from interstate cooperation,[242] or that local action will draw attention and voters but will be a distraction because the level of policy intervention cannot generate the impact needed.[243] Yet, the examples drawn upon above—CEDAW, Kyoto, and the Sudan—involve iterative coordination but not a singularity of power that signals undue concentrations of authority. To the contrary, it is the judiciary acting in concert with the executive that appears to be centralizing power in the national government.

Instead, judges ought to adopt a posture of *non-encroachment* by insisting on exacting evidence of particular and specific imminent harms before invalidating actions by localities or by states as those entities determine their own expenditures of funds and rules. To do so would entail abandonment of the "dormant foreign affairs" approach. Judicial interventions ought to occur only when a demonstrable showing has been made that a specific local directive conflicts directly with, or is completely incompatible with, congressional mandates. Executive representations, generic statements in congressional resolutions, general authority for executive negotiations to take place, and concerns about economic competitiveness should not suffice to preclude local action.[244]

IV. THE END OF BUCOLIC FEDERALISM

This Article has documented the degree to which local and state actors work in conjunction with their counterparts as they shape and are in turn affected by policies that transcend the boundaries of their jurisdictions. Whether shopping for goods and services or generating human rights laws,

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[242] *Cf.* Bowman, supra note 23. Seeking to identify variables to indicate a propensity to cooperate, Bowman tracked the differential rates at which states entered compacts, undertook multistate legal action, or adopted uniform state laws. *Id.* at 539–42.

[243] In contrast, local action can serve as a "trigger" to national and international interventions. *See* Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1025 (2006); *see also* Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825 (2006).

[244] Debate about whether the broadening scope of preemption in other areas is problematic can be found in Merrill, *supra* note 22; Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39 (2005); Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 471–72 (2002). Others worry about "state regulatory aggression" on economic issues. *See* Greve, *Federalism Values*, *supra* note 25, at 362. For discussion of the parameters and content of the doctrine of preemption more generally, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); and Gardbaum, *The Nature of Preemption*, *supra* note 22.

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whether coping with new immigrants, guns, health care, social welfare, or natural resources, local actors live in unbounded worlds.

I do not want to be read as suggesting that this reconfiguration necessarily produces socially desirable processes or outcomes. To insist on the relevance of translocal engagement is not to presume its scope or content, nor to assume that it is fueled, under some pastoral democratic vision, by indigenous activists aimed at enhancing participatory values. Rather, my view is that bringing these institutional networks into sight makes problematic some of what has been extolled as the virtues of federalism.

Specifically, discussions about federalism often posit states as repositories of the democratic values of accountability and transparency because of the ability of local actors directly to partake in their own governments. Town hall meetings still take place and local actors continue to have opportunities for voice, but those voices may also be carried, via the Internet, around the world. The input and output of those meetings, like the problems that confront them, do not match state and city lines. Those open channels may reduce worries about the capacity to be unduly parochial, given that it is decreasingly possible to identify issues, lobbying efforts, or solutions that are unique to a single place. But the translocal efforts also undercut the presumption that localities are working out individual responses to particular problems such that a rich diversity of approaches develop.

With the networks of local government officials and private sector actors thus in view, the metaphors and concerns of federalists need to change. The literature's focus on the "race to the bottom" presumes interstate effects but singular state incentive structures. Yet, the evidence of cooperative action among state actors suggests their increasing awareness of spillover effects that require coordinated actions. Cooperative work could sound bucolic, but it also could result in a diminution of diverse responses as well as the kind of horizontal aggrandizement that shapes some federalist theorists' concerns.[245] Moreover, one could conceptualize some of the transjurisdictional organizations as forms of government that lack accountability and transparency. But these transjurisdictional networks also provide some counterweight to the concentration of executive power at the national level. In short, translocalism—like other jurisdictional arrangements—has potential to express or do harm to democratic values.

