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JUDITH RESNIK

Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry

ABSTRACT. Legal theorists are engaged in understanding the legitimacy of techniques by which principles of rights-holding travel across borders. Sovereigntists in the United States object to that migration. The history of both protest about and the incorporation of "foreign" law provides important lessons for contemporary debates. Through examples from conflicts about slavery, the rights of women, and the creation of the United Nations, I chart the anxiety occasioned when American law interacts with human rights movements. At times, through silent absorption rather than express citation, some of the "foreign" sources become lost in translation, and the new rights become constitutive elements of "American" identity.

To conceive of these debates as engaging only questions of national boundaries is, however, to miss the reliance on federalism as a justification for declining to participate in transnational rights work. Yet America's federalist structure also serves as a path for the movement of international rights across borders. As illustrated by the adoption by mayors, city councils, state legislatures, and state judges of transnational rights stemming from the U.N. Charter, the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), and the Kyoto Protocol on global warming, the debate about transnationalism is deeply democratic, with significant popular engagement reframing American norms. Such local government actions require revisiting legal doctrines that presume the exclusivity of national power in foreign affairs – as that which is "foreign" is domesticated through several routes.

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I. SETTING BOUNDARIES

A. *Positioning the "Foreign" and the Judge*

Many countries have politicians who invoke anti-foreign rhetoric in their efforts to garner votes. Some American politicians have embraced this strategy, as can be seen from the Constitution Restoration Act of 2004, which would require that:

> In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon 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 English constitutional and common law.[1]

A parallel proposal proclaims that the "American people are rightfully entitled to be governed by the Constitution, not as amended by judges through the process of 'transjudicialism.'"[2] That provision would instruct federal judges not to "employ" non-United States law, other than the English common law extant when the Constitution was drafted.[3] As that resolution's negative reference to

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1. S. 2082, 108th Cong. § 201 (2004). Enforcement provisions, set forth in Title III of the bill, threaten judges with impeachment if they engage in "any activity that exceeds the jurisdiction of the court" as limited by the provisions of the bill. *Id.* § 302.

2. American Justice for American Citizens Act, H.R. 4118, 108th Cong. § 2(7) (2004). The "findings" state that in *Atkins v. Virginia* and *Lawrence v. Texas*, the Court "employed a new technique of interpretation"—"transjudicialism," defined as "the reliance by American judges upon foreign judicial and other legal sources outside of American constitutional law." *Id.* § 2(5). (The term "transjudicialism" has also been used by Justice O'Connor, who is supportive of learning from comparative and international law. *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) [hereinafter O'Connor 2002 ALI Remarks].) In March 2005, Republican Senator John Cornyn of Texas proposed a resolution to state the sense of the Senate "that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions" unless they "inform an understanding of the original meaning of the Constitution of the United States." S. Res. 92, 109th Cong. (2005).

3. H.R. 4118, § 3. The terms of that provision specifically exempt "the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States." Today's legislators are neither the first to attempt to forbid judges from using law from abroad nor to encounter disagreement from contemporaries about the wisdom of that approach. Early in the nation's history, a few states—underscoring the rejection of English rule—enacted laws aimed at limiting reliance on English decisions. *See, e.g.*, Act of Feb. 12, 1808, ch. 447 (Ky.), *in* 3 THE STATUTE LAW OF KENTUCKY (William Littell ed., Frankfort, Ky., Johnson & Pleasants 1811) (providing that "all reports and books

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judicial amendment of the Constitution also suggests,[4] "sovereigntist" hostility to foreign and international law is often intertwined with particular views about the Constitution, the role of judges in expounding its content, and the American political project in general.

Legislators opposed to the use of "transjudicialism" have counterparts on the Supreme Court, where Justice Scalia serves as a central spokesperson for the sovereigntist position that the Court should not use "foreigners' views as part of the *reasoned basis* of its decisions."[5] He argues that judges are "not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own."[6] Justice Scalia is also identified with an interpretative method, called "originalism," that sends judges on a quest to find evidence of how Americans living at the time of the Constitution's creation might have understood its terms.[7] By also espousing an

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containing adjudged cases in the kingdom of Great Britain, which decisions have taken place since the 4th day of July 1776, shall not be read nor considered as authority" in the courts of that state, notwithstanding contrary customs); Act of June 13, 1799, § 5, 1799 N.J. Laws 435-36 (providing that no decisions in law or equity in Great Britain after July 4, 1776 "shall be received or read in any court of law or equity" as "law or evidence of the law, or elucidation or explanation thereof"). Pennsylvania had a more complex approach—that it was not "lawful to read or quote in any court in this Commonwealth, any British precedent or adjudication" originating before July 4, 1776 but that the provision should not be "construed to prohibit the reading of any precedent of maritime law, or of the law of nations." *See* Act of Mar. 19, 1810, ch. 98, *in* ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 136 (Phila., John Bioren 1810). In contrast, some states affirmatively embraced English common law. *See* DEL. CONST. of 1776 art. 25 (excepting those parts that were "repugnant to the rights and privileges" of the Constitution); N.Y. CONST. of 1777 art. 35; *see also* ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836 (1964); 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 67-69 (1965); Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 799-800 (1951).

4. H.R. 4118, § 3 (commenting on judges' "purported exercise of judicial power to interpret and apply the Constitution").

5. Roper v. Simmons, 125 S. Ct. 1183, 1228 (2005) (Scalia, J., dissenting).

6. Antonin Scalia, Commentary, 40 ST. LOUIS U. L.J. 1119, 1122 (1996); *see infra* notes 13-20.

7. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Under an originalist approach, a good deal of evidence demonstrates that at the country's inception, discussion of law from elsewhere was commonplace. *See, e.g.*, Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L. L. (forthcoming 2006) (providing examples across an array of issues); Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855 (2005) (focusing on transnational law in the Court's admiralty and trade decisions between 1791 and 1835). Critics of the contemporary use of foreign law sometimes reply that foreign sources were not used to interpret the meaning of the Constitution. Defenders respond that (1) as an empirical matter, citations in cases prove otherwise; (2) in early periods, the Court did less constitutional interpretation; and (3) the line between common law and

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approach to statutes that focuses on text rather than on context, Justice Scalia argues that the judicial role can be limited to applying preexisting standards rather than developing new ones.[8]

The sovereigntist model has a competitor: internationalism. Its roots can also be linked to the Framers' methods, but its proponents generally assume that interpretations of constitutional and statutory provisions should evolve, and they welcome learning from abroad.[9] Prominent internationalists, including Justices O'Connor, Kennedy, Ginsburg, and Breyer, have cited comparative or international sources and spoken about the desirability of broadening American understanding of non-United States law.[10] As Justice

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constitutional interpretation was not sharp. *See generally The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

8. *See* Antonin Scalia, Foreign Legal Authority in the Federal Courts, Keynote Address Before the 98th Annual Meeting of the American Society of International Law (Mar. 31, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305, 309 (2004) (arguing that, from proponents' perspective, adding "foreign law to the box of available legal tools is enormously attractive to judges because it vastly increases the scope of their discretion").

9. *See generally* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today's World*, CHI. B. ASS'N REC., Oct. 2002, at 25.

10. *See* Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) (criticizing Justice Breyer's reference to practices in other federations); *id.* at 977 (Breyer, J., dissenting); Stephen Breyer, Keynote Address Before the 97th Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003) (arguing that the lines between comparative and international law have been blurred and that directives from the Council of Europe, as well as non-U.S. judicial opinions, have interpretive value). Justice Ginsburg (joined by Justice Breyer in a concurrence) has also invoked law from outside the United States and endorsed that practice. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 344-46 (2003) (Ginsburg, J., concurring) (referring to "temporary special measures" endorsed by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as a form of transitory affirmative action without "firmly forecast[ing]" end-dates); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

Justice O'Connor has championed "the need for more knowledge about international law and transnational law," given the "importance of globalization" and the degree to which the "fates of nations are more closely intertwined than ever before." *See* O'Connor 2002 ALI Remarks, *supra* note 2, at 245, 246. While "rarely binding," she suggests that comparative and international law "should at times constitute persuasive authority in American courts" to enhance "transjudicialism." *Id.* at 247-48. To that end, Justice O'Connor has spearheaded several conferences for lawyers and judges on international law. *See* Sandra Day O'Connor, Keynote Address Before the 96th Annual Meeting of the American Society of International Law (Mar. 13, 2002), *in* 96 AM. SOC'Y INT'L L. PROC. 348 (2002); Sandra Day O'Connor,

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Kennedy explained in a majority opinion that mentioned legal sources beyond the home-grown, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge" that "other nations and peoples" affirm the same "fundamental rights."[11]

A recent example of the disagreement is *Roper v. Simmons*,[12] which held unconstitutional the imposition of the death penalty on offenders who committed their crimes before the age of eighteen.[13] To understand what is at stake in citing or opposing foreign law requires knowledge of the jurisprudential alternatives. The majority in *Roper* read the Eighth Amendment as requiring the Court first to ascertain whether a national "consensus" had developed that a particular form of punishment was cruel and unusual and, second, to exercise its own "independent judgment" about whether that

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Secundum Legem: *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVER, June 1997, at 3.

Justices Stevens and Souter are co-venturers in some of the cases looking to non-United States law, just as they are in the interpretative methodology of a living Constitution. *See, e.g.*, *infra* notes 13-20 and accompanying text.

11. Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005).

12. *Id.*

13. These sharp exchanges echoed interactions in earlier cases involving capital punishment for the mentally retarded and the criminalization of private sexual acts between consulting adults of the same sex. For example, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the European Union and several United States diplomats filed briefs arguing that executing the mentally retarded violated transnational understandings of human rights and interfered with American diplomatic efforts to reduce human rights abuses. *See* Brief of Amicus Curiae the European Union in Support of the Petitioner, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727) (reintroduced in *Atkins*, *see* Joint Motion of All Amici in *McCarver v. North Carolina*, No. 00-8727, To Have Their *McCarver* Amicus Briefs Considered in this Case in Support of Petitioner, *Atkins*, 536 U.S. 304 (No. 00-8452), 2001 WL 1682012); Brief of Amici Curiae Diplomats Morton Abromowitz et al. in support of Petitioner, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727) (also reintroduced in *Atkins*). The Supreme Court's majority decision acknowledged the role of non-United States law only in a footnote commenting that the "national consensus" against execution of the mentally retarded comported with views of the "world community." *Atkins*, 536 U.S. at 316 & n.21. Both the dissent by the Chief Justice (joined by Justices Scalia and Thomas) and the dissent by Justice Scalia (joined by the Chief Justice and Justice Thomas) objected to the mention of views of other countries. *Id.* at 324-25, 328 (Rehnquist, C.J., dissenting); *id.* at 347-48 (Scalia, J., dissenting). As Justice Scalia put it, "thankfully," the views of other nations were "not always those of our people," *id.* at 348, and the views of other nations, "'however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution,'" *id.* at 347-48 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting)). *See also* Lawrence v. Texas, 539 U.S. 558 (2003) (debating the relevance of non-United States approaches to prohibitions on consensual sex between adults of the same sex); *infra* notes 141, 259.

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punishment was "disproportionate" for juveniles.[14] Only in the final segment of the majority opinion did international and comparative law play a significant role,[15] when the majority discussed the English Parliament's 1948 prohibition on the death penalty for juveniles as well as several international conventions that ban the practice.[16] The majority explained its decision to refer to "the overwhelming weight of international opinion" as "confirmation for" but not as "controlling" the correctness of its interpretation of the Eighth Amendment.[17]

Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice Thomas, objected to the very mention of such sources. In characteristically aggressive prose, Justice Scalia asserted that

> [i]t is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own.[18]

His ire prompted Justice O'Connor (even as she too dissented on the merits) to distance herself from what she described as a claim that "foreign and international law have no place in our Eighth Amendment jurisprudence."[19]

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14. *Roper*, 125 S. Ct. at 1192.

15. *Id.* at 1198-1200. The majority opinion did note that when the United States ratified the International Covenant on Political and Civil Rights (ICCPR), it did so subject to a reservation on Article 6(5), which "prohibits capital punishment for juveniles." *Id.* at 1194. The Court found that, because five states had subsequently outlawed capital punishment for juveniles and because Congress had not extended that punishment to juveniles when enacting the Federal Death Penalty Act in 1994, that reservation was "only faint support for" the argument that no national consensus against the practice existed. *Id.*

16. Justice Kennedy cited the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the American Convention on Human Rights: Pact of San José, Costa Rica, and the African Charter on the Rights and Welfare of the Child. *Id.* at 1199. *See generally* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (3d ed. 2002) (arguing that an international norm has emerged that makes the imposition of the death penalty a violation of several United Nations conventions).

17. *Roper*, 125 S. Ct. at 1200. *But see* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 153 (2005) (arguing that foreign practices are "most relevant for the Court's analysis").

18. *Roper*, 125 S. Ct. at 1228 (Scalia, J., dissenting).

19. *Id.* at 1215 (O'Connor, J., dissenting). During the same Term, the Court interpreted a federal statute that prohibited persons convicted in "any" court from possessing a firearm to

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Rather, the "special character" of that part of the Constitution appropriately "draws its meaning directly from the maturing values of civilized society."[20]

Why so much fuss about a few citations? Why did Justice Kennedy, not forecast at his confirmation hearings in the 1980s to be an agent provocateur, throw down the gauntlet by writing the trailing section of the *Roper* decision to highlight international and comparative law? Why did he and his colleagues invite more arguments than needed instead of pursuing a more minimalist approach?[21] And why do citations such as this prompt a campaign against references to the law of other jurisdictions, a custom that American jurists have used throughout our constitutional history and that jurists on many other high courts think noncontroversial?[22]

The intensity of *Roper* is fueled by the four debates it entails: a first about the morality and legality of executing juveniles; a second about which legal actors (judges or legislatures) have the power to condemn or condone the practice; a third about which set of judges or legislatures (state or federal) have that power; and a fourth about what normative sources (national, local, or transnational) should be the basis for whatever rules are made. The effort to delegitimate the use of foreign law is, in short, part of larger battles about the role of judges in the American polity and the role of this nation in the world. The congressional proposals aimed at banning foreign law provide a window not only into nationalist but also into anti-judicial sentiments in America.

Hostility toward adjudication is expressed through several pieces of legislation promoted by the party currently in control of both the Presidency and the Congress. Controls on judicial sentencing decisions,[23] limitations on

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exclude convictions in foreign courts. Small v. United States, 125 S. Ct. 1752 (2005). Justice Scalia joined a dissent, written by Justice Thomas (also joined by Justice Kennedy) to argue that Congress had wanted the reference to include convictions in foreign courts. *Id.* at 1758 (Thomas, J., dissenting).

20. *Roper*, 125 S. Ct. at 1215 (O'Connor, J., dissenting). Justice O'Connor agreed with the majority about the need to understand domestic opinion but disagreed that a "genuine *national* consensus" against the practice existed. *Id.*

21. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

22. *See, e.g.*, Cleveland, *supra* note 7; Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (addressing U.S. Supreme Court practices and models of engagement with non-U.S. sources); *see also* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 18-20 (1998) (discussing the influence of U.S. jurisprudence on Canadian law).

23. *See* 18 U.S.C.A. §§ 3553(e), 3742 (West 2000 & Supp. 2005); 28 U.S.C.A. § 994(w) (West 2000 & Supp. 2005) (constraining judicial discretion by limiting downward departures, increasing appellate review, and requiring data collection of how individual judges imposed

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access to habeas corpus,[24] and diminished judicial review of immigration proceedings[25] are already in place. In addition, the Bush Administration has consistently opposed judicial oversight of the treatment of detainees alleged to be threats to national security[26] and of the Executive's surveillance activities.[27] Further, judicial implementation of various liability rules are claimed to undermine American competitiveness.[28] Congressional proposals opposing specific judicial decisions[29] are a regular part of contemporary politics. The effort to derail transnational legal dialogues is a piece of this challenge to adjudication as an instrument of regulating the public and private sectors.

Rejection of foreign sources is also aimed at shoring up the viability of this nation-state. One might have assumed that the need to press a unique national identity would correlate with the newness of a country, seeking to establish its own authority. Having one's "own" law can be a source of "pride," as William Fletcher explained when describing 1820s American lawyers speaking about a "distinctly American law merchant, different in significant respects from the international law merchant."[30] Yet, as is evident from the contemporary conflict, the aging of this country has not produced a relaxed approach to law

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sentences); *see also* Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005) (proposing to restrict access to habeas corpus).

24. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2254-2255 (2000)).

25. *See* Illegal and Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in part at 8 U.S.C. § 1252 (a)(2)(C) (2000)); INS v. St. Cyr, 533 U.S. 289 (2001) (interpreting the limits on jurisdiction to avoid raising the issue of whether Congress had impermissibly suspended the writ of habeas corpus).

26. The government has put forth that position in several cases. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S.Ct. 622 (2005); *see also* Respondents' Motion To Dismiss for Lack of Jurisdiction, Hamdan v. Rumsfeld, No. 05-184 (Jan. 2006).

27. See Alberto R. Gonzales, U.S. Attorney Gen., Prepared Remarks at the Georgetown Univeresity Law Center, Intercepting Al Qaeda: A Lawful and Necessary Tool for Protecting America (Jan. 24, 2006), *available at* http://www.law.georgetown.edu/news/documents/Gonzalesspeech-1.pdf.

28. President's Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126, 127 (Feb. 2, 2005) ("Justice is distorted and our economy is held back by irresponsible class actions and frivolous asbestos claims, and I urge Congress to pass legal reforms this year.")

29. *See, e.g.*, H.R. 214, 109th Cong. (2005) (proposing that if the Supreme Court held in a then-pending case that a public display of the Ten Commandments violated the Constitution, members of the House of Representatives should display a set in the House chambers).

30. *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1520 (1984).

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from abroad. Moreover, one can find new polities (such as South Africa[31]) open to international norms.

The argument against foreign sources often relies on the integrity of domestic democratic processes.[32] Faced with the claim that the ethics of human obligations deduced from philosophies of personhood transcend yet bind all nation-states,[33] American sovereigntists insist on a competing ethical obligation – to majoritarian decisionmaking. As I document below, however, the fight over the use of foreign norms is itself a deeply democratic one, pressed by a variety of government actors at state and federal levels in both legislatures and courts, and affected by a host of grassroots organizations crisscrossing the country. Popular sovereignty is very much at work in the import/export exchange of legal norms.

Those democratic voices are particularly focused on issues often grouped under the rubric of "the culture wars" – a phrase usually referring to clashes about gender and sex, lifestyles and families, race, crime, and punishment.[34] The turn to the "foreign" to influence the "domestic" in these contexts is seen by some as particularly objectionable, just as others argue the special relevance of transnational norms. For example, in the 1940s, American proponents of equality turned to the U.N. Charter and the Universal Declaration of Human Rights (UDHR) as the basis to render illegal certain forms of discrimination against blacks and aliens.[35] Today, American advocates for women's equality invoke the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[36] now ratified by some 180 nations but not the United States.

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31. *See* S. AFR. CONST. 1996, ch. 2, § 39(1).

32. *See generally* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004) (arguing that what he calls "international constitutionalism" and defines as predicated on universal rights, can be distinguished from "democratic constitutionalism," which he posits as predicated on popular expressions of political commitments).

33. *See, e.g.*, SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2004); DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996); Linda Bosniak, *Denationalizing Citizenship*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 237 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

34. *See* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA 5-7 (2004) (arguing that mobilization around "explosive social issues" results in the election of leaders whose economic policies do harm to those enlisted through the leadership's positions on social issues).

35. *See infra* Subsection II.B.2.

36. 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).

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But the conflict among "cultures" is not limited to questions about the meaning of equality and of human dignity. Also at issue are differing conceptions of the obligations of governments toward all people and of the use of courts to identify and enforce those obligations. Leaders of the national government in the United States have become increasingly committed to deregulation and privatization, thereby reducing the transparency of government and the liabilities of public and private actors.[37] In contrast, many other constitutional democracies have commitments to what some commentators have termed a "culture of justification,"[38] in which social, political, and equality rights are increasingly policed through judicial review. It is the confluence of these two kinds of culture wars—social and regulatory—that explains why some Justices on the Supreme Court of the United States are insistent upon linking the American project with that of the wider world, as well as why their mild-mannered footnotes and textual references have inspired so much vitriol. Justices on both sides of the debate are battling about their own role as jurists in a constitutional democracy.

B. Introducing the Many Iterations of Federalism

Because the federal court system is such a powerful source of shared narratives, the discussion of the fight that Justice Scalia started about foreign citations[39] offers law review readers a ready reference.[40] But my purposes here

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37. *See* Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2003).

38. Cherie Booth & Angela Ward, Convergent Roots and Divergent Futures? Human Rights in Australia and the UK 22 (July 2005) (unpublished manuscript, on file with author). *See generally* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 1 (Robert Badinter & Stephen Breyer eds., 2004) (providing a "record of an organized conversation" by several jurists and academics). Badinter, the former President of the Conseil Constitutionnel of France, argued that the increase in popular aspirations for a just society has made judicial influence greater than ever before. Robert Badinter, *Introductory Remarks* to JUDGES IN CONTEMPORARY DEMOCRACY, *supra*, at 9, 9-12. In a segment devoted to the "secular papacy," Ronald Dworkin commented that experiences around World War II proved that what he termed "democratic romanticism"—faith in parliamentary process—could not suffice; the result was a turn to and the authorization of more decisionmaking by judges. Ronald Dworkin, *The Secular Papacy: Discussion*, *in* JUDGES IN CONTEMPORARY DEMOCRACY, *supra*, at 79, 83-85.

39. Jackson, *supra* note 22, at 109, 110 (discussing the nineteenth-century history of citation to non-United States sources as the Supreme Court interpreted the Eighth Amendment and identifying Justice Scalia's departure, in 1989, from that tradition).

40. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789 (2005). The normative role played by the federal courts has been understood since the country's inception, which is why judicial nominations have prompted conflict since the 1790s. *See*

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are to illuminate and refocus that debate. Internationalists and sovereigntists are insufficently attentive to the range of participants working out our relationships to transnational norms and the rule of law more generally.

My hope is to turn attention toward a wider field of play in which legal claims and rights move. States and localities—through city councils, state legislatures, national organizations of local officials, and courts—serve as both importers and exporters of law. The conceit that United States law is basically bounded is inaccurate. Rather, laws (like people) migrate, and seepage is everywhere. The courts are only one stop along the way.

Thus, while members of Congress may attempt to enjoin federal judges from "employing" or "relying" on foreign law, and Justice Scalia can invoke the "foreign" in a self-conscious attempt to mark a boundary, those efforts cannot stem the currents of thought-producing rights that—like acid rain—do not respect lines that people draw across land. With such permeability, the origins of rules blur. While certain legal precepts are foundational to the United States, one should label them "made in the USA" knowing that—like other "American" products—their parts and designs are also produced abroad. The questions are not *if* or *whether* non-United States law will have an effect but rather (1) how, when, and through which actors lessons from abroad will be brought home; and (2) how, when, and through which actors the United States will attempt to affect the law and practices of nations and of international organizations.

The argument in support of these propositions proceeds in five steps. The first is to prompt reflection on how judges came to insist that "American" law requires dignified treatment of and equal protection for women and men of all colors. The contemporary debate about the legitimacy of "foreigners' views" keys to the post-World War II era, the founding of the United Nations, the promulgation of the UDHR, and the subsequent drafting and ratification of several conventions on political, civil, and economic rights.

But the impression that the American civil liberties community turned only recently to international human rights as sources of instruction[41] ignores the history of abolition and of women's suffrage, two great human rights movements that changed America's law. Equality efforts in the United States

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Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 622-37 (2005).

41. *See, e.g.*, CONG. RESEARCH SERV., REPORT NO. 96-736, HUMAN RIGHTS TREATIES: SOME ISSUES FOR U.S. RATIFICATION 4 (1996) [hereinafter CRS, HUMAN RIGHTS TREATIES] ("The U.S. civil rights movement has been largely a domestic movement not linked to the international human rights movement.").

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have always been a part of a global effort[42] in which America was influenced by and affected events abroad through a lively "reexport trade."[43] Consideration of these many iterations helps to reveal a pattern of anxieties, as challenges to entrenched status hierarchies are channeled into debates about the jurisdictional boundaries of families, states, and the nation. Time and again, human rights movements are met with an insistence on America's sovereignty, claimed to entail an entitlement to originality or "exceptionalism."

Second, distress about "outsiders" is triggered not only when the national boundaries of the United States are crossed; state lines also enshrine presumptions of jurisdictional self-containment. Questions about the scope of national authority were not settled at the Constitution's signing and have been contested ever since. Because federalism has become a shared feature of many constitutional democracies, the saliency of subnational governmental units might now serve to bridge American experiences with those of other nations. With new federations come familiar debates about the desirability of reliance on local control (Europe's "subsidiarity"[44]) for enhancing democratic participation, the differing "competencies" of levels of government and the

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42. *See generally* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955 (2003) (detailing efforts by the NAACP to use international conventions to change American law); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS (2000) (arguing that interest in distinguishing America from the U.S.S.R. affected equality law); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998) (discussing advocacy groups, motivated by value commitments and relying on information exchange, mobilizing constituencies around the world); John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 761 (2004) (arguing that the "new language of civil liberties in America" in the early twentieth century stemmed from internationalists and their organizations). On America's influence abroad, see Louis Henkin, *The Universal Declaration and the U.S. Constitution*, 31 POL. SCI. & POL. 512 (1998) (arguing that the Constitution influenced the Declaration of Human Rights, and that the Declaration influences American law); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) (discussing norm entrepreneurs and the influence of their ideas); Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, *in* ZUR AUTONOMIE DES INDIVIDUUMS 249 (Dieter Simon & Manfred Weiss eds., 2000) (tracing the development of that concept in America and abroad).

43. IAN TYRRELL, WOMAN'S WORLD, WOMAN'S EMPIRE: THE WOMAN'S CHRISTIAN TEMPERANCE UNION IN INTERNATIONAL PERSPECTIVE, 1880-1930, at 6 (1991).

44. Subsidiarity is a complex concept not simply to be equated with the preference for or legal commitment to state decisionmaking in America. *See* N.W. Barber, *The Limited Modesty of Subsidiarity*, 11 EUR. L.J. 308 (2005); Phil Syrpis, *In Defence of Subsidiarity*, 24 OXFORD J. LEGAL STUD. 323 (2004) (reviewing ANTONIO ESTELLA, THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE (2002)); Kees van Kersbergen & Bertjan Verbeek, *Subsidiarity as a Principle of Governance in the European Union*, 2 COMP. EUR. POL. 142, 151 (2004).

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degree to which variation in norms is tolerated,[45] and the viability of individuals sustaining multiple affiliations and layers of citizenship.[46] Comparative federalism could be a friendly way to tease out shared lessons about multiple layers of authority.[47]

But a specific premise of the American constitutional agreement to "split the atom of power"[48] was that it enabled slavery to survive, if not flourish.[49] States claimed a sovereign prerogative to determine which persons were recognized as legally entitled to the sanctity of their own bodies and the fruits of their own labors. The undoing of those terms after the Civil War was a victory of force rather than a shared moral imperative, resulting in efforts thereafter to revisit the post-Civil War constitutional amendments and to dampen imperatives for equality.

As other persons—women, prisoners, the disabled—of all colors and ethnicities sought recognition of their personhood, jurisdictional divides (local versus national, domestic versus international) were trumpeted as the bases for

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45. *See* Gráinne de Búrca, *Setting Constitutional Limits to EU Competence?* (Faculdade de Direito da Universidade Nova de Lisboa, Francisco Lucas Pires Working Paper Series on European Constitutionalism, Working Paper 2001/02, 2001).

46. Justice O'Connor's explanation in *Gregory v. Ashcroft*, 501 U.S. 452, 458-60 (1991), is widely cited to explain the commitment to state decisionmaking. Criticisms are detailed in Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

47. *See, e.g.*, THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaidis & Robert Howse eds., 2001); Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731 (2004); Vicki C. Jackson, *Gender and Transnational Legal Discourse*, 14 YALE J.L. & FEMINISM 377 (2002).

48. Justice Anthony Kennedy has used variations of this phrase more than once. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 751 (1999) (quoting Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999)); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *see also* Cynthia L. Cates, *Splitting the Atom of Sovereignty:* Term Limits, Inc.*'s Conflicting Views of Popular Autonomy in a Federal Republic*, PUBLIUS, Summer 1996, at 127; Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1, 2-4 (2002); Charles Sumner Clancy, *An Organic Conception of the Treaty-Making Power vs. State Rights as Applicable to the United States*, 7 MICH. L. REV. 19, 27 (1908) ("The people might have a hundred governments, each a specified power, without surrendering one atom of sovereignty." (internal quotation marks omitted)).

49. Some read the Constitution as itself committed to slavery. As abolitionists argued, "the American Constitution was an 'agreement with death and a covenant with Hell.'" BETTY FLADELAND, MEN AND BROTHERS: ANGLO-AMERICAN ANTISLAVERY COOPERATION 288 (1972). Others argue that the original text permitted slavery to continue but created conditions under which it could be extinguished. *See* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 10-13 (2001).

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refusing to alter status regimes or as justifications to have varying rules.[50] Thus, the invocation of sovereign boundaries in debates about legal change involving the United States are doubly valent, with both national and state borders marking a commitment to jurisdictional autonomy that is intertwined with painful episodes of American history. America's standoffishness from the twentieth-century international human rights movement is rooted in protection of local as well as national prerogatives to set the standards of interpersonal hierarchies.

Third, the actual autonomy—of states to each other, to the nation, or of the nation to the world—is vastly overstated, which is one reason why debates about foreign law have become so shrill. With and without citation, state and federal courts and legislatures have made law that is influenced from abroad and that, in turn, exerts influence on law outside our borders. Because of such influences, the current effort to build "Fortress America"[51] is understandable from the perspective of those reasonably fearing that transnational commitments could alter the status quo.

Fourth, once these multiple ports of entry come into view, so do questions about the legality and desirability of various modes of action by a range of actors (judges, legislatures, and the executive, both national and local). Below, I examine two bodies of law that have taken in transnational rights by different routes. One mode, "silent absorption," can be seen through tracing the law of "dignity" in the Supreme Court's discussions of the Bill of Rights. That term only comes into focus in the 1940s, as dignity was also enshrined as a central principle in the U.N. Charter and the UDHR. Yet Supreme Court Justices rarely cited either the Charter or the UDHR as sources.

