RATIFYING KYOTO AT THE LOCAL LEVEL: SOVEREIGNTISM, FEDERALISM, AND TRANSLOCAL ORGANIZATIONS OF GOVERNMENT ACTORS (TOGAS)

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This Article addresses the problem of how to conceptualize the federalism grid, often depicted on two dimensions, horizontal and vertical. Our interest is in the growth and significance of translocal organizations of government actors (TOGAs)—such as the U.S. Conference of Mayors and the National Governors Association—and their role in the importation and exportation of law across

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This Article is related to a series on federalism. *See* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY. L.J. 31 (2007); Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 INT'L J. CONST. L. (I·CON) 33 (2007); Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. (forthcoming 2008); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L. J. 1564 (2006). Thanks are due to Sally Rider, Carol Rose, and Kristen Engel who shaped the excellent conference, to the participants for their generative comments, and especially the exchanges with Barbara Atwood and Daniel Farber; to Camilla Tubbs for extraordinary library assistance; to Allison Tait, Michelle Morin, Monica Bell, Vasudha Talla, and Adam Grogg for energetic and thoughtful research; to Paige Herwig, who suggested this focus on environmentalism in the context of translocalism; and to Denny Curtis, Vicki Jackson, Reva Siegel, Seyla Benhabib, and Katherine Tang Newberger.

national boundaries, and specifically, their activism regarding climate change. In addition to examining how TOGAs shape law and policy in ways that criss-cross a two-dimensional grid and undercut claims of the exclusivity of certain issues as either "national" or "local," we consider the legitimacy, from federalist perspectives, of the particular form of aggregate political capital created by TOGAs. Our assessment is that TOGAs forward some, but not all, federalist virtues. We also explore the ways in which law has and can respond to TOGAs. Because we see TOGAs as generative, we argue that special forms of legal status should be accorded to these configurations.

I. MAYORS, GLOBAL WARMING, AND FEDERALIST INVENTIONS

Domestic policies in the United States on global warming have been shaped in the last several years through democratically iterative interactions among transnational lawmakers, the national government, and hundreds of subnational actors including cities. This proposition does not fit easily with a formal understanding that treaty-making belongs, as a matter of law, exclusively to the national government, which has not ratified the Kyoto Protocol on climate change.

But localities within the United States have affiliated with what Kyoto stands for, shaping a de facto transnational alliance through translocal action. These subnational activities—generated by mayors of several cities and implemented by the U.S. Conference of Mayors Climate Protection Agreement—undermine essentialist categorizations of the subject-matter competencies of local and of national governments.

This Article places the example of climate control in the context of the more general phenomenon of subnational and majoritarian-based importation and domestication of "foreign" law. Much of this work is furthered by entities that resemble nongovernmental organizations (NGOs) but gain their political capital from the fact that their members are government officials or employees such as mayors, attorneys general, governors, or legislators. Many such actors work together in groups such as the U.S. Conference of Mayors and the National Governors Association. To distinguish that genre from private sector groups, we offer the term "translocal organizations of government actors" (with the acronym "TOGAs"), and then examine their history, missions, functions, and some of the interests that they champion.

TOGAs are deeply federalist, in the sense that they mirror the layers of the federal system. They also prompt reconsideration of some of the standard

precepts of federalism, which posit states as individual actors in vertical and horizontal relationships with one another. But TOGAs criss-cross that grid, as they exemplify one of many inventions within the United States federalist system. Moreover, the transnationalism of the work of subnational and popularly-elected leaders undermines the presupposition that the importation of foreign law is necessarily countermajoritarian. In addition to prompting new mappings of federalist practices, the development of TOGAs also raises conceptual and legal questions familiar in discussions of aggregate representation, for TOGAs purport to "speak for" a host of cities or towns or mayors.

Below, we explore the relationship of TOGAs to federalism theory, including whether this form of aggregation ought to be specially enabled through public subsidies, recognized and accorded distinct and privileged status through doctrine and statutes, regulated to ensure accountability and participation of those presumed to be represented, or left mostly alone as are many other associations. We begin by examining the interaction between the recent national decision to keep distant from the Kyoto Protocol and the many ways in which local-level public officials have participated in a populist movement to embrace the Protocol. Thereafter, we unpack some of the ways in which legal and political doctrines that we collectively refer to as "sovereigntism" seek to essentialize a problem as if it naturally belonged to a particular level of government; for example, sovereigntists insist that transnational agreements on global warming are the exclusive domain of the national government. As we detail, however, lawmaking on climate change and most other issues takes place in many venues and at various levels of government. Through analysis of several TOGAs, we show that the categories of "domestic" and "foreign" are permeable, such that claims that a particular issue is "truly local" or "truly national" cannot be sustained. We conclude by exploring how law can recognize the importance of TOGAs by engaging, through doctrine and statutes, in the promotion and regulation of their functioning.

II. THE NOTION OF NATIONALLY-BOUNDED LAW

The 1972 Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration") is a major marker in the history of international environmentalism. The Stockholm Declaration endorses "the sovereign right [of nations] to exploit their own resources," as it commits to protect the "natural resources of the earth . . . for the benefit of present and future generations" and "to ensure that activities within our jurisdiction . . . do not cause damage" to the environment beyond.[1]

As this brief quotation from the Declaration illustrates, transnational lawmaking in the 1970s focused on the interdependencies of nations. The Declaration presumed that the nation-state was the relevant level for making law and policy. The Stockholm Declaration recognized a "sovereign right" of each

1. U.N. Conference on the Human Env't, Stockholm, Swed. June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, princs. 2, 21, U.N. DOC. A/CONF. 48/14 (June 16, 1972), *available at* http://www1.umn.edu/humanrts/instree/humanenvironment.html.

nation to use its resources, but also insisted that nations pay attention to the externalities that their use of resources imposed on others.

Twenty-five years later, meetings in Kyoto, Japan yielded an agreement to address global warming that again posited the nation-state as central to international exchanges. The Protocol created a framework of timetables for nations to reduce greenhouse gas emissions.[2] In 1998, President William J. Clinton signed the Protocol on behalf of the United States.[3] But within the United States, opposition to ratification mounted. For example, a group called the Committee to Preserve American Security and Sovereignty (COMPASS), composed of former government officials opposed to the Kyoto proposals, raised objections to ratification through a report entitled *Treaties, National Sovereignty, and Executive Power: A Report on the Kyoto Protocol.*[4] The group's acronym "COMPASS" insisted on the relevance of place, and its argument relied on jurisdictional claims, both across and within national boundaries.

COMPASS argued that the Protocol reflected a "new world order," shaped in large measure by "politically unaccountable NGOs," which, under the rules of the United Nations, were given "formal recognition and rights to participate in policy-making at international conferences."[5] Further, went the objections, adherence to the Kyoto Protocol would redistribute power in the United States by giving the President new opportunities to exercise authority.[6] Specifically, COMPASS warned that "[t]he Protocol may convert decisions usually classified as 'domestic' for purposes of U.S. law and politics into 'foreign,' and thus move substantial power from the Congress, from state and local governments, and from private entities into the federal Executive Branch," presumed to hold power over "foreign affairs."[7]

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

3. *Id.*

4. 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.

5. *Id.* The report said that:

> NGOs play important roles in the political decision making process. Like a local chapter of the League of Women Voters or a Rotary Club they provide a vehicle for citizens to assert their civic duty. Influencing the decisionmaking process, however, is different than taking control of it. We would not want the League of Women Voters to assume control of local zoning decisions, for example, because they would not be accountable to the public as a whole. Accordingly, the role and the power of NGOs in international governance requires great scrutiny.

Id.

6. *Id.* ("If ratified, the Kyoto Protocol would also have grave impacts on internal U.S. governance. Presidents have immense power over foreign relations."). Further, the report argued that the Kyoto Protocol reflected a general "assault" on "the world structure of free trade" through enforcement of multinational environmental treaties by trade sanctions. *Id.*

7. *Id.*

The COMPASS report is one example of *sovereigntism*,[8] a posture insistent on delineating the boundaries of the nation-state by stressing the importance of a nation's right to define its own lawmaking. The sovereigntism evident in the objections by COMPASS to the Kyoto Protocol is not unique to conflicts over transnational environmentalism. Predecessors include mid-twentieth-century efforts aimed directly against the involvement of the United States in the United Nations. In 1952, Senator John Bricker of Ohio proposed that the Constitution be amended to state that "[n]o treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution."[9] His suggestion was immensely popular, losing in the Senate by a single vote. Moreover, as Louis Henkin put it, "the ghost of Senator Bricker" haunted U.S. policies towards human rights conventions for decades thereafter.[10] A contemporary shadow of Brickerism can be seen in *Medellin v. Texas*,[11] a recent case in which the Supreme Court held that, absent express provisions, treaties create no domestically enforceable rights.

Another example of sovereigntism is a proposal called the Constitution Restoration Act, put forth in 2004 and 2005 by members of Congress who sought to limit foreign influences on domestic law by banning judicial citation of foreign law. The bill sought to ensure that, when "interpreting and applying the Constitution of the United States," federal courts would not be able to rely on any "constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency," other than English law at the time of the adoption of the U.S. Constitution.[12] Although the Constitution Restoration Act has not become law, other efforts to erect such boundaries have succeeded. For instance, in a provision

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8. For more discussion of sovereigntism, see Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 INT'L J. CONST. L. (I·CON) 33 (2007) [hereinafter Resnik, *Law as Affiliation*].

9. 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). For more discussion of the Bricker Amendment's history and the role that the United Nations Charter and the Declaration of Human Rights played in United States law, both state and federal, see Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1567–74 (2006) [hereinafter Resnik, *Law's Migration*], and Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 918 (1984).

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

11. 128 S. Ct. 1346, 1356 (2008).

12. S. 520, 109th Cong. § 201 (2005); *see also* S. 2082, 108th Cong. § 201 (2004). This proposal gained a substantial amount of attention, much of it critical. *See, e.g.*, Ruth Bader Ginsburg, J., U.S. Supreme Court, "A decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Constitutional Court of South Africa (Feb. 7, 2006) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html). *See generally* Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1335 (2007); Resnik, *Law's Migration*, *supra* note 9.

of the Military Commissions Act of 2006 (MCA),[13] Congress instructed judges that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States" when interpreting the United States' obligations to comply with the Third Geneva Convention and to provide "effective penal sanctions for grave breaches . . . in the context of an armed conflict not of an international character."[14]

The form of sovereigntism expressed in the COMPASS report, the Bricker Amendment, the Constitutional Restoration Act, and the MCA is *exclusivist*. It espouses a view that the legal regime in the United States ought to be made from within and protected from foreign influences. Sovereigntism need not take that form, however. It could be inclusivist or dialectical, linking a specific national identity to transnational exchanges. South Africa's Constitution, for example, describes the country as a participant in the "family of nations" in part by directing its jurists that, when interpreting that nation's bill of rights, they "must consider" international law and may consider comparative provisions.[15]

One need not share many of the precepts of an exclusivist approach to sovereigntism (often expressed in the United States in conjunction with isolationism and unilateralism) to understand that sovereigntists raise important questions about political and legal legitimacy. Legal sovereigntists presume that law plays a significant role in the identity of the nation-state.[16] Conflicts about law's sources, ownership, and connection to a particular legal regime show how deeply law is imbedded as a social practice. In this respect, legal sovereigntism deserves appreciation for underscoring the aspiration that law ought to play a role in fashioning a nation's collective identity.

III. ESSENTIALISM, PROCESS, AND POWER

Claims in support of exclusive sovereigntism (such as the COMPASS report's criticisms of the Kyoto Protocol) are often grounded in arguments that rely on democratic majoritarianism and the structure of American federalism, both of which posit an engagement with "foreign" law to be problematic. A first step in that argument is that the regulation of a particular subject matter (in this context,

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13. Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of titles 10, 18, and 28 of the United States Code).

14. 18 U.S.C. § 2441(a)(2) (2006).

15. *See* S. AFR. CONST. 1996, pmbl.; *id.* ch. 2, § 39; *see also Kaunda v. President of S. Afr. and Others*, 2004 (10) BCLR 1009 (CC) at ¶ 222 (S. Afr.) (O'Regan, J., concurring) ("[O]ur Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law."); Resnik, *Law as Affiliation*, *supra* note 8, at 43–45. Some have argued that the U.S. Constitutional tradition requires similar regard for the law of nations. *See, e.g.*, Vicki C. Jackson, *Transnational Discourse, Relational Authority and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 335–37, 336 nn.227–28 (2003); *see also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

16. *See generally* Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17 (2005).

climate control and energy policy) belongs to a certain level of government (in this instance, "domestic" decisionmaking rather than "foreign" affairs).

How can one tell what problems fall within either the arena of the "domestic" or the "foreign," and whether characterizing a problem as "domestic" necessarily precludes it from also being described as "foreign"? These questions have been posed in many legal contexts, often prompting litigation. Examples include lawsuits about whether Massachusetts has the power to decide not to use its taxpayers' dollars to buy goods made with forced labor in Burma,[17] and whether legislatures or executive officials in Illinois—appalled at genocide in Darfur—can divest their state's assets from Sudan.[18] Like the question of energy policy, these examples illustrate that problems are often "domestic" *and* "foreign." Allocating a citizenry's tax dollars to control one's own fisc is a local political decision that can (depending on where dollars are spent) have global ramifications, just as how one consumes oil affects both domestic and foreign interactions.

In contrast, the kind of categorical approach adopted by the COMPASS report assigns a topic to a particular jurisdiction as if it self-evidently and naturally inhered.[19] Feminist theorists call this "essentialism," and use the term to discuss claims about gender that presume some qualities to be intrinsically "female" or "male." Essentialists ignore how practices and ideas about the distinctions between women and men are shaped by the interaction between social forces and human beings; rather, essentialists rely on "nature" as the primary source of differences.[20] A parallel exists in the context of jurisdictional classifications on climate control and energy policy. The categories "domestic" or "foreign" are, like many attributions of the intrinsic effects of gender, human constructions rather than artifacts of nature alone.[21]

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17. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

18. *See, e.g.*, Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731 (N.D. Ill. 2007) (striking Illinois' divestment act as an infringement on the foreign affairs authority of the national government); *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, General Treasurer of the State of Rhode Island), *available at* http://banking.senate.gov/public/_files/caprio.pdf.

19. *See generally* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

20. *See generally* ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988).

