PART VII

State, Nation, World

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What's Federalism For?

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The word *federalism* does not appear in the text of the U.S. Constitution. This fact may come as a surprise, given that the American Revolution is said to have invented this form of government and that the U.S. Supreme Court has come to use the term federalism as an explanation of why Congress, or the executive, or states do—or do not—have certain kinds of power.

The Constitution does, however, create a federal structure in which states are the linchpin. States are the source of senators, members of the House of Representatives, and, via the Electoral College, the president. The Constitution also recognizes states' lawmaking powers, which are separate from those of the national government. States can structure their own court systems, legislatures, and executive branches. Further, states can make their own laws, even if their rule making is at odds with those of other states and the national government. The result is a complex, redundant, and in some ways deliberately inefficient form of government, celebrated for separating powers, respecting local autonomy, and generating diverse practices about how to order interdependent and connected legal, political, social, and economic regimes.

But the diversity that federalism engenders is also constrained. The predicate proposition is that some basic commitments are so foundational as to permit no deviation. The perennial issue is specifying what

national norms trump local choice. Thus, although federalism may seem to be a dry facet of political theory, the Supreme Court's federalism docket repeatedly features many of the pressing and politically freighted topics of a given era.

The present is no exception. Decisions in the late twentieth and early twenty-first centuries parsed the constitutional clauses regulating commerce, providing equal protection, and giving some immunity to states from lawsuits, as the Court decided questions such as whether Congress can authorize individuals to seek money damages from states for violating federal rights to fair labor standards (it can't),[1] for violating federal protections against discrimination based on age or disability (it can't),[2] or for violating rights to take family leaves (it can).[3] Other famous federalism cases have involved a state's power to execute people who committed crimes when under age eighteen (prohibited),[4] a state's capacity to ban the import of liquor from out-of-state producers (also prohibited),[5] and a state's authority to limit its own purchase of goods from Burma, where laborers work in horrid conditions (again, prohibited).[6]

The Ideology of Separate Spheres

In federalism opinions, the decisions typically posit states to be singular actors, sometimes in competition but rarely understood to act in concert. Further, the Supreme Court often speaks in essentializing terms, as though certain categories of law belong intrinsically to separate spheres that are naturally governed by what we have come to call "state" or "federal" law but which did not have those labels until several decades after the United States was founded.[7] For example, the Court has intervened to prevent federal "interference" with state governance of tort, family law, crime, and education. Yet, at other points, the Court has preempted state lawmaking, even when states are engaged in activities that could also be categorized as traditionally theirs, such as protecting consumers from commercial fraud.[8]

The Court's weaving back and forth demonstrates the unworkability of its categorical enterprise. The flip-flops have been particularly vivid since the late 1980s. What were once nationally regulated income supports and speed limits on highways became areas claimed better suited to state governance. And, while education and marriage were once specially identified as within state prerogatives, national laws (with titles such as No Child Left Behind[9] and the Defense of Marriage Act[10]) now impose federal regulations.

The Progressive Potential of Interdependent Realities

The actual autonomy—of states vis-à-vis each other or the nation, and of states and the nation vis-à-vis the world—is vastly overstated. The Constitution itself recognizes that states may join together in compacts sanctioned by Congress.[11] Twentieth-century examples include the Tennessee Valley Authority and New York's Port Authority. Further, under the aegis of the National Conference of Commissioners on Uniform State Laws, representatives of states meet to draft laws that are then brought to state legislatures, which independently adopt the same provisions, perhaps with modifications, on issues ranging from extradition to commercial law. Many federal laws, in turn, rely on state implementation, prompting political scientists to use the metaphors of a marble cake,[12] picket fences,[13] and matrixes[14] to capture the interdependencies of local, state, and national governance.

But even those terms no longer suffice, as technology and globalization further interrupt a tidy narrative of federalism. Forms of jurisdiction bending are everywhere, as private sector nongovernmental organizations (NGOs) seek to bring about translocal changes that range from bans on abortions, same-sex marriage, or immigration to the regulation of handguns and caps on greenhouse gases. Further, subnational and transnational collectives regularly defy conventional federalism's assumptions that interactions are either horizontal (state to state) or vertical (nation to states or cities). State and federal judges join forces to deal with lawsuits involving harms from mass torts and environmental hazards that respect no jurisdiction lines. Executive officials of state and local governments work in conjunction with their counterparts elsewhere as they formulate standards to apply around the country.