Another approach, "express invocation," can be found in the litigation (culminating in *Shelley v. Kraemer*[52]) to make illegal racially restrictive land

50. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) [hereinafter Resnik, *Categorical Federalism*]; Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

51. This term plays off the appellation "Fortress Europe," used to refer to efforts to stem migration, limit asylum, and create holding places outside of many European states for those seeking entry to Europe. *See, e.g.*, Alexander Caviedes, *The Open Method of Co-ordination in Immigration Policy: A Tool for Prying Open Fortress Europe?*, 11 J. EUR. PUB. POL'Y 289 (2004). The phrase "Fortress America" itself appears in a mid-century discussion of efforts to amend the United States Constitution to limit treaty-making. *See* Glendon Austin Schubert, Jr., *Politics and the Constitution: The Bricker Amendment During 1953*, 16 J. POL. 257, 292 (1954); *infra* Section II.C.

52. 334 U.S. 1 (1948); *see also* Subsection II.B.2.

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covenants. The overt reliance on the U.N. Charter helped to propel a reaction that was almost powerful enough in the 1950s to amend the Constitution to limit treaty-making powers. In short, American judges have choices as they write judgments to affect specific action and therefore need to determine self-consciously what practical import their express citation or silent absorption of foreign sources will have.

Advocates for or against "the foreign" have obligations to consider the implications of American practices not only in the United States but beyond. Many proponents of internationalism focus on the national system,[53] hoping that the Senate will ratify various conventions, such as CEDAW. But, were the United States to do so, it might also try to export its own more narrow approaches to equality rather than import CEDAW's broad interest in transforming women's opportunities in public and private arenas. That power of exportation can be seen in the United States's approach to human trafficking, another transnational effort in which America's current policy, aimed at making prostitution illegal worldwide rather than at enhancing the economic opportunities of women, has been able to influence other countries.

Fifth, and more generally, I take issue with the assumptions that the critical field of play is federal law and that the transformative players are on the Supreme Court of the United States. While federal courts are and ought to be a part of movements for social change, judges or other national actors cannot alone entrench new legal commitments. Citations in Supreme Court decisions to conventions such as CEDAW are one method of domestication but not necessarily the most effective means of either making its precepts constitutive of American identity or of altering the circumstances of people living in this country.

State courts and city councils, as well as administrators and other executive branch officials, are important participants in the process of absorption. Although the United States has yet to ratify CEDAW, a few cities have adopted aspects of it as local law. San Francisco has, for example, called for a review of laws to identify systematic and structural discrimination against women and girls.[54] And, while the current federal administration has declined to participate in the Kyoto Protocol on global climate change, a group of mayors agreed to their own climate protection program that was then approved by the United

53. *See, e.g.*, U.S. HUMAN RIGHTS NETWORK, SOMETHING INSIDE SO STRONG: A RESOURCE GUIDE ON HUMAN RIGHTS IN THE UNITED STATES (2003), *available at* http://www.ushrnetwork.org/pubs/ushrn_resource.pdf.

54. *See* S.F., CAL., ADMIN. CODE § 12K.4 (2005); *infra* Subsection IV.B.1.

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States Conference of Mayors.[55] Those rules in turn shape states' public policies that state courts must apply.

As these many actors, at national and local levels, in and outside formal legal structures, embrace propositions like racial and gender equality, new understandings become entrenched, even if what obligations flow from commitments to equality remain contested. When successfully incorporated at these various levels, Americans come to think of these precepts as internal to the American project.[56]

But contemporary doctrines of federalism, insistent on national preemption of local rulings addressing "foreign affairs," undermine these methods of absorption. After considering how city councils can make that which is foreign a domestic affair, I parse the case law to understand what kind of local uptake ought to be legally permissible. Recent Supreme Court prohibitions on local involvement stem from Massachusetts's effort to ban the purchase of goods from Burma because of the use of forced labor and California's requirements of disclosure of insurance policies to help compensate Holocaust victims.[57] In contrast, San Francisco's CEDAW law and various mayors' climate laws are local actions imposing new ("foreign") obligations on domestic government actors. I argue that federal law should not interfere with state incorporation of human rights and of customary international law absent a showing that a particular rule in practice undercuts a foreign affairs policy or otherwise violates federal law.

Returning to the debate in *Roper*, the Court is a great source of national narratives, with its easily identifiable partisans giving voice to battling conceptions of the country. The hyperbolic Justice Scalia and the more measured Justice Kennedy have in fact a deep disagreement enacted through fencing about citations. At stake is not simply whether we can, in Justice Kennedy's terms, seek "confirmation" from abroad rather than be "control[led]"[58] by what Justice Scalia calls "five Members of this Court and

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55. *See* Cities Working Together To Protect Our Air Quality, Health and Environment: A Call to Action, Letter from Greg Nickels, Mayor of Seattle, et al., to U.S. Mayors (Mar. 30, 2005) [hereinafter Mayors' Air Quality Letter], *available at* http://www.ci.seattle.wa.gov/mayor/climate/PDF/USCM_6-page_Climate_Mailing_ALL.pdf; *infra* Subsection IV.B.2.

56. *See* Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17 (2005) (analyzing how express racial classifications were once American social policy and later became so evidently not "American" that no constitutional elaboration was needed when the Supreme Court invalidated tax exemptions for Bob Jones University, which had defended its commitment to separating individuals by race as "religious.").

57. *See infra* Sections IV.A, D.

58. Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005).

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like-minded foreigners,"[59] but also what the American democratic constitutional project entails. Yet the choice is not between being "control[led]" or gaining "confirmation." Rather, American law is constituted at home and abroad.

II. CLAIMING EXCEPTIONALISM: THE OPPOSITION TO AND THE INFLUENCE OF THE "FOREIGN" ON AMERICAN LEGAL RULES

In many parts of the world, lawmakers, social movement activists, and academics are examining the obligation of nations to protect human rights.[60] A good deal of recent legal literature focuses on the role that judges play in transnational dialogues occurring in the wake of the adoption of constitutions and of international human rights conventions. From reported decisions to conferences and listservs, judges in different countries are exchanging views on the meaning of law.[61]

The United States legal community stands in an awkward relationship to those discussions. As illustrated by the introductory examples of legislative insistence on "American Justice for American Citizens" and Justice Scalia's objection to "foreigners' views,"[62] some seek to stand apart from these exchanges. Their posture is at times described as "exceptionalism," a term that covers ideas ranging from an empirical observation of difference to a normative assertion of the right to be different.[63] For some, as the exceptional nation, America should be a "model . . . with a special and unique destiny to lead the

59. *Id.* at 1217 (Scalia, J., dissenting).

60. *See, e.g.*, Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003) (describing an array of different kinds of engagement with nondomestic legal rules); *see also* Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271 (2003); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000).

61. *See* 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). A closed transnational listserv, available by invitation only for judges, is called "Jurist-L." Telephone Interview with Nancy Gertner, Judge, U.S. Dist. Court for the Dist. of Mass. (Nov. 17, 2005).

62. H.R. 4118, 108th Cong. (2004); *Roper*, 125 S. Ct. 1183, 1228 (2005) (Scalia, J., dissenting). In the wake of 9/11, exceptionalism has had something of a renaissance in legal and political policy circles. *See, e.g.*, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005) (including essays about the empirical, normative, and political claims for exceptionalism).

63. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

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rest of the world to freedom and democracy."[64] Yet others take exceptionalism as a license for unilateralism.[65]

Notice that all these approaches rely on comparisons between nation-states.[66] Historians and political theorists have questioned that focus as they study regions and transnational movements that undermine the coherence of national boundaries as intelligible analytic divides.[67] Moreover, to posit the United States as exceptional presumes that the experiences of other countries can be amalgamated into a baseline from which America deviates.[68]

Yet for some lawyers, exceptionalism remains attractive, in part because of America's relative legal isolation. In contrast to other common law democracies that stayed longer within the British Empire and now participate in Commonwealth-based organizations, the United States has had less experience with legal interdependencies.[69] Moreover, from an internal perspective,

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64. Anthony Molho & Gordon S. Wood, *Introduction* to IMAGINED HISTORIES: AMERICAN HISTORIANS INTERPRET THE PAST 4 (Anthony Molho & Gordon S. Wood eds., 1998); *see also* PAUL D. CARRINGTON, SPREADING AMERICA'S WORD: STORIES OF ITS LAWYER-MISSIONARIES (2005).

65. *See* PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR (2005).

66. *See* IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM (Byron E. Shafer ed., 1991); Daniel T. Rodgers, *Exceptionalism*, *in* IMAGINED HISTORIES, *supra* note 64, at 21, 24-27 (tracing the shift from a late-nineteenth-century sense of being part of a worldwide project of "an assertion of rights . . . for the entire world of mankind and all coming generations, without any exceptions whatsoever" (internal quotation marks omitted) to Frederick Jackson Turner's claim of America's deviation from the normal progression of other nations, and then, in the 1950s, to an insistence on a "distinctive 'American way'" identified in opposition to practices in the Soviet Union). Rodgers has argued that only after World War II did exceptionalism come to be taken as a given, and moreover, "not as a deficit but as a gift." *Id.* at 22, 24; *see also* DUDZIAK, *supra* note 42 (analyzing the impact of the Cold War on American legal and political development).

67. *See* Chadwick F. Alger, *The World Relations of Cities: Closing the Gap Between Social Science Paradigms and Everyday Human Experience*, 34 INT'L STUD. Q. 493 (1990); George M. Fredrickson, *From Exceptionalism to Variability: Recent Developments in Cross-National Comparative History*, 82 J. AM. HIST. 587 (1995).

68. As Fredrickson has explained: "[T]he notion that the United States has exhibited radical peculiarities that have made its experience categorically different from that of other modern or modernizing counties has encouraged an oversimplified and often idealized view of the American past." *See* Fredrickson, *supra* note 67, at 588-89; *see also* Rodgers, *supra* note 66, at 33-34.

69. Legal professionals of various kinds come together through the Commonwealth, a collective of countries that includes 1.8 billion citizens or about thirty percent of the world's population. Commonwealth Secretariat, Who We Are, http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=20596 (last visited Feb. 15, 2006); *see also* Cherie Booth & Max du Plessis, *Common Wealth*, 66 MOD. L. REV. 837 (2003). In contrast, America has had

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exceptionalism nests comfortably within strands of American federalism, as it reiterates national and state prerogatives to be different, a stance that has been deployed throughout America's history to deflect transnational efforts to enhance the equality and dignity of human beings.

A. The Double Entendre of the "Domestic"

Two great human rights movements of the eighteenth and nineteenth centuries – emancipation for slaves and equality for women of all colors – both crossed continents and oceans, with activists in many countries working through networks that relied on letters and pamphlets in the years before e-mail existed.[70] Using a variety of transnational organizing techniques and often working with religious societies and churches,[71] these human rights proponents coordinated innovative actions, including a transnational boycott of sugar produced through slave labor,[72] the dissemination of pamphlets and leaflets around the world,[73] several international conferences,[74] and appeals to

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a more self-contained sociolegal culture. *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002).

70. *See, e.g.*, DAVID BRION DAVIS, SLAVERY AND HUMAN PROGRESS (1984); PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS (2d ed. 2003); KAREN OFFEN, EUROPEAN FEMINISMS, 1700-1950: A POLITICAL HISTORY (2000); LEILA J. RUPP, WORLDS OF WOMEN: THE MAKING OF AN INTERNATIONAL WOMEN'S MOVEMENT (1997); WOMEN'S RIGHTS AND TRANSATLANTIC ANTISLAVERY IN THE ERA OF EMANCIPATION (Kathryn Kish Sklar & James Brewer Stewart eds., forthcoming 2006). These actions were not unique to these social movements and are exemplary of those undertaken by many transnational efforts aimed at expanding the reach of particular religions or political regimes as well as improving working conditions and the quality of the environment. *See* KECK & SIKKINK, *supra* note 42; TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE (Jackie Smith, Charles Chatfield & Ron Pagnucco eds., 1997). Lawyers have played an important role in many of these efforts. *See* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); Lawyers Without Borders: Crossing Borders To Make a Difference, http://www.lawyerswithoutborders.org (last visited Jan. 1, 2006).

71. *See, e.g.*, FLADELAND, *supra* note 49, at 296-99, 364-66.

72. *See* CLARE MIDGLEY, WOMEN AGAINST SLAVERY: THE BRITISH CAMPAIGNS, 1780-1870, at 35-40 (1992).

73. *See* FLADELAND, *supra* note 49, at 165 n.51, 178; MARGARET H. MCFADDEN, GOLDEN CABLES OF SYMPATHY: THE TRANSATLANTIC SOURCES OF NINETEENTH-CENTURY FEMINISM 109-10 (1999). Both works discuss Elizabeth Heyrick's 1824 call for "immediate, not gradual abolition" in a pamphlet that Fladeland described as making the "biggest stir of all among antislavery people in both Great Britain and the United States." Abolitionist newsletters in both countries published work by writers from across the ocean. FLADELAND, *supra* note 49, at 178, 215-17, 238-39, 359.

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international and national bodies to end subordinating practices.[75] And they changed America's law.

1. *The Trade in Abolition*

Early abolitionists framed their goals in global terms, as they sought change transnationally. Betty Fladeland has provided a history of the "unremittant" efforts, beginning after the Napoleonic wars, to engender international cooperation.[76] For example, when the United States Senate considered legislation prohibiting United States citizens from participating in the slave trade, the challenge was how to handle ships from foreign sovereigns.[77] One proposal, involving Great Britain, Spain, Portugal, and Holland, authorized a right to search ships for slaves and provided that cases about seized ships would be tried in "mixed courts," staffed by judges from the country capturing the ship and judges from the country under which flag the ship sailed.[78] An approach supported by the House of Representatives was to

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74. *See, e.g.*, FLADELAND, *supra* note 49, at 258-70, 284 (discussing the first world antislavery convention, held in Britain in 1840, and the second, in 1843); TYRRELL, *supra* note 43, at 16-20, 45 (describing a first meeting in 1853 as a "World's Temperance Convention" with delegates from Canada and Britain; a second meeting, in 1876, attended by representatives of Japan, Canada, the United States, and Great Britain, and then subsequent conferences of representatives from more countries). *See generally* RUPP, *supra* note 70 (analyzing the development of the International Council of Women, the International Alliance of Women, and the Women's International League for Peace and Freedom and their many meetings).

75. *See, e.g.*, MIDGLEY, *supra* note 72, at 68 (describing an 1833 petition, signed by 162,000 women, calling upon Britain to abolish slavery); TYRRELL, *supra* note 43, at 39-43 (reproducing a photograph of the "polyglot petition," which, by the time it was presented in 1895 to U.S. President Grover Cleveland, was signed by more than one million women—fifty-seven percent from the United States—and called on governments and "the men of the world" to attack "the poison habits of all lands"); *see also infra* notes 166-170 and accompanying text (discussing filings at the United Nations by leaders of the African-American community to obtain redress for racial discrimination).

76. FLADELAND, *supra* note 49, at 255, 258-61, 284 (discussing the British and Foreign Anti-Slavery Society, founded in 1839 and having the goal of abolishing slavery wherever it existed); *see also* FEHRENBACHER, *supra* note 49, at 156-72.

77. David B. Roe & Russell K. Osgood, *United States Supreme Court February Term 1824*, 84 YALE L.J. 770, 774 (1975).

78. FLADELAND, *supra* note 49, at 119 (explaining that if they disagreed an arbiter was to be chosen by lot). Fladeland also discussed the decision in *La Jeune Eugénie*, in which Americans boarded ships flying French colors off the African coast; then-Judge Story ruled that the slave trade violated the laws of nations because slavery, like piracy, had become a practice universally denounced. *Id.* at 131; *see* United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551). In *The Antelope*, 23 U.S. (10 Wheat) 66 (1825), that position was overturned, with a holding that slavery did not violate international law. *See*

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enter into a treaty with other countries to permit reciprocal search and seizure rights.[79]

In the first half of the nineteenth century, however, the United States Senate repeatedly rejected proposals to join with "foreign powers (England, specifically)" to do so.[80] Don Fehrenbacher has noted that some of that reticence stemmed from more general anti-British sentiments as well as from concerns about protecting American ships.[81] As proposals were forwarded for joint ventures to seize ships and prosecute those involved in the slave trade, objections sounded in terms that remain familiar today; an opponent argued that the Constitution would be violated if "American citizens were tried in a court that was partly composed of foreigners and might sit outside the country."[82] Further, slaveholders objected to national officials who put "the rights of foreigners above those of American citizens."[83] In December of 1841, Britain, France, Austria, Prussia, and Russia signed a treaty through which they agreed to mutual rights to search each other's ships and in which they declared that the slave trade was piracy.[84] America did not sign, although it

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generally William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34 (1978).

79. Roe & Osgood, *supra note* 77, at 775 (citing a resolution on Suppression of the Slave Trade, 40 ANNALS OF CONG. 1147-55 (1823)).

80. FLADELAND, *supra* note 49, at 123; *see also* Roe & Osgood, *supra* note 77, at 775.

81. FEHRENBACHER, *supra* note 49, at 158 (noting that the "real sticking point was right of search," and that "[h]aving just finished a war with Britain over freedom of the seas, Americans were understandably reluctant, even in a good cause, to endorse a major infringement of that freedom.").

82. FLADELAND, *supra* note 49, at 119. Fehrenbacher described Richard Rush as pointing out that the "mixed commissions might violate the clauses of the Constitution vesting all federal judicial power in a supreme court and such inferior courts as Congress might establish, while providing that the judges of those courts should hold their offices during good behavior and be subject to impeachment." FEHRENBACHER, *supra* note 49, at 389, n.106. Objections to joint action were reiterated in 1820. FLADELAND, *supra* note 49, at 127-29. A more limited bilateral treaty failed despite initial agreements, in 1824, to authorize ships of Britain and the United States to patrol ocean coasts to detain and capture slave ships and providing that each country was to enact its own laws identifying the slave trade as a form of piracy and then try offenders in their own countries. *Id.* at 125-44 (criticizing Britain's unwillingness to exempt the American coastline and noting American politicians' fear that such cooperation would have been a step toward general emancipation). Fehrenbacher cautioned against a narrative that assumes that American policy was driven by slave trade issues alone, as he argued that anti-British sentiment played an important role. FEHRENBACHER, *supra* note 49, at 157-204.

83. FLADELAND, *supra* note 49, at 188.

84. FEHRENBACHER, *supra* note 49, at 166.

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agreed to join Great Britain in 1842 in stationing ships off the African coast to suppress slave trading.[85]

While some hoped to insulate America from undue influence *from* abroad, others looked abroad *for* support. From the Revolutionary era through the Civil War, both abolitionists and slaveholders looked overseas for endorsement of their positions.[86] Abolitionists sought moral and financial support from England. And even as they decried outside influences, Southerners courted popular opinion in Great Britain.[87] During the Civil War, information sheets went weekly from the South and the North to some three hundred English newspapers.[88] When one side put on a public campaign or launched a local support group, the other replied in kind.[89]

Within the United States, the jurisdictional interplay was reiterated as state authorities insisted on the power of their own borders in an effort to ward off national intervention as well as intrusion from foreign actors, including those from other states. Illustrative of a sense of the harm imposed from outside is an 1844 law from South Carolina, which made it a crime to disturb the peace in matters "concerning slaves or free colored people" but provided that the rule "applied only to persons from other states"[90] or to any "Foreign Power."[91]

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85. *Id.* at 169 (describing the Webster-Ashburton Treaty, U.S.-Gr. Brit., Aug. 10, 1842, 8 Stat. 572, later ratified by the Senate, that made each country "independent of each other" while cooperating with each other).

86. Some historians assume that sympathies followed class lines, with aristocratic English more pro-South (but not necessarily pro-slavery) and working classes more sympathetic to abolition. Through a study of 125 newspapers published from 1861-1865 in about forty cities in Britain, a more complex pattern of affiliations emerges. *See* R.J.M. BLACKETT, DIVIDED HEARTS: BRITAIN AND THE AMERICAN CIVIL WAR 4-5, 89-121, 245 (2001). Further, as Fladeland noted, during the colonial period, some Americans attacked England for its pro-slavery position; a few decades later, "British interference" came to be equated with abolitionism, as Americans looked to the British Parliament to "set the example." FLADELAND, *supra* note 49, at 151-52, 159.

87. BLACKETT, *supra* note 86, at 122-132 (recounting efforts to affect British popular opinion by getting newspapers to endorse the Confederacy); FLADELAND, *supra* note 49, at 407 (describing the British press's lack of support for the North during the Civil War).

88. BLACKETT, *supra* note 86, at 153.

89. *Id.* at 193 ("There was little that was spontaneous about any of this: resting on a firm foundation of national and local societies, the agitation was organized, well financed, and aimed to reach the broadest audience possible.").

90. FLADELAND, *supra* note 49, at 319.

91. *See* An Act To Provide for the Punishment of Persons Disturbing the Peace of this State, in Relation to Slaves and Free Persons of Color, No. 2925, 1844 S.C. Acts 292 (including banishment from the state as a punishment).

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What impact did the various transnational exchanges have? Fladeland noted that, between 1792 and 1794, "the British Parliament and the American Congress had both arrived at essentially the same position. Neither was ready for complete abolition of the trade, but both had declared their power to regulate it."[92] Whether transatlantic coordination hindered or helped American abolitionists is a question addressed by Fehrenbacher, who argued that anti-British attitudes sometimes impeded compromises.[93] Looking beyond the United States, one English commentator argued that the American Civil War profoundly altered English history—that the "triumph of the North . . . was the force that made English liberalism powerful enough to enfranchise the workmen, depose official Christianity in Ireland, and deal [a] first blow at the landlords."[94]

By 1861, Great Britain had abolished slavery both domestically and in the colonies, and had entered into international agreements with France, Spain, Portugal, Denmark, and the Netherlands to prohibit slave trading; Canada and the West Indies had become havens for fugitive slaves. Given these developments, one could characterize the eventual abolition of slavery in the United States as an outgrowth of both local and global interactions. In other words, those worried about "foreign influences" had it right, as those influences were a source of energy, funds, and strategies, generating support and antipathy. The foreign role was not (to use the terms in the debate between Justices Scalia and Kennedy in *Roper*) "controlling"[95] but did serve as a source of "confirmation"—for adherents on both sides—of the fundamental rightness of their causes.

2. *Transcontinental Feminists*

The women's movement is similarly predicated on a transcontinental set of volunteers attacking discrimination against women in nation-states around the globe and thereby undermining a certain form of national sovereign authority. Given that so many countries prohibited women from participating in

92. FLADELAND, *supra* note 49, at 58.

93. FEHRENBACHER, *supra* note 49, at 89-204.

94. John Morley, *England and the War*, 46 FORTNIGHTLY REV. 479 (1870), *quoted in* BLACKETT, *supra* note 86, at 5. Morley's essay, addressing the conflict between France and Germany, counseled against intervention by England.

95. *See* Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005); *id.* at 1228 (Scalia, J., dissenting).

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politics,[96] these women's groups were "NGOs" before that term gained its currency: They were nongovernmental organizations not by choice but by default. Women's disenfranchisement fueled interest in the international arena as well as skepticism about the benefits of nationalism.[97] Efforts to reconfigure the boundaries of gender roles often entailed appeals beyond the nation-state; opponents argued in turn the jurisdictional propriety of leaving issues of gender to the nation-state.[98]

In the United States, international antislavery work intersected with a growing sense of urgency about discrimination against women. In 1840, American feminists Elizabeth Cady Stanton and Lucretia Mott met at the first world antislavery convention in London. Both were excluded because they were women. As Mott's diary entries explain, it was there that they "resolved to hold a convention as soon as we returned home, and form a society to advocate the rights of women."[99] That effort culminated in the 1848 Seneca Falls *Declaration of the Sentiments of Women.*[100] Their work in America paralleled that

96. *See* John Markoff, *Margins, Centers, and Democracy: The Paradigmatic History of Women's Suffrage*, 29 SIGNS 85 (2003) (surveying where and when women gained voting rights in countries around the world).

97. Ian Tyrrell made the argument that women's exclusion from the developing "political society of the nineteenth century" diminished their attachment to the nation-state as a central forum for norm and law generation. TYRRELL, *supra* note 43, at 35-36; *see also* Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993) (cautioning against feminists assuming any one attitude toward state sovereignty); Karen Knop & Christine Chinkin, *Remembering Chrystal Macmillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523 (2001) (describing the role played by women during the formative period of the founding of the International Law Association); Witt, *supra* note 42, at 710, 736-39 (discussing how women's attenuated membership in the nation-state prompted interest in internationalism). The inadequacy of state regulation to protect women workers continues to be a basis for alienation and transnational responses. *See* Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law To Empower Women Migrant Workers*, 8 YALE HUM. RTS. & DEV. L.J. 1 (2005).

98. *See* ELIZABETH MADDOCK DILLON, THE GENDER OF FREEDOM: FICTIONS OF LIBERALISM AND THE LITERARY PUBLIC SPHERE (2004) (discussing eighteenth-century fears of foreign liberal influences).

99. *See* Kathryn Kish Sklar, *"Women Who Speak for an Entire Nation": American and British Women at the World Anti-Slavery Convention, London, 1840*, *in* THE ABOLITIONIST SISTERHOOD: WOMEN'S POLITICAL CULTURE IN ANTEBELLUM AMERICA 301, 302 (Jean Fagan Yellin & John C. Van Horne eds., 1994) (quoting the diary).

100. The Declaration is reproduced in many volumes but has as of yet no citation in America's law books. For its full text, see THE CONCISE HISTORY OF WOMAN SUFFRAGE 94-98 (Mari Jo Buhle & Paul Buhle eds., 1978).

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of many other women, who often relied on transnational religious organizations as a base for political power.[101]

As proponents of women's rights in the United States challenged states' refusals to recognize their personhood and to rein in husbands' prerogatives to "chastise" their wives, they were met sometimes with arguments on the merits (e.g., that the practices were licit) and at other points with arguments that, even if laws should be revised, such decisions were to be left to each state.[102] Similarly, when women pursued political voice through the vote, opponents countered both that the national government should not interfere with state decisionmaking[103] and that the international suffragette movement should not affect United States lawmaking.

In the 1870s, the jurisdictional claim—that the issue of women's right to vote belonged to the states—succeeded in the United States Supreme Court. Virginia Minor claimed that the privileges and immunities of citizens, confirmed by the then-new Fourteenth Amendment, entitled her to vote in state elections, but Missouri refused to permit her to do so.[104] In its 1875 opinion, the Supreme Court agreed with Minor that women were "citizens" but concluded that this status did not necessarily imply rights of suffrage, which were (at least absent congressional legislation) to be determined by state law.[105] That form of response—"not your jurisdiction"—has been reiterated many times within America's federation and in the international arena, as

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101. *See* SHEILA ROWBOTHAM, WOMEN, RESISTANCE AND REVOLUTION: A HISTORY OF WOMEN AND REVOLUTION IN THE MODERN WORLD (1972); TYRRELL, *supra* note 43.

102. *See* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

103. *See, e.g.*, Wm. L. Marbury, *The Nineteenth Amendment and After*, 7 VA. L. REV. 1, 4 (1920) (making the argument that "the people of a State should have the power to make their own laws").

104. As the "syllabus" of the Court described her: "Mrs. Virginia Minor, a native born, free, white citizen of the United States, and of the state of Missouri, over the age of twenty-one years" wished to vote. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 163 (1875). She was also a suffrage leader, joining others in generating test cases. *See* Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2178 n.14 (1993).

105. *See Minor*, 88 U.S. (21 Wall.) 162. The Court concluded that the Constitution was silent on the issue and that, given no action by Congress, the Court need not address whether "such interference" from Congress into state practices would be constitutional. *Id.* at 171; *see also* Ann D. Gordon, *Woman Suffrage (Not Universal Suffrage) by Federal Amendment*, *in* VOTES FOR WOMEN!: THE WOMAN SUFFRAGE MOVEMENT IN TENNESSEE, THE SOUTH, AND THE NATION 3 (Marjorie Spruill Wheeler ed., 1995); Allison Sneider, *Woman Suffrage in Congress: American Expansion and the Politics of Federalism, 1870-1890*, *in* VOTES FOR WOMEN: THE STRUGGLE FOR SUFFRAGE REVISITED 77, 80 (Jean H. Baker ed., 2002).

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sovereigntists conflated women's equality with "domestic relations" and insisted on the authority of the nation-state to regulate that domain.[106]

The bivalent jurisdictional divide—the state within the nation, the nation within the world—continues to constrain women's access to full equality. During the 1930s, even as the Depression prompted a redrawing of the contours of federalism through the congressional authorization of New Deal programs, state prerogatives, interacting with status inequalities, again came into play. Federal statutes gave states primary authority over programs identified with women and children of all colors; the federal government retained more control over wage-work, identified with white men.[107]

These provisions reinforced an impression that states have unique responsibilities for family life, thereby ignoring the fact that the wage and nonwage work of both men and women, inside and outside families, support both households and the economy.[108] In the beginning of the twenty-first century, the insistence on the rightfulness of local dominion can be seen in a five-to-four decision of the United States Supreme Court, which held that Congress lacked the power to respond to violence against women by endowing federal courts with authority to hear civil rights claims filed by victims of gender-based violence. In *United States v. Morrison*, Chief Justice Rehnquist refused to conceptualize these harms as governed by either the Commerce Clause or the Fourteenth Amendment and instead characterized the matters as criminal or tort law, both "truly local" rather than "truly national" problems.[109]

B. Jurisdictional Seepage

Just as those seeking to constrain new conceptions of equality have repeatedly turned to jurisdiction to bolster arguments against reforms, proponents have looked outside their own jurisdictions in search of opportunity. For example, after the formation of the United Nations, W.E.B. DuBois was one of the leaders of an effort, supported by the "Big Five Negro

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106. *See infra* notes 225-228 and accompanying text; *see also* Witt, *supra* note 42, at 731-40.

107. *See* SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998).

108. *See* Resnik, *Categorical Federalism*, *supra* note 50, at 644-56 (discussing the many "federal laws of the family" and the gendered jurisdictional assumptions). *See generally* David Bradley, *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, 4 GLOBAL JURIST FRONTIERS 3 (2004), http://www.bepress.com/gj/frontiers/vol4/iss1/art3 (discussing whether European or national laws should regulate domestic relationships).

109. 529 U.S. 598, 617-18 (2000) (holding unconstitutional one provision—the civil rights remedy—of the Violence Against Women Act); *see infra* note 358 and accompanying text.