21. The claim that laws of particular genres are "state" or "federal" has been asserted with some regularity in recent legal controversies, as has the rebuttal that the distinctions are overdrawn and result from decisions that are neither inevitable nor stable over time. For example, when finding unconstitutional the "Civil Rights Remedy" of the Violence Against Women Act, the majority in *United States v. Morrison*, 529 U.S. 598 (2000), insisted on categorical and mutually exclusive boundaries. Chief Justice Rehnquist concluded that the "Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617–18. A parallel effort to delineate by using the terms "internal" and "external" comes from the *Medellin* litigation about consular notification. *See Ex Parte* Medellin, 223 S.W.3d 315, 333–34 (Tex. Crim. App. 2006). More poignant are debates over how to characterize Medellin himself (the petitioner was born in Mexico but

At stake in the effort to categorize something as either "domestic" or "foreign" are questions of power and process. The COMPASS report argued that the Kyoto Protocol's attempt to "convert decisions usually classified as 'domestic' for purposes of U.S. law and politics into 'foreign,'" gave more power to the President and limited the powers of Congress, local governments, and private entities.[22] Further, COMPASS charged that the Protocol could reallocate power to state and federal courts, which could then use customary international law to create a new "super-national source of binding legal rules."[23] These concerns about transnational influences on domestic law and about international lawmaking in general are often bundled as evidence of a "democratic deficit."[24] The premise is that international lawmaking undercuts both the majoritarian procedures and the separation of powers embedded in the U.S. Constitution. Exclusivist sovereigntism is thus equated with constitutionalism and popular will.

IV. SUBNATIONAL TRANSNATIONALISM: LAW UNBOUNDED

To assess the sovereigntist critique of the Kyoto Protocol, consider events after the 1998 COMPASS report, and particularly what happened on the "domestic" front. The transnational commitment to environmentalism expanded, and, in February of 2005, the Kyoto Protocol went into effect with a group of 141 countries; as of 2008, it has been ratified by 174 state parties.[25] But, a year after the 2000 election in which the White House switched hands from the Democratic to the Republican Party, George W. Bush, the new president, withdrew American support for the Kyoto Protocol. Some of President Bush's arguments echoed those made by COMPASS.[26] One could thus read the sequence of an election, followed by the new President distancing the nation from the Protocol, as a vindication of

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lived in the United States since he was three years old). *See id.* at 358–59 (Hervey, J., concurring). For a critique of a categorical approach to immigration law, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

22. COMM. TO PRESERVE AM. SEC. & SOVEREIGNTY, *supra* note 4.

23. *Id.*

24. That critique can be found in many places. *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 unelected panel of foreign experts on 'gender politics' any power to determine the laws and policies of American society.").

25. *See* U.S. Conference of Mayors, Endorsing the U.S. Mayors Climate Protection Agreement (2005) [hereinafter U.S. Conference of Mayors, Climate Protection Agreement], *available at* http://usmayors.org/resolutions/73rd_conference/en_01.asp; United Nations, Gateway to the UN System's Work on Climate Change, http://www.un.org/climatechange/background/kyoto.shtml.

26. *See Contemporary Practice of the United States Relating to International Law, U.S. Rejection of Kyoto Protocol Process*, 95 AM. J. INT'L L. 647, 647–49 (2001); Remarks on Global Climate Change, 1 PUB. PAPERS 634, 634 (June 11, 2001) (offering as an explanation that "[t]he Kyoto Protocol was fatally flawed" because relevant scientific information was lacking and that exemptions for certain countries undermined the agreement); *see also* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

the view that the election represented a majoritarian commitment to anti-internationalist preferences.[27]

When one probes deeper into the U.S. "domestic" front by turning from the national to the subnational level, however, the link between sovereigntism and majoritarianism weakens. Many local officials in the United States did not share President Bush's opposition to the Kyoto Protocol. Cities as diverse as Seattle and Salt Lake City enacted ordinances aimed at conforming to the Protocol's targets for controlling local emissions of greenhouse gases.[28] In March 2005, a group of nine mayors agreed to a Climate Protection Agreement and then garnered the support of many other mayors as well as the official approval of the U.S. Conference of Mayors, which endorsed a modified version of the Agreement in June 2005.[29] The Agreement aims for mayors to "meet or exceed the Kyoto Protocol targets . . . in their own operations and communities" through initiatives such as retrofitting city facilities, promoting mass transit, and maintaining healthy urban forests. In addition, the mayors have called upon federal and state governments to comply with Kyoto targets and have urged Congress to pass bipartisan legislation to create an emissions trading system and "clear emissions limits" for greenhouse gases.[30]

In 2007, the U.S. Conference of Mayors convened a Climate Protection Summit, and announced as its "top legislative priority" for the 110th Congress a new Energy and Environmental Block Grant program; the Conference also published a *Climate Protection Strategies and Best Practices Guide*[31] that detailed how, with "cross-cutting" or "comprehensive multi-faceted approaches," "regional initiatives," and "focused initiatives," fifty-two cities conserved energy and reduced greenhouse gases.[32] By the spring of 2008, more than 800 mayors, representing towns and cities whose combined populations numbered almost 80 million people, endorsed the Climate Protection Agreement.[33] Further local action

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27. The caveat here is that Al Gore, the Democrat who was also identified as committed to addressing global warming, won the popular vote for the presidency.

28. *See* Office of the Mayor of Seattle, Wash., U.S. Mayors Climate Protection Agreement, http://www.seattle.gov/mayor/climate (last visited July 14, 2008).

29. *Id.*

30. U.S. Conference of Mayors, Climate Protection Agreement, *supra* note 25.

31. U.S. CONFERENCE OF MAYORS, CLIMATE PROTECTION STRATEGIES AND BEST PRACTICES GUIDE (2007), *available at* http://www.mayors.org/climateprotection/documents/2007bestpractices-mcps.pdf.

32. *Id.* at 1.

33. *See* Mayors Climate Prot. Ctr., List of Participating Mayors, http://www.usmayors.org/climateprotection/list.asp (last visited July 14, 2008); *see also* Lina Garcia, *800 Mayors Join Mayors Climate Protection Agreement*, U.S. MAYOR NEWSPAPER, Mar. 10, 2008, *available at* http://usmayors.org/uscm/us_mayor_newspaper/documents/03_10_08/pg10_800_mayors.asp. To provide a baseline for the number of people living in cities whose mayors have supported climate control, consider that in the 2000 presidential election more than one hundred million people voted, with 50,456,169 voters supporting George W. Bush and slightly more, 50,996,116, supporting Al Gore. CNN/Allpolitics.com, Election 2000 Archive, http://www.cnn.com/ELECTION/2000/. While all of the people within the Mayors Climate Protection Agreement were not voters,

took place through coordinated initiatives within states. For example, in 2007, residents of 134 towns in New Hampshire approved resolutions supporting local and national efforts to combat climate change.[34]

Government actors in the United States are not the only ones who have embraced horizontal coordination at the subnational level. Cities around the world work together, and many have a particular focus on climate issues.[35] Illustrative of such national border crossings by subnational units is the International Council for Local Environmental Initiatives (ICLEI), a group of more than 815 local governments begun in 1990 by the International Union of Local Authorities and the United Nations Environmental Program.[36] Another example of translocal work is a 2007 initiative through which a coalition of sixteen of the world's largest cities (including Berlin, Chicago, Mumbai, São Paulo, and New York) agreed to sponsor upgrades to older buildings to cut energy use and reduce greenhouse gas emissions.[37] A consortium of banks lent five billion dollars, to be repaid as cities save money through reduced energy use.[38]

Other such cooperative arrangements mix subnational and national level actors. For example, in 2007, ten states joined the Canadian provinces of Manitoba and British Columbia, the European Commission, New Zealand, and several European countries (including France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, and the United Kingdom) in a declaration forming an International Carbon Action Partnership (ICAP) to promote a cap-and-trade system.[39] Eight states joined two other Canadian provinces—Ontario and

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their cumulative numbers undermine arguments that the commitments to respond to global warming through Kyoto Protocol-like measures are contrary to majoritarian practices.

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

35. *See* Michele M. Betsill & Harriet Bulkeley, *Cities and the Multilevel Governance of Global Climate Change*, 12 GLOBAL GOVERNANCE 141 (2006).

36. *See* Int'l Council for Local Envtl. Initiatives, About ICLEI, http://www.iclei.org/index.php?id=643 (last visited July 20, 2008). Established at the World Congress of Local Governments for a Sustainable Future at the United Nations in New York, ICLEI is an international association of local governments that have "made a commitment to sustainable development." *Id.* It "provides technical consulting, training, and information services to build capacity, share knowledge, and support local government in the implementation of sustainable development at the local level." *Id.*

37. *See* Andrew C. Revkin & Patrick Healy, *Global Coalition to Make Buildings Energy-Efficient*, N.Y. TIMES, May 17, 2007, at A18. The participating cities were Bangkok, Thailand; Berlin, Germany; Chicago, Illinois, United States; Houston, Texas, United States; Johannesburg, South Africa; Karachi, Pakistan; London, England; Melbourne, Australia; Mexico City, Mexico; Mumbai, India; New York, New York, United States; Rome, Italy; São Paulo, Brazil; Seoul, South Korea; Tokyo, Japan; and Toronto, Ontario, Canada. *Id.* Former President Clinton is credited with helping to promote this effort. *Id.*

38. *Id.* The banks were Citigroup, UBS, Deutsche Bank, ABN Amro, and JPMorgan Chase & Company. *Id.*

39. Int'l Carbon Action P'ship [ICAP], Political Declaration (Oct. 29, 2007) http://www.icap-carbonaction.com/docs/icap_declaration.pdf; *see also* ICAP, Members, http://www.icap-carbonaction.com/members.htm (last visited July 13, 2008). The states are Massachusetts, California, New Jersey, New York, Maine, Maryland, Arizona, New Mexico, Oregon, and Washington. For a description of "cap-and-trade" systems generally,

Quebec—in what was termed a Great Lakes Agreement to regulate water diverted from the Great Lakes.[40] Some such translocal agreements include states and Indian tribes.[41] On a much smaller scale, in the winter of 2008, the park services of the United States and Mexico held a "first ever" joint meeting to share management of areas that affect animals whose movements have not been dictated by national borders until fences and barriers are placed across the lands and waters they use.[42]

Grassroots activism related to the environment is not a new phenomenon. One famous predecessor is Earth Day, conceived in 1969 by Wisconsin Senator Gaylord A. Nelson to focus attention on the deterioration of the wilderness.[43] Its first celebration, on April 22, 1970, engaged over twenty million Americans, and by 1990 the day had come to be marked worldwide.[44] The innovation of the United States mayors' support for the Kyoto Protocol was to take that kind of grassroots enthusiasm and to organize their work through government structures that also crossed jurisdictional boundaries.[45] The coordination of both public and private subnational leaders illustrates that territorial jurisdiction is less coherent as an operating principle than it once was. The problems of how to use resources efficiently are not only local, and neither are the sources of energy—a point particularly pressing for countries that are heavily reliant on oil from abroad.[46]

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see ENVTL. PROTECTION AGENCY, TOOLS OF THE TRADE: A GUIDE TO DESIGNING AND OPERATING A CAP AND TRADE PROGRAM FOR POLLUTION CONTROL 1–2 (2003). As that report explains, "[c]ap and trade is a market-based policy tool for environmental protection. A cap-and-trade program establishes an aggregate emission cap that specifies the maximum quantity of emissions authorized from sources included in the program. . . . To be in compliance, each emission source must surrender allowances equal to its actual emissions. It may buy or sell (trade) them with other emission sources or market participants." *Id.*

40. *See* Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (Dec. 13, 2005), *available at* http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf. The states are Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.

41. *See* Cindy Tuck, Assistant Secretary for Policy, the California Environmental Protection Agency, Presentation at Panel on *States as Actors on the Global Stage*, William H. Rehnquist Center on the Constitutional Structures of Government Conference: Federalism and Climate Change: The Role of the States in a Future Federal Regime (Feb. 11, 2008), http://www.law.arizona.edu/FrontPage/Events/Gallery/fedconference/index.htm; Barry Rabe, *Commentary*, 50 ARIZ. L. REV. 787 (2008).

42. *See Conference Ends with Plans for Action*, GRAND CANYON NEWS, Mar. 12, 2008, at 1, *available at* http://grandcanyonnews.1upprelaunch.com/main.asp?Search=1&ArticleID=7192&SectionID=1&SubSectionID=1&S=1.

43. *See* Keith Schneider, *Gaylord A. Nelson: Founder of Earth Day, Is Dead at 89*, N.Y. TIMES, July 4, 2005 at B6; *see also* BRUCE J. SCHULMAN, THE SEVENTIES: THE GREAT SHIFT IN AMERICAN CULTURE, SOCIETY, AND POLITICS 90 (2001).

44. In 2000, activists in 183 countries marked the event. Jeff Gerth, *Peaceful, Easy Feeling Imbues 30th Earth Day*, N.Y. TIMES, Apr. 23, 2000, § 1 at 22.

45. *See also* Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 687 (2008) [hereinafter Stewart, *States and Cities as Actors in Global Climate Regulation*].

46. Thus, the assumption that a regulating authority can fully internalize the costs as well as gain the benefits of a particular policy is undercut by such

The authors of the COMPASS report leveled specific objections to transnational activity by arguing that it undercut local democratic practices in the United States. But the Bush Administration's reluctance to participate in the Kyoto Protocol at a national level prompted a sequence of subnational democratic debates about energy policy choices. Elected officials in state and local governments championed features of the Kyoto Protocol. As we detail below (and elsewhere[47]), the democratic iterative processes that generated the Mayors Climate Protection Agreement are not idiosyncratic events specific to environmentalism. What the efforts of elected officials make plain is that one cannot assume that transnational policymaking necessarily undercuts or aborts majoritarian processes.[48]

The engagement of localities in climate control issues also undermines COMPASS's efforts to essentialize specific problems as intrinsically within the exclusive decisionmaking authority of a particular level of government. Such exclusive categoricalism fails particularly in light of globalization, which entails the movement of goods, services, persons, and resources across borders. Given that today's challenges have both local and global dimensions, responses will need to include layered regulatory policies.

Thus, the sovereigntist opponents of the Kyoto Protocol erred in framing the problem as binary and in claiming that transnational processes inherently undercut majoritarian processes. But sovereigntists were correct to point out that lawmaking from abroad has domestic effects. The Kyoto Protocol did influence mayors and localities, who were persuaded by the mix of their own problems and the solutions that had been proffered outside the United States, to generate new policies. And that impact is not *sui generis*. One can find a repeating pattern of transnational influence in which localities function as ports of entry for non-United States law and policy.