A new institutional infrastructure reflects these changes through the development during the twentieth century of national organizations of local officials (such as the National League of Cities, the U.S. Conference of Mayors, and the National Governors Association). These translocal organizations of government actors (which are private organizations deriving political capital from being composed of public officials or employees) help to weave common agendas for cities and states on topics ranging from trade and antitrust to the environment and personal liberties. They regularly cross national borders as well, such that issues once characterized as foreign affairs can become matters of domestic obligations. While political scientists have focused on what they term special interest groups ("SIGs") and public interest groups ("PIGs") as

well as NGOs, less attention has been paid to the structural and political import of these translocal organizations of government actors, which I think are aptly denoted "TOGAs" to capture the civic roots and agendas of these entities.[15]

This translocalism ought to prompt progressive Americans to reassess attitudes toward federalism. Progressives need to reread the history of the United States to remember that the abolition of slavery was nurtured at the state level before gaining national currency, and that women voted in states (Wyoming was the first that lasted in 1869) some fifty years before getting the national franchise. Moreover, the protection of twentieth-century rights, from welfare and employment to access for the disabled, depends heavily on protection at the state level. Of course, states have also been sites of radical racism and nativism. One needs thus to be keenly aware that no jurisdiction is intrinsically generative or oppressive, and those seeking to make good on constitutional promises of equality and liberty need to be both fans and skeptics of federalism and of nationalism.

The Freight of Federalism

Federalism in the United States has a painful history. The nation was founded on a constitutional agreement to split "the atom of sovereignty"[16] and thereby to enable the survival of slavery. States claimed a sovereign prerogative to determine which persons were entitled to the sanctity of their bodies and the fruits of their labors. The Civil War represented a victory of force rather than a shared moral imperative. While Reconstruction aimed briefly to implement some promises of equal treatment, backlash and retrenchment followed, putting into place multiple forms of subordination of blacks.

During the middle of the twentieth century, national policies shifted. Responding to the Depression, two world wars, the needs of a national economy, and then renewed commitments to equality, all three branches of the federal government pressed for enhanced national power. "States' rights" and "federalism" became euphemisms for assertions of freedom from national regulation and, in many instances, for the provision of less equality, less access to well-being and safety, and fewer protections for black individuals. Even after *Brown v. Board of Education* nationalized one aspect of education policy by banning segregated schools, state leaders opposed national interference at other sites of segregation, such as housing and the criminal justice system.

Federalism continues to be used to constrain various forms of equality claims. In 2000, a five-person majority in *United States v. Morrison*[17] held that Congress lacked the power to redress violence against women by giving victims the right to seek money damages from their assailants through lawsuits in federal court. According to the opinion's author, Chief Justice William Rehnquist, the problem of violence against women was "truly local" rather than "truly national."[18] Similarly, when efforts are made to convince the United States to join international human rights conventions, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[19] opponents rely regularly on their conceptions of U.S. federalism to argue that foreign influences ought not disturb either the democratic processes represented by local governance or the dominion of states over interpersonal relations.

This freighted history has prompted many progressives to look to the national government to bring about new understandings of rights and social welfare. Such faith in national elaborations has sometimes been rewarded. In the nineteenth century, vindication came through the Civil War, the aftermath of which produced amendments to the Constitution and civil rights remedies in federal courts. In the twentieth century, New Deal legislation focused on the regulation of national markets and the provision of social benefits while, in the 1960s and 1970s, congressional mandates prohibited discrimination in employment, voting, housing, and credit, thereby shaping a Second Reconstruction. In addition, new kinds of rights came into view through the development of national standards for clean air, clean water, and the protection of endangered species. Prompted by social activists and joining with Congress and the executive branch, the Supreme Court shared in this elaboration of rights. The Fourteenth Amendment was reread to prevent certain kinds of discrimination based on sex, and the Bill of Rights came to be seen as curbing the power of state prosecutors, police, and judges.