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organizations in the United States," to move the problem of racism outside national boundaries.[110] In 1946, 1947, and 1951, three appeals—filed respectively by the NAACP, the National Negro Congress (NNC), and the Civil Rights Congress (CRC)—asked the United Nations to protect American Negroes.[111]

But the agreement that forged the United Nations (like the one that created the United States) also recognized the "domestic" as a place for prerogatives. The U.N. Charter states: "Nothing contained in the present Charter shall

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110. *See* James L. Roark, *American Black Leaders: The Response to Colonialism and the Cold War, 1943-1953*, 4 INT'L J. AFR. HIST. STUD. 253, 254-55, 258 (1971) (including, in the set of the "Big Five," the NAACP, the National Urban League, the National Negro Congress, the National Council of Negro Women, and the March on Washington Movement but also noting that "[v]ery few prominent Negroes or Negro organizations . . . failed to participate in the pan-racial and anti-colonial movement during the war years," *id.* at 258); W.E. Burghardt Du Bois, *The Realities in Africa: European Profit or Negro Development?*, 21 FOREIGN AFF. 721, 731-32 (1943) (calling for the end of colonialism in Africa and the return of the land and resources to its native inhabitants).

111. The National Negro Council filed its charges in 1946. NAT'L NEGRO COUNCIL, A PETITION TO THE UNITED NATIONS ON BEHALF OF 13 MILLION OPPRESSED NEGRO CITIZENS OF THE UNITED STATES OF AMERICA (1946). In 1947, the NAACP lodged its petition, a lengthy document including an introduction by Dr. DuBois, with the United Nations. NAACP, AN APPEAL TO THE WORLD!: A STATEMENT ON THE DENIAL OF HUMAN RIGHTS TO MINORITIES IN THE CASE OF CITIZENS OF NEGRO DESCENT IN THE UNITED STATES OF AMERICA AND AN APPEAL TO THE UNITED NATIONS FOR REDRESS (1947). DuBois argued that the "discrimination practiced in the United States against her own citizens and to a large extent a convention of her own laws, cannot be persisted in, without infringing upon the rights of the peoples of the world and especially upon the ideals and the work of the United Nations." *See* W.E.B. DU BOIS SPEAKS: SPEECHES AND ADDRESSES 1920-1963, 219 (Philip S. Foner ed., 1970) (reproducing excerpts). Each of the subsequent chapters, separately authored, traces the harms from the "denial of legal rights" in 1787 and argues the relevance of the U.N. Charter. The State Department responded that the Charter did not apply because, as they had no distinct culture or language, Negroes were not "national minorities." *See* ANDERSON, *supra* note 42, at 72-82. The NAACP's efforts prompted Eleanor Roosevelt to threaten to leave its board, and soon thereafter, the NAACP retreated from its international human rights agenda. *Id.* at 102-11, 130-61; *see also* DUDZIAK, *supra* note 42, at 50-70 (discussing the government's reaction).

In 1951, the third petition was filed, with some ninety individuals joining the Civil Rights Congress in a 200 page document listing deaths of specific Negroes as well as estimates that economic and social policy caused 30,000 unnecessary Negro deaths annually. *See* WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE 57-125 (Int'l. Publishers Co. ed. 1970) (1951). Presented in Paris, France at the Fifth Session of the General Assembly, that petition argued that the racism of the United States was also a "flagrant violation of the . . . UN Convention for the Prevention and Punishment of Genocide"; the "UN did not respond to the Petition." William L. Patterson, *Foreword to New Edition* of WE CHARGE GENOCIDE, *supra*, at vii.

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authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter."[112] One question is about which matters were seen as "essentially within the domestic jurisdiction" of a state. The history of the clause's drafting suggests that it was shaped in response to America's interest in protecting its freedom to deal with race relations.[113]

Yet another issue is what limits the clause imposed on the United Nations. Some saw it as acknowledging limitations on the United Nations alone but obliging member states to implement the Charter's commitments, including its obligations of nondiscrimination. Others read the clause as freeing member states to maintain legal regimes accepting inequalities predicated on gender, race, or ethnicity.[114] And within short order, the efforts in the United States to bring the United Nations's promises "home" became entangled in conflicts with the Soviet Union[115]—a pattern that persists today when opponents of transnational human rights accuse proponents of seeking to undermine "American" patterns of social and economic life.

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112. U.N. Charter art. 2, para. 7.

113. *See* ANDERSON, *supra* note 42, at 40-49 (describing efforts by W.E.B. DuBois and the NAACP to have the United Nations focus on the rights of colonial peoples everywhere and the insistence in response by John Foster Dulles that the Charter did not "authorize . . . intervention in matters which are essentially within the domestic jurisdiction of the State concerned"). Dulles made acceptance of the "domestic jurisdiction" clause a predicate to American participation. *Id.* at 49-51; *see also* Roark, *supra* note 110, at 258-62 (offering, by way of explanation, that while America had commitments to equality, the leadership's fear of communist influences prompted a preference for European colonial influences in Africa over liberation of the colonials); Rowland M. Brucken, A Most Uncertain Crusade: The United States, Human Rights, and the United Nations 1941-1954, at 11-50 (1999) (unpublished Ph.D. dissertation, Ohio State University), *microformed on* UMI No. 9919845 (Univ. Microforms Int'l) (arguing that the United States repeatedly objected to empowering the United Nations to enforce human rights).

114. *See infra* notes 148-191 and accompanying text.

115. *See* ANDERSON, *supra* note 42, at 2-6 (criticizing both the reticence of Eleanor Roosevelt and Harry Truman to use transnational human rights to bring about change in the United States as well as the NAACP's subsequent decisions to "reincarnate itself as an 'American organization' and retreat from the struggle for human rights"); *id.* at 179-209 (describing support from the Soviet Union of African-Americans' criticisms of America's lack of racial equality and the domestic backlash); DUDZIAK, *supra* note 42, at 61-78 (describing complaints about loyalty leveled against prominent African-Americans). As Roark put it, "[t]he Communist Party made the task of Negro leaders doubly difficult." Roark, *supra* note 110, at 267.

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1. *Dignity Becomes an American Constitutional Right*

The jurisdictional interaction of international, national, and local bodies produced changes in American law, sometimes unacknowledged and sometimes with direct attribution. One example of silent seepage comes from tracing the impact of the transnational commitment to human dignity, emerging from World War II, on American constitutional law.[116] The 1948 UDHR begins with the recognition of the "inherent dignity" of all people.[117] Many other transnational agreements proclaim their commitments to human dignity; included are the International Covenant on Economic, Social and Cultural Rights (ICESCR),[118] the International Covenant on Civil and Political Rights (ICCPR),[119] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[120] and CEDAW.[121] Similarly, many constitutions and basic laws that were drafted during the second half of the twentieth century express a commitment to human dignity.[122]

In contrast, while aspects of the concept of dignity are implicit in the U.S. Constitution's commitment to liberty, equality, and other personal rights,[123] the Constitution does not use the term. Given the era in which the

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116. This discussion builds on Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

117. This part of the text states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Universal Declaration of Human Rights pmbl., G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Its first article declares: "All human beings are born free and equal in dignity and rights." *Id.* art. I, at 72.

118. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

119. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

120. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). The United States ratified this convention in 1994. 140 Cong. Rec. 14326 (1994) (listing caveats).

121. *See supra* note 36.

122. For example, the first article establishing the Basic Rights of Persons in the Basic Law of Germany—adopted in 1949, after World War II—guarantees the protection of human dignity. It reads: "(1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority." GRUNDGESETZ [GG] [Constitution] art. 1 (F.R.G.). Section 2 of the Basic Law on Human Dignity and Liberty of Israel, adopted in 1992, declares: "There shall be no violation of the life, body or dignity of any person as such, and Section 4 entitles all persons to the protection of "their life, body, and dignity." BASIC LAW § 4 (Isr.).

123. Neuman, *supra* note 42, at 251-52.

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Constitution was written, that absence is not surprising. During the sixteenth and seventeenth centuries, dignity was not considered to be an attribute of all persons but was, in Western nations, reserved for nobility.[124] However, as is detailed elsewhere,[125] three hundred years of revolutionary ideology about the rights of individuals, the role of governments, and popular sovereignty succeeded in expanding the categories of persons understood as having dignity.

But Justices on the United States Supreme Court did not turn until the 1940s to the vocabulary of dignity to explain the meaning of America's constitutional rights of personal security. The word dignity can be found hundreds of times in the volumes of the Supreme Court reporters[126] – but was used during the eighteenth, nineteenth, and early twentieth centuries only when Justices focused on the attributes of entities rather than on personal liberties. Specifically, the Court used the term "dignity" in discussions of nations,[127] states,[128] and of legal institutions such as courts[129] and their judges.[130]

That usage persists: Many contemporary references can be found to concepts like the "peace and dignity" of the state.[131] But, in the middle of the twentieth century, a different use emerged as Justices turned to the idea of dignity to capture aspects of individuals' relationship to government. This application first appeared in 1942 and 1943 in the context of criminal defendants' rights to counsel[132] and – poignantly, in light of post 9/11

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124. *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1285 (2000) (arguing that the protection of dignity in Germany and France derives not only from post-World War II concerns for human rights but also from aristocratic cultures of earlier centuries grounded in hierarchy).

125. Resnik & Suk, *supra* note 116, at 1933-58.

126. *Id.* at 1933-34 (noting also that about two-thirds of the nine hundred references in the Court's decisions were written during the twentieth century).

127. *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 39 (1800) (commenting that references to nations as "*enemies*" serves the "honour and dignity of both nations").

128. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 451 (1793) (discussing the immunity of a state from suit).

129. *See, e.g.*, Green v. Lessee of Neal, 31 U.S. (6 Pet.) 291, 298 (1832) (finding that local statutes revising Supreme Court rulings would be inconsistent with the "dignity of this tribunal").

130. *See, e.g.*, *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 39 (1866) (referring to the "dignity and independence of the judges").

131. *See, e.g.*, Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 460 (2004) (Thomas, J., dissenting, joined by Scalia, J.) (arguing that a limited in rem exception to state sovereignty in bankruptcy could permit a proceeding to be "resolved by motion without offending the dignity of the State"); United States v. Lara, 541 U.S. 193, 197 (2004) (stating that, when an individual commits an act that "violates the 'peace and dignity' of two sovereigns," prosecutions are permissible by each).

132. Glasser v. United States, 315 U.S. 60, 89 (1942) (Frankfurter, J., dissenting).

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developments—in an explanation of why detained individuals have the right to be brought before a neutral third party.[133]

In the decades thereafter, dignity became more frequently attached to personal rights and, with such use, its content thickened. Since the 1940s, various Justices have used the term in relationship to the First Amendment protection of religious freedom,[134] the Fourth Amendment right to be free from unreasonable searches and seizures,[135] and the Fifth Amendment shelter against coercive interrogations,[136] as well as the Eighth Amendment prohibition on cruel and unusual punishment in a variety of contexts,[137] including conditions in prisons[138] and the death penalty.[139] Further, the language of personal dignity has played an important role in discussions of equal protection, liberty, and

133. McNabb v. United States, 318 U.S. 332 (1943). The Frankfurter opinion, written for the majority, stresses the need for a prompt appearance because a "democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process." *Id.* at 343. The phrase "human dignity" first appears in the text of a Supreme Court opinion in 1946. *See* Neuman, *supra* note 42, at 256 (citing *In re* Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting)). The *Yamashita* decision linked that idea to transnational human rights. Justice Murphy's dissenting opinion explained that, "[i]f we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness." *Yamashita*, 327 U.S. at 29.

134. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 41 (2004) (O'Connor, J., concurring) (discussing how to "acknowledge the religious origins of our Nation's belief in the 'individuality and the dignity of the human being'" (quoting H.R. REP. NO. 83-1693, at 2-3 (1954))).

135. *E.g.*, United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (concluding that the "dignity and privacy interests of the person being searched" do not apply when vehicles are searched).

136. *E.g.*, Chavez v. Martinez, 538 U.S. 760, 774 (2003) (discussing whether the questioning was "'so offensive to human dignity'" as to violate due process (quoting Rochin v. California, 342 U.S. 165, 172 (1952))).

137. Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). The opinion in *Trop*, by Chief Justice Earl Warren, invoked the wider context by stating that "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime," *id.* at 102, and by noting a United Nations survey of nationality laws that found only two countries permitting denationalization for deserting, *id.* at 103.

138. *E.g.*, Hope v. Pelzer, 536 U.S. 730, 745 (2002) (identifying an Eighth Amendment violation when prison guards tied an inmate to a hitching post for hours, an action called "antithetical to human dignity").

139. *E.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1190 (2005) (commenting that by "protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons").

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due process under the Fourteenth Amendment.[140] As Justice Kennedy explained for the majority in *Lawrence v. Texas*, states cannot make criminal the act of same-sex sodomy because "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[141]

The Justices who use the word dignity do so without direct citation to the U.N. Charter, the UDHR, or the other conventions or constitutions that rely so prominently on that term in their texts.[142] However, as documents from the United Nations and from other countries came to embrace dignity as a central premise of their constitutional orders, so did the United States Supreme Court. Of course, correlation does not necessarily demonstrate causation, yet I make that claim: Only when people around the world came to use the term "human dignity" in rejection of the horrors of fascism of various forms did that word seep into American constitutional jurisprudence on the Bill of Rights.[143]

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140. *See* Tennessee v. Lane, 541 U.S. 509, 537 (2004) (Ginsburg, J., concurring, joined by Souter & Breyer, J.J.) (discussing how legislation "calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible" with commitments to federalism).

141. Lawrence v. Texas, 539 U.S. 558, 567; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

142. As noted above, a few opinions do link dignity to practices abroad, but they do so without reference specifically to documents such as the U.N. Charter as their source. For example, in *Trop*, 356 U.S. at 102-03, Chief Justice Warren discussed many foreign laws and the "international community of democracies" when finding impermissible denaturalization for desertion. *See also In re* Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) (referring to "an orderly international community").

143. *See also* Karl N. Llewellyn, *The Law, Human Dignity, and Human Civilization*, *in* SCIENCE, PHILOSOPHY AND RELIGION: THIRD SYMPOSIUM 297, 297-99 (Lyman Bryson & Louis Finkelstein eds., 1943), *reprinted in* KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 476, 476-77 (1962) (discussing the "negative" side of "Human Dignity" as a source of prohibitions on slavery and the "positive" side that legal systems ought to aspire to as an ideal); RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 182 (1999) (focusing on the influence of Hannah Arendt on the turn in American political and legal theory to "human dignity"); Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 429 (1996) (finding that during the 1930s, *The Yale Law Journal* published no articles on natural law and universal rights whereas, after World War II, such articles appeared regularly).

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2. *Aliens, Equality, and the United Nations Charter*

"*Brown* as a Cold War decision" has become (thanks to Mary Dudziak[144]) a shorthand for the thesis that a desire to distinguish America from the Soviet Union during the Cold War affected America's jurisprudence on equality. Looking back before 1954, Robert Cover linked judicial interpretations of a special protection for minorities in the American Constitution to jurists' awareness in the 1930s of the horrid treatment such groups endured under totalitarian regimes.[145]

Some lawyers tried a more direct route—arguing that the U.N. Charter and the UDHR changed domestic rights. These advocates had some early victories, as judges and lawyers in a handful of important cases relied on the Charter as a source of American policy and law. But such decisions also inspired opposition sufficient to fuel a movement in the 1950s that almost succeeded in amending the Constitution. Amid that furor, the Cold War again came into play, shadowing the work of the United Nations. Both litigants and jurists backed away from the enterprise of expressly linking development of American constitutional rights to international human rights and, today, courts routinely reject the proposition that the U.N. Charter[146] and the UDHR[147] provide Americans with rights in their own courts.

Yet, as judges retreated from those positions, they came to the view that home-grown equality provisions required some of what advocates had claimed flowed from the United States's joining the United Nations. The relevant period, from the founding of the United Nations in 1946 until around 1955,[148]

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144. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

145. *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289-90, 1297-98, 1313-15 (1982) (focusing on footnote four of *Carolene Products* and arguing that, given the constitutional commitment to state authority, federal judicial intervention to dismantle "Apartheid" may well have been the least intrusive mechanism available).

146. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655, 666 (1992) (noting that a claim that Americans had forcibly abducted a defendant to the United States, and therefore ought not to be able to bring him to trial, was not grounded in the U.N. Charter as "an independent basis for the right"); *see also infra* Subsection II.B.2.

147. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 735, 734 (2004) (rejecting a claim that the UDHR would be the basis for "the relevant and applicable rule of international law," because the "Declaration does not of its own force impose obligations as a matter of international law").

148. *See* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 918 (1984) (analyzing references to the United Nations documents and the invocation of a 1945 Ontario High Court decision that had invalidated a restrictive covenant against Jews).

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overlaps with the beginnings of the sub silentio and relatively uncontroversial incorporation of transnational norms about personal dignity into American constitutional values. But the frank efforts to use the U.N. Charter and the UDHR to diminish racial restrictions sparked conflicts akin to the battles today exemplified by *Roper*. Below, I trace the litigation efforts and thereafter turn to Congress and the proposal by Senator John Bricker to prevent the domestic uptake through constitutional amendment.

A series of cases involved restrictive covenants, which in the West prevented Americans of Japanese descent from owning land and in the East focused on limiting African-American ownership. One such lawsuit was filed by Kajiro Oyama who, with his family, had been sent to a detention camp during World War II. California's Alien Land Law barred Oyama from acquiring agricultural land but permitted a transfer of land to his American son, then a minor. However, the elder Oyama did not comply with specific filing requirements that California imposed on that form of ownership.[149] In 1944, when the family was still in a detention camp, the state sought and obtained the escheat of the land.[150] In 1948, in *Oyama v. California*,[151] the United States Supreme Court invalidated the state's action.

As the discussion between the majority and dissents in *Oyama* reveals, the grounds for that ruling were unclear. In an awkward decision that avoided finding the California Alien Land Law itself unconstitutional, Chief Justice Vinson wrote for the Court that the California restrictions on the son's ownership unlawfully created a presumption that deprived the son of "the equal protection of California's laws and of his privileges as an American citizen,"[152] and that the escheat of the land to the state, based on such a presumption, worked a deprivation of due process.[153] Concurring, Justice

149. People v. Oyama, 173 P.2d 794, 796 (Cal. 1946), *rev'd*, 332 U.S. 633 (1948).

150. *Oyama*, 332 U.S. at 636-38.

151. *Id.* at 633.

152. *Id.* at 640.

153. *Id.* at 647. The Court did not specify whether that reference was to federal or state due process rights and further expressly declined to find that "failure to apply any limitations period to escheat actions" denied due process. *Id.* The two concurrences (one by Justice Black, joined by Justice Douglas and the other by Justice Murphy, joined by Justice Rutledge) both criticized the Court's opinion for failing to find a violation of the Fourteenth Amendment. *Id.* (Black, J., concurring); *id.* at 662-63 (Murphy, J., concurring). Justice Reed, joined by Justice Burton, dissented, arguing that "unless the California Land Laws are to be held unconstitutional, . . . the presumption and its resulting effects must be accepted as legal." *Id.* at 684 (Reed, J., dissenting). Justice Jackson dissented separately to complain that the Court could not "logically . . . set aside" the judgment of escheat without

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Black, joined by Justice Douglas, argued that the Court should have issued a broader decision, finding the law a violation of both the Fourteenth Amendment and federal statutes.[154] In addition, citing the U.N. Charter, Justice Black noted that the California statute "stands as an obstacle" to "our policy in the international field;" as he explained, "we have recently pledged ourselves to cooperate with the United Nations to 'promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'"[155]

Justice Murphy, joined by Justice Rutledge, wrote a lengthy concurrence outlining the history of the racist land laws, aimed by state legislators at the "'yellow horde'" of Asians, a term the Justice used to underscore the antipathy that he had documented.[156] That concurrence urged the Court to acknowledge the lack of any "rationalization necessary to conform the statute to the requirements of the equal protection clause of the Fourteenth Amendment" and to overturn earlier decisions upholding such legislation.[157] Further, invoking the nation's recent pledge through the U.N. Charter to promote human rights, Justice Murphy concluded that the Alien Land Law "does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations."[158]

A year later, in *Shelley v. Kraemer*,[159] the Court invalidated another racial covenant, this one limiting the ownership of land by African-Americans. Unlike *Oyama*, that decision made no mention of the U.N. Charter.[160] But the petition for certiorari had discussed the U.N. Charter when arguing that it (as well as the Act of Chapultepec, entered into with Latin American nations in 1945) constituted American public policy rendering racial restrictions illegal.[161]

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invalidating the underlying law, something it was not willing to do. *Id.* at 684, 687 (Jackson, J., dissenting).

154. *Id.* at 647-48 (Black, J., concurring).

155. *Id.* at 649-50.

156. *Id.* at 661 (Murphy, J., dissenting). Murphy also dissented in *Korematsu v. United States*, 323 U.S. 214 (1944).

157. *Oyama*, 332 U.S. at 672 n.31 (listing several cases that had sustained state restraints on alien ownership of land).

158. *Id.* at 673 (Murphy, J., concurring).

159. 334 U.S. 1 (1948).

160. *See* Paul Sayre, Shelley v. Kraemer *and United Nations Law*, 34 IOWA L. REV. 1, 11 (1948) (criticizing the Court for failing to speak to the Charter).

161. Petition for Writ of Certiorari, Shelley v. Kramer, 334 U.S 1 (1948) (No. 72). The petition identified four grounds for invalidating the covenants: that they violated public policy, the Fourteenth Amendment, and equal protection rights under Missouri law, and that they

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An internationalist legal argument was also raised in *Sipes v. McGhee*,[162] a Michigan ruling consolidated with *Shelley* in the Supreme Court.[163] The state court decision below noted that the litigants argued that "the intervention of a World War and the declarations of statesmen and international deliberative bodies [had made] the device of restrictive covenants against minority racial groups a matter of concern and public policy,"[164] but the Michigan jurists rejected the idea that those provisions could have "the effect of law."[165] In the certiorari petition in *Sipes* and in their brief on the merits, Thurgood Marshall and Spottswood Robinson again invoked the U.N. Charter when arguing that these restrictions violated American public policy.[166] As they put it, court enforcement of racial covenants had to be "struck down . . . or America will stand before the world repudiating the human rights provisions of the United Nations Charter and saying of them that they are meaningless platitudes for which we reject responsibility."[167]

Several of the sixteen amicus briefs filed (including that of the United States) debated the relevance of the Charter.[168] Worthy of special note is the

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caused petitioners (Missouri citizens) harm by generating a crisis in housing for Negroes. *Shelley*, 334 U.S. at 42-57.

162. 25 N.W.2d 638 (Mich. 1947), *rev'd*, 334 U.S. 1 (1948). The Court also issued a ruling in the companion case of *Hurd v. Hodge*, which had challenged restrictive covenants in the District of Columbia and was therefore governed by federal laws other than the Fourteenth Amendment. *See infra* text accompanying notes 170, 173.

163. *See Shelley*, 334 U.S. at 1.

164. *Sipes*, 25 N.W.2d at 644.

165. *Id.* ("We do not understand it to be a principle of law that a treaty between sovereign nations is applicable to the contractual rights between citizens of the United States when a determination of these rights is sought in State courts."). In the petition for rehearing, the appellants argued that treaties did bind the state courts and that "contracts and property rights" should not "supersede human rights." Transcript of Record at 70-71, McGhee v. Sipes, 334 U.S. 1 (1947) (No. 87).

166. Petition and Brief in Support of Petition for Writ of Certiorari to the Supreme Court of Michigan 6-7, 28, *Sipes*, 334 U.S. 1 (arguing that the "solemn obligations of the United Nations Charter" became "dead letters" without "protection against such judicial action to implement private agreements"); Brief for Petitioners at 4, 84-90, *Sipes*, 334 U.S. 1 (presenting the question, "Does the enforcement by state courts of [restrictive covenants] . . . violate the Fourteenth Amendment and treaty obligations under the United Nations Charter?"). The other lawyers on these submissions included Francis Dent, Willis M. Graves, Marian Wynn Perry, Loren Miller, William H. Hastie, and Charles H. Houston.

167. Brief for Petitioners, *supra* note 166, at 90.

168. *See* Lockwood, *supra* note 148, at 932-35, app. at 953. The briefs referenced below were filed in Shelley v. Kraemer, 334 U.S. 1 (Nos. 72 & 87), Hurd v. Hodge, 334 U.S. 24 (Nos. 290 & 291). Among the sixteen briefs debating the relevance of the U.N. Charter are the Brief of Amicus Curiae American Indian Citizens League of California at 6-7 (arguing that the

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filing on behalf of the United States; then-Attorney General Tom Clark signed it and used his personal engagement to signal that the brief represented the views of the Truman Administration.[169] The government argued both that the Charter illuminated the public policy of the United States and that restrictive covenants harmed America's "international prestige."[170]

Although the Court said nothing in *Shelley* about the international premises, its ruling—that the Fourteenth Amendment barred judicial enforcement of racial restrictions in property contracts[171]—was "a major departure from previous law."[172] Further, in the companion case, *Hurd v.*

Charter was binding); Brief of Amicus Curiae Civil Liberties Department of the Grand Lodge of Elks, I.B.P.O.E.W. at 7, (arguing that the Charter prohibited such discrimination on the basis of race); Brief of Amicus Curiae St. Louis Civil Liberties Committee at 1, 16 (relying on the Charter as evidence of United States's public policy); Brief of the American Civil Liberties Union at 27, *reprinted in* 46 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 393, 425 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS] (relying on the Charter as a statement of the "overriding public policy" of the United States); Brief of the Congress of Industrial Organizations at 2, 4, *reprinted in* LANDMARK BRIEFS, *supra*, at 505, 508, 510 (invoking both the Charter and the need to fight fascism); and the Brief of the Non-Sectarian Anti-Nazi League to Champion Human Rights Inc. at 5 (arguing that covenants violate the treaty obligations of the Charter). Another amicus brief, filed by lawyers including Alger Hiss, Asher Bob Lans, Philip Jessup, Joseph Proskauer, Myres McDougal, and Victor Elting for the "American Association for the United Nations," detailed the "obligations of the United States" under the U.N. Charter and argued that the "domestic jurisdiction" clause served to limit what the United Nations could do to enforce the provisions of the Charter but did not reduce the obligations of the member States under the Charter. *See* Brief for the American Ass'n for the United Nations as Amicus Curiae at 13-14, *reprinted in* LANDMARK BRIEFS, *supra*, at 357, 374-75. The American Veterans Committee, filing in support of the invalidation of the covenants, mentioned that its purpose included supporting the United Nations but did not argue about the Charter implications. *See* Brief of Amicus Curiae American Veterans Committee at 2 n.1.

A few amicus briefs supported invalidation of the racial covenants but did not rely on the Charter; included were the Brief of Amicus Curiae American Jewish Congress, and the Brief of California Amici Curiae. An amicus supporting the constitutionality of the covenants—the Arlington Heights Property Owners Association—argued that the Charter either had no effect or, if it did, it violated states' rights. Brief of Amicus Curiae Arlington Heights Property Owners Ass'n at 26-31.

169. DUDZIAK, *supra* note 42, at 90-91, 275 n.24.

170. *See* Brief for the United States as Amicus Curiae at 8, 92, 97-102, *Shelley*, 334 U.S. 1 (No. 72), Hurd v. Hodge, 334 U.S. 24 (No. 260), *reprinted in* LANDMARK BRIEFS, *supra* note 168, at 223, 240, 324, 329-34 (citing a Canadian case to illuminate the relevance of public policy to judicial enforcement of such restrictions).

171. 334 U.S. at 20. Chief Justice Vinson's opinion was unanimous; Justices Reed, Jackson, and Rutledge did not participate.

172. Carol Rose, *Property Stories:* Shelley v. Kraemer, *in* PROPERTY STORIES 169, 169 (Gerald Korngold & Andrew P. Morriss eds., 2004). International currents were but one of many factors

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Hodge, which held invalid the restrictive covenants that prohibited conveying land to "any Negro or colored person" in the District of Columbia,[173] Chief Justice Vinson noted that claims had been pressed under the Charter.[174] The Court's conclusion—that enforcement was contrary to the Civil Rights Act of 1866 and the public policy of the United States as "manifested in the Constitution, treaties, federal statutes, and applicable legal precedents"—could be construed as an oblique reference to the United Nations's requirements.[175]

In the wake of *Oyama* and *Shelley*, aliens challenged Western alien land restrictions in both Oregon and California. In 1949, the Supreme Court of Oregon relied upon the concurrences in *Oyama*, noting Justice Murphy's discussion of the U.N. Charter, and other developments in Fourteenth Amendment law,[176] as the bases for invalidating Oregon's restrictions.[177] In 1950, in *Sei Fujii v. State*, an intermediate California appellate court cited the U.N. Charter's commitment to respecting the "'fundamental freedoms for all without distinction as to race, sex, language, or religion'" as a basis for judging the legality of California's Alien Land Law.[178] The judges reasoned that, by virtue of the Supremacy Clause,[179] the Charter was the law of the land, breached in both "letter and . . . spirit" by the Alien Land Law.[180] On review, the California Supreme Court concluded that the Charter, while not self-executing, was "entitled to respectful consideration" as a "moral commitment of foremost importance" by courts and legislators.[181] The court affirmed on the

after War World II that contributed to this legal change. *See, e.g.*, *id.* at 191 (discussing how restrictive covenants produced racial segregation in newly developing suburbia).

173. 334 U.S. 24, 26 (1948).

174. *Id.* at 28 & n.4 (commenting that while petitioners had placed "[p]rimary reliance" on the due process clause of the Fifth Amendment, they had also advanced arguments based on civil rights statutes, public policy, and "treaty obligations of the United States contained in the United Nations' charter.").

175. *Id.* at 34-35 (noting that in addition to violating the Civil Rights Act, the enforcement of restrictive covenants was "contrary to the public policy of the United States . . . as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents" and, as such, within the supervisory powers of the federal courts to correct).

176. *See, e.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (invalidating a California statute prohibiting aliens ineligible for citizenship from getting commercial fishing licenses as violative of the Fourteenth Amendment).

177. Namba v. McCourt, 204 P.2d 569, 575-83 (Or. 1949).

178. 217 P.2d 481, 484 (Cal. Dist. Ct. App. 1950) (quoting U.N. Charter art. 1, para. 3).

179. U.S. CONST. art. VI, cl. 2.

180. 217 P.2d at 488.

181. Sei Fujii v. State, 242 P.2d 617, 622 (Cal. 1952). That precept has been reiterated in California decisions. *See, e.g.*, People v. Ghent, 739 P.2d 1250, 1276 (Cal. 1987).