V. TRADITIONS OF TRANSNATIONAL LAWMAKING

This interaction of local and global forces should not be modeled as evidence of a "breakdown" or dysfunction in the U.S. constitutional structure or pigeon-holed as an idiosyncratic departure from the nation's traditions. Rather,

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interdependencies, raising questions about proposals in the scholarly literature on environmental federalism to allocate regulatory authority by identifying a government level that "matches" the geography of a particular resource issue. Were one to try to apply this "matching principle," how should the geography of the joint action of the U.S. Conference of Mayors be conceptualized? As city based? What governmental level constitutes the sum of 350 global or 700 U.S. cities?

47. The iterative process, in which courts also play a role, is discussed further in Judith Resnik, *Courts and Democracy: The Production and Reproduction of Constitutional Conflict*, FOUND. FOR L., JUST. & SOC'Y (Oxford Socio-Legal Institute Series, Oxford, U.K.), Apr. 2008, *available at* http://www.fljs.org/uploads/documents/Resnik.pdf.

48. How each country itself decides at the national level to join international conventions can also be "democratic" if defined in terms of majoritarian approval, and in many instances, the procedure for doing so can be the same or comparable to processes through which domestic legislation becomes national law. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

cross-border exchanges have a long history within the United States that date to the country's formation.

The nation's foundational texts are one example. The constitutions of the thirteen original states influenced the words chosen for the U.S. Constitution, as did French and English traditions.[49] One example is the Due Process Clause of the U.S. Constitution that was built from English, French, and state laws against the arbitrary deprivation of liberty and property. Similarly, equal protection mandates in the U.S. Constitution stem from two great human rights movements of the eighteenth and nineteenth centuries. The abolition of slavery and equality for women of all colors were (and are) worldwide movements in which localities in the United Stares and elsewhere played central roles. For example, in 1814, abolitionists persuaded town councils and public gatherings in communities throughout Britain to endorse petitions seeking to alter the content of the treaty to end the Napoleonic Wars so as to ensure that other nations would follow Britain in banning slave-trading.[50] Returning to the United States, innovations at the subnational level have often preceded changes in national level policies; federal law's embrace of both abolition and women's voting rights followed those innovations in several states and in other countries.

A contemporary example emerges from recent efforts to achieve greater substantive equality for women. This movement parallels the response to global warming, which entailed international innovation, national hesitation, and local action. A decade after the U.N.'s Stockholm Declaration on the environment, women's rights activists achieved a comparable victory when, in 1981, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) entered into force.[51] A summary of its ambitions can be found in Article 3, which requires signatory states to take action in "the political, social, economic and cultural fields . . . to ensure the full development and advancement of women" to enable them to have "human rights and fundamental freedoms on a basis of equality with men."[52] Implementation of the Convention occurs through reports made periodically by member states to CEDAW's twenty-three person committee of experts, selected from different regions of the world.[53]

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49. *See, e.g.*, Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* DUE PROCESS 3, 6–11 (J. Roland Pennock & John W. Chapman eds., 1977).

50. *See* Betty Fladeland, *Abolitionist Pressure on the Concert of Europe, 1814-1822*, 38 J. MOD. HIST. 355, 355–61 (1966); Joshua Civin, Civic Experiments: Community-Building in Baltimore & Liverpool, 1785-1835, Ch. V, Ph.D. thesis, Oxford University (forthcoming).

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

52. *Id.* art. 3.

53. *See id.* arts. 17–18. This method is common among human rights conventions, and proposals for responding to its challenges are now debated. *See* Hanna Beate Schöpp-Shilling, *Treaty Body Reform: The Case of the Committee on the Elimination of Discrimination Against Women*, 7 HUM. RTS. L. REV. 201 (2007).

This form of norm elaboration provides a mechanism to integrate transnational premises of equality into the widely varying contexts of different nation-states. Aside from the potential of a recently added optional protocol,[54] CEDAW does not purport to act directly in relation to a given nation's regime. Rather, CEDAW becomes the basis for self-analysis that has been, according to the reports of some countries, an impetus to reconfiguring legal rules on employment discrimination, sexual harassment, education, and the like. This dialectical transnationalism[55] enables one nation to interrogate its own understandings of equality by comparing its rules and practices to those of others.

One hundred eighty-five countries have ratified the basic provisions of CEDAW, albeit sometimes with reservations on particular aspects.[56] President Jimmy Carter signed CEDAW for the United States in 1980, but subsequent administrations either have not succeeded or not tried to secure Senate ratification.[57] Paralleling the example of the Kyoto Protocol, opposition to CEDAW in the United States has been couched in the language of jurisdiction and sovereignty. As one Senate opponent argued, a vote in favor of ratification would mean "surrendering American domestic matters to the norm setting of the international community."[58]

What are the American norms that opponents claim CEDAW threatens? In hearings before a Senate subcommittee in 2002, one speaker explained that

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54. This "optional protocol" permits individuals or groups, after exhausting national remedies, to file complaints directly against a country with the committee that superintends CEDAW. As of November 27, 2007, ninety countries have joined the optional protocol. *See* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 97., and U.N. Division on the Advancement of Women, Department of Economic and Social Affairs, *available at* http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm.

55. This phrase is adapted from that used by Robert M. Cover and T. Alexander Alienikoff, in their article, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

56. *See* Division for the Advancement of Women, United Nations, CEDAW: States Parties, http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited July 20, 2008); *see also* Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 310–11 (2006).

57. Resolutions in support of ratification have been presented. *See, e.g.*, H.R. Res. 101, 110th Cong. (Jan. 24, 2007). In February of 2007, the Bush Administration informed the Senate that it was not supportive of ratification. *See* Luisa Blanchfield, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, CRS Report for Congress, RL33652, Summary (Jan. 4, 2008).

When ratification was considered in 1980, several reservations were attached, including that the United States would make no obligations to assign women to the military nor to require maternity leave, and further that it was the country's "understanding" that no rights to "abortion" or particular forms of family planning were mandated. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Treaty Doc. 96-53 (Nov. 12, 1980).

58. *Treaty Doc. 95-53: Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: Hearing Before the S. Comm. on Foreign Relations*, 107th Cong. 14–15 (2002) (statement of Sen. Michael Enzi).

CEDAW was part of a "campaign to undermine the foundations of society—the two-parent married family, the religions that espouse the primary importance of marriage and traditional sexual morality, and the legal and social structures that protect these institutions."[59] Although often choosing a provocative form (such as calling CEDAW an equal rights amendment "on steroids"[60]), CEDAW's critics have highlighted the Convention's challenge to a conception of women as obliged first to their households. CEDAW does have potentially transformative implications, as it gives no state-party immunity from having to explain to twenty-three experts what efforts it has undertaken to achieve substantive equality for women.

Conflicts over affiliation with CEDAW reflect real differences in world views about what are good policies and social practices and about how to promote human welfare. Further, as was the case in the context of the Kyoto Protocol, CEDAW's opponents correctly understand that some of the transnational precepts surpass some of the current requirements of U.S. law. For instance, federal constitutional law on gender equality is not interpreted to require, as CEDAW does, that government agencies take "all appropriate measures to eliminate discrimination," including temporary special measures aimed at accelerating substantive equality between men and women.[61]

Moreover, as is the case with climate change, despite the Senate's formal authority over treaties, an exclusive focus on the Senate misses a lot of the action. By 2005, forty-seven U.S. cities, nineteen counties, and seventeen states had passed or considered legislation relating to CEDAW, with yet others contemplating action.[62] Many localities responded with expressive, hortatory provisions calling for the United States to ratify CEDAW. But a few went beyond expressive statements and aimed to turn "transnational" law into "local" law. San Francisco is the prime example of this local incorporation.

San Francisco has committed itself to the CEDAW technique of lawmaking through self-interrogation about the effects of equality norms across all domains.[63] For instance, San Francisco has determined to "[r]eview federal, state, and local laws and public policies to identify systematic and structural discrimination against women and girls" in order to "[i]ntegrate gender into every city department to achieve full equality for men and women through the city-wide budgeting process."[64] These goals have a name in transnational parlance: they are

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59. *Id.* at 127 (statement of Patrick Fagan, Fellow, The Heritage Foundation).

60. *See* Catholic Family & Human Rights Inst., *US Pro-Life/Pro-Family NGOs Flood White House Switchboard Against CEDAW*, 5 Friday Fax 24 (June 7, 2002), http://www.c-fam.org/publications/id.244/pub_detail.asp (last visited July 27, 2008).

61. CEDAW, *supra* note 51, at arts. 2(e)–(f), 4. When equality is achieved, the remedial measures are to be discontinued. *Id.* art. 4.

62. WOMEN'S ENV'T & DEV. ORG., FOR WOMEN ENGAGING GLOBALLY, CEDAW IN THE UNITED STATES: WHY A TREATY FOR THE RIGHTS OF WOMEN? 2 (2005).

63. *See* City & County of S.F. Mun. Code, Admin. Code, §§ 12K.1, 12K.4 (2005).

64. City & County of S.F., S.F. Comm'n on the Status of Women: CEDAW Action Plan, Part I.C-D (Feb. 1, 2003), *available at* http://www.sfgov.org/site/cosw_page.asp?id=17146.

what the United Nations, the Council of Europe, and the Commonwealth Secretariat call *gender mainstreaming*, because they aim to ensure that government actors make all social policy decisions with gender issues in mind.

This detour from environmentalism demonstrates that while the mayors' initiative on global warming is impressive in scope, it is not unprecedented in form. Other examples of transnational efforts in the twentieth century include initiatives that have sought 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, to help provide restitution for Holocaust victims,[65] to abolish the death penalty, and to stop the war in Iraq, genocide in Sudan,[66] and sweatshop labor.[67] Given the range, one commentator forecasts that, "[u]nless America becomes a police state, municipal foreign policies are here to stay."[68] These efforts are deeply democratic, in the sense that they spring either from referenda enacted by majorities within subnational jurisdictions or from agendas of popularly elected executive officials (governors, mayors, and city council members) who take positions that resonate with their constituencies. Democratic federalism has been, repeatedly, a source of importation that has transformed the nation's self-understanding of its own legal commitments.

Thus, to the extent sovereigntists seek to ground their objections in federalism or majoritarianism, they can demonstrate no such theoretical or practical underpinnings. Sometimes, sovereigntist positions win popular initiatives to erect boundaries, and other such attempts fail. And, over the long run, sovereigntists have not succeeded in erecting borders between states or across oceans. Local and national law is constantly being made and remade through exchanges, some frank and some implicit, with normative views from abroad. Laws, like people, migrate. Legal borders, like physical ones, are permeable, and seepage is everywhere.

The phenomenon of "law's migration" has both a long history in the United States and many contemporary iterations[69] through various channels, both judicial and majoritarian. Ideas, norms, and practices do not stop at the lines that people draw across land. In the federal system, subnational units provide an array of entry ports. Over time, the origins of rules blur. Certain legal precepts are now

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65. *See generally* 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); 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).

66. *See, e.g.*, Save Darfur, http://www.savedarfur.org (last visited July 16, 2008); *see also infra* notes 361–72 and accompanying text.

67. *See* Adrian Barnes, *Do they Have to Buy from Burma?: A Preemption Analysis of Local Antisweatshop Procurement Laws*, 107 COLUM. L. REV. 426 (2007).

68. Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, FOREIGN POL'Y, Winter 1986-1987, at 154, 171.

69. *See generally* Resnik, *Law's Migration*, *supra* note 9.

seen as foundational to the United States, but one should not label them "made in the USA" without an awareness that, like other "American" products, some parts and designs are produced abroad.

VI. TRANSLOCALISM AND FEDERALISM: TANS, NGOS, AND TOGAS

A. Federalist Perspectives

In many respects, coordinated translocal activities are built on the federal structure of the United States, even as translocal activities also require reconsideration of some stock precepts. In discussions of legal federalism, states are typically conceived as individual and independent actors that must be placed on an "equal footing" by national law.[70] The environmental federalism literature is especially attentive to states as competitors; the metaphor is of races—to the bottom or the top—in which states tailor policies to attract industry and investment to their respective jurisdictions.[71] Indeed, some localities have adopted the "green movement" by positing it as good for their own economic growth.[72]

Less in view are the many joint actions undertaken by states. At the formal level of the Constitution's Compact Clause, some cross-jurisdictional state activities require congressional approval, which is provided through statutes approving specific compacts.[73] But more common than compacts are coordinated

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70. *See, e.g.*, Coyle v. Smith, 221 U.S. 559, 567 (1911). Skocpol analyzes the ways in which U.S. voluntary associations, more generally, mirror the political structures of American federalism in THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 20–126 (2003).

71. *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*", 67 N.Y.U. L. REV. 1210, 1210 (1992); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 274 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 573 (1996).

72. *See, e.g.*, Keith Schneider, *Salt Lake City Is Finding a Payoff in Conservation*, N.Y. TIMES, Nov. 7, 2007, at H10 [hereinafter Schneider, *Salt Lake City*].

73. U.S. CONST. art. I, § 10, cl. 3. A small legal literature addresses the Compact Clause. Pathsetting was the work of Felix Frankfurter and James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925). Recent discussions include Duncan B. Hollis, *Unpacking the Compact Clause*, 73 MO. L. REV. (forthcoming 2008); Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997); and Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465 (1996). In the political science literature, a comparably small body of materials focus on these questions. *See, e.g.*, Timothy J. Conlan, Robert L. Dudley & Joel F. Clark, *Taking On the World: The International Activities of American State Legislatures*, PUBLIUS, Summer 2004, at 183; Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RES. & THEORY 535, 539 (2004).