Federalism Revisited: A Complex Past and Present

But during the latter part of the twentieth century, the national arena became much less hospitable to many rights-seekers. Opponents of the particular substantive powers exercised and of the accrual of power to the national government shaped their own social movement, flying the banner of federalism and calling for power to return to the states. Relying in part on claims that states were the natural holders of power and that

federal authority was constitutionally suspect, this social movement has succeeded on many metrics. The national commitment to progressive rights enhancement (i.e., openness to redistribution and to recognition of status inequalities) has waned, as administrations with different agendas and Congresses with other aspirations have come to power.

Further, because the two political branches nominate and confirm life-tenured judges, many of those selected for that branch are of the view that federal courts' enforcement of certain kinds of rights is illicit. The national government under the presidency of George W. Bush became increasingly committed to deregulation and privatization, as it also reduced the transparency of governance practices and campaigned to limit the obligations and liabilities of public and private sector actors. One technique of particular import for constitutionalists is the erosion of the jurisdiction and remedial powers of federal judges.[20] Concurrent with the narrowing of federal rights has come the preemption of personal rights protected under state laws. Federal judges have read statutes to preclude state-based claims and thus constricted the remedies that had been available to tort victims and to consumers.

It is thus time for progressives to look again at the federalist structure and to reassess a narrative that assumes that national leadership alone has produced the rereading of the Constitution to embrace rights-holding by women and men of all colors. States and localities have been and are important sites of social change. While the Internet has facilitated the ease of connections across localities, transjurisdictional human rights work (of all political stripes) has a long history of coordinated action. That work began with eighteenth-century international efforts to end slavery and enhance women's rights and continues under the contemporary nomenclature of human rights. Today's translocalism and transnationalism run the political gamut as they embrace issues from environmental protection and climate control to the protection of family values and of individual liberties to own property and guns.

Translocal Transnationalism

One contemporary example involves the Convention on the Elimination of All Forms of Discrimination Against Women, entered into force in 1981. This convention has been ratified by 185 countries, but not

the United States. Opponents to ratification recognize that, in some respects, CEDAW is more expansive than current interpretations of U.S. constitutional guarantees of equal protection. CEDAW is focused on impact, rather than discriminatory intent, and its precepts apply to private as well as public actors. Further, counter to the current retrenchment on affirmative action in the United States, CEDAW encourages such "temporary measures" to respond to women's subordination in the "political, social, economic, and cultural fields."[21]

Although the United States has yet to ratify CEDAW, a few cities have adopted aspects of it as local law. For example, reflecting principles of CEDAW, San Francisco requires reports on the role that gender plays in the delivery of municipal services, employment practices, and budget allocations. The goal is to understand "systematic and structural discrimination" against women and girls.[22] This kind of analysis is what the United Nations, the Council of Europe, and the Commonwealth Secretariat all call "gender mainstreaming," which is aimed at ensuring that all policy decisions are made with attention to their effects on both women and men.[23]

The decision by San Francisco to adopt CEDAW measures needs to be understood as not simply a "local" initiative undertaken by a notably progressive community. Rather, San Francisco's provisions are the outgrowth of a social movement that has formed around CEDAW. More than 150 civic and religious organizations built a coalition to provide model resolutions for localities to adopt to combat sex-based discrimination. As of 2004, forty-four cities, eighteen counties, and sixteen states have legislation relating to CEDAW. Most of those provisions are expressive, calling upon the national government to ratify the convention. But, as illustrated by San Francisco, a few jurisdictions have done more, incorporating these precepts as local law.

A second example of local interventions generating self-imposed obligations comes from the U.S. Conference of Mayors Climate Protection Center. That project responds to the national government's refusal to participate in the Kyoto Protocol on Climate Change. In the spring of 2005, a group of 9 mayors from a diverse set of cities agreed to their own climate protection program.[24] After that resolution gained approval by the U.S. Conference of Mayors, more than 900 mayors representing some 80 million people joined the effort. Thus, while at a formal level, only the U.S. Senate can ratify a treaty, at the subnational level, the principles of the Kyoto Protocol have been adopted around the United States.[25]

Translocalism through Transnational Organizations of Government Actors: The Roles of TOGAs

The local interest in CEDAW and the Kyoto Protocol results from networks built through transjurisdictional organizations of government officials and employees. Organizations such as the National League of Cities, the U.S. Conference of Mayors, the National Conference of State Legislatures, the National Governors Association, and the National Conference of Commissioners on Uniform State Laws are conduits for border crossings, city to city, state to state, and transnationally.