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ground that the state law, aimed at preventing Japanese farmers from competing with state citizens, violated the Fourteenth Amendment.[182] By predicating its decision on federal law, the state court anticipated that the United States Supreme Court would overrule precedents then still extant.[183]

In sum, shortly after the formation of the United Nations, litigators and jurists turned to its foundational documents to inform American law. The *Oyama* decision, with four Justices citing the U.N. Charter, made plain the potential reach of Charter commitments. Justices Black and Douglas put it directly: "How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"[184]

It was that very possibility that provoked a concerted and by most accounts almost successful effort—detailed below—to amend the United States Constitution to preclude the United Nations treaties from having domestic effects and to limit the power of the President and the Senate to enter into such agreements.[185] As that hostility toward "foreign" influences gained political force, civil rights advocates[186] and jurists decided to stick closer to home. Illustrative is a 1955 decision about whether a member of the Winnebago tribe could be buried in a city's cemetery officially limited to "members of the Caucasian race."[187] In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, Justice

182. *Sei Fujii*, 242 P.2d at 628 (relying in part on the "statistics collected" by Justice Murphy's concurring opinion in *Oyama v. California*, 332 U.S. 633, 661-62 (1948) (Murphy, J., concurring), documenting anti-Asian sentiments).

183. *See id.* at 630-31 (Carter, J., concurring) (discussing his duty to "so declare"). In another decision, Justice Carter also relied on the Charter and anticipated advances in federal equality law. *See* Perez v. Lippold, 198 P.2d 17, 18 (Cal. 1948) (finding unconstitutional the state's prohibition on marriages between a white person and a "Negro, mulatto, Mongolian or member of the Malay race"); *id.* at 29-30 (Carter, J., concurring).

184. *Oyama*, 332 U.S. at 650 (Black, J., concurring).

185. *See* Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 312 (1988) (detailing claims that human rights efforts put at risk the "American way of life"); Lockwood, *supra* note 148, at 924-28, 925 (arguing that reliance on the Charter by the California intermediate court in *Sei Fujii* was a "legal shot heard around the nation"—and was unique as a state appellate court decision to which law journals paid attention). Similarly, Justice Murphy's concurring discussion of the United Nations in *Oyama* has been described as producing "a tremor of fear among right-wing groups." *See* J. WOODFORD HOWARD JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 354 (1968).

186. *See* ANDERSON, *supra* note 42, at 151-52 (lamenting the retreat by the NAACP leadership from its earlier international human rights agenda); *see also* Risa Lauren Goluboff, *"Let Economic Equality Take Care of Itself": The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1460-67 (2005); Roark, *supra* note 110, at 262-66.

187. Rice v. Sioux City Mem'l Park Cemetery, Inc., 349 U.S. 70, 71 (1955)

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Frankfurter went out of his way to insist that the Justices' disagreements about whether to dismiss the case should not be read to infer "any diversity of opinion" on the question of whether the U.N. Charter was a source of limitations on state powers.[188] Justice Frankfurter's emphatic renunciation in 1955 of the position that the U.N. Charter was a source of right marks the end of the surge to make it so.[189]

A modest revival in the effort to use United Nations documents as American rights can be found in a few opinions during the 1960s,[190] as well as in briefs filed more recently[191] and in cases such as *Roper*.[192] The conceptual

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188. *Id.* at 73. Relying on an intervening statute, the Court dismissed the equal protection challenge to the Iowa decision, which had held that neither *Shelley* nor the U.N. Charter required burial. *Id.* at 72-73, 77. Justice Black (joined by Chief Justice Warren and Justice Douglas) urged the Court to reach the federal constitutional issue. *Id.* at 80 (Black, J., dissenting).

189. *See, e.g.*, Ill. Cent. R.R. Co. v. Ill. Commerce Comm'n, 118 N.E.2d 435 (Ill. 1954) (rejecting for want of jurisdiction a challenge relying on the Charter as a basis for invalidating racial segregation on railroads); *see also* Katzenbach v. Morgan, 384 U.S. 641, 646 n.5 (1966) (finding it unnecessary to decide whether, in addition to powers under Section 5 of the Fourteenth Amendment, Congress also had the power to prohibit literacy tests for voting under the U.N. Charter).

In contrast, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 667-68 (1952), Chief Justice Vinson, dissenting and joined by Justices Reed and Minton, had described the Charter as a part of agreements for mutual security as he argued that the President had the power to seize the steel plants. And, in the late 1940s, Frankfurter had himself been more open to acknowledging United Nations's sources. *See* Am. Fed'n. of Labor v. Am. Sash & Door Co., 335 U.S. 538, 549 n.5 (1949) (Frankfurter, J., concurring) (joining a decision that state legislatures could limit unionization and mentioning that, in Article 20 of the UDHR, a person cannot be "compelled to belong to an association").

190. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 521 n.14 (1969) (Marshall, J., dissenting) (arguing that a limit on the amount of family support regardless of family size under a federal welfare program violated the Equal Protection Clause and listing the UDHR among citations on the "issue of whether there is a 'right' to welfare"); Zemel v. Rusk, 381 U.S. 1, 4, 14 n.13 (1965) (Warren, C.J.) (upholding a prohibition on citizen travel to Cuba against a challenge that it violated the Constitution and the UDHR); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963) (Goldberg, J.) (rejecting the forfeiture of citizenship and commenting that the "drastic consequences of statelessness" led to the reaffirmation of the "right of every individual to retain a nationality" in the UDHR); Int'l Ass'n. of Machinists v. Street, 367 U.S. 740, 776-77 (1961) (Douglas, J., concurring) (referring to debates on the UDHR about the ability of individuals to make independent judgments).

191. *See, e.g.*, Brief of International Law Scholars & Women's, Civil Rights & Human Rights Organizations as Amici Curiae in Support of Respondents at 3-7, Town of Castle Rock v. Gonzales, 125 S.Ct. 2796 (2005) (No. 04-278) (arguing that comparative and international law provide "persuasive authority" for interpreting the Due Process Clause to provide a federal remedy against police failure to protect against domestic abuse); Brief of International Law Scholars & Human Rights Experts as Amici Curiae Supporting Petitioners at 18-22, 28-30, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5 & 99-

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frame of the counterattack, as it played out in the 1950s after *Oyama* and *Sei Fujii,* echoed themes from nineteenth-century conflicts over abolition and women's suffrage and, as is detailed below, continues to shape discussions today. The arguments, reiterated in federal courts, Congress, and through local actions, are remarkably congruent over time: that transnational human rights conventions threaten American sovereignty, states' prerogatives, and the domestic order established therein.[193]

C. *Fifty Years of Fighting the United Nations*

Turn then to events in Congress in the 1950s that shaped the context in which jurists retreated from mentioning United Nations's requirements in their judgments. While today's activists against "transjudicialism" propose statutory prohibitions on using "foreign" law,[194] in the early 1950s, Senator John Bricker, a Republican from Ohio, sought to amend the Constitution to prevent the United States from entering into treaties that would alter the rights of Americans and to restrict presidential powers to enter into executive agreements.[195] Arguing that treatymaking had become a "clear and imminent

29), 1999 WL 1037253 (arguing that the ICCPR and customary international law provided additional congressional authority for enacting the Violence Against Women Act).

192. Roper v. Simmons, 125 S. Ct. 1183 (2005); *see also* Medellin v. Dretke, 125 S. Ct. 2088, 2107 (2005) (Breyer, J., dissenting) (disagreeing with the dismissal of the writ challenging a state's failure to inform the consul of Mexico about the detention of a citizen and citing the Charter as obliging the United States to comply with the judgments of the International Court of Justice).

193. *See* Kaufman & Whiteman, *supra* note 185, at 330-37 (finding, by coding legislative histories from the 1950s to the 1980s, that more than ninety percent of the arguments against the ratification of four human rights treaties in the 1979 hearings were the same as those raised in 1953); *see also* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

194. *See* Constitution Restoration Act of 2004, S. 2082, 108th Cong. § 201 (2004); *supra* note 1.

195. *See Hearings Before a Subcomm. of the S. Comm. on the Judiciary on S.J. Res. 1: Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements, and S.J. Res. 43: Proposing an Amendment to the Constitution of the United States, Relating to the Legal Effect of Certain Treaties*, 83d Cong. (1953) [hereinafter *1953 Bricker Amendment Hearings*]. Several versions of the amendment were considered. One, introduced in 1952, stated that "[n]o treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution." S.J. Res. 130, 82d Cong. (1952), *reprinted in* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP app. C at 222 (1988). In January of 1953, the proposal included that "[a] provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect," that a "treaty shall become effective as internal law in the United States only through legislation that would be valid in the absence of treaty," that "Executive agreements shall be subject to regulations by the Congress and to

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danger to the rights of the American people,"[196] Bricker "wanted to insure that international agreements would not lead to United Nations interference or more liberal social and economic policies and legislation in the United States."[197] Supporters were particularly attentive to the threat of increased federal power over the "so-called field of civil rights,"[198] as they argued that the U.N. Charter would "be destructive of the existing division of authority between States and Nation."[199]

The American Bar Association (ABA) and Frank Holman, who served as the ABA's President in 1948, were central to these efforts.[200] As Holman explained: "[A]lert[ing] . . . the public to the dangers of . . . 'the treaty-making powers,' used to change, restrict, and even nullify the domestic rights of the citizens of the United States"[201] was essential because treaties failed "to preserve

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the limitations imposed on treaties by this article," *1953 Bricker Amendment Hearings*, *supra*, at 13-14 (statement of Frank E. Holman, Past President, American Bar Association), and that "[n]o treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States," *id.* at 1 (statement of Sen. Bricker). *See also* Kaufman & Whiteman, *supra* note 185, at 312-18 (providing analyses of four sections of the Bricker Amendment); Schubert, *supra* note 51, at 284-85 (comparing different versions).

196. *See 1953 Bricker Amendment Hearings*, *supra* note 195, at 11 (statement of Sen. Bricker).

197. TANANBAUM, *supra* note 195, at 31.

198. *1953 Bricker Amendment Hearings*, *supra* note 195, at 145 (statement of Frank E. Holman).

199. ANDERSON, *supra* note 42, at 221 (citation omitted). In addition to the ABA leaders, supporters included a coalition of "Republicans and conservative, mostly southern, Democrats" who had worked together against other legislative proposals, some businessmen who created a Foundation for Study of Treaty Law, some doctors fearing "socialized medicine," and representatives from the Vigilant Women for the Bricker Amendment, a group fearful of the effects of the U.N. and of the International Labor Organization on the United States. *See* TANANBAUM, *supra* note 195, at 43, 118, 116-120.

200. *See* Kaufman & Whiteman, *supra* note 185, at 322 (identifying ABA members as providing sixty-nine percent of all testimony supporting the amendment); *see also 1953 Bricker Amendment Hearings*, *supra* note 195, at 14-16 (discussing the ABA's contributions to the proposal); *id.* at 33-75 (statement of Alfred J. Schweppe, Chairman, American Bar Association Committee on Peace and Law through the United Nations) (providing resolutions not to permit treaties to become effective internally without domestic legislation); *id.* at 190, 200 (statement of Dana Converse Backus, on behalf of the Association of the Bar of the City of New York) (presenting the conclusion that the Bricker Amendment would "place so many impediments upon our conduct of foreign affairs as to constitute a grave threat to our chances of survival in the modern world"); *id.* at 406-08, 514-20, 1215-19 (statement of Frank E. Holman) (detailing the position of the "official voice" of the ABA in support while noting some dissent).

201. *See* FRANK E. HOLMAN, STORY OF THE "BRICKER" AMENDMENT 8-9 (1954). The monograph, published by the Committee for Constitutional Government, had an initial printing of 100,000 copies and welcomed reprintings. *Id.* at iv.

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constitutional government . . . as conceived and intended by the founders of the Republic."[202] The Bricker Amendment marked the "line . . . between those Americans who believe in the preservation of national sovereignty and national independence and those who believe that our national independence . . . should yield to international considerations and some kind of world authority."[203]

These claims were politically popular. By 1952, when a second version of the Bricker Amendment was introduced, fifty-nine senators served as cosponsors; a year later, sixty-two cosponsors lent support, and another "weaker" version lost the requisite two-thirds vote in the Senate by a single vote.[204] While President Eisenhower eventually opposed amending the Constitution in a manner that would constrain executive authority,[205] his administration noted its sympathy with the concerns represented by the Bricker Amendment. Secretary of State John Foster Dulles explained in Senate hearings that the Eisenhower Administration did not see treaties "as the proper and most effective way to spread throughout the world the goals of human liberty,"[206] as he gave assurances that America's government would not seek ratification of the Genocide Convention nor participate in drafting other covenants.[207]

Although the Bricker Amendment did not become law, its influence on American policy has been substantial, for, as Holman predicted, this "great

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202. *Id.* at 23. Holman also explained his opposition to joining the Genocide Convention. *Id.* at 37-39.

203. *Id.* at 22. For him, "all lovers of America" needed to organize because the "Amendment is the greatest issue which faces America today, greater than taxes or inflation or even Communist infiltration." *Id.* at 104 (emphasis omitted).

204. *See* Kaufman & Whiteman, *supra* note 185, at 319-20. Another count records sixty-four Senators as sponsors. *See* Schubert, *supra* note 51, at 265.

205. *See* ANDERSON, *supra* note 42, at 250-54 (detailing a brief compromise between Senator Bricker and President Eisenhower; Bricker's reneging on the proposed limits; and Eisenhower's opposition to the constraints); TANANBAUM, *supra* note 195, at 79 (noting that Eisenhower objected to restrictions on executive authority). *See generally* Stephen A. Garrett, *Foreign Policy and the American Constitution: The Bricker Amendment in Contemporary Perspective*, 16 INT'L STUD. Q. 187 (1972) (arguing that the Bricker controversy exemplified a rivalry between Congress and the President that was repeated in the Vietnam era).

206. *1953 Bricker Amendment Hearings*, *supra* note 195, at 825. Dulles also lauded Bricker supporters for having "performed a patriotic service in bringing their fears to the attention of the American public" and announced the Administration's commitment not to "use the treatymaking power to effect internal social changes." *Id.* at 824-25.

207. *1953 Bricker Amendment Hearings*, *supra* note 195, at 886. The Senate ratified the Genocide Convention in the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (codified as amended at 18 U.S.C. §§ 1091-1092 (2000)), with a series of reservations, understandings, and declarations. 132 Cong. Rec. 2326-2353 (1986).

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issue like a righteous cause does not die."[208] Neither do the arguments about this "great issue." In 1953, Holman suggested that "our American concept of freedom of speech and of press and of religion, and even of 'due process,' including our right to trial by jury" were at risk.[209] In 2005, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, took the same approach,[210] warning Americans that international guarantees put protections of the Bill of Rights in jeopardy. In the 1950s, Holman challenged the proposition[211] (announced in the 1920 decision in *Missouri v. Holland*[212]) that treaties can augment federal power; today's opponents do so as well.[213] Similarly, the specter of what we now call a "democratic deficit,"[214] namely that transnational lawmaking drains too much authority from America's elected officials, was also raised in the 1950s.[215] Then, as today, judicial reliance on human rights treaties was criticized, with the *Sei Fujii* and *Oyama* decisions serving in the Bricker Amendment hearings as negative exemplars,[216] while internationalists hope that treaties will have that very use.[217]

Further, transnational courts continue to loom as either negative or positive possibilities. In the 1950s, Senator Bricker warned that "[s]ome day we can expect to witness an American soldier convicted and sentenced to die by a

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208. HOLMAN, *supra* note 201, at 104.

209. *1953 Bricker Amendment Hearings*, *supra* note 195, at 139.

210. Roper v. Simmons, 125 S. Ct. 1183, 1226-28 (2005) (mentioning the right to jury trial, grand jury indictment, the exclusionary rule, separation of church and state, and abortion).

211. *See 1953 Bricker Amendment Hearings*, *supra* note 195, at 58-63; HOLMAN, *supra* note 201, at 26-30; Kaufman & Whiteman, *supra* note 185, at 314-15 (describing challenges to the role of treaties in American law).

212. 252 U.S. 416 (1920).

213. *See, e.g.*, Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); *see also* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003) (explaining the debate); Peter J. Spiro, *The New Sovereigntists*, 79 FOREIGN AFF., Nov./Dec. 2000, at 9, 13 (supporting transnational legal influences).

214. *See, e.g.*, Wendy McElroy, *Senate Must Not Ratify CEDAW*, FOXNEWS.COM, Aug. 13, 2002, http://www.foxnews.com/story/0,2933,60218,00.html ("The Senate must not give an *un*elected panel of foreign experts on 'gender politics' *any* power to determine the laws and policies of American society.").

215. *See* Kaufman & Whiteman, *supra* note 185, at 331-34.

216. *See, e.g.*, *1953 Bricker Amendment Hearings*, *supra* note 195, at 129, 138-39 (statement of Frank E. Holman).

217. *See* Brucken, *supra* note 113, at 301-10 (describing the concern, in the 1950s, that the Genocide Convention would have domestic application); *supra* notes 166-170.

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foreign court."[218] Today's opponents of the International Criminal Court (ICC) similarly raise the specter of Americans before that tribunal.[219] And each side relies on the United States Constitution, as both proponents and opponents create organizations named to claim their special role as protectors of the Constitution.[220]

A few aspects of the debate have shifted since the 1950s. First, soon after the founding of the United Nations, the legal question was whether state or federal laws ought to be invalidated because the public policy and the law of the United States had changed as a result of American commitments in the Charter and the UDHR.[221] In contrast, Justice Scalia's position in *Roper* seeks to deter even a reflective comparative inquiry that disavows direct application of transnational or comparative provisions to American law.

Second, the politicians opposed to United Nations human rights treaties in the 1950s also sought constraints on executive authority.[222] Today, the picture is more complex, with some proponents and opponents of the use of non-United States law endorsing federal executive power to preempt state decisions

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218. HOLMAN, *supra* note 201, at 57 (quoting Sen. Bricker); *see also* Brucken, *supra* note 113, at 300-02 (describing the ABA's mobilization of opposition to the Geneva Convention on these grounds).

219. *See, e.g.*, John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, LAW & CONTEMP. PROBS., Winter 2001, 167, 169-70; *see also* American Servicemembers' Protection Act of 2002, 22 U.S.C.A. § 7423(d) (West 2004) (requiring that American armed forces involved in peacekeeping be immunized from extradition to and prosecution at the ICC).

220. *See, e.g.*, HOLMAN, *supra* note 201, at 64-65 (accusing the "Committee for Defense of the Constitution" of using that title as a "misnomer"; his monograph was produced by the "Committee for Constitutional Government"). Today's parallels are the Federalist Society and the American Constitutional Society.

221. Holdings such as *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which takes the view that neither the Charter nor the UDHR is self-executing, and *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the United Nations provisions went unmentioned, could be understood as victories for that position. However, as is detailed above in Subsections II.B.1-2 and discussed below in Section III.A, transnational interactions altered understandings of what domestic rights entailed.

222. *See* Kaufman & Whiteman, *supra* note 185, at 312 (discussing the degree to which "dismay at the increased power and independence of the executive in foreign affairs" fueled Brickerism); Arthur E. Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281, 290 (1953) (arguing how the "nightmare of a headstrong President, ignoring congressional commands and, by a mere dicker with a foreign chief of state, effectively legislating to the contrary for the whole United States" could be ended through a judicially enforceable doctrine that prior federal legislation preempts executive agreements).

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that have some relationship to international relations[223] and to respond to fears of terrorism.[224] Thus, to the extent the earlier anti-foreign sentiment converged with anti-national or anti-Executive authority, some within the contemporary anti-foreign contingent do not oppose consolidation of power in the national Executive.

Third, the status relationship most obviously called into question by a commitment to nondiscrimination in the 1950s was the racial subordination of millions of people in the United States. While some sought attention for women's rights,[225] that effort was rebuffed. As Secretary of State Dulles explained in 1953, the United States would not sign the "Convention on the Political Rights of Women" because the "equal political status" of women was not a "proper field for exercise of the treatymaking power," and moreover that the United States had no "clear" interest in the "eligibility of women to political office in other nations."[226] Only in later years would women's equality rights gain constitutional stature in the United States[227] and prompt a range of far-ranging interventions abroad.[228]

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223. *See infra* 318-326, 432-441 and accompanying text.

224. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004) (exploring the claimed exemption by the Bush Administration). Representatiave Ron Paul, cosponsor of the American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004), on the other hand, opposes "unchecked executive power." Ron Paul's Texas Straight Talk, Torture, War, and Presidential Powers (June 14, 2004) http://www.house.gov/paul/tst/tst2004/tst061404.htm.

225. *See, e.g.*, Wilson v. Hacker, 101 N.Y.S.2d 461, 473 (1950) (holding that a union excluding women could not demand that a bar be unionized and invoking the UDHR—making discrimination on the basis of sex unlawful and endorsing everyone's right to work—as "indicative of the spirit of our times").

226. *1953 Bricker Amendment Hearings*, *supra* note 195, at 825. Dulles also commented that, given "some foreign countries where the present state of education of women is so little advanced[,] . . . international welfare would be hurt rather than helped by their holding political office until they had a greater opportunity to be informed about world affairs." *Id.* at 897.

227. *See* Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263 (1997) (mapping the changes from the 1950s).

228. *See* Brooke A. Ackerly, *Women's Human Rights Activists as Cross-Cultural Theorists*, 3 INT'L FEMINIST J. POL. 311-46 (2001) (describing transnational feminist efforts); *infra* note 372 (discussing the efforts in Europe, the United Nations, and in Commonwealth countries to adopt a policy of "gender mainstreaming"). Those developments, in turn, have provoked new arguments against international human rights. *See* Kaufman & Whiteman, *supra* note 185, at 331-32 (identifying the emergence in the 1970s of new claims as opponents to the ICCPR such as Phyllis Schlafly argued it would take "away the rights of state legislatures in the fifty states to enact and retain the marriage laws desired by the people of each state and devised in a process of democratic decision-making").

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Similarly, a focus on the environment and an understanding of the interdependencies of the globe has also become prominent in more recent decades. Thus, while sovereigntists hostile to foreign law repeat themes now hundreds of years old, they also have new targets – including CEDAW and the Kyoto Protocol on global warming, both of which I discuss below after I analyze the normative implications of the different postures that American jurists take toward non-United States law.

III. THE LOGIC OF SILENCE AND OF IMPLICIT DIALOGUES

A. *Taxing Adjudication by Challenging Transnational Constitutionalism*

How is one to assess the legitimacy and utility of the silent absorption of United Nations precepts as contrasted with an express discussion about their direct application? One might think silence the better route, as exemplified by the lack of protest as the Supreme Court developed a new American law of dignity without direct citation to the United Nations's documents and to constitutions of other countries. Yet, the sharing of a vocabulary of rights does not necessarily bespeak a deep agreement.[229] Thus, I am not making the claim that the law on dignity today is what it might have been had the Supreme Court engaged in an open jurisprudential dialogue about how interpretations of dignity elsewhere might influence American norm development.[230] Similarly, were the Supreme Court's case law dotted with references to other courts, it might prompt those courts to turn to American rulings when crafting their jurisprudence of dignity.[231]

In this respect, the incorporation of the language of dignity without acknowledgement of a debt stunts the development of two internal bodies of law, the American law on dignity and the American law on transnational

229. This point is a general one – that adoption of the same legal terms does not always (and perhaps does not often) result in shared interpretation and implementation. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (looking at the relationship between the signing of human rights treaties and compliance with those treaties).

230. *See* Dierk Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, 3 GLOBAL JURIST FRONTIERS 1, 16-103 (2003), http://www.bepress.com/gj/frontiers/vol3/iss1/art1 (analyzing the differences in the law of human dignity in Canada, which lacks a textual basis for dignity, and in Germany, which has an express textual commitment, as well as the influences of one country's jurisprudence on the other).

231. *See* L'Heureux-Dubé, *supra* note 22, at 24-31 (discussing exchanges among constitutional courts in other countries and the declining influence of American law as the Rehnquist Court did not participate).

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constitutionalism. Prevented is the expansion of an interjurisdictional "juridical field," to borrow Pierre Bourdieu's description[232] of the distinctive language, routes of communication, and modes of discourse that judges and lawyers share. A further cost is that an ethical means for judges to exchange information is cut off.[233] As jurists' discussions take place instead through closed listservs and conferences, due process and ethical questions emerge about whether judges are gaining knowledge relevant to decisions in specific cases from authorities undisclosed to parties who therefore have no means to comment on the interpretations proferred.[234]

On the other hand, were non-United States law expressly cited, such notations could mark legal events with different meanings. As a growing law review literature details, a domestic jurist can rely on another country's case law to inform, educate, explain, illuminate, bind, compare, deride, or to display erudition. An array of terms—comparison, adaptation, supplementation, complementarity, translation, transjudicialism, mediation, occupation, supplantation, review, usurpation, harmonization, convergence, persuasion—are employed in efforts to delineate distinctive postures[235] to respond to what Jeremy Waldron has termed the need for a "general theory of the citation and authority of foreign law."[236] As more constitutional democracies join

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232. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (Richard Terdiman trans., 1987).

233. Jackson, *supra* note 22, at 118-20.

234. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(B)(6)(b) (Supp. 2005) (regulating ex parte communications of judges).

235. The outpouring of literature on this topic attests to the saliency of the methodological questions. *See, e.g.*, HIRAM E. CHODOSH, GLOBAL JUSTICE REFORM: A COMPARATIVE METHODOLOGY 28-34 (2005); Ruth Rubio-Marín & Martha I. Morgan, *Constitutional Domestication of International Gender Norms: Categorizations, Illustrations, and Reflections from the Nearside of the Bridge*, *in* GENDER AND HUMAN RIGHTS 113 (Karen Knop ed., 2004); *see also* Cleveland, *supra* note 7, at 68-75; Rex D. Glensy, *Which Countries Count?* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357 (2005); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003); Jackson, *supra* note 22, at 124-28; Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

236. Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 129 (2005). Working out relationships among legal systems is a subject of inquiry worldwide. *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287

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transnational discussions, differences and convergences – about a particular concept and about modalities of transnational discourse to be embraced or discarded – can be clarified.

In short, citation has appeal. But I do not assume that the only desirable, honorable, or permissible mode of incorporation of non-national law into domestic law is to use that route. A "general theory of the citation and authority of foreign law"[237] should include, in my view, explications of silences as well as uses of external sources because, as detailed in Part II, "foreign influences" are endemic rather than exotic. Hence, the decision about when to acknowledge which debts to other legal regimes are owed entails normative and strategic judgments that may also vary depending on the particular charter that runs to judges in different legal systems and the circumstances in which judgments are rendered. Given what Meir Dan-Cohen has called "acoustic separation" – the potential space between what law does and what it says[238] – judges have to make hard choices as they puzzle about how what they say affects what the legal precepts articulated can do. Attention to practical consequences is a requirement.

This problem is particularly acute in the United States. Unlike many legal systems in which advisory opinions are permissible and in which government actions can readily be challenged through petitions filed by anyone arguing illegality, federal judges currently have a more circumscribed charter. Locked (at least for now) into a reading of Article III that demands individual injury and immediate consequences as predicates to the existence of a "case or controversy,"[239] federal judges can act only to make law "do" differently. They are animated by and they must think about the practical consequences of their judgments. By relying exclusively on domestic law yet changing its content, jurists take responsibility for explicating norms intrinsic to their own system and make demands on that system to live up to its own promises. They ought to consider whether acceptance and implementation of their judgments would be facilitated by a singular focus on the domestic heritage of the obligations pronounced.

(1995/96); Maarit Jänterä-Jareborg, *Foreign Law in National Courts: A Comparative Perspective*, 304 RECUEIL DES COURS 185 (2003).

237. *Id.*

238. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

239. *See* FEC v. Akins, 524 U.S. 11 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Both are doctrines increasingly at variance with the rules of other constitutional democracies, which are more open to citizen standing and to court review of administrative action. *See* Aharon Barak, *The Supreme Court, 2001 Term – Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 106-10 (2002).

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Whether litigants' obligations of compliance do in fact vary with the source of a legal rule (e.g., judicial versus legislative, national versus state, international versus national) is an empirical question dependent on many variables. For example, when the United Kingdom was told that its ban on gays in the Royal Navy violated the European Convention on Human Rights, it both complied and made special efforts to recruit gays.[240] In contrast, in the United States, many pronouncements of even domestic rights by courts—infamously the mandate to desegregate schools—have been refused by the governmental officials subject to those orders. As Part I made plain, campaigning against federal judges' decisions is a popular activity in American politics.[241] Federal judges in the United States must, therefore, reflect on when their opinions are likely to provide vehicles for mobilization and what arguments become targets of attention. Good-faith jurists could well believe that compliance may come more promptly if their judgments were based on obligations internal to their own polity. This consequentialist approach should neither be read as "passive"[242] nor purely strategic, but rather as an affirmative normative assertion that domestic law requires a particular result.

If American law is understood as demanding the end of racial covenants or of the imposition of the death penalty for juveniles, jurists who also want to clarify that America's obligations are confirmed (or influenced or affected) by those elsewhere should do so because they believe that, given the political culture and the current freight of "foreign sources," having a battle about those sources in addition to having the battle about the underlying legal obligation is important to the American legal project. Here, the history of restrictive covenants on the transfer of lands is instructive. By many accounts, California's intermediate appellate court's decision in the *Sei Fujii* case to rely expressly on the U.N. Charter was the "catalyst which touched off the somewhat explosive movement among the bar for amending the Supremacy Clause."[243]

And, of course, the more sovereigntists "tax" such mention of foreign sources in their attempt to derail dialogic exchanges among comparable authorities prepared to cooperate through interactive exchanges, the more the

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240. *See* Lustig-Prean & Beckett v. United Kingdom, App. Nos. 31417/96, 32377/96 (Eur. Ct. H.R. Dec. 27, 1999), http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search "Case Title" for "Lustig-Prean"); Sarah Lyall, *New Course by Royal Navy: A Campaign To Recruit Gays*, N.Y. TIMES, Feb. 22, 2005, at A1 (describing the lifting of the ban after a judgment of the European Court in 1999 and the attempt to make life for gays in the Navy better through proactive policies).

241. *See* H.R. Res. 214, 109th Cong. (2005); *supra* note 29.

242. Alexander M. Bickel, *The Supreme Court, 1960 Term— Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

243. Schubert, *supra* note 51, at 290 n.129.

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need for internationalists to cite those sources grows. As I argued at the outset, the contemporary iteration of this conflict entails a deepening disagreement about the role of courts and of government more generally in the United States.