Bowman also noted a lack of research as she studied cooperative activities undertaken by more than one state.. Tracking the number of state compacts unrelated to borders, Bowman found a range of such activity, with some states participating in up to thirty-two compacts. *Id.* at 539. Many compacts were bilateral, but a few involved numerous states; for example, as of 1998, forty-three states were members of the Drivers' License Compact,

initiatives through multistate executive orders, informal administrative agreements, or other joint ventures among similarly situated subnational actors.[74]

The term "horizontal federalism"—state to state interaction—has recently gathered some attention within the legal academy[75] as a useful way to characterize exchanges mediated through the Full Faith and Credit Clause, the Dormant Commerce Clause, and the Fourteenth Amendment.[76] Scholars and policymakers have used examples ranging from marriage laws to the treatment of criminal offenders after incarceration, as they consider how regimes in one state must or can be used by another state when people or goods travel,[77] and whether courts or Congress should impose national resolutions of such questions. Furthermore, concerns about "horizontal aggrandizement"—the possibility that some states will take advantage of their superior resources to obtain national legislation beneficial to their interests at the expense of other states—have been elaborated in support of arguments for judicial oversight of congressional decisions.[78]

Turning to the "vertical dimensions," one finds discussions of "cooperative federalism"—used to denote collaboration linking federal actors with either state or local actors, often in the context of city- or state-based implementation of national programs.[79] In addition, the ideas and practices of regionalism are central to scholars of local government.[80] But the legal federalism literature does not pay much attention to federalist practices that cross both vertical and horizontal dimensions at the same time, which (at the Conference from which this Article emerged) Daniel Farber suggested we call "diagonal federalism"[81] and

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which provided for the exchange of information about nonresident traffic law violators. *Id.* at 540. Bowman sought to identify factors forecasting cooperation, but found that none of those that she investigated—including party-affiliation, policy liberalism, neighboring state behavior, and government capacity—were predictive.

74. Bowman, *supra* note 73, at 544 (noting the increasing popularity of this mode of coordination, which could be quickly negotiated and amended).

75. *See, e.g.*, Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. (forthcoming 2008).

76. *See generally* Bowman, *supra* note 73, at 536.

77. *See, e.g.*, Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005).

78. *See* Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 955–56, 966–67 (2001) [hereinafter Baker, *Putting the Safeguards Back*]; *see also* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 106 (2001).

79. *See, e.g.*, Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 968–69 (2007). His focus is the role of federal courts in empowering localities vis-à-vis states in which they sit. *See also* Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542 (2006).

80. *See, e.g.*, Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 405 (2006).

81. Daniel Farber, Remarks at the William H. Rehnquist Center Conference: Federalism and Climate Change: The Role of the States in a Future Federal Regime (Feb. 11, 2008), http://www.law.arizona.edu/FrontPage/Events/Gallery/fedconference/index.htm.

which we explore below as we discuss translocal organizations of government actors—"TOGAs."

Translocal action requires us, first, to reappraise the propriety of conceiving of states in the singular rather than appreciating their role as a collective national force and, second, to ask questions about what import this reconception could have for political theory, legal doctrine, and the desirability of regulatory interventions. To do so, in turn, entails attending to the differing interests *within* states. As detailed below, translocal organizations often key to one or another level of government (e.g., city, county, or state) or kind of governmental actor (e.g., mayor, council member, governor, or legislator). States are themselves aggregates of entities and of persons holding different (and sometimes conflicting) views of what constitutes that state's "interest." Evidence of such divergence comes regularly in courts and legislatures when such officials argue opposite sides of an issue. Several aspects of the formation and implementation of translocal policies are mediated through organizational structures developed during the twentieth century. Those entities enable local officials to make their marks on national and transnational policy. Much of what TOGAs do is both interesting and underexplored, empirically and normatively, especially in legal scholarship.[82]

B. Governmental and Non-Governmental: TOGAs

A significant body of scholarly literature addresses social movements through a focus on "networks" of activists bringing parallel and coordinated initiatives across a spectrum of issues.[83] These "transnational advocacy networks" (TANs) are often spawned by nongovernmental organizations (NGOs), or groups formed to advance a particular issue. Examples include organizations focused on the environment, including those that the COMPASS report bemoaned, even though that report was itself authored by an issue-driven (albeit apparently short-

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Brief mention of these organizations can also be found in Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1551–59 (1994).

82. As noted, a small literature related to "public administration" has engaged these issues, and other social scientists have begun to consider the function of such groups. *See, e.g.*, ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM (1995); Carson Chase Hicks, Bringing the States Back In: The National Governors' Association and Transformations in U.S. Welfare Policy, 1986–1996, at 3–5 (2007) (unpublished Ph.D. dissertation, Columbia University) (*available at* ProQuest, UMI No. 3249091); DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING (1974). Across the social sciences, interest is turning to the role of international efforts by local governments. *See, e.g.*, Terrence Guay, *Local Government and Global Politics: The Implications of Massachusetts' "Burma Law,"* 115 POL. SCI. Q. 353, 354 (2000); Michele M. Betsill & Harriet Bulkeley, *Transnational Networks and Global Environmental Governance: The Cities for Climate Protection Program*, 48 INT'L STUD. Q. 471 (2004).

83. *See, e.g.*, MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 2 (1998).

lived) NGO.[84] Many commentators explore how "norm entrepreneurs" operating in NGOs and through TANs affect civil society.[85]

Because transnational advocacy networks include "relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services,"[86] groups such as the U.S. Conference of Mayors could be placed within the NGO fold. But the term "NGO" is generally used to mean what its initials stand for—a "*nongovernmental* organization"—a group of persons in the private sector working in concert, playing a significant role in the public sphere in order to garner support for influencing government policies.

In contrast, the network that spawned the Mayors Climate Protection Agreement was comprised of many individuals who know each other because, as elected officials of cities with populations of 30,000 or more, they were eligible to be members (as of right) of the U.S. Conference of Mayors.[87] That organization is one of several in the United States defined and populated by people holding positions in local or state government. As an organization, the U.S. Conference of Mayors is "private" in the sense that it is not a part of local, state, or the federal governments. But the political capital of the U.S. Conference of Mayors comes from the fact that its members are democratically elected, public-sector officials.

Yet the U.S. Conference of Mayors is not a "GO"—a governmental organization. Rather, it is a voluntary association that is not bound by, nor does it bind, the government units of which its members are the mayors. The U.S. Conference of Mayors and its counterparts are also both public and private in terms of finances; their resources are generally a mix of grants, corporate sponsorships, and taxpayer funds. As one scholar of municipal associations put it, they are "part interest groups, part associations, part institutions of government."[88]

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84. COMPASS's report is today available on a website maintained by James V. Delong, former Research Director of the Administrative Conference of the United States. *See* COMM. TO PRESERVE AM. SEC. & SOVEREIGNTY, *supra* note 4. Web-based information does not suggest that COMPASS is currently active.

85. *See, e.g.*, Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1526 (2003); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 215–17 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

86. KECK & SIKKINK, *supra* note 83, at 2.

87. To be a voting member, one must be a mayor of a city in the United States that has a population of 30,000 or more. *See* U.S. Conference of Mayors, About the U.S. Conference of Mayors, http://www.usmayors.org/about/information.asp (last visited August 16, 2008). In addition, "[a]ssociate Membership is available to those cities under 30,000 in population; Mayors who are Associate Members cannot vote on Conference policy or hold office in the Conference leadership." *Id.*

88. Bertram Johnson, *Associated Municipalities: Collective Action and the Formation of the State Leagues of Cities*, 29 SOC. SCI. HIST. 549, 550 (2005) [hereinafter Johnson, *Associated Municipalities*]. In the 1970s, Haider characterized various TOGAs (such as the National Governors Association and the Council of State Governments) as "a kind of 'third house' of elected representatives at the national level" even as he noted that they were "private, voluntary associations . . . with no formal toehold in the executive or

This set of such organizations could be captured by a clunky shorthand that, if fully descriptive (such as Translocal Private Organizations of Government Officials and Actors, or TPOGOA), does not abbreviate well.[89] We choose instead the phrase *Translocal Organizations of Government Actors* and therefore the acronym *TOGA* to hearken back to the ancient Roman garb that denoted dignity (and perhaps peacefulness) and that marked citizenship.[90] Further, we think that TOGA helps to indicate the government-supportive and broad base of these entities, in contrast to the less attractive abbreviations sometimes offered for "special interest groups" (SIGs) and "public interest groups" (PIGs).[91] Our point about the importance of such organizations can be seen in part through the table, *Translocal Organizations of Government Actors: A U.S. Snapshot*, which lists some of the prominent TOGAs, set forth chronologically by the year in which they were formed.[92]

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legislative branches." HAIDER, *supra* note 82, at 306. He provided a history of several as well as case studies of their effects and their interaction with different national administrations during the 1960s and 1970s.

89. David S. Arnold and Jeremy F. Plant proffer another term, "public official association," which they define as "all those organizations whose primary membership consists of practicing public officials, elected or careerist, and whose purpose is the advancement of the professional interests of the membership and the general public interest." DAVID S. ARNOLD & JEREMY F. PLANT, PUBLIC OFFICIAL ASSOCIATIONS AND STATE AND LOCAL GOVERNMENT: A BRIDGE ACROSS ONE HUNDRED YEARS 5 (1994). Our thought is that the genre needs to be understood, as we elaborate below, in broader terms. Hence, we proffer a different nomenclature not tied to a definition that invokes "the general public interest."

90. *See* Caroline Vout, *The Myth of the Toga: Understanding the History of Roman Dress*, 43 GREECE & ROME 204, 214–16 (1996). Vout explores the toga's import as a ceremonial indication of political and civic status, belonging to men. *Id.* at 210–15. Lillian Wilson also explains how variations detailed the wearer's rank and position. The "toga pura" was the standard dress of the male Roman citizen, given to him in a special coming of age ceremony, and it denoted his enfranchisement; the "toga candida" was worn by political candidates for public office; and the "toga praetexta" had a purple or scarlet band and was worn by magistrates and senators. LILLIAN MAY WILSON, THE ROMAN TOGA 51–52 (photo. reprint 2006) (1924). And while it was possible that women wore togas in the early days of Rome, only "disreputable" women used the garment once the Republic was established. *Id.* at 27.

91. *See* Hugh Heclo, *Issue Networks and the Executive Establishment*, *in* THE NEW AMERICAN POLITICAL SYSTEM 87, 94–105 (Anthony King ed., 1978); ARNOLD & PLANT, *supra* note 89, at 108; *see also* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 32–40 (2007).

92. In their 1994 volume, Arnold and Plant provided a "list of sixty-one generalist and specialist associations." ARNOLD & PLANT, *supra* note 89, at 7, 10–11. They included the ones we discuss as well as other kinds of groups, such as the American Public Transit Association, the Institute of Transportation Engineers, and the National Association of State Mental Health Program Directors. *Id.* at 10–11.

Table 1: Translocal Organizations of Government Actors: A U.S. Snapshot

TOGA	*Founding Year*
National Conference of Commissioners on Uniform State Laws	1892
National Association of Attorneys General	1907
National Governors Association	1908
International City/County Management Association	1914
Council of State Governments	1933
U.S. Conference of Mayors	1933
National Association of Counties	1935
Conference of Chief Justices	1949
National League of Cities	1964
National Conference of State Legislatures	1975
National Association of Towns and Townships	1976

As their names describe, many TOGAs are not organized by an interest (such as global warming or women's rights), but rather by the political actors they gather—the level of jurisdiction (federal, state, county, city) or the kind of office (governor, attorney general, legislator, mayor).[93] Eligibility for membership is often automatic for a person filling a certain rank or for an entity of a particular kind. As such, these organizations are self-replenishing and thus less fragile than many NGOs that have to struggle to create links and then to attract people to participate. TOGAs are not invulnerable to attrition. They, too, need to make plain why membership matters. TOGAs do so, for example, by providing education, practical services, and visibility for their members to local, national, or global audiences.[94] The appeal of TOGAs varies with local and state officials' needs for

93. Our focus is on generalist TOGAs, whereas several TOGAs are tied to specific forms of expertise (such as the National Association of State Aviation Officials) or to certain issues. One example of an issue-based focus is the Environmental Council of the States (ECOS), founded in 1993; its members are state cabinet-level environmental protection officials. *See* Envtl. Council of the States, About ECOS, http://www.ecos.org/section/_aboutecos (last visited July 20, 2008). Another example is the National Tribal Environmental Council. *See* Nat'l Tribal Envtl. Council, About Us, http://www.ntec.org/aboutus.htm (last visited July 20, 2008). In addition, some TOGAs stem from activities of federal officials, such as the National Conference of Federal Trial Judges. *See* Nat'l Ass'n of Fed. Trial Judges, ABA Judicial Division, http://www.abanet.org/jd/ncftj/ (last visited July 15, 2008). As our focus here is on action at the subnational level, our discussion will not address federal TOGAs.

94. As one scholar noted, media attention is an important variable and during the mid-1990s, state governors received a good deal such that, on some issues, "the nation's governors had eclipsed all other elected policy makers." *See* Deborah Suzanne Meizlish,

such services and benefits, which in turn depend on the identity of a particular actor and the governmental entity to which that person belongs. For example, governors of large states may be less regularly involved in national organizations because they already command attention and have other avenues for gaining information and advantage.[95]

TOGAs often define themselves as bipartisan, potentially generating opportunities otherwise not available. Networking is one obvious aspect of TOGAs' work, enabling them to serve as clearinghouses and repositories for information and sometimes as research and educational institutions. Through the information they collect, the committees they organize, the conferences they run, and the services that they provide, TOGAs can affect members' understandings of the kinds of problems and forms of group-based responses appropriate to their office. TOGAs can thus shape both norms and policy preferences.[96] The work of the U.S. Conference of Mayors on climate change illustrates this point; a decade earlier, mayors might not have perceived this issue as "theirs" nor felt any collective pressure to opine about or regulate it.

Depending on their own resources, TOGAs can also provide technical assistance and, depending on their bylaws, they may also work as advocates and lobbyists to affect policies in various jurisdictions. Like all organizations (governmental or private), they are always in need of funding to support their infrastructures and ambitions. And, in recent decades marked by the nationalization and globalization of the economy, TOGAs have broadened their horizons. As detailed above and below, they are conduits for border crossings—state to state, state to federal, and international.[97]

Translocal institutions are legally and politically intriguing because they are national but not part of the federal government. They are also deeply federalist in that they are artifacts of U.S.-style federalism, and they obtain their identity and some of their legitimacy from the fact of federalism. Further, they are very present

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Negotiating Federalism: Governors and the Politics of State-Federal Relations, at 1 (2001) (unpublished Ph.D. dissertation, University of Michigan). *available at* http://proquest.umi.com/pqdlink?Ver=1&Exp=0722013&FMT=7&DID=728973851&RQT=309&attempt=1&cfc=1.