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[245] *See, e.g.*, Baker, *Putting the Safeguards Back*, *supra* note 19; Baker & Young, *supra* note 19; Greve, *Cartel Federalism?*, *supra* note 31; Greve, *Compacts, Cartels*, *supra* note 34.

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Furthermore, the substance of the policies generated at the local, the translocal, the national, and the transnational levels do not intrinsically have a particular point of view on matters of social ordering. My discussion above focused on what could be termed progressive or liberal policies involving CEDAW and global warming. I can also use examples in which local action is aimed at entrenching particular economic or status relationships and in warding off some of the very changes I have mentioned. In the 1990s, when CEDAW proponents went to local legislatures, they marched in the footsteps of anti-foreign activists supporting the amendment that Senator John Bricker proposed in the 1950s.[246] Those groups succeeded in the Texas State Senate in 1954, which passed a resolution petitioning Congress to submit the Bricker Amendment to the states for ratification.[247]

Since the 1960s, mobilization by conservative groups has wrought an impressive transformation.[248] As Lisa McGirr has detailed, the "men and women who rejected the liberal vision and instead championed individual economic freedom and a staunch social conservativism"[249] have had a significant impact,[250] with recent examples including bans on gay marriages and legislation to limit access to abortions.[251] Comparable positions for and against various interventions are regularly registered in the United States Supreme Court. The famous federalism cases—*Printz v. United States*, *Lopez v. United States*, *New York v. United States*, and *United States v. Morrison*—are all instances in which state actors can be found on both sides, either guarding state prerogatives or supporting national action on issues of gun control, nuclear waste management, and violence against women.[252]

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[246] *See Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the S. Comm. on the Judiciary*, 83d Cong. 25–32 (1953) (reproducing letters from local organizations and individuals, all in support of Bricker).

[247] *See* S. Con. Res. 1, 53d Leg., 1st Sess. (Tex. 1954), *reprinted in* FRANK E. HOLMAN, STORY OF THE "BRICKER" AMENDMENT 173–76 (1954).

[248] *See, e.g.*, SARA DIAMOND, ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES (1995); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2001).

[249] MCGIRR, *supra* note 248, at 12.

[250] *Id.* at 177 (citing Reverend Bob Schuler as expressing a popularly supported view that the United Nations was symbolic of the "complete destruction of the American way of life and the dethronement of true democratic freedom").

[251] *See* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA 92–101, 192–93 (2004) (discussing the long history of populist movements rife with anti-intellectualism). Another example comes from state lawmaking to alter federal abortion rights.

[252] *See* Judith Resnik & Joshua Civin, When States Disagree: Discourse, Discord, and Disaggregation in the Supreme Court's Federalism Jurisprudence (2005) (unpublished manuscript, on file with author). For example, in *Printz v. United States*, 521 U.S. 898 (1997), eight states' attorneys general came together to file an amicus brief in support of the petitioner. *See* Brief for the States of Colorado, Idaho, Kansas, Montana,

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Moreover, these social movements of public and private actors are funded through public and private channels and have demonstrable effects on American law. From the school desegregation of *Brown v. Board of Education*[253] to the banning of certain late-term abortions with no exceptions to guard a woman's health in *Gonzales v. Carhart*,[254] courts are very much a part of the "action," as organized "public interest" groups of all kinds engage in strategic efforts to reshape American law and the composition of the judiciary.[255]

Turning to the national agendas that I have discussed, in recent years they have been largely conservative and insistent on executive prerogatives. To take a few current examples, not only has United States law been resistant to broadening protections of civil rights, American exportation of law includes efforts to have other countries adopt legal prohibitions on abortion and to permit only certain forms of contraception as a predicate to the receipt of aid. Other efforts include diminishing protections on detainees suspected of terrorism, toleration of coercion, and broad programs of surveillance. America's agendas are by no means limited to security, for many efforts are made to protect certain forms of free-market economic structures.[256]

Yet, the national identity cannot be assumed to be inevitably committed to these approaches. Progressives once dominated, shaping the New Deal, the so-called Third Reconstruction, and the creation of the United Nations. Furthermore, as sovereigntists such as Justice Scalia frequently comment, importation of norms from abroad could not only alter but lessen various