On this consequentialist account, one more factor needs to be calibrated by jurists. Above, I laid out the optimistic view that open judicial exchanges produce more, better, and clearer law on rights. But American judges must also be aware that their reliance on treaties can have many effects, including on treaty negotiations. Covey Oliver, a former Assistant Secretary in the State Department focused on Inter-American affairs, raised this issue in the context of litigation in the 1970s challenging Texas's exclusion of noncitizen children from its schools.[244] In addition to their Fourteenth Amendment claims, advocates cited the Charter of the Organization of American States and the U.N. Charter.[245] Relying on his experiences as a diplomat, Covey argued that to "load into the treaty process" the specter of parades of plaintiffs was to impose "too great a burden" on a "fragile" process.[246] Taking the (cheerful[247]) view that having commitments in treaties gives focus to national goals, he chastised human rights advocates for efforts that could result in a return to Brickerism, arguing that "binding ourselves up as a nation in this way is not going to further the cause of human rights elsewhere."[248]

B. Licensing References and the Customs of Lawmaking

In this utilitarian calculus resides the ever-present question of judicial task as well as the ever-present problem of cost/benefit analyses, haunted by many unknown and nonquantifiable or noncommensurable factors. What roles should judges play in the story of law's migration? How actively should they—as contrasted with or in addition to other public and private actors—serve as

244. *See* Covey T. Oliver, *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*, 9 HOFSTRA L. REV. 411 (1981).

245. *See In re* Alien Children Educ. Litig., 501 F. Supp. 544, 589-93 (S.D. Tex. 1980); *see also* Doe v. Plyler, 628 F.2d 448, 453 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982). When Oliver wrote, the Court had not yet decided, in the consolidated litigation, that the practice was violative of the Fourteenth Amendment. *See* Plyler v. Doe, 457 U.S. 202 (1982); Oliver, *supra* note 244, at 421-28.

246. Oliver, *supra* note 244, at 431-32.

247. *See* Hathaway, *supra* note 229 (describing the lack of compliance with obligations within human rights treaties and therefore questioning their utility).

248. Oliver, *supra* note 244, at 432.

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"norm entrepreneurs,"[249] helping to incorporate transnational understandings into domestic settings? Some countries have rules that provide answers and in others, such as the United States, federal and state judges have different judicial charters that can facilitate or impede bringing law home.

1. *A Variety of National Practices*

Some nations build directions for judges into legal documents. South Africa's Constitution is an oft-cited example, requiring its courts in some contexts to consider international law and licensing consideration of "foreign" law.[250] Other nations' constitutions (including those of Benin, Burundi, Cameroon, Equatorial Guinea, Gabon, Madagascar, and Mali) commit, invoke, or affirm their affiliation to international human rights documents, including the UDHR.[251] The Constitution of the Netherlands describes that nation's commitment to "development of the international legal order,"[252] a provision that could be read as a basis for invoking lawmaking outside that country. Yet another route, common to countries that do not have automatic application of treaties to domestic regimes, is the enactment of nonlocal law as a domestic rule. England's adoption of the European Convention on Human Rights is an illustration,[253] while the American decision not to make various human rights treaties the sources of domestic rights represents the opposite choice.

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249. *See* Koh, *supra* note 42.

250. S. AFR. CONST. 1996, ch. 2, § 39(1) provides: "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." Other provisions state that customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament," and that courts are to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation." *Id.* ch. 14, §§ 232-233.

251. *See, e.g.*, BENIN CONST. pmbl. (reaffirming the people's "attachment to the principles of democracy and human rights" with specific mention of the U.N. Charter, the UDHR, and the African Charter on Human and Peoples' Rights); CAMEROON CONST. pmbl. (affirming "our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of United Nations, and the African Charter on Human and Peoples' Rights"); MALI CONST. pmbl., art. 116 (subscribing to the UDHR, and stating that "treaties and or agreements regularly approved or ratified" are superior to the laws of the state). As Elizabeth Brundige noted, many of the Francophone African nations have constitutional provisions akin to those of France, in which certain types of treaties require ratification by statute to have effect. *See* Memorandum on African Constitutions and International Law from Elizabeth Brundige to author (April 29, 2005) (on file with author).

252. GRONDWET [GW.] [Constitution] art. 90 (Neth.).

253. *See* Human Rights Act 1998, ch. 42 (U.K.). The Act specifies that a "court or tribunal determining a question which has arisen in connection with a Convention right must take

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Justices in Canada offer another approach. They have construed Canada's Charter of Rights as presumptively congruent with international human rights values, understood as generating an interpretative gestalt for particular domestic provisions.[254] Internationalists in the United States argue that *The Paquete Habana* (a 1900 decision stating that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice"[255]) represents a comparable stance, while sovereigntists demur that the application of that principle is more limited.[256]

Internal obligations to reason from precedent can also prompt consultation of nondomestic sources. If jurists write decisions that engage non-United States sources without making them domestic law, subsequent rulings may need to reflect back on the relevance of those sources. For example, when concurring in *Bowers v. Hardwick*[257] that same-sex acts could be criminalized, Chief Justice Warren Burger argued that "the history of Western civilization" demonstrated condemnation of same-sex sodomy.[258] That claim licensed inquiry into its accuracy, making the responding jurists in *Lawrence* reporters about the facts and law of "Western civilization."[259]

Whether licensed through positive commands to consider law from outside their jurisdiction or by interpretations of their own legal regimes, judges may be useful participants in the import and export of legal precepts. Given the peculiarities of adjudication as a genre of decisionmaking, judges can calibrate how much to take in, from using sources as binding authority to making a passing informative reference. Through frank exchange with attention to relevant differences, internationalist jurists can sort out criteria for making such references – such as whether more weight ought to be accorded to transnational rules as contrasted with country-specific comparisons, or rules prevalent in more than one legal order, or rules in legal systems with similar political structures and roles for judges, or rules responsive to shared social problems. Further, given the increasing number of transnational conventions

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into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights," *id.* § 2(1)-(1)(a), and, as far as possible, domestic law is to be "read and given effect in a way which is compatible with the Convention rights." *Id.* § 3(1).

254. *See* Knop, *supra* note 235, at 510-12 (discussing Justice L'Heureux-Dubé's use of the Convention on the Rights of the Child in her decision in *Baker v. Canada*, [1999] 2 S.C.R. 817).

255. 175 U.S. 677, 700 (1900).

256. *See* Scalia, *supra* note 6, at 1119-20.

257. 478 U.S. 186 (1986).

258. *Id.* at 196 (Berger, C.J., concurring).

259. Lawrence v. Texas, 539 U.S. 558, 571-73 (2003).

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and international courts, and the turn to judicial review in other democracies, the set of comparative experiences can expand. Moreover, all of what judges do is subject to examination by virtue of the public character of their stated explanations in the judgments rendered.

2. *American Federalist Possibilities*

Turning to questions internal to American law, the Constitution Restoration Act of 2004[260] uses the word "restoration" in its title to suggest that consideration of "foreign" law is nontraditional. Yet a growing body of scholarship documents an "unbroken tradition of judicial recognition of international law trad[ing] back to the founding"[261] and responds to originalist objections that comparative excursions by federal judges are illicit.

Looking at state court practices as a source of United States norms, one finds additional support for the custom of referring to the law of another jurisdiction when deciding an internal rule.[262] As Shirley Abrahamson, Chief Justice of the Supreme Court of Wisconsin, explained, neither Canadian nor Floridian law has precedential value for the state of Wisconsin, yet "state courts routinely look to the decisions of their sister jurisdictions for the insights and persuasive value they potentially possess."[263] In addition to this common law practice, positivists can also cite state legislatures, which have adopted some laws (such as the Uniform Commercial Code) that aim to make rules uniform across jurisdictions and that prompt judges from one state to look to another state's interpretations.[264] These are forms of "federalist" practice – the "ideal of healthy dialogue and mutual trust" – that Justice O'Connor commends when encouraging national courts to look abroad.[265]

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260. S. 2082, 108th Cong. § 201 (2004); *supra* note 1.

261. Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 130; *see also* Cleveland, *supra* note 7, at 12-87; Fletcher, *supra* note 30, at 1566-69.

262. *See, e.g.*, Moore v. Ganim, 660 A.2d 742, 755-61 (Conn. 1995) (considering opinions from dozens of states and the federal system); Constant A. v. Paul C.A., 496 A.2d 1, 3 n.2, 10 (Pa. Super. Ct. 1985) (referring to the U.N. Charter and federal law as well as the laws of Virginia, Washington, Massachusetts, Indiana, New Jersey, North Carolina, Kentucky, and Michigan as part of a "review of the cases throughout the country").

263. Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 276 (1997).

264. *See* U.C.C. § 1-102(2)(c) (2004).

265. Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 41 (1995-1996).

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However, another contemporary doctrine of American federalism—the "independent and adequate state ground rule"[266]—complicates the question of the shape of such exchanges. Unlike some federated systems in which law is unified and high courts can review the underlying bases of decisions from states or provinces, the American federation permits state courts independent control over state law, as long as no federal rights are implicated. Justice O'Connor is not only an enthusiast about learning from abroad, she is also the author of a central decision, *Michigan v. Long*,[267] setting forth the presumption that if state jurists discuss federal case law as they formulate a state law rule, the United States Supreme Court can presume that federal law influenced the outcome and therefore the Court can review the judgment.[268] Over objections from some of her colleagues,[269] Justice O'Connor formulated a rule that silence on federal constitutional issues offers some protection for state courts: If a state court does not cite to federal law, the Supreme Court will assume the decision is independently grounded, and limit the Court's jurisdiction absent a finding that the state ground violated federal law.[270]

While this rule could be seen as protective of state autonomy, it also creates incentives for not citing (whether read or not) the decisions of similarly situated jurists within the same polity who are responding to parallel problems that may be governed by identically worded provisions with related histories.[271] This approach may promote diversity of legal rules, but it does not promote open discussions among judges from different jurisdictions. Justice O'Connor's commitment to looking abroad yet putting up walls within could

266. *Murdock v. City of Memphis*, 87 U.S. (20 Wall) 590 (1874), is the classic (albeit slightly out of date) statement of this doctrine, which some believe is a rule of constitutional common law rather than compelled by the Constitution itself. *See* William M. Wiecek, Murdock v. Memphis*: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, *in* ORIGINS OF THE FEDERAL JUDICIARY 223 (Maeva Marcus ed., 1992).

267. 463 U.S. 1032 (1983).

268. *Id.* at 1040-42.

269. Justice Ginsburg and Justice Stevens have each written about why such a presumption is unwise in the federal system. *See* Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting); *Long*, 463 U.S. at 1066 (Stevens, J., dissenting).

270. In a subsequent decision, the Court ruled that this presumption does not operate in the same way when habeas petitions are filed in federal district courts. *See* Coleman v. Thompson, 501 U.S. 722, 746 (1991).

271. This rule has also prompted the New Hampshire Supreme Court to add a statement that "when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions." State v. Ball, 471 A.2d 347, 352 (N.H. 1983); *see also* State v. Wood, 536 A.2d 902, 904 n.2 (Vt. 1987) (citing this passage from *Ball*).

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be rationalized by distinguishing (1) the freedom of an independent judicial system (that of the United States) to learn from everyone but be bound by none from (2) the dependent judicial system (state courts) in need of shelter from federal influence. But that position may impede the flow in the other direction—discouraging federal judges from building on state precedents that, in turn, may have been informed by many jurisdictions, including those outside the United States.

Federalism doctrine informs the discussion in the United States about borrowing law in other respects. Sovereigntists argue that, whatever the practice elsewhere, the federal courts of the United States are specially disabled in that they lack authority, absent congressional authorization or constitutional directive, to develop new legal norms, whatever their source. Adherents to this position use various labels (originalism, textualism, Framers' intent) as they approach the constitutional text; they then transport parallel constraints to federal adjudication in interpreting domestic statutory law, fashioning common law,[272] crafting equitable remedies,[273] considering comparative and international law, and developing customary international law. I will use the term "non-encroachment" to describe the posture promoted, that federal courts ought not do more than they need to out of respect for the roles of other branches of government.

This attitude posits that federal judges ought not, absent congressional authorization, generate substantive legal norms or new remedies. A subset of that approach focuses particularly on cases in which state law controls. In the late 1930s, the Supreme Court held that federal jurists lacked legal authority to

272. Justice Antonin Scalia is again a spokesperson for these views. *See* Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, The Tanner Lectures on Human Values at Princeton University (Mar. 8 & 9, 1995), *available at* http://www.tannerlectures.utah.edu/lectures/scalia97.pdf. Disagreement can be found in William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001).

273. Justice Scalia, for a majority of five, has held in two cases that, absent express congressional direction, federal judges lack the authority to shape equitable remedies beyond those extant in English common law circa 1776. *See* Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). Criticism of this approach can be found in John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1356-61 (2003); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 234-72 (2003).

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supply federal common law rules in cases in which state law governed.[274] This "*Erie* doctrine" is sometimes described as holding that federal judges lack the power to make federal common law. But the turn to *Erie* is more complex, for the scope of that decision has been debated ever since it was decided. In practice, federal common law rules are plentiful, governing many arenas, including admiralty, preclusion, defendants' immunities,[275] and various kinds of interactions with foreign nations.[276] Moreover, *Erie* itself may not be a constitutional decision but rather a rule of self-restraint, making the proposition that federal courts have no power to make common law itself an example of federal common lawmaking.[277]

What both *Michigan v. Long* and *Erie* represent is a view that federal judges ought not, when possible, encroach on the presumptively preferable modalities of lawmaking—decisions by state and national legislatures. When that approach is coupled with the constitutional location of treaty power in the Congress, a history of deference to the Executive in foreign affairs, and the proposition that federal courts have limited jurisdiction, some argue a prohibition on, and others a hesitancy about, federal judicial importation of non-United States law.

In theory, *Michigan v. Long* and *Erie* also recognize the license of state court judges to go their own way. Yet a major debate has emerged about whether federal decisions involving international conventions, common law, and customary international law preempt state lawmaking powers. Harold Koh has argued for that proposition,[278] while Curtis Bradley and Jack Goldsmith disagree, focusing especially upon customary international law.[279]

Opponents of federal judicial engagement with customary international law are often also interested in constraining federal judges more generally. If one

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274. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see* EDWARD A. PURCELL JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER AND THE POLITICS OF FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000).

275. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

276. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

277. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

278. *See* Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); *see also* Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295.

279. *See* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 550-54 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

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believes that customary international law includes not only positive action by nation-states but also norm development through adjudication, that genre of interpretation is particularly threatening.[280] Moreover, as Jeremy Waldron has explained, because the rubric of "foreign law" could include natural law, customary international law, universal obligations of nations toward private individuals, general common law referring to English-based practices, and *ius gentium* (universal or fundamental precepts that serve as a repository to guide judgment),[281] closing off resort by judges to foreign law could constitute a significant constraint.

In terms of doctrinal answers, in an earlier essay I suggested that both state and federal judges should be seen as equally situated common law importers rather than positioned only in a hierarchical relationship that puts federal jurists in complete control of customary international law.[282] Just as William Fletcher has argued that maritime commercial law was once a shared body of legal rules developed through exchanges between American and English courts,[283] so might customary international law be advanced through judicial actors in various parts of the world, sometimes within federated systems and sometimes in unified nation-states or on international courts. Were the enterprise seen as shared, the anxiety in the United States that "judicial federalization" imposes national norms on localities could be somewhat assuaged.[284]

Another option is to turn to legislation to inform the debate. As I described at the outset, sovereigntist legislators propose to order judges not to use

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280. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987) (describing the sources of customary international law as "general and consistent practice[s] of states followed by them from a sense of legal obligation"). The comment includes "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy." *Id.* cmt. b. Acquiescence as well as express statements can constitute customary international law. *Id.* cmts. c-d. Moreover, section 103 provides that judgments of national tribunals, of international judicial and arbitral tribunals, writings by scholars, and pronouncements of states can be evidence of various kinds of international law. *Id.* § 103.

281. Waldron, *supra* note 236, at 136-40. Waldron then argues that the whole set refers to "the same jurisprudential enterprise," *id.* at 137, of "problem-solving" by seeking as wide an understanding as appropriate in order to inform one's own reasoning, *id.* at 146-47.

282. Resnik, *Categorical Federalism*, *supra* note 50, at 670-80; *see also* Melvin A. Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 FLA. ST. U. L. REV. 1229, 1259 (2002) (arguing that lower courts depart from a hierarchically superior court's common law rule through distinguishing it and further that common law is binding in a weaker sense than are other forms of law).

283. Fletcher, *supra* note 30, at 1517-21, 1539.

284. That phrase comes from the critics. *See* Bradley, *supra* note 279, at 552.

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foreign law.[285] Internationalist legislators might borrow from the approach by promoting competing bills that encourage (but do not oblige) federal judges to consult non-United States sources as a means of mobilizing a constituency for that posture. As long as Congress is not specifying a rule of decision or overly constraining judicial discretion to shape judgments, such a provision should survive challenges under separation of powers doctrine.[286] But a Congress (internationalist or sovereigntist), appreciative of the prerogatives of state courts, ought not to advise state judges on how they should approach lawmaking.

Alexander Aleinikoff, also interested in the scope of federal authority and in a role for legislation, has offered another technique – that a statute specify that federal courts' pronouncements on customary international law be less than binding federal law (and hence not preemptive of state decisions) and that Congress create a right of action in federal court only to determine whether federal executive or legislative action violated customary international law.[287] My approach differs in proposing that federal judges continue to have the authority to recognize customary international law as a source of federal right and, if doing so, their judgments would bind state courts. On the other hand, federal judicial refusal to find a violation of customary international law would not prevent states from doing so, subject to the showing (discussed further below[288]) of a specific claim for foreign affairs preemption – that the particular right identified, if actionable in a given state court, would undercut the national government's ability to deal with foreign affairs in a unified manner. For example, rulings like *Sosa v. Alvarez-Machain*,[289] concerning the reach of federal jurisdiction to redress torts that violated "the law of nations" through the Alien Tort Statute, would be read as holding that no cognizable federal

285. *See, e.g.*, S. 2082, 108th Cong. (2004); *supra* note 1.

286. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); United States v. Klein, 80 U.S. 128 (1871). One might argue that Congress has yet greater license. *See* Miller v. French, 530 U.S. 327 (2000) (upholding aspects of the Prison Litigation Reform Act of 1995 that alter settlements and final judgments requiring injunctive relief). As I believe that case wrongly decided, I do not propose its rule as a model of what Congress should do.

287. *See* T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 100-02 (2004); *see also* Neuman, *supra* note 261, at 130 (arguing that customary international law does not "automatically" become American law without action by some branch of government, "including the courts").

288. *See infra* notes 318-325, 432-438 and accompanying text.

289. 542 U.S. 692 (2004).

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rights had been breached[290] but not as precluding a state court from reaching different conclusions if a suit were properly filed in that jurisdiction.[291]

This invitation to state courts to participate[292] fits the longstanding federalist pattern of joint venturing that has laced American history. In recent years, state supreme court justices have underscored the relevance of international and comparative law to the work of their courts.[293] In deciding questions of diplomatic immunity, the abduction of overseas fugitives, family obligations, and the law of sovereign immunity, state as well as federal judges have been active law producers, importers, and consumers of doctrine from abroad.[294]

In the debate about judicial lawmaking, sovereigntists and internationalists both claim that history is on their side. But neither the scope of judicial authority nor the power of states in this federation is determined solely by historical practices, even if such history were fully susceptible to specification. Rather, the boundaries are set by normative political judgments made by public and private actors with the power to impose them at a particular time.[295] When the sovereigntists in *Roper* object to the mention of foreign materials, they do so in an effort to lay claim to an authenticity about their views on cruel

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290. Justice Souter, for the Court, concluded that while "a norm of international character" could give rise to jurisdiction under 28 U.S.C. § 1350 (2000) (a provision dating from the eighteenth century), the claim of an arbitrary detention did not qualify. *Id.* at 725. Justice Scalia concurred in part but objected to the practice of federal judicial incorporation of customary international law. *Id.* at 750 (Scalia, J., concurring).

291. As Fletcher has noted, however, some deference to the federal system is likely. *See* Fletcher, *supra* note 30, at 1575 ("[A]lthough the decisions of the United States Supreme Court were not in any legal sense supreme, the Court was nonetheless *primus inter pares*.").

292. *See infra* Section IV.D.

293. *See, e.g.*, Margaret H. Marshall, *"Wise Parents Do Not Hesitate To Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 44 JUDGES' J., Spring 2005, at 7 (noting, as the Chief Justice of the Supreme Judicial Court of Massachusetts, that state jurists have freedom to develop the common law and that, given the many state constitutions with protection of positive liberties, comparisons are especially useful); Thomas R. Phillips, *State Supreme Courts: Local Courts in a Global World*, 38 TEX. INT'L. L.J. 557, 560, 564 (2003) (describing, as the Chief Justice of the Supreme Court of Texas, the history "from the beginning" of state courts' resolution of international disputes and arguing that "[t]oday, state courts probably handle more international law cases than do federal courts"); *see also* Abrahamson & Fischer, *supra* note 263 (discussing the growing presence of international litigation in state courts).

294. *See* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004); Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L. L. 265 (2001).

295. *See* Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465 (1996) (detailing the changing contours of the allocation of power in this federation).

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and unusual punishment and about the scope of judicial authority. Arguing that their approach is grounded in a constitutional commitment that the decision on forms of punishment belongs to the popular will as expressed through state legislatures, they seek to shore up the boundaries of the nation, the states, and the judicial role.

And it is the development of the nation-state that, in turn, makes plausible the idea that law itself has a nationality, just as legal rules like *Erie* and *Michigan v. Long* make meaningful a distinction between state and federal law within the United States. Yet, while sovereigntists can delineate American law when comparing it with that of other countries, it is less clear that "American" law should be conceived as separate from transnational law. Treaties and customary international law ought not to be positioned as completely external to the United States, for the United States is a participant (even when not a signatory) in drafting treaties, as well as in developing worldwide legal consensus on particular issues. Moreover, if persuaded by my view that the United States's version of its "own" constitutional norm of dignity is embedded in the international dialogue, and by the arguments of Professors Lockwood, Dudziak, and Cover that "our" equality jurisprudence was shaped through interactions with foreign polities (both democratic and not), the conception that a nation's law is self-generated is undermined. Even when judges do not see themselves as charged with transporting norms, they cannot avoid it. Wittingly or not, "our people" understand "our" law through the lens of other polities.[296] In Moliere's terms, "we" have been "speaking prose" all along.[297]

IV. MULTIPLE PORTS OF ENTRY

As exemplified by the arguments surrounding abolition, women's suffrage, and the Bricker Amendment, American federalism is often invoked to justify why the United States should not participate in transnational human rights efforts. Yet, as is detailed below, at the local level, transnational precepts are often incorporated locally, through actions of a diverse group of state actors. I first explore state courts as ports of entry for transnational rights, and then turn to the intake of transnational rights through city councils, state legislatures, mayors, and national organizations of local officials. Thereafter, I consider objections to local actions engaging with the international—

296. Atkins v. Virginia, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting).

297. MOLIERE, LE BOURGEOIS GENTILHOMME act. 2, sc. 6, at 37 (M. Levi ed., 1910) (1670) ("*Par my foi, il y a plus de quarante ans que je dis de la prose sans que j'en susse rien*") (roughly translated, "My goodness, I've been speaking prose for over forty years and never knew it").

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challenged again in jurisdictional terms. The prerogatives of the nation to be the exclusive conduit of foreign laws within this federation are argued to bar localities from enforcing their own laws. Instead, I suggest that local uptakes should, under federalist theory, be seen as particularly appropriate and legally permissible.

A. *State Jurists Making International Norms State Law*

In principle, and unlike some federations in which unification of state and national law occurs, states within the United States have substantial authority over their own law.[298] When rendering judgments that are "independent" of federal law and not otherwise illegal under federal law, state judges are immune from oversight by federal judges.[299] In a small body of case law, state courts refer to international or comparative precepts; advocates urge jurists to do so more as they develop positive rights.[300]

State law offers several grounds from which to launch a broad embrace of transnational norms and treaty promises. In terms of their legal authority, Paul Kahn has argued that, as separately constituted interpretative bodies, state courts are free to go their own way and ought to do so to enrich constitutional interpretation by avoiding homogeneity.[301] For those in search of additional bases, state constitutions often contain provisions that, while overlapping with federal constitutional rights, differ in terms of specificity and breadth. Examples include mandates to provide education or welfare and injunctions

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298. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); Randall T. Shepard, *The Renaissance in State Constitutional Law: There Are a Few Dangers, but What's the Alternative?*, 61 ALB. L. REV. 1529 (1998).

299. *See supra* Subsection III.B.2.

300. *See, e.g.*, Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006); Robert Doughten, *Filling Everyone's Bowl: A Call To Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions To Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421 (2003); Bert B. Lockwood, Jr., R. Collins Owens III & Grace A. Severyn, *Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor*, 2 WM. & MARY BILL RTS. J. 1 (1993); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001).

301. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1154-56, 1163-68 (1993).

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relating to equality,[302] thereby creating independent licenses (if needed) for comparative inquiries.

Moreover, some localities' constitutions purposefully echo texts from abroad. As Vicki Jackson has explained, the constitutions of Montana and Puerto Rico use the term "dignity" to express their foundational commitments to human rights.[303] These relatively new provisions—added in 1972 in Montana, building from Puerto Rico's 1951 constitution that in turn drew on the UDHR[304]—are occasions for interaction among courts around the world as judges explore the meaning of a shared term.[305] Similarly, the legislative history of New Jersey's 1947 constitutional amendment recognizing women's equality refers to the attention paid at the United Nations to women's rights and the "world-wide demand for equal rights."[306] States can thus mine their own histories to consider the relevance of international sources.

Further, as I discuss below, if state and local legislatures directly incorporate aspects of conventions such as CEDAW, those precepts become public policy upon which state jurists should draw. State judges' authority to craft common law rules is not debated,[307] thus freeing those judges from the criticism that is sometimes leveled at federal judges when crafting common law

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302. *See* Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 WOMEN'S RTS. L. REP. 69, 70 (1994).

303. MONT. CONST. art. II, § 4 ("The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."); P.R. CONST. art. II, § 1 ("The dignity of the human being is inviolable."); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21-28 (2004).

304. Jackson, *supra* note 303, at 22-24.

305. As Jackson noted, *id.* at 35-36, Puerto Rican cases have cited German law on human dignity.

306. Letter from Mrs. James E. Carroll & Mrs. George T. Vickers, Co-Chairmen, Women's Alliance for Equal Status, to the Chairman and Delegates to the New Jersey Constitutional Convention (June 20, 1947) (emphasis omitted), *reprinted in* Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 WOMEN'S RTS. L. REP. 69, 111 (1994); *see also* Recommendation of the New Jersey State Bar Association on the Status of Women (June 13, 1947), *id.* at 108 (commenting that the "demand for the removal of discrimination against women has become a world-wide movement" and was "one of the principles set forth in the Charter of the United Nations"). One convention participant argued that "the State of New Jersey should be as progressive as the United Nations." *The Constitutional Convention of 1947: Committee on Rights, Privileges, Amendments and Miscellaneous Provisions* (statement of Mrs. Carpenter, New Jersey Federation of Business and Professional Women's Clubs), *reprinted in id.* at 103, 103.

307. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995); Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065 (1998). Chief Judge Kaye is the current Chief Judge of the State of New York, and Justice Peters has served as the Chief Justice of Connecticut.

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rules. In addition, as Helen Hershkoff has argued, judicial elections, a feature of selection in several states, are an antidote to the claimed "countermajoritarian difficulty" associated with federal judicial review.[308] And, as noted above,[309] state jurists have a long history of interjurisdictional consultation—reviewing the experiences of their sibling states as they shape legal rules.

But Penny White (a former justice on the Tennessee Supreme Court and now a law professor) has raised another problem: Can state judges legally and ethically use international provisions that federal judges have expressly held to be unavailable in federal courts?[310] Some critics press further, arguing that when the Senate ratifies a treaty with reservations and non-self-executing clauses, those caveats are part of an underlying treaty agreement and, as supreme law of the land, bind state judges.[311] White's approach is more federalist, arguing that state judges have an independent authority to interpret the underlying treaties and reservations as well as to evaluate customary international law and therefore to reach results different from those of federal courts.[312]

Yet another argument from federalism, specific to certain treaties, is also available: When the United States ratifies treaties but makes reservations in the name of federalism (that deference to states on the legality of a particular practice is appropriate and necessary[313]), the purpose is to preserve autonomy for states. Such reservations ought to empower state jurists to evaluate independently of federal law whether, in light of international conventions or other developments, a particular state rule withstands scrutiny. If judgments varied from state to state, the treaty's reservation of the issue would have been particularly efficacious.

A harder question is the breadth of state judges' power to develop customary international law when federal judges have declined to do so. If a

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308. Hershkoff, *supra* note 298, at 1158-61.

309. *See* Abrahamson & Fischer, *supra* note 263.

310. Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937 (2003).

311. *See* Bradley, *supra* note 279, at 547; *cf.* Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998) (lauding the federal government's deference to Virginia in the *Breard* litigation, involving consular rights and the death penalty).

312. White, *supra* note 310, at 967-78.

313. *See infra* notes 349-350 (discussing reservations to protect state lawmaking); *see also* Bradley, *supra* note 279, at 556 (stressing that the Eighth Amendment does not require the juvenile death penalty, leaving states free to reject it).

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state's jurisprudence has a narrow view of customary international law (e.g., that it could be gleaned only from the positive commitments made by government officials on behalf of nations) one would expect relatively few instances in which a state jurist had a different reading than a federal jurist. If a state's jurisprudence were instead to embrace a more far-ranging definition that accepts the role of courts in identifying evolving norms,[314] it is plausible that state courts might find behavior actionable—like the "unilateral, nonconsensual extraterritorial arrest and detention" at issue in *Sosa*[315]—that federal law does not. A state judge could use the existence of an international norm as a factor in evaluating whether state rights had been breached, or whether a state judge could rely on international law (customary or positive) as the basis for an independent and new kind of action in a state court.

Would such rulings violate current Supreme Court doctrine on foreign affairs preemption? Part of the answer depends on who the defendants are and what a particular case is about. If any defendants fall within the definitions of the Foreign Sovereignty Immunities Act,[316] the case could be removed to federal court because the Supreme Court has held that the statute creates subject matter jurisdiction.[317] If the defendants are private actors, they may well also argue that national legislation or executive action supports federal preemption on foreign affairs grounds. For example, in *American Insurance Ass'n v. Garamendi*,[318] a bare majority of the United States Supreme Court found preempted a California statute requiring insurance companies doing business in that state to disclose policies sold by them or their affiliates in Europe between 1920 and 1945.[319] Justice Souter identified the Executive's

314. *See supra* note 280.

315. Alvarez-Machain v. Sosa, 331 F.3d 604, 620 (9th Cir. 2003), *rev'd*, 542 U.S. 692 (2004).

316. 28 U.S.C. § 1603 (2000).

317. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488-89 (1983). What entities are "foreign sovereigns" has been the subject of other decisions. *See, e.g.*, Dole Food Co. v. Patrickson, 538 U.S. 468, 473-78 (2003).

318. 539 U.S. 396 (2003) (Souter, J., joined by Rehnquist, C.J., O'Connor, Kennedy & Breyer, J.J.). The dissenters, who would have permitted the state legal regime to stand, were Justice Ginsburg, joined by Justices Stevens, Scalia, and Thomas. *Id.* at 430 (Ginsburg, J., dissenting). See also *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), discussed *infra* notes 432-441 and accompanying text, a seven-to-two decision in which, again, some of the internationalists were notably protective of national executive prerogatives.

319. *See* Holocaust Victim Insurance Relief Act of 1999, CAL. INS. CODE § 13804 (West 1999). California had also provided that Holocaust victims and their heirs could bring civil actions arising out of insurance policies in effect in Europe before 1945 in that state's superior courts. *See* CAL. CIV. PROC. CODE § 354 (West Supp. 2006). That provision was not before the Court in *Garamendi* but was held preempted on a different theory in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), discussed *infra* notes 440.

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policy interest in its negotiated settlement with the German government on related issues as displacing state lawmaking, while the dissent by Justice Ginsburg argued that the state's disclosure obligations could exist concurrent to the federal regime.[320] The reach of the *Garamendi* rule (that some argue is an undue and aberrationally generous grant of power to the Executive[321]) suggests that state decisions addressing subjects already governed by various national policies could be challenged.[322]

Today's foreign affairs preemption has become so broad that it resembles what federal courts' scholars call "protective jurisdiction"—the idea that Congress can vest lawmaking authority in federal courts through jurisdictional grants that do not provide substantive rules of decision.[323] And just as that doctrine came to be criticized for enabling overreaching by the federal courts,[324] so too should the current scope of federal foreign affairs preemption be constrained. As is explained in more detail below, deference to state lawmaking should make presumptively proper these local ordinances that reinterpret domestic obligations to create state-based (but internationally influenced) rights of action against local or state actors or private parties—absent a showing of specific and concrete effects on national capacities to resolve wars or to undertake foreign affairs initiatives.[325]

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320. 539 U.S. at 430; *see also In re* Holocaust Victims Asset Litig., No. CV964849, 2005 WL 1213817 (E.D.N.Y. Mar. 31, 2005) (detailing some of the settlement oversight); *In re* Holocaust Victims Asset Litig., 302 F. Supp. 2d 89 (E.D.N.Y. 2004) (discussing a dispute relating to the allocation of part of the proceeds from the settlement); *In re* Holocaust Victims Asset Litig., 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (describing the issues).

321. *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825 (2004) (discussing how *Garamendi* is broader than the cases decided before it that found for or against preemption on foreign affairs grounds).

322. Even before *Garamendi*, the Ninth Circuit had held that, because the federal power to make and resolve wars was exclusive, California could not provide additional remedies through state causes of action for persons harmed as slave laborers in World War II. *See* Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003).

323. *See* Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983) (arguing for the utility of protective jurisdiction); Paul J. Miskin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953) (explaining protective jurisdiction's sources).

324. *See* Textile Workers Union v. Lincoln Mills of Ala. 353 U.S. 448, 483-84 (1957) (Frankfurther, J., dissenting) (objecting to the use of jurisdictional statutes as a springboard for federal lawmaking and implicitly criticizing Mishkin's arguments).

325. The judicial task would be akin to that undertaken by Justice Harlan in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), in which he explained that "some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the

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How willing state courts are to take a prominent role in using transnational commitments to interpret local law is unclear. A search of case law from state courts since the 1940s provides some evidence that, while state courts use non-United States law in various ways,[326] citations to the U.N. Charter, the UDHR, and other U.N. human rights conventions are not commonplace.[327] A few instances can be found in which jurists invoke these conventions to inform their decisions on the meaning of their own law. In an oft-cited 1981 opinion from the Supreme Court of Oregon, for example, Justice Hans Linde cited the UDHR, the U.N. Charter, and the ICCPR along with standards promulgated by the ABA and other entities when determining that cross-gender searches of clothed inmates that involved "touching of sexually intimate body areas" violated the protections afforded to prisoners under that state's constitution.[328] In a 1993 decision, Chief Justice Ellen Peters of the Connecticut Supreme Court discussed the UDHR as she argued in a concurrence that a growing consensus

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justification for exclusivity in the political branches." The question there was whether the judiciary, absent executive insistence, should create an "act of state" defense, *id.* at 400-01, whereas, as detailed below, the question in some cases should also be whether state rights affect or implicate foreign relations at all.

Whether such a showing could be made by private parties, whether claims made by the Executive should suffice, or whether courts should be reticient to preempt local action without congressional affirmation of executive actions are all issues to be developed through analyses of specific problems. *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (arguing that no historical basis exists for relying exclusively on executive action); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001) (asserting that the "vesting clause" of Article II supports executive unilateralism).

326. *See supra* notes 293-294 and accompanying text.

327. *See* Johanna Kalb, The Role of the United Nations Human Rights Treaties in State Courts, (June 25, 2005) (unpublished manuscript, on file with author) (using Lexis and Westlaw databases to search for citation by state judges to the UDHR, CERD, ICCPR, CEDAW, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention of Genocide, the ICESCR, and the Convention on the Rights of the Child); Marin Levy & Jennifer Peresie, The United Nations Charter in State Courts (Sept. 18, 2005) (unpublished manuscript, on file with author) (searching Lexis and Westlaw databases for that document's invocation). The databases are not complete; state supreme courts decisions are online as of 1945 but not all of the intermediate or lower courts are online as of either that date or the present. From what was available, Kalb found human rights treaties cited in ninety-two state court cases; excluding territories, Levy and Peresie located references to the U.N. Charter in fifty-nine decisions. Some of those are also in the set of the ninety-two state cases citing the other conventions searched. Several decisions cite more than one human rights document.

328. *See* Sterling v. Cupp, 625 P.2d 123, 127-28, 131 n.21, 136 (Or. 1981); *see also* Jackson, *supra* note 303, at 39 n.92.

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supported a right to government assistance.[329] In 1979, a California court invoked the UDHR to confirm the right to travel under both federal and state law as a fundamental attribute of personal liberty.[330] A database search of state court decisions does not, however, reveal a frequent invocation of CEDAW, with only two reported state cases making passing reference to that convention.[331]

B. Local Plebiscites, Both Expressive and Self-Obliging

I turn now from courts to other state institutions that serve as vehicles for law's migration. Some of those local efforts are aimed at changing national policy. Examples run from the nineteenth-century American Anti-Slavery Society campaign (which relied on "mass-produced" petitions for local organizations to send to Congress)[332] to twentieth-century initiatives seeking to alter the conduct of the Vietnam War, the Gulf War, and the conflicts in Northern Ireland and the Middle East, to promote nuclear disarmament, to protect against land mines, to end apartheid in South Africa, and to help provide restitution for holocaust victims.[333]

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329. Moore v. Ganim, 660 A.2d 742 (Conn. 1995) (reading the Connecticut Constitution to impose an obligation to provide a safety net but concluding that the plaintiffs had not shown that what was provided violated that obligation). In that case, Chief Justice Peters also rehearsed the many scholarly objections to the importation of law and noted that most were aimed at federal adjudication, with the only relevant exceptions being concerns about unmanageable standards and perverse incentives. *Id.* at 780-81 (Peters, C.J., concurring) (citing the ICESCR, the UDHR, and California and Oregon cases as supportive of recognition of the right).

330. *In re* White, 158 Cal. Rptr. 562, 567 n.4 (Ct. App. 1979) (holding that travel restrictions imposed as a condition of probation violated the rights of the petitioner, who had pled guilty to soliciting an act of prostitution).

331. *See In re* Marriage of Shaban, 105 Cal. Rptr. 2d 863, 868 n.4 (Ct. App. 2001) (citing a law review article on CEDAW's compatibility with Islamic law in a case involving the division of property after the marriage of two Muslims dissolved); Cauthern v. State, 145 S.W.3d 571, 596 (Tenn. Crim. App. 2004) (mentioning CEDAW as one of several international conventions cited by a prisoner seeking post-conviction relief).

332. FLADELAND, *supra* note 49, at 177, 303 (noting that in the 1820s and 1830s, more than 200 antislavery societies sent hundreds of petitions to the British Parliament to abolish slavery).

333. *See* BRIAN HOCKING, LOCALIZING FOREIGN POLICY: NON-CENTRAL GOVERNMENTS AND MULTILAYERED DIPLOMACY (1993); JANICE LOVE, THE U.S. ANTI-APARTHEID MOVEMENT: LOCAL ACTIVISM IN GLOBAL POLITICS (1985); 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). For example, seventeen states and forty municipalities endorsed the "MacBride principles," aspiring to eliminate discrimination against Catholics in Northern Ireland. *See* Halberstam, *supra*, at 1033 n.98. Municipalities have also protested the Iraq war or declared themselves

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Below, by focusing on activities related to CEDAW[334] and on the mayors' consortium using the Kyoto Protocol on global warming, I bring into focus a different form of local action aimed at bypassing the nation-state to make transnational precepts local law. Those provisions, in turn, form the public policy of a state, and thereby become legally relevant to state court adjudication. But the legality of these kinds of local actions is also a question requiring more attention.

1. *Reconceiving the Rights of Women: Local Embrace of CEDAW*

a. *Federalist Objections to CEDAW at the National Level*

CEDAW provides a first illustration. That convention requires signatory states to take action in political, social, economic, and cultural fields – including legislation – to "ensure the full development and advancement of women, for the purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."[335] 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.[336]

For implementation, CEDAW relies on member states to make reports periodically to its twenty-three person committee, which, to discharge its monitoring function, engages in a public exchange with representatives from a reporting state about achievements and problems.[337] Beginning in 2000, states

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"nuclear-free." *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, 545, 548-49 (2005). In the 1980s, when identifying the trend toward municipal action, Michael Shuman asserted that "[u]nless America becomes a police state, municipal foreign policies are here to stay." Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, FOREIGN POL'Y, Winter 1986-1987, at 154, 171.

334. In 1979, the U.N. General Assembly adopted CEDAW, which entered into force in 1981. *See supra* note 36. CEDAW is, technically, the acronym for the expert committee that oversees implementation but it has also colloquially become one of two shorthands – the other being the "Women's Convention" – for this enactment. I use CEDAW to avoid the implication that conventions on political and economic rights or racial discrimination are not also centrally about women.

335. CEDAW, *supra* note 36, art. 3.

336. *Id.*, arts. 2(e)-(f), 4. When equality is achieved, the remedial measures are to be discontinued. *Id.*

337. *Id.*, 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, 49th Sess., Supp. No. 38, U.N. Doc.

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could also join an "optional protocol" permitting individuals or groups, after exhausting national remedies, to file complaints directly and authorizing the CEDAW committee to initiate investigations.[338] Proponents of CEDAW trace many changes in national laws to their making this transnational commitment.[339]

Some 180 countries have done so, by ratifying the basic provisions of CEDAW (albeit sometimes with reservations on particular aspects[340]), and seventy-six nations have also agreed to participate in the optional protocol.[341] President Jimmy Carter signed CEDAW for the United States in 1980,[342] but

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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 in New York. *See* Division for the Advancement of Women, United Nations, CEDAW 34th Session Homepage, http://www.un.org/womenwatch/daw/cedaw/34sess.htm (last visited Feb. 28, 2006); *see also* 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).

338. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83. The Optional Protocol entered into force (after obtaining the requisite ten first ratifications) in December of that year. *See* UNITED NATIONS, THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: THE OPTIONAL PROTOCOL: TEXT AND MATERIALS 1 (2001); *see also id.* at 6-7 (detailing the investigation process and providing, in article 17, that member-states cannot join the protocol with reservations).

339. *See Treaty Doc. 96-53; 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) (attributing to CEDAW changes in laws and practices relating to violence, education, and security).

340. See Division for the Advancement of Women, United Nations, CEDAW: States Parties, http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Feb. 28, 2006).

341. *See* Division for the Advancement of Women, United Nations, CEDAW: Signatures to and Ratifications of the Optional Protocol, http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm (last visited Feb. 28, 2006).

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

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subsequent administrations either have not succeeded or have not tried to secure ratification by the Senate.[343]

The prospect of the United States ratifying CEDAW has sparked considerable anxiety in some quarters, with debates as fierce as those engendered by *Roper*.[344] Consistent with the historical practice of asserting "domestic" authority as a barrier to transnational lawmaking,[345] these concerns are sometimes couched in the language of jurisdiction—that CEDAW is particularly pernicious because it undermines the rightful place of state governance of personal status relationships. As one opponent put it, joining would entail "surrendering American domestic matters to the norm setting of the international community."[346]

Even when the relatively supportive Clinton administration proposed that the Senate ratify CEDAW, the Executive also submitted "reservations, understandings, and declarations" (RUDs), caveats that enable selective adherence to treaty provisions.[347] The RUDs attached to CEDAW specified that the Convention's provisions would not give rise to independent domestic rights and that ratification would not result in acceptance by the United States of "any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States."[348] Further, in what is termed a

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343. Resolutions to do so remain pending. *See* H.R. 67, 109th Cong. (2005). The Bush Administration has not sought congressional ratification but stated support of CEDAW when involved in the war in Afghanistan. Thereafter, the Administration indicated that it was reviewing the effect of CEDAW on United States law. *See* Howard LaFranchi, *Women's Treaty Revives Old Debates*, CHRISTIAN SCI. MONITOR, July 30, 2002, at 1. More recent statements describe the Administration as examining the issue of CEDAW ratification rather than calling for it. *See* Press Release, Ambassador Sichan Siv, U.S. Representative to the U.N. Econ. and Soc. Council, Explanation of Position on Agenda Item 110: Advancement of Women (Oct. 30, 2003), *available at* http://www.un.int/usa/03_210.htm.

344. *See* Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. (forthcoming 2006) (examining the arguments against CEDAW made in the 2002 hearings).

345. *See, e.g.*, CONG. RESEARCH SERV., *supra* note 41, at 5; *supra* Section II.A.

346. *2002 CEDAW Hearings*, *supra* note 339, at 15 (statement of Sen. Michael Enzi).

347. *See* Comms. on Int'l Human Rights & Int'l Law, *Recommendations on the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 53 REC. B. ASS'N CITY N.Y. 511, 518-24 (1998); Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727 (1998) (both detailing and responding to the proposed reservations); *see also supra* note 15 (discussing reservations on United States's ratification of the ICCPR's approach to the juvenile death penalty).

348. S. EXEC. REP. NO. 103-38, at 51 (1994).

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"federalism understanding," the proposed RUDs explain that ratifying CEDAW could not alter the allocation of authority between state and national governments.[349]

States' rights are one set of prerogatives delineated by opponents of CEDAW; adherence to gender roles (also a battle about boundaries[350]) is another. Opposition to CEDAW is predicated on both kinds of border claims, as is exemplified by testimony given in 2002 at Senate subcommittee hearings on CEDAW. A speaker testifying on behalf of the Heritage Foundation accused the United Nations of being 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."[351]

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349. The understanding reads:

> The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments. To the extent that State and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary take appropriate measures to ensure the fulfillment of this Convention.

Id.; *Convention on the Elimination of all Forms of Discrimination Against Women: Hearing Before the S. Comm. on Foreign Relations*, 103d Cong. 13 (1994) (statement of Jamison S. Borek, Deputy Legal Advisor, Department of State); *see also 2002 CEDAW Hearings*, *supra* note 339, at 63 (statement of Sen. Biden) ("[T]he Federal Government will assure compliance within the reach of its powers, otherwise the States will, not the U.N. or anyone else . . . ."). Parallel reservations accompanied the United States's ratification of the CERD in 1994. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE 422-23 (1996); S. EXEC. REP. NO. 103-29, at 24 (1994) (stating that the treaty does not "federalize the entire range of anti-discrimination actions"); 140 CONG. REC. 14326 (1994). Federalism reservations, worded slightly differently to those proposed for CEDAW, were also made to the ICCPR. For example: "[T]o the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." 138 CONG. REC. 8071 (1992).

350. *See* Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEM. 393 (2002).

351. *2002 CEDAW Hearings*, *supra* note 339, at 127 (statement of Patrick Fagan, Fellow, Heritage Foundation); *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. Patrick F. Fagan, *How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty* (Heritage Found., Backgrounder No. 1407, 2001), *available at* http://www.heritage.org/Research/InternationalOrganizations/BG1407.cfm. Objecting to U.N. policies that create incentives for mothers to enter the workforce and leave their

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Those charges are predicated on disagreement with CEDAW's call for both women and men to take responsibility for the "upbringing and development of their children."[352] CEDAW does expect state parties to enable women to have access to a host of activities beyond family life. Moreover, because CEDAW defines discrimination to include any "distinction, exclusion, or restriction made on the basis of sex" that works an inequality in any field ("political, economic, social, cultural, [or] civil"[353]) its inquiries are far-reaching, seeking accounts of how gender affects safety, education, health, employment, recreation and sports, government benefits, and political power. From this perspective, the Heritage Foundation and other critics have correctly identified (if hyperbolically attacked[354]) CEDAW's challenge to a conception of women as obliged first and foremost to their households and to a conception of the United States as not required to account to other organizations or nations. If having to respond to questions is an affront to a nation's sovereignty, critics' concerns have a basis for their argument. Were the United States to ratify it, this country—like nations around the world—would be required to send its representatives to reply to questions by the twenty-three members of the CEDAW Committee about compliance with treaty provisions.

Further, opponents have understood that CEDAW's aspirations surpass the current requirements of federal constitutional law on gender equality.[355] Not only is affirmative action appropriate under CEDAW, but the definition of what constitutes inequality differs from current American constitutional law. CEDAW focuses on the purpose and effect on women of laws or actions rather than on the intent of a particular legal rule.[356] 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

children to be cared for by others, and noting that the "United Nations has become the tool of a powerful feminist-socialist alliance that has worked deliberately to promote a radical restructuring of society," the monograph called on Congress to protect against the dangers that the United Nations poses to the sovereignty of the United States. *Id.*

352. CEDAW, *supra* note 36, art. 5.

353. CEDAW, *supra* note 36, art. 1.

354. *See, e.g.*, Brett Schaefer & Patrick Fagan, *U.N. Treaty Targets Motherhood* (Heritage Found., Press Room: Commentary, May 13, 2002), http://www.heritage.org/Press/Commentary/ed051302a.cfm.

355. 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/FAX/Volume_5/faxv5n24.html.

356. *See* Ginsburg & Merritt, *supra* note 10 (providing a comparative analysis).

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old age.[357] Similarly, although the United States Supreme Court narrowly rejected an effort by Congress to give women victims of violence access to redress in federal courts,[358] resolutions of the United Nations frame violence as a "manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women" and as a "crucial social mechanism[] by which women are forced into a subordinate position compared with men."[359]

b. National Action Gaining Support for CEDAW at the Local Level

Concerned about the United States's reluctance to embrace CEDAW, the General Federation of Women's Clubs,[360] the Women's Institute for Leadership Development for Human Rights (WILD),[361] along with Amnesty International, many church groups, and other NGOs,[362] initiated a drive to have states and localities enact resolutions calling for the United States to ratify CEDAW.[363] Some one hundred and ninety civic, religious, educational,

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357. *See* CEDAW, *supra* note 36, 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).

358. United States v. Morrison, 529 U.S. 598 (2000); *see supra* note 109 and accompanying text.

359. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/48/49 (Feb. 23, 1994); *see also* Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19*, U.N. GAOR, 49th Sess., Supp. No. 38, U.N. Doc. A/47/38 (Jan. 29, 1992).

360. That federation, founded in 1899, has thousands of clubs in the United States and in more than twenty countries; its concerns include civic involvement and community service. *See* General Federation of Women's Clubs: About Us, http://www.gfwc.org/about_us.jsp (last visited Feb. 28, 2006).

361. This organization was founded in June of 1996, after the 1995 United Nations Fourth World Conference on Women, to help domestic application of human rights principles. *See* Women's Institute for Leadership Development for Human Rights (WILD), http://www.wildforhumanrights.org/about/index.html (last visited Feb. 28, 2006).

362. For example, in 1999, "the Church Women United and the United Methodist Women" joined other CEDAW supporters to give "10,000 individually handwritten letters to Senators" to obtain their support for ratification. *2002 CEDAW Hearings*, *supra* note 339, at 10 (statement of Rep. Lynn C. Woolsey).

363. 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) (1999), *available at*

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environmental, and legal organizations have built a coalition that provides model resolutions for localities to "recognize" equal rights, to "eschew all forms of discrimination on the basis of sex," and to endorse efforts to obtain U.S. ratification.[364] As of 2004, forty-four cities, eighteen counties, and sixteen states have passed or considered legislation relating to CEDAW,[365] with yet others contemplating action.

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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.

364. *See* CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN, *supra* note 339, at 16-17; 67-72.

365. *Id.* at 73. According to Billie Heller and Ellen Dorsey, Iowa City was the first to adopt such a resolution, doing so on August 1, 1995. *See* Iowa City, Iowa, Resolution No. 95-222 (Aug. 12, 1995); 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. Iowa City Resolution No. 95-222.

Locating the underlying documents is difficult because many municipalities' resolutions are not databased. Copies of materials cited in this footnote are on file with the Yale Law Library. Billie Heller, Sarah Albert, Rita Moran, and Paula Petrotta provided copies of materials in their files, some of which can also be found in published sources. Localities on record with resolutions supporting United States ratification of CEDAW and/or its underlying principles include (grouped alphabetically by state): Contra Costa County, Cal., Resolution No. 99/551 (Oct. 26, 1999); L.A., Cal., Resolution in Support of CEDAW (Mar. 15, 2000); Redlands, Cal., Proclamation: Convention in Support of Women's Rights (Jan. 19, 1999); San Bernadino, Cal., Resolution No. 2000-50 (Mar. 8, 2000); San Diego, Cal., Resolution No. R-98-964 (Mar. 17, 1998); San Jose, Cal., Resolution No. 68921 (June 15, 1999); Chi., Ill., United States Senate Urged To Ratify "Convention on the Elimination of All Forms of Discrimination Against Women" (May 12, 1999); Evanston, Ill., Resolution No. 41-R-97 (Aug. 18, 1997); Highland Park, Ill., Resolution No. R10-99 (Aug. 9, 1999); Portland, Me., Order No. 242 (March 15, 1999); Berea, Ohio, Resolution No. 99-28 (June 7, 1999); Cleveland Heights, Ohio, Resolution No. 69-1999 (May 17, 1999); Mayfield Heights, Ohio, Resolution No. 2000-46 (June 13, 2000); Middleburg Heights, Ohio, Resolution No. 1999-71 (June 24, 1999); Strongsville, Ohio, Resolution No. 1999-141 (July 7, 1999); Phila., Pa., Resolution No. 980148 (Mar. 12, 1998); Pittsburgh, Pa., Resolution Supporting the Ratification or Accession by the United States to the Convention on the Elimination of All Forms of Discrimination Against Women (Apr. 29, 1997); Burlington, Vt., Resolution Relating to the Adoption of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Apr. 28, 1997); Montpelier, Vt., Resolution Endorsing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Feb. 26, 1997); Spokane, Wash., Resolution No. 00-4 (Jan. 24, 2000); Fond du Lac, Wis., Resolution No. 7050 (Sept. 22, 1999); Madison, Wis., Resolution No. 56744 (Nov. 30, 1999); Milwaukee, Wis., Resolution Recognizing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (July 7, 1998).

Several states have introduced or passed resolutions calling for ratification. The materials located thus far include: S.J. Res. No. 30, 1992 Gen. Assemb., Feb. Sess. (Conn. 1992) (introduced); H. Con. Res. 23, 140th Gen. Assemb., 1st Sess. (Del. 1999)

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Most of those provisions are expressive or hortatory, calling for the United States to ratify CEDAW. Some local adaptations have varied the text of the model resolution to insist on either the propriety of local action or (echoing a theme of exceptionalism) the special role of America as a human rights leader.[366] For example, noting it was "the home of the Liberty Bell and Independence Hall," the City of Philadelphia asserted the "appropriate and legitimate role" that localities have in "affirming the importance of international law in our own communities as a universal norm and to serve as guides for public policy."[367] Burlington, Vermont went further, addressing "the greatly increased interdependence of the people of the world" and its understanding that "we are citizens of the world with responsibilities extending beyond the boundaries of our city, state, and nation, as demonstrated through [the] Sister Cities Program."[368]

Such "ratification" resolutions are the most common form of local engagement with CEDAW, but a few jurisdictions have done more, directly implementing some of CEDAW's precepts. San Francisco is the most prominent, making aspects of CEDAW its own domestic law by requiring reports on the role women play in departments responsible for Public Works, Adult Probation, Arts, Environment, and Juvenile Probation.[369] In 2003, San

(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); Resolution 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. (Wisc. 1999) (introduced). The Territory of Guam also issued a proclamation endorsing ratification. Proclamation No. 98-37, Territory of Guam (Apr. 23, 1998); *see also* CEDAW: TREATY FOR THE RIGHTS OF WOMEN, *supra* note 339, at 73-74.

366. *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").

367. Phila. Resolution No. 980148.

368. Burlington Resolution Relating to the Adoption of CEDAW.

369. *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 Feb. 14, 2006). As Emily

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Francisco's Commission on the Status of Women put forth a further action plan,[370] aimed at reviewing "federal, state, and local laws and public policies to identify systematic and structural discrimination against women and girls," to "[i]ntegrate gender into every city department to achieve full equality for men and women through the city-wide budgeting process," to "[i]ncrease[] opportunities for non-traditional and higher-paid employment for women," to develop "and expand work/life policies that impact[] women at all levels," to "[i]ncrease women's access to financial resources," and to increase protection for women's "bodily integrity," safety, and "well-being."[371] These goals 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.[372]

Efforts comparable to those in San Francisco are under way 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

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Murase, the Executive Director of the San Francisco Department on the Status of Women, explained in testimony aimed at persuading the New York City Council to enact a comparable ordinance, when first approached, the San Francisco Department of Public Works did not understand how its tasks implicated gender. Its leadership came to see that whether sidewalks were traversable by strollers or well lit affected women and men differently. *See 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. *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 (Wendy Chavkin & Ellen Chesler eds., 2005).

370. *See* SFGov, San Francisco Commission on the Status of Women, CEDAW Action Plan (2003), *available at* http://www.sfgov.org/site/cosw_page.asp?id=17146.

371. *Id.*

372. *See* The 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); 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).

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CEDAW."[373] In addition to pledging not to discriminate in employment, to protect women and girls from violence, to require police to focus on violence against prostitutes, and to "make funding decisions mindful of the need to treat people equally," Los Angeles also decided to launch "gender analyses, to determine what, if any, City practices and policies" could be improved.[374] Berkeley has a resolution putting its Board of Supervisors on record as supporting "local implementation of the underlying principles" of CEDAW.[375] The New York City Council held hearings in the spring of 2005 on a broader ordinance that would include aspects of CERD as well as of CEDAW,[376] and the General Assembly of Pennsylvania has called for hearings on how to review its laws to integrate "human rights standards."[377] Finally, in 2005, California's legislature passed legislation committing that state to implement the "principles underlying" CEDAW, but Governor Arnold Schwarzenegger vetoed it.[378]

2. *Sharing the Environment: The Mayors' Adaptation of the Kyoto Protocol*

Thus far, I have used conflicts over the roles of race and gender in social ordering as instances in which the specter of non-United States law prompts an insistence on sovereign prerogatives. This account could create a

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373. 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.*

374. *Id.* As of the summer of 2005, the city's Commission on the Status of Women (CSW) (a seven-member body, appointed by the Mayor and chartered in 1975) sent a questionnaire to three departments—the Department on Aging, the Convention Center, and the CSW itself—to assess whether gender was a facet of budget and policy planning in each agency. Telephone Interview with Paula Petrotta, Executive Dir., CSW (July 8, 2005).

375. Telephone Interview with Rita Moran, Lecturer on Human Rights, Univ. of Cal. at Berkeley (July 8, 2005); Berkeley, Cal., Resolution No. 1021-97 (Nov. 10, 1997); Berkeley, Cal., Proclamation in Recognition of International Women's Day (March 8, 2005) (on file with the Yale Law Library) (noting that Berkeley was the "third U.S. city to have taken this historic step" supporting the "integration" of CEDAW principles into its municipal code).

376. A CEDAW/CERD initiative was introduced in December of 2004. *See 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).

377. Gen. Assemb. Res. 144, 183d Leg. (Pa. 2003).

378. Assemb. B. 358, 2003-2004 Reg. Sess. (Cal. 2004); Governor's Veto Message to Assembly Bill 358 (Sept. 29, 2004), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0351-0400/ab_358_vt_20040929.html.

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misimpression that the turn to sovereignty is reserved for discussions about race and gender. But, as environmentalists, labor and trade specialists, and economists know well, anxiety about global influences has provoked an insistence on sovereignty in a host of contexts, from nuclear policy to global warming to social welfare. In sum, "[g]lobalization has changed the definition of what constitutes 'local issues.'"[379]

Therefore, a brief foray into another arena, environmental regulation, is appropriate to sketch how the themes developed in more depth above are replayed. Like the history of transnational human rights, environmental protection efforts began more than a century ago,[380] with a more recent touchstone being the 1972 Stockholm Conference that resulted in the Stockholm Declaration.[381] As in the U.N. Charter and UDHR, this Declaration includes recognition of both the transnational concerns of all and the interests of individual nations. "[T]he sovereign right [of nations] to exploit their own resources"[382] is stated along with a commitment to protect the "natural resources of the earth . . . for the benefit of present and future generations,"[383] and "the responsibility to ensure that activities within their jurisdiction . . . do not cause damage" to the environment beyond.[384]

By one count, in addition to the Convention on Biological Diversity and Framework Convention on Climate Change (UNFCCC), both agreed to in 1992,[385] about one thousand treaties, regional agreements, and bilateral documents aim to protect the environment and to create models for sustainable

379. WILLIAM B. STAFFORD, GLOBALLY COMPETITIVE REGIONS: WHAT SEATTLE IS LEARNING FROM THE REST OF THE WORLD 1 (1999).

380. *See* Joel B. Eisen, *From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law*, 32 U. RICH. L. REV. 1435, 1444-45 (1999) (describing regulations in the late nineteenth century on seal hunting and early-twentieth-century protection of wildlife).

381. 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 and Corr. 1 (June 16, 1972).

382. *Id.* princ. 21.

383. *Id.* princ. 2.

384. *Id.* princ. 21.

385. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143, *available at* http://www.biodiv.org/convention/articles.asp; U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, *available at* http://unfccc.int/essential_background/convention/background/items/1349.php; *see also* U.N. Conference on Env't & Dev., June 3-4, 1992, *Report of the United Nations Conference on Environment and Development*, U.N. Doc. A/Conf.151/26 (Aug. 12, 1992), *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

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development.[386] Borrowing from Charles Reich, a commentator described these many events as the "greening" of international law.[387] And, as with human rights efforts, issues of standards and enforcement abound, along with questions about the role of courts.

In December of 1997, a group of nations came together in Kyoto, Japan to address global warming. Their agreement, the Kyoto Protocol to the UNFCCC, created a framework, relying on certain timetables, to reduce greenhouse gas emissions.[388] The United States accounts for between a fifth and a quarter of the world's greenhouse gases.[389] In 1998, the United States signed the Protocol.[390] By 2001, eighty-four nations had signed the Protocol, and thirty-six had ratified it, but during that year President George W. Bush withdrew American support.[391] Other countries lent their support, and by February 2005 the Kyoto Protocol went into effect in the 141 countries that had ratified it.[392]

Many local officials in the United States do not share the President's views. Several cities, including Seattle and Salt Lake City, enacted ordinances aimed at conforming to the Protocol's targets for controlling local utility emissions. In March 2005, a group of ten mayors agreed to their own climate protection

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386. Eisen, *supra* note 380, at 1447; *see also* WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE (1987).

387. *See* Philippe Sands, *The "Greening" of International Law: Emerging Principles and Rules*, 1 IND. J. GLOBAL LEGAL STUD. 293 (1994).

388. 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. *See 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 (1999).

389. The President's speech withdrawing from the Kyoto Protocol uses the twenty percent figure. Remarks on Global Climate Change, 1 PUB. PAPERS 634 (June 11, 2001). The U.S. Mayors' Climate Protection Agreement states that the United States "with less than five percent of the world's population, is responsible for producing approximately 25 percent of the world's global warming pollutants." U.S. Conference of Mayors, U.S. Mayors' Climate Protection Agreement (June 13, 2005) [hereinafter Mayors' Agreement], *available at* http://usmayors.org/uscm/resolutions/73rd_conference/en_01.asp.

390. Kyoto Protocol, *supra* note 388.

391. *See U.S. Rejection of Kyoto Protocol Process*, 95 AM. J. INT'L L. 647, 647-49 (2001); Remarks on Global Climate Change, *supra* note 389 (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).

392. *See* Mayors' Agreement, *supra* note 389.

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program,[393] which was approved by the United States Conference of Mayors in June 2005 and, by February 2006, had received endorsements from more than 200 mayors.[394] That program, relying on "the Inter-Governmental Panel on Climate Change (IPCC), the international community's most respected assemblage of scientists,"[395] includes efforts 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.[396]

And, just as local engagement on environmental rights parallels human rights activism about equality, the opposition to transnational efforts also sounds familiar, arguing that American sovereignty is in danger. In 1998, the Committee to Preserve American Security and Sovereignty (COMPASS), a group of former government officials mostly affiliated with Republican administrations and apparently functioning together specifically to oppose the Kyoto treaty, issued *Treaties, National Sovereignty, and Executive Power: A Report on the Kyoto Protocol.*[397] That document, like a letter addressed a few months earlier to President Clinton,[398] warned against the Protocol. The arguments are akin to those President Bush would later make when withdrawing from the Protocol—that the science remained uncertain, that Kyoto's exemptions of certain countries undermined its use, and that the treaty wrongly imposed limits on the "legitimate exercise of US sovereign decision making."[399]

COMPASS—objecting to the actions of President Clinton—also returned to a theme of Brickerism by objecting to the expansion of presidential

393. Office of the Mayor of Seattle, Wash., Homepage for the U.S. Mayors Climate Protection Agreement, http://www.seattle.gov/mayor/climate (last visited Feb. 28, 2006).

394. *Id*; *see also* Eli Sanders, *Rebuffing Bush, 132 Mayors Embrace Kyoto Rules*, N.Y. TIMES, May 14, 2005, at A9 (describing the then-132 mayors in cities in thirty-five states that in total have more than twenty-nine million Americans, from "liberal" to "conservative" cities, joining a "bipartisan coalition" that was an "implicit rejection" of the national policy).

395. Mayors' Air Quality Letter, *supra* note 55.

396. *Id.*

397. 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. This report is hosted by the Regulatory Policy Center, which focuses on "the personal right to own and use property," as well as the "growing power and punitiveness of the Regulatory State." Regulatory Policy Center, http://jamesvdelong.com (last visited Feb. 28, 2006).

398. Letter from Richard Burt, Former Ambassador to Germany and Former Chief Arms Control Negotiator, et al., to President William Jefferson Clinton (Jan. 22, 1998), *available at* http://www.marshall.org/article.php?id=41.

399. *Id.*

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authority. As its report explained, the Protocol attempted to "convert decisions usually classified as 'domestic' for purposes of U.S. law and politics into 'foreign,'" thus limiting the powers of Congress, local governments, and private entities.[400] Further, 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."[401] And, 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."[402]

C. *Domesticating the "Foreign": The International Programs of the National Organizations of Governors, Mayors, and Cities*

Much of the discussion thus far has dealt with localities as singular entities, pursuing agendas that are sometimes driven by networks of activists. But officials of state and local governments are also members of national and international organizations. These governmental "interest groups" were formed during the twentieth century to protect localities from national encroachments, to forward municipal agendas in Washington, and to engender contacts for similarly situated individuals. With the nationalization and globalization of the economy, they have broadened their horizons.

These various organizations—the National League of Cities, the United States Conference of Mayors, the National Conference of State Legislatures, the National Governors' Association, and the National Commissioners on Uniform State Law—are conduits for border crossings, state to state and internationally.[403] While rarely directly involved in treaty ratification, they are, in the language of social movement theory, "norm entrepreneurs," using their institutional voices to shape policies and to define the parameters of their concerns. And, although some of their spokespersons described themselves as not involved in human rights issues,[404] today their dockets demonstrate the

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400. COMM. TO PRESERVE AM. SEC. & SOVEREIGNTY, *supra* note 397.

401. *Id.*

402. *Id.*

403. *See, e.g.*, GLOBAL NETWORKS, LINKED CITIES (Saskia Sassen ed., 2002); Diane E. Davis, *Cities in Global Context: A Brief Intellectual History*, 29 INT'L J. URB. & REGIONAL RES. 92 (2005); Darel E. Paul, *Re-Scaling IPE: Subnational States and the Regulation of the Global Political Economy*, 9 REV. INT'L POL. ECON. 465 (2002).

404. James A.R. Nafziger, *State Collaboration in United States Ratification of Human Rights Treaties*, 3 ILSA J. INT'L COMP. L. 621, 625 (1997) (describing the NGA as not involved with

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interconnections between economic development and human rights and between the global and the local. Thus, through what Saskia Sassen described as the "re-scaling"[405] of relationships and what I have discussed as examples of "federalism's options,"[406] a myriad of opportunities for import are presented.

Initially, many of these organizations organized to influence national policies as the federal government's reach expanded during the early part of the twentieth century.[407] More recently, these groups have turned to the global arena. They are entering into accords and forging links with other subnational entities around the world in a fashion that Earl Fry argues is beyond the ability of the national government to "control, supervise, or even monitor."[408] Much of the work is self-promotion for trade and tourism, but a small subset reflects concerns about human rights. Further, while most of the international activities involve missions, conferences, and exchanges, a few entail the development of policy agendas that produce resolutions and lobbying. Some of the resolutions are expressive, aimed at shifting national policy (akin to those described above on CEDAW), while others are programmatic, generating obligations such as the Mayors' Climate Control program.[409] Through their internationalization, what was once "foreign" becomes "domestic."

One example comes from the development of agendas of the National League of Cities (NLC), which emerged in 1964 from the American Municipal Association, an organization that had been formed in 1924 by representatives of ten cities.[410] *"National League of Cities"* has become shorthand in the

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human rights treaties and stating that the USCM described human rights as "national" issues that were not the focus of their "urban" organization).

405. Saskia Sassen, *Globalization or Denationalization?*, 10 REV. INT'L POL. ECON. 1, 6, 14-15 (2003).

406. Resnik, *supra* note 295.

407. *See* DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING 49-52 (1974); R. Allen Hays, *Intergovernmental Lobbying: Toward an Understanding of Issue Priorities*, 44 W. POL. Q. 1081 (1991). Haider has provided one marker: In 1967 the National Governors' Conference had a Federal-State Relations Office in Washington, D.C. with a staff of five and a budget of about a quarter of a million dollars; by 1972, that operation had twelve professionals and a budget of $400,000. HAIDER, *supra*, at 30-31; *see also* ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM 128-31 (1995) (tracking efforts to preserve federal funding and to generate new initiatives).

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

409. Some scholars have raised the concern that borrowing may result in ill-conceived reforms. *See, e.g.*, Dennis Muniak, *Policies that "Don't Fit": Words of Caution on Adopting Overseas Solutions to American Problems*, 14 POL'Y STUD. J. 1 (1985).

410. 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

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jurisprudence of the federal courts for a (short-lived) Supreme Court decision recognizing a locality's Tenth Amendment exemption from federal regulation.[411] But we should also learn to associate that name with energetic support for network-building, both local and global.[412]

An aspect that many will recognize is the Sister Cities Program, begun during the second half of the Eisenhower Administration as "people to people" diplomacy and that, with funding through federal grants, has grown into Sister Cities International (albeit with its home office in Washington and a board of Americans), linking 126 countries and 2500 communities worldwide.[413] In addition, through the NLC, leaders of cities regularly take "international study missions" to "study and learn from the practices and programs of other cities and cultures that may provide solutions" for problems here and to develop "sophisticated civic leadership . . . on international issues."[414] While much of that activity is framed around developing commerce and trade, it also includes attention to the provision of adequate housing and education as well as to "opportunity and inclusiveness" and respect for diverse cultures.[415]

Further, the NLC has pledged to deal with "inequalities in our cities."[416] One effort deals with the problem of institutional racism built into policies

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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: History of the National League of Cities, http://www.nlc.org/inside_nlc/about_nlc/792.cfm (last visited Mar. 2, 2006); *see also* DONALD L. JONES, STATE MUNICIPAL LEAGUES: THE FIRST HUNDRED YEARS (1999); Clifford W. Ham, *State Leagues of Municipalities and the American Municipal Association; An Experiment in Cooperation Among Municipal Officials*, 31 AM. POL. SCI. REV. 1132 (1937).

411. *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).

412. *See* FRY, *supra* note 408; 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 COOPERATING IN A GLOBAL ECONOMY (2002), *available at* http://pdf.dec.org/pdf_docs/PNACR090.pdf (outlining where localities can find funds for such work).

413. *See* Sister Cities International: Frequently Asked Questions, http://www.sister-cities.org/sci/aboutsci/faqs (last visited Feb. 16, 2006). NLC once 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.

414. STAFFORD, *supra* note 379, at 3-4.

415. *Id.* at 6-9.

416. *See* NAT'L LEAGUE OF CITIES, FY 2004 STRATEGIC PLAN UPDATE (2004), *available at* http://www.nlc.org/content/Files/StratPlanFY2004.doc (listing this as priority number eight for the NLC in fiscal year 2004).

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ranging from zoning to policing.[417] Another is a "Global Program on Women" that brings together women leaders to "advance the status of women as decision makers in government" and to advocate for "public policies that lead to gender equity."[418] Through its 2005 Resolution on Domestic Violence and International Human Rights Abuse, the NLC has also called for full funding of the federal Violence Against Women Act as well as for "efforts which support the abolition of international systematic cultural and state-sanctioned physical, sexual and psychological human rights abuse and oppression of women throughout the world."[419] The United States Conference of Mayors (USCM), which in the early 1970s took up the question of the Vietnam War,[420] issued a parallel resolution noting that "women all over the world" had been "subordinated[] and continue to suffer from long-standing control and abuse of their bodies and their lives."[421]

The NLC 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 (begun in 1913), the World Federation of United Cities, and Metropolis.[422] The UCLG describes local governments as "key" forces for promoting human rights.[423] It identifies itself as the "main local government partner of the United

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417. Nat'l League of Cities, Reducing Racism and Achieving Racial Justice in America's Cities and Towns, http://www.nlc.org/resources_for_cities/programs___services/382.cfm (last visited Mar. 2, 2006).

418. James Brooks, *NLC Leaders Help Launch Global Women's Program*, NATION'S CITIES WKLY., Oct. 14, 2002, at 4 (describing the launch meeting in the Dominican Republic under the auspices of the International Union of Local Authorities and also noting that the NLC has a "Women in Municipal Government" suborganization helping to shape American policies).

419. Nat'l League of Cities, Resolution No. 2005-36, Domestic Violence and International Human Rights Abuse (2004) (on file with author).

420. In 1971 the USCM called for a pullout from Vietnam and then reversed that stance the following year. *See* John Herbers, *Mayors Demand Pullout by 1972*, N.Y. TIMES, June 17, 1971, at 1; John Herbers, *Mayors, in Shift, Back War Policy*, N.Y.TIMES, June 22, 1972, at 1.

421. U.S. Conference of Mayors, Resolution on Domestic Violence and International Human Rights Abuse (2004), *available at* http://www.usmayors.org/uscm/resolutions/72nd_conference/csj_09.asp.

422. *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 Feb. 28, 2006).

423. United Cities and Local Governments, Equality, http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=23 (last visited Mar. 2, 2006) (discussing the UCLG coordination of local governments' contribution to the U.N. Women's Conference on Beijing +10); *see also* Donald J. Borut, *Local Officials from Around the World Meet in China*,

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Nations" as well as an entity committed to protecting local governments' authority.[424]

The theoretical literature on the centrality of cities in the global world explains why the NLC and the USCM would be more likely to be active globally than other national organizations representing local actors. But the websites and materials from various state-based organizations suggest that they too are globalizing. The National Governors Association (NGA), begun at the invitation of President Theodore Roosevelt in 1908, first focused on trade, but by the end of World War II had broadened its agenda to support American entry into the United Nations, NATO, and the Marshall Plan.[425] Today, its stated purposes include "state leadership in a global economy,"[426] environmental protection, and improved immigration policies.[427] The National Conference of State Legislatures (NCSL) also has a department devoted to international programs that bring legislators from abroad together with those in the United States.[428]

Closer to "legal" home, the National Conference of Commissioners on Uniform State Laws has become an official observer at the United Nations Commission on International Trade Law (UNCITRAL), which was established in 1966 to address disparities in national law that are obstacles for trade; harmonization, when possible, is preferred.[429] The National Center for

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NATION'S CITIES WKLY., June 27, 2005, at 5, *available at* http://www.nlc.org/content/Files/NCW062705.pdf.

424. United Cities and Local Governments, About Us, http://www.cities-localgovernments.org/uclg/ (follow "About Us" hyperlink) (last visited Feb. 28, 2006).

425. GLENN E. BROOKS, WHEN GOVERNORS CONVENE: THE GOVERNORS' CONFERENCE AND NATIONAL POLITICS 1-29 (1961); John M. Kline, *The Expanding International Agenda for State Governments*, 57 ST. GOV'T 2 (1984).

426. NAT'L GOVERNORS ASS'N, A GOVERNOR'S GUIDE TO TRADE AND GLOBAL COMPETITIVENESS 5 (2004), *available at* http://www.nga.org/cda/files/AM02TRADE.pdf.

427. The NGA has called on the federal government not only to provide funds for health care and education, but also to protect borders while "maintain[ing] the values that make us a beacon of democracy, human rights, and civil rights." National Governors Association, Policy Position: Immigration and Refugee Policy (2004), http://www.nga.org (follow "Policy Positiitions" hyperlink, then follow "Immigration and Refugee Policy" hyperlink).

428. Exchanges include training of staff and legislators in other countries, study tours, the development of long term "institutional relationships" between Mexico and American legislatures, projects focused on Africa and the Middle East, and participation in the Parliamentary Conference of the Americas, a program of information sharing for those in the Western Hemisphere that began in Quebec. *See* National Conference of State Legislatures, International Programs: International Legislative Exchange Programs, http://www.ncsl.org/public/internat/exchange.htm (last visited Mar. 9, 2006).

429. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, DIVERSITY OF THOUGHT—UNIFORMITY OF LAW—A CENTURY OF SERVICE: ANNUAL REPORT 2002-2003, at 8-12 (2003),

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State Courts (NCSC), with grants from the United States Agency for International Development, has shaped an international agenda "to help developing countries reform and improve their justice system," with such projects in sixteen countries.[430] And the Judicial Conference of the United States has a standing committee on International Judicial Relations, which regularly provides for exchanges among federal judges and jurists on foreign and international courts.[431]

In short, the global is local, with importation and influence coming by way of the individual acts and the interrelated activities of leaders of municipalities, legislatures, and courts around the United States.

D. The Legality of Local Transnationalism: Domestic and Foreign Affairs

Return then to the legality of local-global interactions. Many of the transnational projects of organizations like the NLC, the USCM, and the NCSL are innocuous from a legal perspective (albeit, I have argued, predicates to norm migration and domestication). But sometimes, states or localities create new laws, such as California's provision of information and recovery rights to Holocaust victims, Massachusetts's prohibition on purchasing goods from Burma, and New York's refusal to recognize claims of foreigners if their home nations do not reciprocate. Those are now the "classic" examples[432] of what the Supreme Court has found to be beyond state jurisdiction through its doctrine of foreign affairs preemption, a rule that is either extrapolated from the Constitution or represents federal common law doctrine.

Justice Douglas, writing for the Court in *United States v. Pink*, offered an expansive version—stating that the power "over external affairs is not shared by the States; it is vested in the national government exclusively."[433] That 1940 decision displaced state laws regarding an executive agreement that the

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available at http://www.nccusl.org/nccusl/pdf/2003anrep.pdf; United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/index.html (last visited Feb. 28, 2006).

430. NAT'L CTR. FOR STATE COURTS, COURTING THE FUTURE: 2004 ANNUAL REPORT 15 (2004), *available at* http://www.ncsconline.org/D_Comm/images/04AnnualReport.pdf.

431. See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 2004, at 17-18 (2005), *available at* http://www.uscourts.gov/library/dirrpt04/2004AnnualReport_Full.pdf.

432. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); United States v. Pink, 315 U.S. 203 (1942); *see also* Miami Light Project v. Miami-Dade County, 97 F. Supp. 2d 1174 (S.D. Fla. 2000) (enjoining a local ordinance requiring recipients of cultural grants to affirm that they had no business with Cuba and holding that the requirement was greater than federally imposed limits).

433. *Pink*, 315 U.S. at 233.

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President had entered into as part of the recognition of the Soviet Union. In two more recent decisions—*Crosby v. National Foreign Trade Council* (addressing Massachusetts's efforts to refuse to purchase products from Burma)[434] and *American Insurance Ass'n v. Garamendi* (addressing California's efforts to require companies doing business there to disclose information from the Holocaust era),[435] the Court again insisted on national control. All three decisions raise questions about whether action by the Executive alone (as contrasted with Executive/congressional interactions) suffices as the basis for the federal courts to find state lawmaking displaced. *Crosby* involved a federal statute setting forth sanctions and authorizing the President to calibrate the need and amount,[436] whereas in *Garamendi*, the Court relied on executive action that had less of a mandate from Congress,[437] as was also the case in *Pink*.[438] In short, as the doctrine has developed, the Court has shown special solicitude to the Executive and its authority to provide "one voice"[439] in foreign policy.

But how is one to characterize San Francisco's CEDAW ordinance or the mayors' climate programs? Both collapse the global into the local, turning problems that could have been dealt with as foreign policy by the national level (e.g., by entering into treaties) into domestic policies about how cities run themselves. Nonetheless, might they be challenged, assuming plaintiffs can overcome jurisdictional constraints (such as the political question and standing doctrines[440]) and that either private or public actors have sufficient incentive to bring claims?[441]

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434. *Crosby*, 530 U.S. 363; *see* Resnik, *Categorical Federalism*, *supra* note 50, at 668-69; Edward T. Swaine, Crosby *as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001).

435. 539 U.S. 396 (2003).

436. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-121, 3009-166 to -167 (1996).

437. Congress had created a national commission on Holocaust claims, and the Executive had negotiated settlements with the German government, but the language of both the commission's charter and the settlement could have been read to permit concurrent state disclosure rules. *See Garamendi*, 539 U.S. 396, 439-43 (Ginsburg, J., dissenting).

438. *Pink*, 315 U.S. at 233.

439. *Crosby*, 530 U.S. at 381.

440. *See, e.g.*, Deutsch v. Turner Corp., No. CV 00-4405, 2000 WL 33957691 (C.D. Cal. Aug. 25, 2000) (dismissing a claim based on a California slave labor recoupment statute on the ground that it was a political question), *aff'd on other grounds*, 317 F.3d 1005 (9th Cir. 2003), *amended by* 324 F.3d 692 (9th Cir.). In both *Crosby* and *Garamendi*, the local programs were challenged by entities alleging economic injury.

441. Paul L. Posner, *The Politics of Preemption: Prospects for the States*, 38 POL. SCI. & POL. 371 (2005) (focusing on how to craft state agendas to avoid federal intervention).

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Do local resolutions urging the United States to ratify CEDAW violate the "one voice" rule? What about San Francisco's own CEDAW ordinance or legislation or the vetoed California law that would have committed that state to implementing the "principles underlying" CEDAW?[442] Has the Court's recent recognition of the broad reach of federal power in cases interpreting Commerce Clause powers created yet additional bases for preemption?[443] And what about the expansive executive authority acknowledged by courts in issues ranging from terrorism to the application of obligations to inform consulates when one of their nationals is detained as a criminal defendant?[444] In short, given that the Court has limited, in the name of federalism, congressional production of rights that constrained states yet has also licensed Executive power to narrow the purview of local and state authorities, what range of local action remains?

Both the local CEDAW actions and the climate initiatives can be distinguished from the kinds of state actions preempted thus far. Several of the decided cases had implications for relations with particular countries—the Soviet Union, Burma, Germany, and Austria. In contrast, San Francisco and the mayors of many cities have imposed new obligations on themselves. As to the expressive efforts of localities urging the national government to ratify CEDAW or protect against global warming, such hortatory commentary has long been customary and protected by the First Amendment, for it is plainly political speech aimed at changing ideas and policies. Furthermore, a growing literature raises questions about how exclusive federal authority ought to be. One set of critiques is based on the historical claim that state activity in foreign affairs has long been tolerated. Another is grounded in the fear of too much federal executive or judicial power.[445] Yet another argues that the federal

442. Assemb. B. 358, 2003-04 Reg. Sess. (Cal. 2004); Governor's Veto Message to Assembly Bill 358 (Sept. 29, 2004), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0351-0400/ab_358_vt_20040929.html.

443. *See* Gonzales v. Raich, 125 S. Ct. 2195 (2005) (upholding congressional authority to override California's law permitting the use of marijuana for medical purposes); Granholm v. Heald, 125 S. Ct. 1885 (2005) (concluding that federal commerce powers trump state authority under the Twenty-First Amendment to regulate interstate shipment of wines).

444. Medellin v. Dretke, 125 S. Ct. 2088 (2005) (dismissing the writ of certiorari as improvidently granted because, after certiorari was granted, a federal executive order had been issued requiring compliance by Texas with the ruling of the International Court of Justice on obligations under the Vienna Convention and because new state legislation was pending).

445. *See* Bradley & Goldsmith, *supra* note 279, at 820-21, 873-76; Halberstam, *supra* note 333, at 1015-17 (surveying the debates); *see also* Alfred C. Aman, Jr., *Federalism Through a Global Lens: A Call for Deferential Judicial Review*, 11 IND. J. GLOBAL LEGAL STUD. 109 (2004) (arguing that, in light of the pace of change and the need for innovation, variation is appropriate).

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government depends on state resources to advance foreign policy agendas, and therefore that state and local involvement is useful to the nation.[446]

But federal displacement of local obligations could come not only through foreign affairs preemption but also from claims that other aspects of national power have been breached. For example, in addition to providing for disclosure of insurance policies in pre-War Europe, California had also created a cause of action for torts perpetrated by American enemies during World War II.[447] Even before *Garamendi*, that provision was held to intrude on the exclusive power of the federal government to resolve war claims.[448] If, through adoption of CEDAW principles, localities were to require affirmative action programs beyond those now permitted under federal law, then challenges would be possible—not on the basis of foreign affairs exclusivity but based on a claimed violation of Fourteenth Amendment equality principles. Thus far, however, the few localities that have enacted implementation ordinances have used CEDAW as an injunction for self-interrogation to learn, through "gender analyses," whether the programs, policies, and employment practices of their own government take women and men into account.

In sum, the discussion now focused on the legitimacy of judicial importation should take into account how "foreign" precepts make their way into American law through ports of entry other than courts. The legal literature needs to address the incorporation or absorption of transnational or non-American law through regulation, administrative action, and legislation shaped by government actors nationally, locally, and inter-regionally.[449] In doing that

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446. Halberstam, *supra* note 333, at 1040-47; Scott A. Silverstone, *Federal Democratic Peace: Domestic Institutions and International Conflict in the Early American Republic*, 13 SEC. STUD. 48, 51-54 (2004) (arguing, based on several case studies, that the political structure of federalism imposed limits on warmaking by the federal government).

447. *See* CAL. CIV. PROC. CODE § 354.6(b) (West 1982 & Supp. 2005) (providing jurisdiction in state superior courts for any "Second World War slave labor victim" or his or her heirs against "any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate"). The statute made such claims available through December 2010, without regard to other applicable statutes of limitation. *Id.* § 354.6(c).

448. *See* Deutsch v. Turner Corp., 324 F.3d 692, 716 (9th Cir. 2003) (holding that California Civil Procedure Code section 354.6 was unconstitutional). In a case brought by a Korean national against a Japanese company, the California intermediate appellate court relied on a related but different basis in finding that section 354.6 was unconstitutional. *See* Taiheiyo Cement Corp. v. Superior Court, 117 Cal. App. 4th 380 (Ct. App. 2004) (finding that the 1951 peace treaty between the United States and Japan preempted the statute).

449. One example is a 1995 memorandum from the Field Operations Office of the Immigration and Nationalization Service instructing its officers that, when evaluating gender-based claims, they should take guidance from "the framework provided by existing international

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analytic work, appreciation of United States federalism should animate presumptions of concurrency of state and federal action, rather than exclusivity of national authority.

V. IMPORTING AND EXPORTING

A. *Changing the United States or CEDAW?*

I have mapped a conflict in the United States about what role non-United States law should play and which legal actors should erect barriers or welcome exchanges. From the perspective of someone living in the United States and hoping for an expansive understanding of human rights, importation has great attraction. A good deal of innovation—exemplified in this discussion by women's rights—is coming from outside the United States as women not only gain recognition as rights-holders but also change the meaning of rights and the content of obligations. Examples run the gamut of human activity, from new rules for elections to ensure that women will serve in national and local parliaments in more than token numbers[450] to new definitions of war crimes that include rape and sexual slavery.[451]

I have also sketched a multitude of methods of incorporation, arguing that local engagement has special appeal in rebutting the claimed "democratic deficit" of international lawmaking. But a less time-consuming and resource-intensive means of importation is for the United States to become party to international conventions such as CEDAW and, further, to give such laws domestic application. Not surprisingly, as described above, many organizations

human rights instruments and the interpretation of these instruments by international organizations" such as CEDAW. Memorandum from Phyllis Coven, Office of Int'l Affairs, Dep't of Justice, to All INS Asylum Office/rs & HQASM Coordinators, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995), *in* 72 INTERPRETER RELEASES 781 app. I (1995) (describing its provenance as "a natural and multi-faceted outgrowth of a set of gender guidelines issued by the UNHCR in 1991, the 1993 Canadian gender guidelines, a proposed set of guidelines submitted by the Women Refugees Project (WRP) of the Harvard Immigration and Refugee Program . . . and recent . . . U.S. caselaw"). This memorandum was cited in *Fisher v. INS*, 79 F.3d 955, 967-68 (9th Cir. 1996) (Noonan, J., dissenting).

450. *See, e.g.*, Françoise Gaspard, *The French Parity Movement*, *in* HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 55, 55-66 (Jytte Klausen & Charles S. Maier eds., 2001).

451. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (recognizing acts of sexual and gender violence as among the most serious crimes under international law); ANNE TIERNEY GOLDSTEIN, CTR. FOR REPROD. LAW & POLICY, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME UNDER INTERNATIONAL LAW (1993).

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and people advocate that the United States should do so.[452] As President Jimmy Carter explained when calling for the Senate to ratify CEDAW, the 1976 ratification of the Convention on the Political Rights of Women served as an American expression "that human rights in general and women's rights in particular are matters of legitimate concern to the international community and are not subjects with exclusively domestic ramifications."[453]

The efforts to persuade the Senate to ratify CEDAW rely on two kinds of arguments. The first, drawing on American "exceptionalism" in the "beacon of liberty mode,"[454] argues both the awkwardness of standing apart from this great human rights effort and the need to participate so as to press other nations "for fuller compliance."[455] The second is that the United States is already CEDAW-compliant in that our law on women's equality mirrors that of CEDAW.[456]

I share proponents' sense of poignancy about American distance from CEDAW and their understanding of the congruence between American aspirations for equality and those of CEDAW. Further, I agree about the often unfair characterizations of the import of CEDAW, simultaneously posited as ineffective and radically transformative[457] and constantly misrepresented as

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452. *See supra* note 365. Proponents of ratification on the national level include Senators Joseph Biden, Barbara Boxer, and Russell Feingold, *see 2002 CEDAW Hearings, supra* note 339, at 4, 7, 18, as well as many members of the House of Representatives and organizations such as the ABA, the United Methodist Church, the League of Women Voters, and many others. *Id.* at 56, 85-86, 97-98.

453. Carter CEDAW Signing, *supra* note 342, at 2716.

454. *See* Mohlo & Wood, *supra* note 64, at 4.

455. *See, e.g., 2002 CEDAW Hearings, supra* note 339, at 11 (statement of Rep. Lynn Woolsey); *id.* at 49 (statement of Ambassador Juliette Claggett McLennan); *see also* Phila., Pa., Resolution No. 980148, at 2, 3 (Mar. 12, 1998) (on file with the Yale Law Library) (arguing that "as one of the oldest continuous democracies in the world it is an embarrassment that the United States has not ratified The Convention," and that lack of U.S. involvement "compromises our credibility and deprives the international community of our vast experience in combating discrimination"). A variant of this argument distinguishes the idea of lending the United States's voice and symbolic support from that of providing expertise abroad, as well as the signaling effect of participation in addressing domestic problems. *See 2002 CEDAW Hearings, supra* note 339, at 26-27 (statement of Rep. Juanita Millender-McDonald).