95. Meizlish argued that the National Governors Association was of particular import for governors of smaller states. *Id.* at 34–35. Yet the platform that the National Governors Association provides can also be of use to governors of larger states. For example, in April 2008, Arnold Schwarzenegger, Governor of California, chose to speak at a celebration of the one hundredth anniversary of the association during a meeting at Yale University in New Haven, Connecticut, where the topic—global climate challenges—was one of particular interest to him. *See* David Funkhouser, *Yale Plans a Warming Summit: Schwarzenegger to Join Rell, Others to Urge U.S. Action on Problem*, HARTFORD COURANT, Mar. 28, 2008, at B9. That meeting was not an official NGA gathering, but more than a dozen governors, including Schwarzenegger, used it as a mechanism to publicize their joining in a statement on global warming. *See id.*

96. *See* Michele M. Betsill & Harriet Bulkeley, *Transnational Networks and Global Environmental Governance: The Cities for Climate Protection Program*, 48 INT'L STUD. Q. 471, 475–77 (2004); *see also* Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. (forthcoming 2008).

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

in U.S. law. Their impact can be seen at the national level in various statutory and regulatory regimes, and they are becoming regular participants in courts, sometimes as parties to lawsuits and other times as amici filing either directly or through their members.[98] Moreover, many of the policies that they help to disseminate—like greenhouse gas emissions reduction or Sudan divestiture—end up in court through challenges grounded in the view that such lawmaking encroaches on the prerogatives of other states or the nation and is therefore preempted. Legal interventions can invigorate translocal institutions. For example, statutes can directly assign roles to them or, by providing revenues targeted to one or another level of government, can shape markets in which TOGAs operate. Similarly, decisions by courts either to intervene at their behest or to decline create incentives for TOGAs to work to influence judges and legislatures in local and national settings.[99]

Before exploring the features of specific TOGAs and their contemporary influence, a moment of history and a sketch of the missions of a few are in order to see the matrix that they form and to assess their significance for the practices and the law of federalism. In the United States, the roots of these governmental "interest groups" go back to the late nineteenth and early twentieth century. Like today's government actors, participants then had various agendas. One concern was mismanagement of localities; in 1894, some "150 citizens united by a desire for more efficiency and less corruption in city government assembled in Philadelphia" at the suggestion of the Municipal League of Philadelphia and the City Club of New York.[100] At the time, more than forty localities had reform organizations, concentrated in fourteen states.[101] Theodore Roosevelt was among those who came together in Philadelphia; the assembled group called for a "First National Conference for Good City Government," which was held that year and resulted in the formation of the National Municipal League.[102] Within a couple of years, 180 municipal leagues had come into being.[103] These reformist efforts[104]

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98. *See infra* notes 117–30 and accompanying text.

99. *See* ARNOLD & PLANT, *supra* note 89, at 89 (providing a chart noting events such as the Housing Act of 1949 and the 1962 Supreme Court decision of *Baker v. Carr*, 369 U.S. 186 (1962), affecting reapportionment of state legislatures); *id.* at 123 (providing a chart from 1970 to 1990 identifying the end of "federal revenue sharing," the Family Support Act of 1988, and other milestones affecting associational work). They also comment that a Supreme Court decision, *National Bellas Hess v. Illinois*, 386 U.S. 753 (1967), holding that states cannot tax interstate mail order sales without statutory authorization from Congress, prompted TOGAs to understand the importance of a Washington-focused legislative lobbying strategy. ARNOLD & PLANT, *supra* note 89, at 135–36.

100. ALVA W. STEWART, THE NATIONAL MUNICIPAL LEAGUE: A BIBLIOGRAPHICAL SURVEY 3 (Vance Bibliographies Pub. Admin. Series: Bibliography #P 53) (1978) [hereinafter STEWART, THE NATIONAL MUNICIPAL LEAGUE].

101. Clinton Rogers Woodruff, *The Progress of Municipal Reform, 1894-1895*, *in* PROCEEDINGS OF THE FIRST AND SECOND NATIONAL CONFERENCES FOR GOOD CITY GOVERNMENT 304, 305 (1895) [hereinafter Woodruff, *Progress of Municipal Reform*].

102. *See* STEWART, THE NATIONAL MUNICIPAL LEAGUE, *supra* note 100, at 3. A time line of "key events in association history" from 1886 to 1948 is provided in ARNOLD & PLANT, *supra* note 89, at 48.

103. Woodruff, *Progress of Municipal Reform*, *supra* note 101, at 305.

aspired not only to limit corruption but also to protect localities from state overreaching as well as to insist that states spread their wealth rather than give special benefits to a single city.[105]

The leagues also sought to develop better government institutions. The National Municipal League provided "models" of plans for city managers, including constitutions, charters, and the like, as it also promoted "home rule"—local control.[106] In that quest, some proponents also drew on experiences from abroad: "the European cities are conspicuous examples of self-governing communities as to all local matters . . . . The Citizens of Glasgow govern Glasgow [but] the Legislature of New York governs Buffalo."[107] And, as the aptly named "National Municipal League" made plain, the group aimed to make clear that "the question of good city government was more than a purely local issue; rather it was one of the most important issues confronting the nation at the time."[108] Its commitments included transparent mechanisms for accounting for localities, planning, and attending to "local self-government" while interacting with counties and states.[109]

Support for such networks drew on "Taylorism," an ideology named after Frederick Winslow Taylor, who embraced "scientific management" in industry.[110] While Taylor was not a direct part of the civic reform movement, his ideology of

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104. "[A]dvocates of good government are not fighting Republicans or Democrats as such, but professional politicians." Clinton Rogers Woodruff, *A Year's Work for Municipal Reform*, *in* PROCEEDINGS OF THE FOURTH NATIONAL CONFERENCE FOR GOOD CITY GOVERNMENT AND OF THE SECOND ANNUAL MEETING OF THE NATIONAL MUNICIPAL LEAGUE 62, 67 (1896).

105. *See* Johnson, *Associated Municipalities*, *supra* note 88, at 558.

106. *See* STEWART, THE NATIONAL MUNICIPAL LEAGUE, *supra* note 100, at 4; Horace E. Deming, *The Municipal Problem in the United States*, *in* PROCEEDINGS OF THE INDIANAPOLIS CONFERENCE FOR GOOD CITY GOVERNMENT AND FOURTH ANNUAL MEETING OF THE NATIONAL MUNICIPAL LEAGUE 53, 54–56 (1898); *see also, e.g.*, COMM. OF MUN. PROGRAM OF THE NAT'L MUN. LEAGUE, A MODEL CITY CHARTER AND MUNICIPAL HOME RULE (1916). Deming argued that state policies should be reformed to set floors, not ceilings. For example, "[t]he state may be satisfied to require only elementary education throughout the State generally; the city may desire high schools and free colleges." *Id.* at 56. And, while he argued for overlap, he also evidenced some essentialist claims: "The determination . . . of the public education policy within the municipality as to the higher grades of education is as purely a local government function as is the decision of such matters as street grading and paving, the height of buildings and maintenance of parks, the construction of a bridge, the erection of a city hall, the establishment of general markets." *Id.* at 57. As for conflicts, his test would be: "Does the local policy conflict with the general public policy" of a state that was applied "equally . . . to every part of the State?" *Id.*

107. Deming, *supra* note 106, at 55.

108. STEWART, THE NATIONAL MUNICIPAL LEAGUE, *supra* note 100, at 5–6. As Stewart recounts, in the late 1940s, the National Municipal League held an "All America Cities competition" to recognize community improvements by giving about a dozen awards annually. *Id.* at 7. The League also provided information on state constitutional conventions, and its other projects, typically funded by targeted grants, focused on topics ranging from ethics to legislative reapportionment. *Id.* at 6.

109. *Id.* at 8–9.

110. ARNOLD & PLANT, *supra* note 89, at 51.

efficiency through well-crafted systems of production was influential for civic reformers, aspiring to have better-run governments.[111] Other proponents identified with a political movement known as populism. These advocates sought to "improve the machinery for self-government, to promote honest and efficient government, and to place public affairs and public officials under direct and final control of the electorate."[112] To advance the National Municipal League's aims, a 1916 publication compiled an "authoritative record to date of the experiences of American Municipalities" under what it termed a commission form of government.[113] As the editors of the essay explained, it was "highly important and instructive for those at work in any one municipality to know how matters are being managed in other municipalities in various parts of our great country."[114]

As the discussion of the history of early TOGAs makes plain, their agendas should not be conceived as unidirectional, as if a set of interests is produced at any one level and then pressed elsewhere. Rather, agendas are the product of interactions between local needs and state policies or between subnational needs and federal policies. Indeed, the federal government has been, on occasion, an important source of funding for some TOGAs and, in a few instances, has helped to create these translocal organizations in efforts to gain support for national policies and to diffuse criticism.[115] Further, TOGAs are dynamic. Many have reconfigured over time or merged with other entities. Several continue to have charters that result in sharing members with other TOGAs, and

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111. *Id.*

112. *See* 18 EQUITY 2 (1916). Equity was a quarterly publication edited by Charles Fremont Taylor; its board of "editorial counselors" included Robert M. La Follette, the United States Senator from Wisconsin, Samuel Gompers, President of the American Federation of Labor, and George W. Norris, United States Senator from Nebraska. *Id.*

113. Proposed "for the sake of efficiency" was that local lawmaking and executive authority be vested in a "small group of officials ideally elected through non-partisan and proportional methods, that they rely on expert managers, and that voters have the powers of petition and recall." *The Nation-Wide Movement for Municipal Efficiency under Popular Control*, 17 EQUITY 162, 174 (1916) [hereinafter *Municipal Efficiency*]. That article was followed by a "Comparative Table of the General State Laws and Constitutional Provisions Concerning the Commission, Commission-Manager, and other New Forms of Municipal Government, Including the Initiative, Referendum and Recall," *id.* at 175–80, and "A Summary of State General Laws and Constitutional Provisions Concerning Municipal Organization and Reports from Municipalities Operating Hereunder, Arranged in the Alphabetical Order of States," *id.* at 181–311.

114. *Id.* at 162.

115. *See infra* notes 144–48, 170–75 and accompanying text (discussing the activities of the U.S. Conference of Mayors and the National Association of Towns and Townships). The Environmental Council of the States (ECOS), founded in 1993, is another example, convened with support from the Environmental Protection Agency (EPA) just before a newly Republican-controlled Congress, acting on its "Contract with America" to cut federal regulatory action, sought to reconsider and retract basic environmental protection laws. The goal of ECOS was to create a group with whom the federal EPA could work to resolve problems collaboratively and thereby oppose retrenchment of the federal regime. *See* DENISE SCHEBERLE, FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION 3 (2d ed. 2004).

some TOGAs are subsets of others. Both jurisdictions and government actors may be a member of more than one TOGA.

As non-essentialists, our larger point here is that these "local," "federal," and "international" "interests" are not fixed but emerge based on various interdependencies. Further, TOGAs' varied positions demonstrate that to describe an entity in terms of a level of government (cities, for example) is not necessarily to know what position that entity will take toward particular issues (such as gun control or immigration). An organizational level (county, city, federal, state) does not consistently predict a particular point of view that can be styled as "progressive" or "conservative." Moreover, issues such as environmentalism may not fit easily in those boxes. Once seen as coming at the price of economic growth, efforts to be "green" are now promoted as the key to expanding development opportunities.[116] And, given that environmental regulation could affect differently situated subnational regimes in different ways, one can expect that particular subnational jurisdictions and TOGAs could adopt oppositional stances on the same issues at any given time.

One example of this divergence comes from controversy over the authority to regulate greenhouse gas emissions, an issue litigated in the United States Supreme Court in 2007. At issue in *Massachusetts v. EPA*[117] was whether the Clean Air Act requires the EPA to regulate greenhouse gases emitted by motor vehicles.[118] A preliminary question—given that the State of Massachusetts was a named plaintiff—was whether states had standing to bring the challenge. In a majority decision written by Justice Stevens, the Court held that Massachusetts was a proper plaintiff and that the EPA had been in default for its failure to regulate vehicle emissions.[119] Explaining the standing decision, the Court reasoned that its caselaw on sovereign immunity was relevant. Given that the doctrine gave the states protection as defendants, the Court concluded that the states' "stake in protecting [their] quasi-sovereign interests . . . is entitled to special solicitude in our standing analysis."[120] The Court also noted the limits of those "quasi-sovereign interests"; by entering the union, a state "surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some

116. *See* Schneider, *Salt Lake City*, *supra* note 72 (quoting an analysis from Brookings that "[e]nvironmental policy has emerged as a central organizing principle of economic growth in metropolitan level in America").

117. 127 S. Ct. 1438 (2007).

118. *Id.* at 1462–63.

119. Although other local government and environmental organizations were plaintiffs as well, Justice Stevens' majority opinion addressed only the question of Massachusetts's standing; when doing so, he relied on the doctrine that "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review." *Id.* at 1453.

120. *Id.* at 1454–55. The dissent, penned by Chief Justice Roberts, would have refused to recognize the state as a proper plaintiff, *id.* at 1464–66, a point to which we return as we analyze in Part VII, *infra*, the question of what legal rules should apply to TOGAs.

circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be preempted."[121]

In the debate before the Court, different groups of subnational participants took opposing positions. Massachusetts was the first named plaintiff, joined as parties by eleven other states,[122] three cities (New York, Baltimore, and Washington, D.C.), and a territory (American Samoa), as well as by environmental organizations.[123] Ten other states intervened in support of the federal government but did not take a position on the standing issue.[124] Before the Supreme Court, six additional states as well as Alaska Indian Tribes[125] filed amici briefs in support of Massachusetts.[126] In sum, counting litigants and amici, the states split before the Court, eighteen on the side of Massachusetts as contrasted to ten on the opposite side in support of the federal government. Also weighing in as amici on the side of Massachusetts were three TOGAs (the U.S. Conference of Mayors, the National Association of Counties, and the International Municipal Lawyers Association), and four cities, including Seattle, which introduced itself in its "statement of interest" as a pioneer in the Kyoto Protocol activism that helped to launch the U.S. Mayors Climate Protection Agreement.[127] In its filing with the Court, the U.S. Conference of Mayors similarly trumpeted its translocal and transnational work.[128]

The array that includes cities, states, or TOGAs on both sides in *Massachusetts v. EPA* is not idiosyncratic. Rather, in virtually all of the Supreme Court's major recent federalism cases, subnational actors representing their

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121. *Id.* at 1454.

122. Those states were California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

123. *Id.* at 1446 & nn.2, 3.

124. *Id.* at 1446–47 (Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah). But Idaho "elected not to join" the Brief of the State respondents in the Supreme Court. *See* Brief for Respondents States of Michigan, North Dakota, Utah, South Dakota, Alaska, Kansas, Nebraska, Texas, and Ohio at ii, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120) 2006 WL 3095443.