In many respects, these organizations are artifacts *of* U.S. federalism. They were formed during the twentieth century as government-based interest groups to protect localities from national encroachments and to forward municipal agendas in Washington. With the nationalization and globalization of the economy, they have broadened their horizons. They are, in the language of social movement theory, "norm entrepreneurs," using their institutional voices to shape policies and define the parameters of their own concerns. But unlike classic NGOs or the SIGs and PIGs in the political science literature, these TOGAs—private organizations of public officials—straddle public and private sectors.[26] Further, they are now forging links to other national and subnational entities around the world in a fashion beyond the ability of the national government to "control, supervise, or even monitor."[27]

Judicial Crossings of Federalism's Jurisdictional Borders

Boundary bending does not only occur through the actions of local executives of state governments. State and federal judges, presumed to be landlocked, are also actively involved in practices sometimes described as "judicial federalism," which reflect the interdependencies of federal and state court systems.

Global trading, national and transnational companies, national law firms, the Internet, and a population in which millions move annually do not fit into territorial boxes; persons and activities do not belong either singularly to one state or exclusively to any one national government. Pressures from large-scale aggregated litigation, such as environmental litigation or mass torts, prompted some of this innovation. While formally based either in state or federal court, participants in these cases often aspire to global peace—a settlement that includes all pending cases, whether filed in state or in federal courts. In other kinds

of cases, incentives to coordinate come from prisoners' filings from cross-jurisdictional issues in criminal, immigration, and bankruptcy cases, and from efforts to regulate attorneys.

During the 1980s, federal and state judges began to cross jurisdictional lines simply to talk. In 1990, the Conference of Chief Justices and the Judicial Conference of the United States authorized the creation of Federal-State Judicial Councils, resulting in 1992 in the first-ever national conference aimed specifically at bringing state and federal judges together. In various parts of the country, judges of both kinds of courts set up regular meetings to address shared problems—from how to transfer prisoners to how to deal with mass torts. The consequences of judicial federalism became visible through the press, law reviews, and occasionally case law. Despite the formal statements of statutes and doctrine (that federal and state judicial systems are distinct, with few mechanisms for interjurisdictional consolidation), informally, federal and state judges have co-ventured. For example, federal and state judges in charge of the Brooklyn Navy Yard asbestos cases literally sat in the same room, jointly convening a "state and federal court" and ruling together on issues. In the *Exxon Valdez* oil-spill litigation, federal and state judges coordinated scheduling and discovery. On the criminal side, the cross-designation of federal and state agents and prosecutors makes permeable the lines between state and federal crime enforcement.

We Are All Federalists Now

This brief overview has revealed the need to reevaluate attitudes toward localism and nationalism in U.S. constitutional law. Take the National League of Cities, whose name is the shorthand in the jurisprudence of the federal courts for a Supreme Court decision recognizing a locality's (short-lived) Tenth Amendment exemption from federal regulation of fair labor laws.[28]

In addition to equating the National League of Cities with local prerogatives, we should also associate that name with energetic support for network building, both local and global, and with a nascent equality agenda. In the 1950s during the Cold War, the National League of Cities developed the Sister-Cities program aimed at people-to-people diplomacy. More recently, it has created projects to reduce racism and to promote women as decision makers in government, locally and globally. In 2005, the National League of Cities called for full funding of the federal Violence Against Women Act as well as "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."[29] The organization also raised concerns about federal use of the USA PATRIOT Act in a resolution arguing that its "sweeping law enforcement and intelligence gathering powers . . . would dilute, if not undermine, many basic constitutional rights," and the NLC has called for "equal treatment and due process for all immigrants."[30]

State constitution writers themselves have ventured abroad. The legislative history of New Jersey's 1947 constitutional amendment to recognize women's equality refers to the attention paid at the United Nations to women's rights and the worldwide demand for equal rights.[31] Puerto Rico's 1951 Constitution, inspired by the United Nations' Universal Declaration of Human Rights, protects individual "dignity," as does the Constitution of Montana, which in 1972 also incorporated that language.[32]