456. *See 2002 CEDAW Hearings, supra* note 339, at 34 (statement of Harold Hongju Koh, Professor, Yale Law School) ("The provisions are entirely consistent with the letter and the spirit of the Constitution, both State and Federal."); *id.* at 50 (statement of Ambassador McLennan) (stating that ratifying CEDAW "will *not* require any change in U.S. laws. As this committee noted in its report in 1994, U.S. laws are already consistent with the standards in the treaty.").

457. *2002 CEDAW Hearings, supra* note 339, at 63-64 (statement of Harold Hongju Koh) (identifying this "central contradiction of the position taken by the con speakers").

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unfriendly to families.[458] Were the United States to join, even with reservations, it could facilitate transformations from within through a process that (as Jennifer Nedelsky has described) prompts interrogation of one's own commitments by comparing them to the stances of others.[459] Even joining with reservations has the utility of acknowledging shared norms while providing time and the means of exchange to develop a deeper convergence.[460] Ratification could also symbolize a different domestic understanding of America's equality provisions. Finally, I understand (indeed, have given evidence here of) the utility of a strategic and normative posture aimed at making "foreign" law less foreign.

However, I do not believe that the current law of the United States fits so easily within all of CEDAW's provisions. As was noted in President Carter's 1980 message on CEDAW, while the "great majority of the substantive provisions" are consistent with United States law, "certain provisions . . . raise questions of conformity."[461] The intervening years have not made that observation obsolete.[462] My hope for the United States's ratification is based on a view that CEDAW would be a source of change.

A risk exists, however, that rather than CEDAW changing the law of the United States, the United States could change the law and practices of CEDAW. Walking humbly with others has not been a hallmark of American foreign or international policies. As Paul Carrington has recently documented, American lawyers of all affiliations have a long tradition of "spreading the word" through missionary efforts.[463] Whether welcomed or rejected as liberating, democratic, evangelical, arrogant, imperialist, or colonialist,

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458. A clear listing of and response to these attacks was provided by Harold Koh. *Id.* at 34, 37-39; *see also* CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN, *supra* note 339, at 61-62 (rebutting the claim that CEDAW is opposed to Mother's Day).

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

460. *See* Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. (forthcoming 2006), *available at* http://ssrn.com/abstract=700981.

461. Carter CEDAW Signing, *supra* note 342, at 2716.

462. *See 2002 CEDAW Hearings*, *supra* note 339, at 19 (statement of Sen. Christopher Dodd) (arguing both that America needs to "set an example for other nations to follow" and that "[t]hrough the treaty's ratification, the United States would be forced to take necessary measures to introduce paid maternity leave without the loss of employment seniority, merit, or benefits" because "CEDAW has great domestic and global implications").

463. CARRINGTON, *supra* note 64. Carrington's thesis is that most of these efforts have been failures and that the claimed interest in enabling democracy has often served to mask economic and political self-interest.

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American leaders have not been shy in seeking to convince other nations to follow their lead.

Examples of what Karen Knop has described as this "empirical asymmetry" are plentiful.[464] American involvement comes with the threat of domination, as was evident during the drafting of the U.N. Charter, the shaping of the UDHR, the efforts to bring other conventions into force,[465] the formation of the ICC, and the creation of programs on climate change.[466] Of late, the United States's complaints against the United Nations have intensified.[467] In the spring of 2005, the United States representative to the meeting in honor of the tenth anniversary of the 1995 Beijing Conference on Women tried to limit the reach of the renewal of commitments made ten years earlier.[468] She insisted that the commemorative declaration "did not create international legal rights or legally binding obligations on States under international law."[469]

Americans are therefore not the only ones who might have "fears of the foreign." Were the United States to ratify CEDAW, this country could attempt to impose its narrower approaches to equality law, with the effects felt more by those abroad than by those at home. To do so, the United States could seek to influence the appointment of individuals to serve on the expert committee that promulgates general policy interpretations and that assesses countries' reports.[470] American opponents of CEDAW have attacked the committee's

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464. Knop, *supra* note 235, at 522 (discussing the lack of attention paid to what role U.S. courts might play in exporting law in the guise of transnational discourse).

465. ANDERSON, *supra* note 42, at 226-31 (describing Secretary of State John Foster Dulles's opposition to a Convention on the Political Rights of Women, as well as efforts to limit the creation of a Covenant on Political and Civil Rights).

466. *See* Andrew C. Revkin, *G-8 Draft on Global Warming Is Weakened at U.S. Behest*, N.Y. TIMES, June 18, 2005, at A9 (describing the Bush Administration's success in removing calls for prompt action on global warming in a statement to be issued by leaders of major industrial countries).

467. *See* American Sovereignty Restoration Act of 2005, H.R. 1146, 109th Cong. § 2(a) (2005) (calling for repeal of the United Nations Participation Act of 1945).

468. In March of 2005, the United Nations's Commission on the Status of Women called on "all sectors of civil society . . . to fully commit themselves and to intensify" their efforts to implement Beijing's Platform. *See* Chairperson of the Comm'n on the Status of Women, *Declaration Issued by the Commission on the Status of Women at its Forty-Ninth Session*, U.N. Doc. E/CN.6/2005/L.1 (Mar. 3, 2005).

469. Press Release, Econ. and Soc. Council, Full Implementation of 1995 Beijing Action Plan for Women Essential to Achieving Global Anti-Poverty Goals, Women's Commission Declares (Mar. 4, 2005), *available at* http://www.un.org/News/Press/docs/2005/ wom1496.doc.htm.

470. Arguments for joining include that ratification would entitle the United States to nominate an expert and "wield even greater influence." *2002 CEDAW Hearings*, *supra* note 339, at 28 (statement of Rep. Juanita Millender-McDonald); *see also id.* at 64 (statement of Harold Hongju Koh) (stating, as a person who "actually appeared before one of [the] treaty committees," that

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approach to a host of issues—complaining that its views of prostitution are too permissive and that its focus on enabling women to enter the wage market harms family values.[471]

The CEDAW committee—operating without an American expert—has thus far seemed undaunted, with recent directives calling for "temporary special measures"[472] and with its support of the 2000 Optional Protocol authorizing direct action by individuals against nation-states. Both approaches contrast with current United States law that clips the capacity of entities to undertake affirmative action programs and of individuals to sue government actors and their delegates.[473] Yet, as I sketch below by reference to recent American work on trafficking, in arenas of special concern for women, American engagement in international efforts may be less rights-expanding than American internationalists hope. Absent changes in constitutional jurisprudence supported by federal legislation taking different directions from those of the last decade, American restrictive precepts may be the ones to migrate abroad.

B. Proliferating Longstanding American Anti-Trafficking Methods

In contrast to the distance maintained by the United States from CEDAW and the Kyoto Protocol, the United States has been an active participant in one set of international efforts: those aimed at trafficking in persons. Beginning in the early part of the twentieth century, the United States joined efforts to end

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"particularly once U.S. experts were put on those committees, those committees have done a good job").

471. This refrain is longstanding. *See 2002 CEDAW Hearings*, *supra* note 339, at 12 (statement of Rep. Jo Ann Davis) (claiming it was "simply inexcusable" that "the CEDAW committee has actually called upon China to decriminalize prostitution, rationalizing that it is often the result of poverty" and "it commended Greece for decriminalizing prostitution"). Once again, opponents of CEDAW can fairly view CEDAW as less focused than some Americans would like on punishing prostitution. *See, e.g.*, L.A., Cal., Ordinance 175735, at 4 (Dec. 24, 2003), *available at* http://clkrep.lacity.org/councilfiles/00-0398-S2_ORD_175735_02-08-2004.pdf (noting that "[p]rostitutes are especially vulnerable to violence because their legal status tends to marginalize them," pledging to investigate violence against prostitutes, and promising to "develop and fund projects to support prostitutes who have been subjected to violence and to prevent these acts").

472. Comm. on the Elimination of All Forms of Discrimination Against Women, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures* (2004), *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html.

473. Correctional Servs. Corp. v. Malesko, 534 U.S. 61 (2001); Alexander v. Sandoval, 532 U.S. 275 (2001); *see also* Resnik, *supra* note 273, at 231-72.

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what was then called (disquietly) the "white slave trade."[474] The focus was on prostitution, with some seeking abolition and others regulation;[475] international agreements of the first decade of the twentieth century sought to stem the transportation of women across borders.[476]

In 1910, relying on the international accords as well as its powers under the Commerce Clause, Congress followed (jurisdictional) suit, enacting domestic legislation known for its sponsor as the Mann Act to make illegal the transportation inside the United States across state lines of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[477] Like the congressional innovations in the 1994 Violence Against Women Act, a challenge followed. But unlike the 2000 holding that Congress had breached its constitutional bounds,[478] the Supreme Court upheld the Mann Act even as to interstate transportation not claimed to involve commercialized sex but only incidental to "immoral purposes."[479] As the Court explained soon thereafter, the "importation of alien women and girls for the purpose of prostitution 'and any other immoral purpose' . . . [permitted] an alien woman to live in concubinage with the person importing her," thus threatening the family—"the sure foundation of all that is stable and noble in our civilization."[480]

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474. White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)); WHITE SLAVE TRAFFIC, H.R. REP. NO. 61-47, app. A (1909) (reproducing the 1904 "Agreement between the United States and other powers for the repression of the trade in white women"). *See generally* ALAIN CORBIN, WOMEN FOR HIRE: PROSTITUTION AND SEXUALITY IN FRANCE AFTER 1850, at 280-300 (Alan Sheridan trans., 1990).

475. CORBIN, *supra* note 474, at 280-300.

476. *See* International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 (providing, "within legal limits," that contracting governments create means to centralize information about "*traite des blanches*" and attempt to apprehend individuals at ports of entry, return the women and girls to their countries of origin, and provide facilities for them in the interim); International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.S.F.P. 244 (noting that "retention, against her will, of a woman or girl in a house of prostitution" was a grave problem, but nonetheless "exclusively a question of internal legislation").

477. Mann Act § 2.

478. United States v. Morrison, 529 U.S. 598 (2000).

479. Hoke & Economides v. United States, 227 U.S. 308, 318 (1913).

480. Caminetti v. United States, 242 U.S. 470, 486-87 (1917) (citations omitted); *see also* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756 (2006).

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America's twenty-first-century efforts against certain forms of trafficking both domestic and international are continuous with this earlier work.[481] Today, the United States is a party to the U.N.'s Convention against Transnational Organized Crime, supplemented by two protocols, one called a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[482] and the other addressed to the smuggling of migrants.[483] These documents define trafficking to include the "exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery."[484]

To understand the mechanisms for exportation of American anti-prostitution policy through its work on trafficking, knowledge is needed of some of the provisions of the 2000 Trafficking Victims Protection Act (TVPA), the domestic counterpart to the international protocols.[485] The TVPA creates an interagency Task Force, chaired by the Secretary of State, to monitor and combat trafficking by facilitating "cooperation among countries of origin,

481. The Mann Act remains in use. It was amended in 1986 to make its terms gender neutral, has been supplemented by anti-pornography legislation, and has been upheld over objections that federal power could not reach the private and local production of graphic images. *See* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5, 100 Stat. 3510, 3510 (codified at 18 U.S.C. § 2251 (2000)) (limiting Mann Act prosecutions to cases involving interstate transportation for prostitution or "any sexual activity for which any person can be charged with a criminal offense" – thereby linking a federal violation with those of state laws governing sexual behavior). The United Nations had shifted to gender neutral language some three decades earlier. *See* Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 272, 282 (entered into force July 25, 1951). *See* Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65 (1998).

482. The United States signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons in December 2000. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 40 I.L.M. 335 (entered into force Dec. 25, 2003), *available at* http://www.unodc.org/unodc/en/trafficking_protocol.html.

483. The United States also signed the Protocol Against the Smuggling of Migrants by Land, Sea and Air in December 2000. *See* Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 40 I.L.M. 384 (entered into force Jan. 24, 2004), *available at* http://www.unodc.org/unodc/crime_cicp_signatures_migrants.html.

484. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 482.

485. Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000)); *see also* Trafficking Victims Protection Reorganization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified at 22 U.S.C.A. §§ 7101-7110 (West 2004 & Supp. 2005) and 18 U.S.C.A. § 1595 (Supp. 2005)).

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transit, and destination" to prevent and prosecute traffickers.[486] Congress instructed the President to undertake "international initiatives to enhance economic opportunity for potential victims"[487] and to fund programs "in foreign countries to assist" victims of trafficking to reintegrate or to resettle.[488] Congress also imposed "minimum standards" on other countries and provided that the United States not give "nonhumanitarian, nontrade-related foreign assistance" to governments that had neither met the standards nor made "significant efforts" to do so.[489] The legislation mandates that the Secretary of State report on compliance and authorizes the President to withhold various forms of aid.[490]

The Act provides victims with the possibility of remaining in the United States—an indication that trafficked women are seen as victims rather than criminals.[491] But eligibility is limited to victims of certain severe forms of trafficking who cooperate with law enforcement officials in particular ways.[492] Data from 2003 described some 374 "continued presence requests" made by the Department of Homeland Security for trafficked persons who helped in prosecutions; no data specify how many the United States has helped to repatriate.[493]

The enthusiasm of lawmakers for anti-trafficking work coheres with the reluctance to ratify CEDAW. In both contexts, anxiety about "foreign" decisionmaking and about significant changes in women's roles animates decisions. Entering into agreements with foreign nations to oppose trafficking is a method of working with outsiders to maintain borders.[494]

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486. 22 U.S.C.A. § 7103(d)(4) (West 2004).

487. *Id.* § 7104(a).

488. *Id.* § 7105(a)(1).

489. *Id.* § 7107(a).

490. *Id.* § 7107.

491. *See* Susan Tiefenbrun, *Sex Slavery in the United States and the Law Enacted To Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 324-27 (2005).

492. To obtain such benefits, a person has to have been subjected to statutorily defined "[s]evere forms of trafficking," 22 U.S.C. § 7102(8) (2000), and meet other requirements, including "willingness to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking," *id.* § 7105(b)(1)(E)(i)(I). A person's ability to obtain a visa to stay depends both on a person's cooperation and on whether such cooperation is deemed necessary by the Department of Justice. *Id.* § 7105(b)(1)(E)(ii).

493. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 258 (2004), *available at* http://www.state.gov/documents/organization/34158.pdf. As to funds, the 190 anti-trafficking programs in 2003 involved $72.2 million affecting 92 countries. *Id.* at 259.

494. Legislation such as the Mann Act was inspired by "distinct strains of anti-urbanism, of xenophobia and opposition to continued large-scale immigration, and even of anti-Semitism."

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Such laws were not only aimed at the protection of women but also at the enforcement of ideas about the moral propriety of certain forms of sexual behavior.[495] Specifically targeted is prostitution, with American funding for international health issues tied to anti-prostitution efforts.[496] In 2005, for example, Brazil decided to "forgo up to $40 million in American support" because of the Bush Administration's demands that "all foreign recipients of AIDS assistance must explicitly condemn prostitution."[497] The 2003 amendments to TVPA keep that pressure on. To obtain funding for anti-trafficking programs, grant recipients must affirm that their programs do not "promote, support, or advocate the legalization or practice of prostitution."[498] More generally, the United States stresses criminalization as the primary response to trafficking,[499] with the list of "best practices" in the State Department's 2004 Trafficking Report centered on prosecution and control.[500]

ALEXANDER BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 229 (1984); *see also* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 202-21 (2d ed. 1997); FREDERICK K. GRITTNER, WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW 127-34 (1990). Further, according to one analysis, a high percentage of cases prosecuted under the Mann Act between the 1910s and 1940s involved interracial couples, interstate adulterers, and breaches of promise to marry. DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 139-97 (1994).

495. *See also* Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS. 17 (2004) (raising concerns that a global focus on violence against women has both progressive and regressive effects on women's opportunities).

496. BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004), *available at* http://www.state.gov/documents/organization/38901.pdf. Protests against that approach come from a "diverse group of public health, human rights, faith-based and community-based organizations" worldwide who believe that current restrictions on anti-HIV/AIDS funds that require condemnation of prostitution undermine the best practices of public health and risk endangering lives. *See* Letter from the Center for Health and Gender Equity et al., to President George W. Bush (May 18, 2005), *available at* http://www.genderhealth.org/pubs/20050518LTR.pdf.

497. *See* Larry Rohter, *Prostitution Puts U.S. and Brazil at Odds on AIDS Policy*, N.Y. TIMES, July 24, 2005, at A3.

498. 22 U.S.C.A. § 7110(g)(2) (West 2004); *see also* U.S. DEP'T OF STATE, *supra* note 493, at 15 (focusing on how "prostitution fuels trafficking").

499. U.S. DEP'T OF STATE, *supra* note 493, at 26-28 (explaining the criteria for minimum standards for ranking of countries by the United States, including law enforcement efforts such as investigation and prosecution, convictions and sentences, as well as monitoring of compliance and progress).

500. *Id.* at 33-34. The international best practices include discouraging sex tourism by informing hotel and airline customers about new laws against trafficking, intercepting potential victims at airports, encouraging cooperation among countries, combating prostitution,

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Other forms of intervention, including major efforts to address the poverty and limited mobility of so many women's lives, are not encouraged under this rubric.[501] Nor are concerns about how anti-trafficking efforts can, in general, inhibit women's ability to travel.[502] Further, some NGOs have raised concerns that too little attention is paid to forms of forced labor other than sex.[503] And no tolerance is accorded the view that prostitution can also be understood as "sex-work."[504]

In short, America's contemporary anti-trafficking laws continue to incorporate concerns about foreign influences, mobile women, disruption of families, and inappropriate sexual behavior of women. This assessment does not minimize the harms addressed nor denigrate the contributions made to prevent transporting people far from their homes to force them into labor and enslavement. Yet the ability to enact such provisions stems in part from the congruence between trafficking laws and anxiety about sexuality in the United States,[505] as well as from presumptions that individuals, and particularly women, do not wish to leave their countries of origin nor use their bodies in sexualized ways to gain income.[506] Given the American track record with the

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battling trafficking through education programs that encourage families to keep children at home, confiscating funds from trafficking proceeds to fund investigations, sharing information, and protecting victims.

501. *See, e.g.*, Miller, *supra* note 495, at 31-34 (addressing the "missing . . . theory of exploitation"); *see also* IN MODERN BONDAGE: SEX TRAFFICKING IN THE AMERICAS 21-28, 295-96 (David E. Guinn & Elissa Steglich eds., 2003); INT'L LABOR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOUR (2005).

502. Audrey Macklin, *Dancing Across Borders: Exotic Dancers, Trafficking and Immigration Policy*, 37 INT'L MIGRATION REV. 464 (2003) (describing women's work as including "sex, childcare and housework" and examining trafficking policies that put at risk some women's access to safe and legal migration).

503. *See* Press Release, Human Rights Watch, U.S. State Department Trafficking Report Missing Key Data, Credits Uneven Efforts (June 6, 2002), *available at* http://hrw.org/english/docs/2002/06/06/usint4023.htm.

504. *See, e.g.*, Marjan Wijers, *European Union Policies on Trafficking in Women*, *in* GENDER POLICIES IN THE EUROPEAN UNION 209 (Mariagrazia Rossilli ed., 2000) (providing an overview of differing approaches taken by the member states of the EU); *see also* Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 18-21 (2002) (objecting to the presumption that all forms of prostitution are undesirable).

505. *See, e.g.*, Tony Carnes, *"Odd Couple" Politics: Evangelicals, Feminists Make Common Cause Against Sex Trafficking*, CHRISTIANITY TODAY, Mar. 6, 2000, at 24.

506. *See* MARJAN WIJERS & LIN LAP-CHEW, TRAFFICKING IN WOMEN: FORCED LABOUR AND SLAVERY-LIKE PRACTICES IN MARRIAGE, DOMESTIC LABOUR AND PROSTITUTION 217-249 (1999); Barbara Sullivan, *Trafficking in Women: Feminism and New International Law*, 5 INT'L FEMINIST J. POL. 67, 73-79 (2003).

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TVPA and its own campaigns related to women, health, sexuality, and families, were the United States to join CEDAW, the precepts surrounding the Convention could change more than would American equality law.

In addition to the substantive impact America could have on policy, a procedural aspect of participation in CEDAW needs to be addressed. In discussing of the development of human rights jurisprudence by judges and by local legislators, I noted the utility of the visibility of their work, which because it is transparent, can therefore be readily engaged by proponents and opponents.[507] Further, when judges address non-United States law, they may seek to affect the meaning of particular provisions but they have little means of compelling decisionmakers in other countries to pay attention, let alone to revise their rulings in light of American interpretations. Judicial power relies on the persuasiveness of the rationales, augmented by the degree to which judicial networking and academic commentary spread their words. Were American jurists to speak directly in their opinions about non-American law, their counterparts in other countries may follow or depart (remember the list of the dozen or so nouns – such as harmonization and translation – now in vogue to describe those interactions) from these interpretations, and all of us can watch and comment.

In contrast, were American executive branch officers to participate in activities such as CEDAW, their influence would be less visible, for example, as they affected the selection of experts, the choice of committee members to take primary responsibility for reviewing individual countries' reports, and the formulation of implementation policies. Unless ratification of CEDAW is accompanied by obligations of transparent reporting by American officials about why and how they have sought to affect the interpretation of its provisions, those officials would have a wide berth and little accountability.

Institutional effectiveness is one dimension of "legal process" school approaches seeking to allocate tasks based on the competency of different institutions. Here I commend another measure – taking into account the degree to which the importation and exportation of law is accessible to the public when deciding whether to have preferences about which actors serve as norm importers/exporters. Judicial and legislative importation (both national and local) offer more prospects for transparency than does delegation to the executive – absent a reconfiguring of the obligations of that branch.

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507. This aspect of adjudication is fragile, particularly in the United States. *See* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 819-41 (2004).

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VI. THE RISKS OF ROMANTICIZING THE LOCAL AND THE FOREIGN

Because the contemporary debate has posited the international comparative exercise as a source of liberalism that welcomes judicial elaboration and enforcement of rights, I have focused on the expansion of rights through various transnational efforts, such as CEDAW and the Kyoto Protocol, that are innovative when compared to facets of American law. Yet, under the domestic regimes of many nations, women and the environment have sometimes made more progress. As Justice Scalia cautioned in *Roper*, foreign innovations are not intrinsically rights-expanding.[508]

Moreover, many commentators criticize international bodies and domestic governments for their failures in responding to acute problems, such as the pandemics of AIDS and of hunger, as well as to the sadly ordinary violence,[509] poverty, and illiteracy that lace women's lives around the world.[510] Indeed, several of the countries that have ratified CEDAW are identified with consistently oppressive conditions for women.[511] Further, international institutions and law have only begun to think about the intersecting forms of discrimination and, according to many commentators, continue to marginalize programs focused on women.[512]

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508. Roper v. Simmons, 125 S. Ct. 1183, 1227-29 (2005) (Scalia, J., dissenting). His discussion includes non-American law with different abortion and different search and seizure protections. *See also* Cleveland, *supra* note 7, at 99 (describing the problem as "rights-diluting").

509. *Domestic Violence Against Women and Girls*, INNOCENTI DIG., June 2000, at 2-3.

510. Seventy percent of the world's poor are women, and women are "less well nourished than men, less healthy, more vulnerable to physical violence and sexual abuse." MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 1 (2000). *See generally* U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE WORLD'S WOMEN 2005: PROGRESS IN STATISTICS (2005) (describing efforts to improve understanding the status of women's health, safety, work, and education); U.N. POPULATION FUND (UNFPA), STATE OF WORLD POPULATION 2004, at 7, 29-35 (2004) (discussing problems of health care and noting that some important changes have occurred at the country level but that both victimization and marginalization persist); U.N. RESEARCH INST. FOR SOC. DEV., GENDER EQUALITY: STRIVING FOR JUSTICE IN AN UNEQUAL WORLD (2005) (assessing the uneven progress, ten years after Beijing).

511. The ratification of CEDAW was accompanied by a notably high number of reservations, bespeaking the constrained willingness of many countries to subscribe to all of CEDAW's parameters. *See* William A. Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & L. 79 (1997).

512. *See* Hilary Charlesworth, *Concepts of Equality in International Law*, *in* LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 137, 143-47 (Grant Huscroft & Paul Rishworth eds., 2002) (arguing that the international legal system does not address the intersection of different forms of discrimination); Knop & Chinkin, *supra* note 97, at 556-82 (exploring "generations" of equality claims and international law's limitations).

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Similarly, while I have mapped the local initiatives attempting to bring transnational insights home, activism at that level does not inevitably fall on the "progressive" side of a ledger. CEDAW proponents in the 1990s have gone to local legislatures, but so did Bricker activists in the 1950s.[513] They succeeded in 1954 in the Texas State Senate, which passed a resolution petitioning Congress to submit the Bricker amendment to the states for ratification.[514] Since the 1960s, mobilization by conservative groups has wrought an impressive transformation now well chartered by social scientists.[515] 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"[516] have had a significant impact,[517] with recent examples including bans on gay marriages and legislation to limit access to abortions.[518]

Turning to the national agendas that I have discussed, today they are largely conservative, but progressives once dominated, shaping the New Deal and the so-called third Reconstruction. Moreover, with the fifty states comes an array of positions. The famous federalism cases—*Printz*, *Lopez*, *New York*, *Morrison*, and now *Medellin*—are all instances in which state actors can be found on both sides, for and against the petitioning litigants, either guarding state prerogatives or supporting national action.[519]

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513. *See 1953 Bricker Amendment Hearings*, *supra* note 195, at 25-32 (reproducing letters from local organizations and individuals, all in support of Bricker).

514. *See* S. Con. Res. 1, 53d Leg., 1st Sess. (Tex. 1954). A version is reproduced in HOLMAN, *supra* note 201, app. at 173-76.

515. *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). Many of these movements attack internationalists as socialists (or communists), anti-religious, and anti-family. Even the demise of the Soviet Union has not eliminated some of those tropes. In the 2002 hearings on ratification of CEDAW, Christopher DeMuth of the American Enterprise Institute for Public Policy Research argued that "CEDAW . . . is like the old Soviet constitution." *2002 CEDAW Hearings*, *supra* note 339, at 144.

516. MCGIRR, *supra* note 515, at 12.

517. *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").

518. *See* FRANK, *supra* note 34, at 92-101, 192-93 (discussing the long history of populist movements rife with anti-intellectualism).

519. *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 of Amici Curiae States Colorado, Idaho, Kansas, Montana, Nebraska, South Dakota, Virginia, and Wyoming, *Printz*, 521 U.S. 898 (Nos. 95-1478 & 95-1503).

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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 Bricker amendment hearings. Today, the ABA plays a leadership role in promoting transnational efforts to enhance human rights, including urging ratification by the United States of CEDAW.[520] The NLC, now generating women's global leadership networks,[521] was also the organization that campaigned against federal regulation of workers' benefits and minimum wages.[522] Moreover as the National Association of Attorneys General took stances supportive of regulation, a subgroup, a Republican National Association of Attorneys General, has spun off.[523] Political scientists discussing the idea of "capture" have dozens of case studies to cite, as all genres of jurisdiction offer opportunities for those with the wherewithal and insight to use them.

Thus, neither the kind of jurisdiction nor the territorial space occupied by a polity produces rights of a particular kind. Renouncing a claim of a "jurisdictional imperative," I am likely to disappoint nationalists and federalists, sovereigntists and internationalists alike. Jurisdictions do not make rights, but people do—through collective action and repeated iterations, some democratic and some not.[524] Further, that work proceeds without the capacity to be self-contained. Promoters of nation-states have relied on the conceit of boundaries as they forged governments during a period of world history in which that level of governance seemed able to offer a set of services and protections for those within its borders. The impulse to assert a robust persona for the nation-state and bright lines of jurisdictional competencies stems from

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Another thirteen states joined in an amicus filing on behalf of the respondent. See Brief of the States of Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, and Wisconsin Amici Curiae in Support of Respondent, *Printz*, 521 U.S. 898.

520. *See supra* note 452.

521. *See* Brooks, *supra* note 418; *see also* John Nichols, *Cities for Progress: Urban Archipelago: Progressive Cities in a Conservative Sea*, NATION, June 20, 2005, at 13, 14 (arguing that cities are central forces for rights expansion).

522. *See* JONES, *supra* note 410, at 79.

523. *See* Alison Mitchell, *G.O.P. Attorneys General Unite To Push an Agenda of Restraint*, N.Y. TIMES, June 22, 1999, at A1; *see also* Republican State Leadership Committee, Mission, http://www.rslconline.com/mission/index.html (last visited Mar. 3, 2006) (describing its mission as "helping to elect conservative state leaders" and "building a Republican majority of state attorneys general"). The Democrats have created a parallel organization. *See* Gary Young, *State A.G. Races Enter a New Era*, NAT'L L.J., Nov. 4, 2002, at 1.

524. *See* BENHABIB, *supra* note 33.

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a fear, fairly grounded, that with border blurring comes a loss of identity.[525] But if America ever had a period that could be called its heyday (pick any one), it was always permeated by ideas and peoples from abroad. Just as individuals constantly defy the immigration laws to enter the United States illegally, so law seeps in—acknowledged or not.

Once norm entrepreneurs let go of an assumption that any one level of power—the international, the transnational, the national, or the local—can be an ongoing source of any particular political stance, they have to understand the necessity to work at multiple sites. That is costly and time-consuming, even as it may be generative of democratic practices and enable shifting understandings as communities compare their own judgments with those of others. Such multiplicity is a source of opportunity, as gaps in governance and alternative governments are spaces in which all power-seekers, be they entrenched or newly fabricated, try to gain toe-holds. Jurisdiction, from this perspective, functions as a form of oppression, as an obstacle to reform, and as a source of opportunity for those seeking to redefine rights that will require dislodging long-entrenched definitions of the bounded roles assigned to women, men, and governments.

As a consequence, the 2004 congressional bills to prevent federal judges from using foreign sources with which I began are not simply wrongheaded (from the perspective of nonisolationists) or unconstitutional (from the perspective of separation of powers) or to be celebrated (from the perspective of their proponents). They are unworkable. One cannot prevent judges from "relying on" or "employing" non-United States law because, inevitably, judges—and all of us—are influenced and affected by, and in some sense "rely on" or "employ," judgments from abroad.

525. *See* Alexander Somek, *Stateless Law: Kelsen's Conception and its Limits* (Univ. of Iowa Coll. of Law, Research Paper No. 05-15, 2005), *available at* http://papers.ssrn.com/abstract_id=708304.

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