125. *See* Brief of Amici Curiae Alaska Inter-Tribal Council, Council of Athabascan Tribal Governments, and Resisting Environmental Destruction on Indigenous Lands in Support of Petitioners, Massachusetts v. EPA, 127 S. Ct. 1438 (No. 05-1120), 2006 WL 2540801.

126. Arizona, Iowa, Maryland, Minnesota, Wisconsin, and Delaware. *See* Brief of Amici Curiae States of Arizona, Iowa, Maryland, Minnesota, and Wisconsin, in Support of Petitioners, Massachusetts v. EPA, 127 S. Ct. 1438 (05-1120), 2006 WL 2563380; Brief of Amicus Curiae Delaware in Support of Petitioners, Massachusetts v. EPA, 127 S. Ct. 1438 (05-1120), 2006 WL 2569576.

127. *See* Brief of Amici Curiae U.S. Conference of Mayors, National Association of Counties, International Municipal Lawyers Association, American Planning Association, the City of Seattle, the City of Albuquerque, the City of Burlington, and the City and County of San Francisco as Amici Curiae in Support of Petitioners, Massachusetts v. EPA, 127 S. Ct. 1438 (No. 05-1120), 2006 WL 2569574 at 3 (Seattle Statement of its interest as an amici) [hereinafter Brief of U.S. Conference of Mayors].

128. *Id.* at 23–29, Massachusetts v. EPA, 127 S. Ct. 1438 (05-1120), 2006 WL 2569574 at 1–4. The majority did not reach the argument asserted by this brief that localities as well as states had demonstrated sufficiently concrete injury in fact as to have standing.

political units or through TOGAs have filed briefs on both sides, arguing that a particular provision either exceeded or fell within congressional powers under the Constitution.[129] Furthermore, splits exist not only across TOGAs but also within them, as members debate whether to take a position and if so, what it should be.[130] In the national legislative arena, different levels of subnational government have frequently disagreed about policy initiatives and vied with one another for federal funds and targeted roles in statutes.[131]

More generally, TOGAs' energies have gone in myriad directions and cannot be easily pigeon-holed on the political spectrum. Whereas the efforts by some TOGAs to promote the Kyoto Protocol and CEDAW could be identified as progressive in their aspirations to create new paradigms or strategies to deal with global warming and women's rights, other subnational initiatives could be identified as conservative in their aims to entrench particular economic or status relationships.[132] As Lisa McGirr has detailed, the "men and women who rejected the liberal vision and instead championed individual economic freedom and a staunch social conservatism" have had a significant impact.[133] Recent examples

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129. *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 authors). For example, in *Printz v. United States*, 521 U.S. 898 (1997), which raised the question of federal power to involve local law enforcement officers in gun control efforts, eight states came together to file an amicus brief in support of the petitioner. *See* Brief of Colorado, Idaho, Kansas, Montana, Nebraska, South Dakota, Virginia, & Wyoming, in Support of Petitioner, Printz v. United States, 521 U.S. 898 (1997) (Nos. 95-1478 & 95-1503), 1996 WL 473580. Another thirteen states joined in an amicus filing on behalf of the respondent. *See* Brief of Amici Curiae Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, & Wisconsin in Support of Respondent, Printz v. United States, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503), 1996 WL 590921.

130. For example, in 2007, a divided U.S. Conference of Mayors passed, by a 51-47 vote, a resolution on the Iraq War calling "for the Administration to begin planning immediately for the swift and prudent redeployment of the U.S. Armed Forces." U.S. Conference of Mayors: Adopted Resolutions, http://www.mayors.org/75thAnnual Meeting/resolutions_full.pdf (June 2007); *see* Ed Somers, *Conference Adopts Resolution on Iraq War*, U.S. MAYOR NEWSPAPER, July 16, 2007, *available at* http://usmayors.org/uscm/us_mayor_newspaper/documents/07_16_07 /pg38_iraq_war.asp.

131. ARNOLD & PLANT, *supra* note 89, at 77–83, 122–23. For example, in the 1940s and thereafter, the U.S. Conference of Mayors sought explicit "statutory endorsement of the practice of direct federal-city relations" while the Council of State Governments wanted "almost uniformity in the administration of federal grant-in-aid programs." *Id.* at 81–82 (citation omitted).

132. Several social scientists have mapped mobilization by conservative groups—including thoughtful engagement with local school boards and city councils—that have produced a wide range of policies. *See, e.g.*, Steven Teles & Daniel Kenney, *Spreading the Word: The Diffusion of American Conservatism in Europe and Beyond, in* GROWING APART? AMERICA AND EUROPE IN THE 21ST CENTURY 136, 136–69 (Jeffrey Kopstein & Sven Steinmo eds., 2007); THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA (2005); 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).

133. MCGIRR, *supra* note 132, at 12.

include bans on gay marriage and legislation to limit access to abortions.[134] Some cities are "sanctuary cities," attempting to provide some degree of safety for their undocumented residents, while others have promulgated anti-immigrant ordinances[135] or resisted implementation of the obligation under international law to provide consular notice when citizens of another country are charged with felonies.[136]

In short, just as one ought not essentialize a problem such as energy as intrinsically "domestic," one should not assume that, by identifying a level of government of a kind of TOGA, one can know the point of view to be expressed. While counties, cities, states, and TOGAs bespeak their commitment to the "interests" of the jurisdictional levels of which they are a part, promoting something called state or municipal "interests" does not decide the question of what those interests are. Further, even if a TOGA has settled on a set of "interests," its posture can change depending its leadership, membership, and particular problems at a given time.[137] Indeed, several TOGAs have changed course dramatically over time, interacting with national and transnational developments in national policymaking.[138] Given TOGAs' relative invisibility in the legal literature, we first discuss the contours of a few to provide a glimpse into the structure, membership, self-stated aims, and evolutions of the genre before we turn to an analysis of their relationship to the law and theory of federalism.

C. Roots both Local and National

TOGAs' primary identity comes from their members—mayors, governors, attorneys general, cities, counties, or tribes.[139] Numbering more than

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134. *See, e.g.*, 1998 Wash Sess. Laws ch. 1 § 3 (providing that marriages are forbidden "[w]hen the parties are persons other than a male and a female") (codified at Wash. Rev. Code § 26.04.020 (2008)), *upheld in In re* Marriage of Bureta, 164 P.3d 534 (Wash. Ct. App. 2007); Robert Post & Reva Seigel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007). Restrictions on access to abortion have been imposed by various state legislatures. One example, recently upheld, is detailed in *Planned Parenthood Minnesota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc).

135. *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 517–30 (M.D. Pa. 2007); Justin Cox, Local Approaches to Undocumented Immigration: Explaining Divergent Paths (2008) (unpublished manuscript, on file with authors).

136. *See* Medellin v. Texas, 128 S. Ct. 1346 (2008); Breard v. Greene, 523 U.S. 371 (1998). *See generally* Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2006).

137. *See, e.g.*, *infra* notes 143–50 and accompanying text (discussing the evolution of the U.S. Conference of Mayors from a lobbying group for large cities during the New Deal era, to a source of technical assistance for cities implementing President Johnson's Great Society, to its current prominence in global warming).

138. ARNOLD & PLANT, *supra* note 89, at 105–06 (discussing how the "general government associations change[d] so dramatically in the 1960s" as they came to focus on policymaking in Washington, where national lawmakers were creating legislative efforts that "established federal-state-local relations in entirely new fields of activity.").

139. *See generally* Nat'l Congress of Am. Indians, Homepage, http://www.ncai.org (last visited July 16, 2008).

one hundred in the United States alone, TOGAs vary on many dimensions, including purpose, size, funding, kind of work, and stature. Further, regional counterparts and affinity groups (such as a "black" or a "women's" caucus) also exist.[140]

In the literature on "intergovernmental relations," certain TOGAs that are repeat players are identified as dominant ("the big five"—the National Governors Association, the National Conference of State Legislatures, the National Association of Counties, the U.S. Conference of Mayors, and the National League of Cities;[141] or the "big seven," adding the Council of State Governments and the International City/County Management Association), as they affect federal policy and collaborate on lobbying.[142] As will soon be plain, one can drown in initials and acronyms. Thus, we skim the surface as we focus on just a few of the national groups.

1. U.S. Conference of Mayors

We begin with the U.S. Conference of Mayors (USCM), as the Mayors Climate Protection Agreement provided our opening example of translocal transnational policymaking. Under the rules of the USCM, "[e]ach city is represented in the Conference by its chief elected official, the mayor."[143] USCM was founded in 1933 in the wake of the Great Depression; "it was formed as a lobby group to represent the interests of large cities in the federal relief effort that the mayors knew would quickly follow the inauguration of Franklin D. Roosevelt."[144] At its inception, its national supporters included President Roosevelt, who sought an urban coalition to support New Deal programs and his

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140. For example, in addition to the National Governors Association, discussed *infra* pp. 749–51, regional groups such as the Western Governors' Association, the Southern Governors' Association, also exist, in addition to affinity groups like the National Black Caucus of State Legislators. *See* W. Governors' Ass'n,, http://www.westgov.org/ (last visited Aug. 3, 2008); S. Governors' Ass'n, http://www.southerngovernors.org/ (last visited July 13, 2008); Nat'l Black Caucus of State Legislators, http://www.nbcsl.org/ (last visited July 13, 2008).

141. Hicks, *supra* note 82, at 2; *see generally* R. Allen Hays, *Intergovernmental Lobbying: Toward an Understanding of Issue Priorities*, 44 W. POL. Q. 1081, 1084–90 (1991) (analyzing the frequency with which representatives of each of the "Big Five" testified before Congress and on which issues).

142. *See generally*, Richard M. Flanagan, *Roosevelt, Mayors, and the New Deal Regime: The Origins of Intergovernmental Lobbying and Administration*, 31 POLITY 415, 416 (1999) [hereinafter Flanagan, *Roosevelt, Mayors, and the New Deal Regime*]; HAIDER, *supra* note 82; CAMMISA, *supra* note 82.

143. U.S. Conference of Mayors, About the U.S. Conference of Mayors, http://usmayors.org/about/overview.asp (last visited July 20, 2008).

144. ARNOLD & PLANT, *supra* note 89, at 77. Arnold and Plant identify USCM as "the first public official association without reform antecedents." *Id.*; *see also* Flanagan, *Roosevelt, Mayors and the New Deal Regime*, *supra* note 142, at, 415–16 (1999) (arguing that USCM was founded to enable "big city mayors . . . [to become] an effective organizational base for lobbying Congress and coordinating with executive branch agencies").

own continued terms in office.[145] As Roosevelt had hoped, USCM supported his national agenda. Frank Murphy, the mayor of Detroit when he helped organize USCM in the 1930s, moved on to become Roosevelt's Attorney General and then to the United States Supreme Court.

By the 1970s, USCM had come to serve as a fount of technical assistance to cities receiving federal funds to comply with and implement President Lyndon Johnson's city-focused Great Society.[146] Thus, while USCM has always been supported in part by dues from members that were keyed to population,[147] during the 1970s, almost two-thirds of its budget came from federal contracts. Devolution under the administration of President Ronald Reagan altered the fortunes of the Conference, and USCM staff has gone up and down over the years.[148]

Yet as its current prominence in the global warming discussion makes plain, USCM has in recent times proved able to attract attention and intervene in national policy debates, activities described in its publication, *U.S. Mayor*. USCM has also gained visibility through its transnational activities, some of which are organized through an "International Affairs Committee."[149] Reflected in USCM's

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145. Flanagan, *Roosevelt, Mayors and the New Deal Regime*, *supra* note 142, at 433–36. *See generally* JOHN J. GUNTHER, FEDERAL-CITY RELATIONS: THE ROLE OF THE MAYORS IN FEDERAL AID TO CITIES 69 (1990); SUZANNE FARKAS, URBAN LOBBYING: MAYORS IN THE FEDERAL ARENA (1971).

146. *See* Richard M. Flanagan, *Lyndon Johnson, Community Action, and Management of the Administrative State*, 31 PRESIDENTIAL STUD. Q. 585, 595–96 (2001).

147. *See* U.S. Conference of Mayors, Membership Dues, http://www.usmayors.org/about/dues.asp (last visited Aug. 2, 2008). For example, in a city with a population above 30,000 and below 50,000 people, dues are $3489, while dues for a city with over four million people are $102,721. *Id.*

148. *See* Jonathan Walters, *Lobbying for the Good Old Days*, 4 GOVERNING 35 (June 1991); Charles H. Levine & James A. Thurber, *Reagan and the Intergovernmental Lobby: Iron Triangles, Cozy Subsystems, and Political Conflict*, *in* INTEREST GROUP POLITICS 202, 212 (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986). According to that volume, USCM staff numbered 5 in 1979, 100 in 1980, and 45 in 1985. *Id.* at 215.

149. *See, e.g.*, Kay Scrimger, *International Affairs Committee Discusses U.S. Trade Initiatives, Sister Cities, Mayors for Peace, Beglobal.Net*, U.S. MAYOR NEWSPAPER, Feb. 11, 2008, *available at* http://usmayors.org/uscm/us_mayor_newspaper/documents/02_11_08/pg33_intaffairs.asp; Kay Scrimger, *International Affairs Committee Discusses Sister Cities' Relationships, Weapons of Mass Destruction, Travel and Tourism Initiatives, Divestment in Sudan*, U.S. MAYOR NEWSPAPER, July 16, 2007, *available at* http://usmayors.org/uscm/us_mayor_newspaper/documents/07_16_07/pg37_intl_affairs.asp.

Mayors participate as international players in other contexts. One example is the Mayors' Hemispheric Forum, an annual gathering of mayors from the Americas initiated in 2006 by Miami Mayor Manuel Diaz and hosted by Chicago Mayor Richard J. Daley in 2007. *See* Kay Scrimger & Geri Powell, *Chicago Mayor Daley Convenes Mayors Hemispheric Forum in Chicago*, U.S. MAYOR NEWSPAPER, Oct. 8, 2007, *available at* http://www.usmayors.org/usmayornewspaper/documents/10_08_07/pg13_hemispheric.asp; City of Miami: Mayor's Int'l Council, Mayors Hemispheric Forum, http://www.miamigov.com/mic/pages/forum/forum.asp (last visited July 15, 2008).

transnational activities is a general appreciation for the centrality of cities as part of what Saskia Sasson has called the "rescaling"[150] in global economies.