The Legality of Local Transnationalism

Many of the transnational projects of organizations like the National League of Cities enable law's migration. They domesticate various non-U.S. precepts or create interactions across borders in a manner that has few economic effects and relatively low visibility. Some measures are more evocative—such as calling for an end to the use of land mines or the ratification of CEDAW. But sometimes, states or localities do more—for example, by creating rights of recovery for war victims, banning the purchase of goods from a certain country because of disapproval of its labor policies, forbidding investments in a particular country because of its policies, or refusing to recognize property claims of foreigners if their home nations do not reciprocate for Americans. Through an inversion of ordinary federalism discourse, which is protective of *state* decision making, federal judges have held these efforts to be illegal. Judges conclude that various state and city initiatives have violated national authority to speak with one voice on anything related to foreign affairs, foreign commerce, war, and national security.

Some of these decisions rest on a legal doctrine called "foreign affairs preemption." Writing in the 1940s for the Court, Justice William O. Douglas read the Constitution to provide, implicitly, for expansive federal authority over issues posited as foreign and opined that the power "over external affairs is not shared by the States; it is vested in the national government exclusively."[33] In two more recent decisions—*Crosby v. National*

Foreign Trade Council[34] (addressing efforts in Massachusetts to refuse to purchase products from Burma) and *American Insurance Association v. Garamendi*[35] (involving a California statute seeking to help Holocaust victims by requiring insurance companies doing business in California to disclose policies sold by them or their affiliates in Europe between 1920 and 1945)—the Court again insisted on national control.

While the *Crosby* decision relied in part on the existence of a congressional act that empowered the president to calibrate sanctions against Burma, in *Garamendi*, a bare majority of the Court held that state powers had to cede to an executive interest in its negotiated settlement with the German government. The dissenters argued that the state's disclosure obligations did not harm general federal interests in settling victims' claims. The Court was thus particularly solicitous of the executive when it claimed that what it categorized as foreign policy or national interests were at stake. Thus, courts have implied that the national government has dormant powers that preempt state lawmaking. This doctrinal development ought, from a progressive conception appreciating the democratic iterations of federalism, be met with dismay. Long ago, Herbert Wechsler counseled that courts should generally leave the allocation of power to what he called the "political safeguards of federalism."[36] His idea was that states should go to Congress rather than to the courts to protect their prerogatives. Today, however, the national government and private parties are going to court to get protection from state laws affecting investments in countries like Burma or the Sudan.

Given the commitments to federalism and the complexity of the issues, we should be leery of claims of the singular authority of the national government. Instead of asking courts to find new ways to preclude local lawmaking, those insisting on a uniform federal rule ought to make their arguments in Congress, which can be responsive to the needs to safeguard both federalism and nationalism. Judges ought not void local or state actions on CEDAW, the Kyoto Protocol, Burma, the Holocaust, or Darfur absent either a specific showing of direct congressional intent to locate all authority in the national government or facts demonstrating exactly how a national interest is in jeopardy. One reason comes from the history here recounted. The norms of the United States have repeatedly been shaped through translocal and transnational dialogues, with localities in the forefront as importers.

Such local efforts embody a second reason for courts to be reluctant to intervene, for they represent what democratic federalism has to offer: efforts to affect national rules or to express local variations through popular initiatives debated in the public sphere. As San Francisco's CEDAW

ordinance and the mayors' climate initiatives illustrate, through majoritarian localism, the global is regularly collapsed into the local, turning problems that could have been dealt with as foreign affairs on the national level (for example, by entering into treaties) into domestic policies about how cities run themselves.

In 2007, the form of political action that I commend produced new federal legislation through interactions among the various sectors of the U.S. polity. During the first years of the twenty-first century and in the wake of revelations of genocide in Darfur, many localities and states—prompted by transjurisdictional NGOs and sometimes working through translocal organizations—decided to withdraw their investments from the Sudan. The words used to capture the point were, "not on our dollar," as state officials insisted that government pension funds or other forms of equity not be held in companies that did business in the Sudan.[37] Some members of the business community, however, objected, and the same trade association that had challenged the refusal of Massachusetts to buy goods produced through the labor system in Burma asked a federal court to enjoin Illinois from divesting from the Sudan. A judge did so by relying on the implied exclusivity of the foreign affairs authority of the national government.[38] But Senator Richard Durbin of Illinois introduced national legislation to permit such local action. The outcome was the 2007 Sudan Accountability and Divestment Act (SADA), a federal statute that empowers local authorities to divest assets, subject to detailed rules of notice and comment to companies and safe harbors for asset managers.[39]