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Nebraska, South Dakota, Virginia, and Wyoming as Amici Curiae in Support of Petitioner, Printz v. United States, 521 U.S. 898 (Nos. 95-1478 & 95-1503), 1996 WL 473580. Another thirteen states joined in an amicus filing on behalf of the respondent. *See* Brief for the States of Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, and Wisconsin as Amici Curiae in Support of Respondent, Printz v. United States, 521 U.S. 898, (Nos. 95-1478, 95-1503), 1996 WL 590921.

[253] 347 U.S. 483 (1954).

[254] 127 U.S. 1610 (2007).

[255] *See* Robert Post & Reva Seigel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); *see also, e.g.*, Planned Parenthood Minn. v. Rounds, 467 F.3d 716 (8th Cir. 2006), *reh'g en banc granted and opinion vacated* (Jan. 9, 2007).

[256] *See generally* Steven Teles & Daniel Keeney, *Spreading the Word: The Diffusion of American Conservatism in Europe and Beyond*, *in* GROWING APART? AMERICA AND EUROPE IN THE 21ST CENTURY 136, 136–69 (Jeffrey Kopstein & Sven Steinmo, eds. 2007); Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post 9/11 Globalization of Public Law and the International State of Emergency*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 347, 347–73 (Sujit Choudry ed., 2006).

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protections (his examples include jury trials, double jeopardy, separation of church and state, and abortion) within America's Bill of Rights.[257]

In short, institutional voices in a host of jurisdictions, public and private, can and do shift their tones. The ABA was once run by sovereigntists who dominated the 1950s hearings on the Bricker Amendment, as they advocated a constitutional amendment to limit the domestic effects of international law. Today, the ABA plays a leadership role in promoting transnational efforts to enhance human rights, including urging the United States to ratify CEDAW. The National League of Cities, now generating women's global leadership networks,[258] was also the organization that campaigned against federal regulation of workers' benefits and minimum wages.[259] All genres of jurisdiction offer opportunities for those with the wherewithal and insight to use them.

What this account has also demonstrated is the fragility of both the content and the contours of the jurisdictional configurations in which we live. One last example provides my conclusion, which comes from a comment made by California's Governor, Arnold Schwarzenegger, who himself both represents the role that immigrants play in reshaping America's imagery (home and abroad) and puts pressure on the constitutional insistence that our presidents be "native born."[260] When signing an agreement with Great Britain on global warming, he demonstrated the interdependencies that span continents and oceans. The Governor was quoted as describing California as the "modern equivalent of the ancient city-states of Athens and Sparta."[261]

The fact of that agreement is yet another illustration of the transborder transactions that are all about us. What subsequently happened to both of the great cities of Athens and Sparta raises questions about whether one would want them to be exemplary of one's hopes for the future. But in that grand rhetorical invocation and the subsequent history of these city-states come useful reminders of the risks of what I call jurisdictional essentialism. Neither

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[257] *See* Roper v. Simmons, 543 U.S. 551, 623–28 (2005) (Scalia, J., dissenting); *see also* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 99 (2006) (describing the problem as "rights-diluting").

[258] *See* Brooks, *supra* note 58; *see also* John Nichols, *Urban Archipelago: Progressive Cities in a Conservative Sea*, NATION, June 20, 2005, at 13, 14 (arguing that cities are central forces for rights expansion).

[259] *See* JONES, *supra* note 55, at 79.

[260] *See* U.S. CONST. art. II, § 1. Another current state governor, also mentioned in relationship to this limitation, is Governor Jennifer Granholm of Michigan; she was born in Canada.

[261] Gar Alperovitz, *California Split*, N.Y. TIMES, Feb. 10, 2007, at A15.

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local, translocal, national, transnational, nor global entities are necessarily safe harbors, enduring forms, or intrinsically generative of democratic iterations.

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