2. National League of Cities

Keeping the focus on TOGAs keyed to cities, the next to consider is the National League of Cities (NLC), founded in 1964. The organization's roots go back to the early part of the twentieth century and a 1924 organization called the American Municipal Association, formed by representatives of ten cities.[151] That municipal association in turn can be traced back to the 1917 Conference of State Leagues of Municipalities, which was prompted by a nineteenth-century movement to generate such "leagues."[152]

Over its own official lifetime, NLC has also reconfigured. Whereas USCM originated as a group of "big city" mayors, NLC has long admitted smaller cities, sometimes through their participation in regional "leagues" that let them join the organization as a group. In 1977, NLC changed its membership rules to permit entry by any city, regardless of population size.[153] Smaller cities remain central to NLC's profile, as 76% of its members have populations of fewer than 50,000.[154]

NLC's mission is to "strengthen and promote cities as centers of opportunity, leadership, and governance."[155] As of 2007, NLC reports that it "serves as an advocate" for more than 19,000 cities, villages, and towns, and that it

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150. Saskia Sassen, *Globalization or Denationalization?*, 10 REV. INT'L POL. ECON. 1, 6, 14–15 (2003); *see* Darel E. Paul, *Re-Scaling IPE: Subnational States and the Regulation of the Global Political Economy*, 9 REV. INT'L POL. ECON. 465, 468 (2002); *see also* GLOBAL NETWORKS, LINKED CITIES, *supra* note 97.

151. NAT'L LEAGUE OF CITIES, 75 YEARS: OPPORTUNITY, LEADERSHIP, GOVERNANCE: FROM LAWRENCE, KANSAS TO THE 21ST CENTURY 1 (1999) [hereinafter NAT'L LEAGUE OF CITIES, 75 YEARS]; *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, 1132–33, 1136 (1937).

152. NAT'L LEAGUE OF CITIES, 75 YEARS, *supra* note 151, at 8–9. The objectives of these leagues "lie[d] principally in the legislative field, in securing legislation needed by the cities and defeating unwise legislation." AM. MUNICIPAL ASS'N, PROCEEDINGS OF THE SEVENTH MEETING 119 (1931).

153. Nat'l League of Cities, Inside NLC: History of the National League of Cities, http://www.nlc.org/inside_nlc/about_nlc/792.aspx (last visited July 17, 2008).

154. *See* Nat'l League of Cities, Members Answer Questions About Why Municipalities Should Join the National League of Cities, http://www.nlc.org/ASSETS/4CA2CA4025F844BAB1312B83B44DEC3D/QA%20Brochure.pdf (last visited July 19, 2008). *See generally* PATRICK HEALY III, THE NATION'S CITIES: CHANGE AND CHALLENGE (1974).

155. Nat'l League of Cities, About NLC, http://www.nlc.org/inside_nlc/aboutnlc.aspx (last visited July 20, 2008). "[T]he National League of Cities serves as a resource to and an advocate for the more than 19,000 cities, villages, and towns it represents. More than 1,600 municipalities of all sizes pay dues to NLC and actively participate as leaders and voting members in the organization." *Id.*

provides its newsletter, *Nation's Cities Weekly*, to some 30,000 local officials.[156] Yet NLC reports receiving dues directly from 1600 municipalities, or less than a tenth of those on whose behalf it advocates. As in USCM, NLC dues are set on a sliding scale based on population.[157]

The National League of Cities is familiar to people who know the law of federalism, for its name is in the heading of a case, *National League of Cities v. Usery*, in which the Supreme Court held that a locality had a Tenth Amendment exemption from federal regulation of the overtime wages it paid employees.[158] At the time, NLC was fighting federal regulation of labor and hours—an agenda that could be characterized as committed to local autonomy in the allocation of taxpayer dollars and/or anti-union and anti-regulatory.

But while NLC may continue to register concerns against national regulation in some contexts, it has also recognized the need for rules imposed from beyond localities' borders and for work across national boundaries. Describing locally-elected officials as the "first-line stewards of the environment," NLC explained that "[b]ecause pollution respects no political boundaries, municipal officials work in tandem with state and federal officials to preserve, protect and restore environmental quality."[159] Consequently, NLC supports local efforts to develop "an advocacy platform that protects municipal environmental interests and facilitates their compliance with federal laws and regulations."[160]

Furthermore, NLC has developed its voice as an advocate for local-global networks, some of which can have regulatory bite.[161] NLC's transnational activity grew in part during the 1950s, when the organization became active in the Sister Cities Program. During the Cold War, the Eisenhower Administration tried what it called "people to people" diplomacy to help promote capitalism in the conflict with communism. This program has since been renamed Sister Cities International, even as it remains Washington-based. Sister Cities International reports linking 126 countries and more than 2500 communities worldwide.[162]

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156. *See* Nat'l League of Cities, Advertising Information, http://www.nlc.org/newsroom/nation_s_cities_weekly_v2/542.aspx (last visited July 20, 2008).

157. Nat'l League of Cities, 2008 Membership Rate, http://www.nlc.org/ASSETS/8B2D67276B974695B5E144D6C8301398/2008%20Rate%20for%20Website.pdf. (last visited Aug. 2, 2008). For 2008, a city with a population of 30,001 to 40,000 must pay dues of $3133; for a city with over four million people, the annual cost is $89,449. *Id.*

158. *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).

159. *See* Nat'l League of Cities, Sustainability, http://www.nlc.org/topics/index.aspx?SectionID=sustainability (last visited July 24, 2008).

160. *Id.*

161. *See* Earl H. Fry, *State and Local Governments in the International Arena*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 118, 119–20 (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) (outlining where localities can find funds for such work), *available at* http://pdf.dec.org /pdf_docs/PNACR090.pdf.

162. *See* Sister Cities Int'l, Frequently Asked Questions, http://www.sister-cities.org/sci/aboutsci/faqs (last visited July 17, 2008). NLC once ran the Sister Cities Program until a separate organization was created. *See* James Brooks, *NLC, Sister Cities*

NLC has also extended its global focus by becoming active in a transnational network called the United Cities and Local Governments (UCLG),[163] which focuses on promoting human rights[164] by working as a "local government partner of the United Nations."[165] Other NLC initiatives focus on the provision of adequate housing and education, "opportunity and inclusiveness" and respect for diverse cultures, and the problems of "inequalities in our cities."[166] Thus, once framed as a pro-capitalist and anti-labor rights organization, NLC now has both a green and a human rights profile.

3. National Association of Towns and Townships

Another TOGA, the National Association of Towns and Townships (NATaT, sometimes also abbreviated as NATT) aims to speak on behalf of "smaller communities" often in rural areas.[167] Given that NATaT defines "smaller communities" as those with 25,000 or fewer residents, its members could also be eligible for membership in NLC. NATaT reports its membership at about

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Enhancing Ties, NATION'S CITIES WKLY., Mar. 26, 2001, at 6; WILLIAM B. STAFFORD, GLOBALLY COMPETITIVE REGIONS: WHAT SEATTLE IS LEARNING FROM THE REST OF THE WORLD 3–4, 6–9 (1999).

163. The UCLG is 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. *See generally* Donald J. Borut, *Stepping Up to the International Agenda*, NATION'S CITIES WKLY., Jan. 19, 1998, at 2; United Cities and Local Gov'ts, 2004 Founding Congress, http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=103 (last visited July 11, 2008).

164. United Cities and Local Gov'ts, Equality, Promoting Women in Local Decision-Making, http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=23 (last visited July 17, 2008) (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*, NATION'S CITIES WKLY., June 27, 2005, at 5, *available at* http://www.nlc.org/content/Files/NCW062705.pdf.

165. Guy Kervella, Unification of IULA and UTO Creates Largest International Local Government Association, City Mayors, http://www.citymayors.com/orgs/unitedcities.html (last visited Aug. 16, 2008).

166. *See* NAT'L LEAGUE OF CITIES, FY 2004 STRATEGIC PLAN UPDATE (2004), *available at* http://www.nlc.org/ASSETS/F1F9EA5BDCFD45E2A5F1A07AC11DB8C0/stratplanfy2004.doc.

167. Linda-Jo Schierow, CRS Report for Congress: A Directory of Some Interest Groups and Governmental Organizations Concerned With National Environmental Policies, No. 93-831 ENR (Sept. 21, 1993), *available at* http://www.ncseonline.org/NLE/CRSreports/general/gen-2c.cfm#National%20Association%20of%20Towns%20and%20Townships.

13,000.[168] NATaT links members to one another and to the federal government in part through its newsletter, *Washington Report*.[169]

NATaT began in 1976 with annual conventions, and then developed an agenda in the later 1970s as an advocate to the federal government on behalf of smaller communities.[170] NATaT's creation offers yet another reason to be leery of essentialism about what "local" interests are, as well as further evidence of the interdependencies of the "local" and the "national." One commentator suggests that the group's development in the 1970s and 1980s was fostered by a segment of national political leaders who wanted the "local" to be represented not only through USCM and NLC but also through intergovernmental lobbying groups that would present more "conservative" voices—i.e., voices in favor of limiting federal support for certain social welfare policies.[171]

NATaT's current policy priorities include the protection of local authority in telecommunications, and additional federal funds for economic development, various infrastructural reforms, and local first-responders.[172] As for climate change, NATaT recognizes the degree to which its members are affected by (and vulnerable economically to) "federal energy programs and policies."[173] NATaT thus has registered the concern that, while localities need to "boost the use of renewable sources of energy for transportation and buildings," they will need federal funds to do so, and the organization insists that federal programs should be shaped to ensure that "towns and townships can benefit from energy policies and programs that promote clean energy in small and rural communities."[174] NATaT aims to make federal policymakers understand "the nature and resources of small governments and to propose flexible and alternative approaches to Federal policies to ensure that small communities can meet Federal requirements."[175]

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168. *See* Nat'l Ass'n of Towns & Townships, About Us, http://www.natat.org/about_us.html (last visited July 20, 2008). NATaT is governed by a fifteen-member Board of Directors, including a president, a vice-president, and a secretary-treasurer. Nat'l Ass'n of Towns & Townships, Board of Directors 2008, http:// www.natat.org/board_of_directors.html (last visited July 20, 2008).

169. Nat'l Ass'n of Towns & Townships, Washington Report, http:// www.natat.org/washington_report.html (last visited July 20, 2008).

170. Rochelle L. Stanfield, *Toward an Urban Policy with a Small-Town Accent*, PUBLIUS, Winter 1979, at 31, 37; *see* Donald C. Menzel, *Collecting, Conveying, and Convincing: The Three C's of Local Government Interest Groups*, 50 PUB. ADMIN. REV. 401, 404 n.4 (1990); Beverly A. Cigler, *The Small City and Rural Governance: The Changing Environment*, 44 PUB. ADMIN. REV. 540, 544 (1984).

171. *See* Hays, *supra* note 141, at 1085.

172. Nat'l Ass'n of Towns & Townships, *NATaT Federal Platform for the 110th Congress: Keeping America's Towns and Townships Strong and Prosperous* (2007), http://www.natat.org/publications/leg_priorities/natat_federal_platform.pdf.

173. Nat'l Ass'n of Towns & Townships, *Regulating Greenhouse Gases*, NATAT WASHINGTON REPORT, May 14, 2007, at 3, *available at* http://www.natat.org/publications/washington_report/2007_4.pdf.

174. *Id.*

175. Schierow, *supra* note 167.

4. National Association of Counties

Moving to another level of government—counties—brings us to the National Association of Counties (NACo),[176] which, like USCM, was founded in the 1930s. At its inception, NACo existed at a small scale; according to one account, before 1957, it was a "sleepy, rural-county, paper head organization run on a part-time basis by two Washington lawyers."[177] That year, it hired a full-time director who focused on expansion and secured a grant from the Ford Foundation to improve the skills of county officials and helped them to secure federal grants related to transportation and welfare.[178]

On the vertical dimension, NACo seeks vertically to represent the views of local governments at the national level; horizontally it provides localities with research, legislative, and technical support.[179] Like other TOGAs, NACo's definition of membership is based on a category of jurisdiction, in this case counties. In its efforts to bring public and academic attention to its work (in part through its biweekly publication *County News*),[180] NACo maintains twenty-three affiliated entities that provide support services aimed at specialists in particular areas of work. These include the National Association of County Civil Attorneys, the National Association of County Surveyors, and the National Association of County Parks and Recreational Officers, as well as the International Association of Fire Chiefs.[181]

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176. Nat'l Ass'n of Counties, About NACo, http://www.naco.org/Template.cfm?Section=About_NACo (last visited July 17, 2008). The purpose of NACo is fivefold:

> . . . to stimulate the continuing improvement of county government; to speak nationally for county government; to contribute to the knowledge and awareness of the heritage and future of county government; to serve as a liaison between the nation's counties and other levels of government; and to achieve public understanding of the role of counties in the federal system.

Nat'l Ass'n of Counties, NACo Bylaws, art. II, § 1, *available at* http://www.naco.org/Template.cfm?Section=Bylaws&Template=/ContentManagement/ContentDisplay.cfm&ContentID=24230.

177. ARNOLD & PLANT, *supra* note 89, at 99 (quoting Haider, *supra* note 82, at 32).

178. *Id.* at 99–100.

179. Membership comes with a package of benefits for the county in addition to representation and legislative resources. Nat'l Ass'n of Counties, County Membership Benefits, http://www.naco.org/Template.cfm?Section=County_Membership&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11802 (last visited July 17, 2008).

180. *See* Donald C. Menzel, Vincent L. Marando, Roger B. Parks, William L. Waugh, Jr., Beverly A. Cigler, James H. Svara, Mavis Mann Reeves, J. Edwin Benton, Robert D. Thomas, Gregory Streib & Mark Schneider, *Setting a Research Agenda for the Study of the American County*, 52 PUB. ADMIN. REV. 173, 175–76 (1992); Nat'l Ass'n of Counties, County News, http://www.naco.org/CountyNewsTemplate.cfm?Section=County_News (last visited July 26, 2008). *See generally* Beverly A. Cigler, *The County-State Connection: A National Study of Associations of Counties*, 54 PUB. ADMIN. REV. 3, 3 (1994).