Resisting a Jurisdictional Romance—Federated or Otherwise

I do not suggest that local initiatives are always to be celebrated by progressives. While I have provided examples aimed at expanding rights, local activism is regularly a site of efforts to constrain such rights. Contemporary examples include proposed bans on abortion and same-sex marriage. Since the 1960s, mobilization by conservative groups has wrought an impressive transformation at both the local and global levels, and their focus has also shifted to exporting such precepts abroad. Coming from conservatives or progressives, locally based initiatives have been proven able to make powerful inroads on national rights regimes.

Further, while the early twenty-first century's national agendas were dominated for several years by conservative policymakers, they

were once shaped by progressives creating the New Deal and a Second Reconstruction, which were aimed at ending forms of racial and gender subordination. The 2008 election of Democrat Barack Obama and of a Congress in which his party has majorities marks the potential for another shift in policy. Moreover, with the fifty states come an array of positions. Many famous federalism cases—including *Printz v. United States*[40] (about local implementation of national gun control laws), *New York v. United States*[41] (about a state's refusal to participate in a federal statute requiring state cooperation in the disposal of low-level nuclear wastes), and *Morrison* (about congressional power to create a private damage remedy for victims of gender-motivated violence)—are instances in which state actors can be found on both sides, for and against the national action. In short, institutional voices in a host of jurisdictions, public and private, can and do shift their tones.

My purpose thus is to refocus the U.S. constitutional conversation about federalism to understand the many ports of entry for rights and the mechanisms by which rights come to be shaped and internalized. The diversity of arrangements among and between state and federal actors that I have sketched stands in contrast to the federalism described in case law and in a good deal of legal commentary, which is both formalistic and unresponsive to an array of efforts—both within the United States and beyond its borders—to reformat arrangements crafted in earlier eras. For more than a century, institutions have developed that recognize the need to cross state lines without becoming instruments of the U.S. government. Horizontal federalism is no longer only about state-to-state interactions but now includes another facet—national but not federal organizations—as well as another focus, transnational localism.

Thus, it is time to depart from the history of dichotomous alternatives (of either a state or a federal domain) and of essentialized images (of both states and the federal government) so as to investigate ongoing, and to imagine new, institutional arrangements that embody the interdependence of participants within and beyond the United States. 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, this chapter is 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. Moreover, only when many actors, at national and local levels, in and outside formal legal structures, fully embrace propositions like racial and gender equality do such understandings become constitutive, even

if the question of what obligations flow from commitments to equality remains contested.

This chapter builds on my discussions in a series of essays, including *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)* (with Joshua Civin and Joseph Frueh), 50 Ariz. L. Rev. 709 (2008); *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 Emory L. Rev. 31 (2007); *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 Yale L.J. 619 (2001); and *Afterword: Federalism's Options*, 14 Yale L. & Pol'y Rev. 465 (1996) and 14 Yale J. Reg. 465 (1996). Thanks are due to Dennis Curtis, Vicki Jackson, Reva Siegel, and Josh Civin for years of conversations about both constitutional parameters and inventions, as well as to Adam Grogg and Joseph Frueh for thoughtful research assistance with the issues of this chapter.

Notes

1. *Alden v. Maine*, 527 U.S. 706 (1999).

2. *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

3. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

4. *Roper v. Simmons*, 543 U.S. 551 (2005).

5. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005).

6. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

7. For example, as late as 1875, the Supreme Court self-consciously noted that it would use the term "Federal question"—relied upon "for the sake of brevity, though not with strict verbal accuracy"—to capture the part of its discussion devoted to issues that involved the construction of the "Constitution, treaties, statutes, commissions, or authority of the Federal government." See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 618 (1875).

8. See, e.g., *Watters v. Wachovia Bank*, 127 U.S. 1559 (2007); *Crosby*, 530 U.S. 363.

9. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301 et seq. (2006)).

10. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

11. See U.S. Const. art. I, § 10, cl. 3.

12. Morton Grodzin, *The American System: A New View of Government in the United States* 3-4 (Daniel J. Elazar, ed., 1966).

13. Deil S. Wright, *Revenue Sharing and Structural Features of Federalism*, 419 Annals 100, 109–10 (1975).

14. Daniel J. Elazar, *Exploring Federalism* 37, 200 (1987).

15. I have used this term to denote these entities and analyze their import in several essays. See, e.g., Judith Resnik, *Lessons on Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "Political Safeguards" of Aggregate Translocal Actions*, 156 U. Pa. L. Rev. 1929 (2008); Judith Resnik, Joshua Civin, and Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 Ariz. L. Rev. 709 (2008).

16. Justice Anthony Kennedy has used this phrase several times. See, e.g., *Alden v. Maine*, 527 U.S. 706, 751 (1999).

17. 529 U.S. 598 (2000).

18. *Id*. at 617–18.

19. Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1971, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981) [*hereinafter* CEDAW].

20. See Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223 (2003).

21. See CEDAW, *supra* note 19, at Preamble, art. 1, and art. 4.

22. See San Francisco, California, *Local Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, § 12.K (Apr. 13, 1998), available at http://www.sfgov.org/site/cosw_page.asp?id=10849. Strategic plans and annual reports from San Francisco's Department on the Status of Women are available online at http://www.sfgov.org/site/dosw_index.asp?id=16978. Gender analysis reports are available at http://www.sfgov.org/site/cosw_page.asp?id=10856.

23. See, e.g., UN Economic and Social Council (ECOSOC), Review of Economic and Social Council Agreed Conclusions 1997/2 on Mainstreaming the Gender Perspective into All Policies and Programmes in the United Nations System, ECOSOC Res. 2004/4, UN Doc. E/2004/INF/2/Add.2 (July 7, 2004). Whether this approach succeeds is another question. See Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 Harv. Hum. Rts. J. 1 (2005).

24. See *Cities Working Together to Protect Our Air Quality, Health and Environment: A Call to Action*, available at http://www.seattle.gov/mayor/climate/PDF/USCM_Climate_Letter_0401.pdf.

25. See Resnik, Civin, and Frueh, *supra* note 15, at 709.

26. The structures of several TOGAs, as well as some of the political economy and legal implications of these organizations, are explored in Resnik, Civin, and Frueh, *supra* note 15.

27. Earl H. Fry, *The Expanding Role of State and Local Governments in U.S. Foreign Affairs* 128 (1998).

28. See *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528 (1985).

29. See, e.g., *National League of Cities, Domestic Violence and International Human Rights Abuse*, Res. 2006-45 (Dec. 10, 2005), available at www.nlc.org/ASSETS/14929CCCB69C45A3999FB8BC26AA796C/2006resolutionspscp.pdf.

30. See *id*. at *Resolution Affirming the Principles of Federalism and Civil Liberties*, Res. 2006-46, Res. 2006-49.

31. New Jersey Joint Legislative Committee, *Proceedings before the Joint Committee of the New Jersey Legislature Constituted under the Senate Concurrent Resolution No. 19* (July–Sept. 1942), as reprinted in 16 Women's Rts. L. Rep. 69, 95 (1994).

32. See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15, 21–28 (2004).

33. *United States v. Pink*, 315 U.S. 203, 233 (1942).

34. 530 U.S. 363 (2000).

35. 539 U.S. 396 (2003).

36. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

37. *Combating Genocide in Darfur: The Role of Divestment and Other Policy Tools: Hearing before the S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. (Oct. 3, 2007) (statement of Frank T. Caprio, Rhode Island general treasurer), available at http://banking.senate.gov/public/_files/caprio.pdf. One count reported more than twenty states with such provisions. See Sudan Divestment Task Force, Figures for States,

Universities, Cities, International & Religious Organizations and Countries, *available at* http://sudandivestment.org/statistics.asp (last updated on October 15, 2008).

38. See *Nat'l Foreign Trade Council, Inc. v. Giannoulias*, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

39. Pub. L. No. 110-174, 121 Stat. 2516 (2007) (to be codified at 50 U.S.C. § 1701).

40. *Printz v. United States*, 538 U.S. 1036 (2003).

41. 488 U.S. 1041 (1992).