181. *See* Nat'l Ass'n of Counties, Affiliates, http://www.naco.org/ Template.cfm?Section=Affiliates_and_Partnerships&Template=/cffiles/naco/aff_list.cfm (last visited July

Representing three-fourths of all counties and over 85% of the nation's population,[182] NACo has come—like many TOGAs—to include energy policy among its priorities. NACo insists that "climate disruption is a reality" and supports regulatory efforts at the national and subnational levels to combat global warming.[183] For example, in 2007, NACo convened what it called the "first-ever national forum for counties on the climate protection subject" in Washington, D.C. Attendees learned about "best practices, tools and resources to assist them in developing and implementing a successful climate change program."[184]

5. International City/County Management Association

The International City/County Management Association (ICMA)[185] suggests the need for more axes and depth in the matrix of TOGAs, for this organization cuts across state and national borders and adds employees as well as government officials to the set of members. In 1914, when it began, ICMA stood for the International City Managers Association; a small group of city executives working in a form of local governance reliant on a council-manager convened the first session. The organization credits the city of Staunton, Virginia with inventing the job of "general manager" in 1908.[186] Reflective of the translocal transnationalism we described in Part IV, ICMA locates another precedent in Westmount, Quebec, which in 1913 modeled its council-manager form of government after the 1912 version adopted in Sumter, South Carolina. As ICMA recounts, Durham County, North Carolina was the first county to use this template.

As its name and history suggest, ICMA's focus is on managerial qualities. It aims to help professionalize workers at local levels of government.[187] While at

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17, 2008). In the 1990s, NACo had affiliations with "fourteen associations of county state officials, state associations of counties, and over one thousand member counties." ARNOLD & PLANT, *supra* note 89, at 100.

182. *See* Nat'l Ass'n of Counties, County Membership, http://www.naco.org/Template.cfm?Section=County_Membership&Template=/cffiles/naco/county_membership.cfm (last visited July 17, 2008).

183. *See* Nat'l Ass'n of Counties, Resolution Urging Congress and the Administration to Take Practical Actions to Reduce the Risks of Global Warming (Mar. 5, 2007) ("NACo supports immediate and long-range efforts by the federal government to involve all levels of stakeholders to mitigate possible sources of climate change now through a series of practical incentives and through more federal funding for all means of emissions reduction."), *available at* http://www.naco.org/Template.cfm?Section= Media_Center&template=/ContentManagement/ContentDisplay.cfm&ContentID=22852; *see also* Edna Sussman, *Reshaping Municipal and County Laws To Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. ENVTL. L.J. 1, 6–7 (2008) (citing the March 2007 NACo resolution on climate change).

184. Nat'l Ass'n of Counties, 2007 County Climate Protection Forum, *available at* http://www.naco.org/Template.cfm?Section=New_Technical_Assistance&template=/ContentManagement/ContentDisplay.cfm&ContentID=25222 (last visited July 17, 2008).

185. Int'l City/County Mgmt Ass'n, History of ICMA and the Local Government Management Profession, http://icma.org/main/bc.asp?bcid=104&hsid=1&ssid1=17&ssid2=22&ssid3=276 (last visited July 17, 2008).

186. *Id.*

187. ICMA's Constitution states that its purpose is to "increase the proficiency of city managers, county managers, and other local government administrators, and to

its inception fewer than fifty localities used the council-manager model, by the beginning of the twenty-first century, more than 3000 local governments adopted this framework.[188] A government qualifying for membership can have more than one member: both "chief administrators" (with substantial responsibilities related to hiring, policies, and budget) and "senior level staff members" with "significant administrative duties" directly reporting to the chief local government administrator are eligible.[189] In 1969, a subtle name changed occurred. Whereas the "M" in ICMA had stood for "Managers," it now denotes "Management." In 1991, ICMA kept its abbreviation ICMA but revised its name to have the "C" stand both for City and County, as it calls itself the "International City/County Management Association." In 2008, ICMA reported more than 9000 members.[190] More than two-thirds of the current members are employed by local governments, and 354 are not from the United States.[191] At this time, ICMA has a presence in at least sixty countries.[192] As for its priorities, it cites "telecommunications, public safety and emergency management, planning and community development, administration and finance, human services, and public works" as areas of interest.[193]

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strengthen the quality of local government through professional management." Int'l City/County Mgmt. Ass'n, IMCA Constitution, art. II, (2007) *available at* http://icma.org/main/bc.asp?bcid=35&hsid=1&ssid1=17&ssid2=22&ssid3=167.

188. Int'l City/County Mgmt. Ass'n, History of ICMA and the Local Government Management Profession, http://icma.org/main/bc.asp?bcid=104&hsid=1&ssid1=17&ssid2=22&ssid3=276 (last visited July 13, 2008).

189. Int'l City/County Mgmt. Ass'n, Determining the Right ICMA Membership Category for You, http://icma.org/upload/bc/attach/{894BBE2E-9EEF-45F9-AC21-BFBC6D7975CA}Membership%20flow%20chart%20121305.pdf.

190. Int'l City/County Mgmt. Ass'n, Organization Overview, http://icma.org/main/bc.asp?bcid=60&hsid=1&ssid1=17 (last visited July 17, 2008). ICMA has two main types of membership: full or voting membership and affiliate membership. Intl City/County Mgmt. Ass'n, Determining the Right ICMA Membership Category for You, *available at* http://icma.org/upload/bc/attach/{894BBE2E-9EEF-45F9-AC21BFBC6D7975CA}Membership%20flow%20chart%20121305.pdf. Affiliate memberships are available for entry-level and mid-level local government employees. *Id.*

191. Int'l City/County Mgmt. Ass'n, IMCA Executive Director's Report (Oct. 2007), *available at* http://icma.org/upload/bc/attach/{9C8B450A-61EC-4B71-BA4D-B07D1F25CAC3}Executive%20Director%27s%20Report%202007.pdf.

192. *See* Int'l City/County Mgmt. Ass'n, ICMA International Brochure, at 3, *available at* http://www.icma.org/upload/bc/attach/{6D683848-E48B-4E26-8721-4CA8E38E7EEC}International_Brochure_06.pdf. *See generally* RICHARD J. STILLMAN II, THE RISE OF THE CITY MANAGER: A PUBLIC PROFESSIONAL IN LOCAL GOVERNMENT (1974); Barbara H. Moore, *Managing Cities and Counties: ICMA Activities and Resources*, 54 PUB. ADMIN. REV. 90 (1994).

193. Int'l City/County Mgmt. Ass'n, What We Do, http://icma.org/main/bc.asp?bcid=654&hsid=1&ssid1=17&ssid2=2532 (last visited July 13, 2008). One study of ICMA reported that it lobbied Congress less frequently than some of the other intergovernmental lobbying groups. *See* Hays, *supra* note 141, at 1085.

6. National Governors Association

At the state level, one of the best known TOGAs is the National Governors Association (NGA). Founded in 1908 as the "Governor's Conference," it was assisted in its first efforts by President Theodore Roosevelt and one of his advisors, Gifford Pinchot, who also founded the United States Forest Service.[194] Reflecting the long history of TOGA involvement in environmental issues, the agenda for the first meeting of the Governor's Conference was one of Roosevelt's favorite causes: conservation of natural resources.[195] By the end of World War II, NGA included in its activities support for the American entry into the United Nations and NATO, and the Marshall Plan.[196] As federal policies and statutory regimes expanded over the decades, NGA sharpened its efforts as a lobby for what it saw as state interests.[197] In 1965, NGA established its headquarters in Washington, D.C.[198]

By the early 1970s, NGA had expanded to create a research department, then called the "Center for Policy Research" and now called the "Center for Best Practices," that disseminates policy briefings and develops proposals for new initiatives.[199] In addition, NGA has a "Federal Relations" office, a media-focused branch, and a management and training consultant group. NGA's members include not only the governors of all fifty states but also those of American Samoa, Guam, the Virgin Islands, Puerto Rico, and the Northern Mariana Islands. NGA works through ad hoc committees that supplement four standing committees whose names explain their agendas: Economic Development and Commerce; Education, Early Childhood and Workforce; Health and Human Services; and Natural Resources.[200] NGA disseminates information and uses it for lobbying and promoting "visionary state leadership" by sharing "best practices."[201] NGA's staff of more than one hundred in its "Hall of States" building in Washington, D.C., is

194. *See* John Douglas Nugent, Federalism Attained: Gubernatorial Lobbying in Washington as a Constitutional Function 143 (1998) (unpublished Ph.D. dissertation, University of Texas), *available at* ProQuest, UMI No. 9838067l; Press Release, Yale Center for Environmental Law and Policy, Governors to Gather at Yale for Climate Change Conference (Apr. 17–18, 2008), *available at* http://research.yale.edu/envirocenter/uploads/Press%20release%202008%20Yale%20Conference%20of%20Governors%20on%20Climate%20Change.doc.

195. ARNOLD & PLANT, *supra* note 89, at 50.

196. *See* 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, 4 (1984).

197. *See* Nugent, *supra* note 194, at 143–45.

198. In 1938, NGA had allied with the Council of State Governments, but in 1975 it became independent. *See id.* at 147.

199. Hicks, *supra* note 82, at 37.

200. Nat'l Governors Ass'n, NGA Brochure, http://www.nga.org/Files/pdf/NGABROCHURE.PDF (last visited July 17, 2008). The number of standing committees has varied over the years. *See* Nugent, *supra* note 194, at 40.

201. Nat'l Governors Ass'n, NGA Brochure, http://www.nga.org/Files/pdf/NGABROCHURE.PDF (last visited July 17, 2008); *see* Hicks, *supra* note 82, at 200–01.

central to states' federal lobbying.[202] NGA regularly submits information to Congress and has issued "policy reports" for decades.[203]

NGA aims to be bipartisan and relies on that identity as a source of its authority and utility as a lobby. The organization's structure—which provides that its chair is elected annually, and includes a vice-chair and a nine-member executive committee—tries to protect a bipartisan approach by requiring rotation by party affiliation of the chair and vice-chair; the executive committee must have four members of one party and five members of the other. NGA thus tries to position itself as providing a unified voice when offering its perspective on national policy.[204] By the early 1960s, however, conflicts prompted the formation of the Republican Governors Association (RGA),[205] which at the time specified its distinct views on welfare policy.[206] A Democratic Governors Association emerged two decades later.[207] While the founding of these party-identified subgroups did not prevent the umbrella group from continuing to operate, some argue that, during

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202. *See* Nat'l Governors Ass'n, NGA Staff: Department Listing, http://www.nga.org/portal/site/nga/menuitem.5cd31a89efe1f1e122d81fa6501010a0/?vgnextoid=b22d7e958d306010VgnVCM1000001a01010aRCRD (last visited July 20, 2008). Other tenants in the Hall of States include the American Association of State Highway and Transportation Officials; the Association of California Water Agencies; the Association of State and Territorial Solid Waste Management Officials; the Coalition of Northeastern Governors Policy Research Center Inc.; the Environmental Council of the States; the Environmental Research Institute of the States; the International Association of Officials Human Rights Agencies; the Midwestern Governors' Association; the National Alliance of State and Territorial AIDS Directors; the National Association of Clean Air Agencies; the National Association of Federally Impacted Schools; the National Association of Insurance Commissioners; the National Association of Secretaries of State; the National Association of State Auditors, Comptrollers and Treasurers; the National Association of State Budget Officers; the National Association for State Community Services Programs; the National Association of State Foresters; the National Association of State Retirement Administrators; the National Association of State Treasurers; the National Association of State Workforce Agencies; the National Black Caucus of State Legislators; the National Conference of State Historic Preservation Officers; the National Council of State Housing Agencies; the National Hispanic Caucus of State Legislators; the Southern Governors' Association; and the Western Governors' Association. *See* State Servs. Org., State Services Organization Tenant List, http://www.sso.org/affiliates.htm (last visited July 13, 2008).

203. *See* Nat'l Governors Ass'n, About the National Governors Association, http://www.nga.org/portal/site/nga/menuitem.cdd492add7dd9cf9e8ebb856a11010a0/ (last visited July 17, 2008). *See generally* Carol S. Weissert, *The National Governors' Association, 1908-1983*, 56 STATE GOV'T 44 (1983).

204. Nat'l Governors Ass'n, About the National Governors Association,, http://www.nga.org/portal/site/nga/menuitem.cdd492add7dd9cf9e8ebb856a11010a0/ (last visited July 17, 2008).

205. *See* Republican Governors Ass'n, About the Republican Governors Association, http://www.rga.org/default.asp?pt=doc&doc=about (last visited July 19, 2008).

206. Hicks, *supra* note 82, at 128–134.

207. *See* Democratic Governors Ass'n, About the DGA, http://democratic governors.org /about (last visited Aug. 3, 2008).

the 1990s, the RGA split-off limited NGA's effectiveness in areas such as welfare policy.[208]

As for global warming, in 2006 NGA issued a Policy Position on Global Climate Change that reflects efforts to bridge different points of view as well as revealing the constraints that come with bipartisanship.[209] While acknowledging that "the degree to which such changes may enhance the natural greenhouse effect is subject to scientific debate," NGA's Policy Position affirms that "[t]he Governors are committed to working in partnership with the federal government, businesses, environmental groups, and others to develop and implement programs that reduce greenhouse gas emissions in conjunction with conserving energy, protecting the environment, and strengthening the economy."[210] Going further than NGA was prepared to do, a few governors joined in the spring of 2008 to press for more action on climate change at the national level.[211]

7. National Association of Attorneys General

Organizations composed of other state officeholders, including attorneys general, legislators, and justices, are the next set to consider. Here the roster is thick and we select only a few examples. One of the oldest is the National Association of Attorneys General (NAAG), formed shortly before NGA.[212] Founded in 1907, NAAG aims "to help Attorneys General fulfill the responsibilities of their office"[213] and it works, like other TOGAs, to enhance the professional stature of its members. A reminder for some not familiar with the office of attorney general is in order: most holders of that position are directly elected and run independently of the governor of a particular state.[214] Thus, like

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208. *See* Hicks, *supra* note 82, at 138, 144, 148–53.

209. Nat'l Governors Assn, Policy Position NR-11, Global Climate Change (July 17, 2008), *available at* http://www.nga.org/portal/site/nga/menuitem.8358ec82f5b198d18a278110501010a0/?vgnextoid=220b9e2f1b091010VgnVCM1000001a01010aRCRD.

210. *Id.*

211. In April 2008, Governors Arnold Schwarzenegger of California, M. Jodi Rell of Connecticut, Jon Corzine of New Jersey, Christine Gregoire of Washington, and Kathleen Sebelius of Kansas met at a conference at Yale University to sign a declaration on the need for further action on climate change at the federal level. *See* Funkhouser, *supra* note 95, at B9. The governors of Arizona, Colorado, Delaware, Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, New Mexico, New York, Oregon, and Virginia also have signed. Press Release, Governor Rell Signs Governors Declaration on Climate Change at Yale (Apr. 18, 2008), *available at* http://www.ct.gov/governorrell/cwp/view.asp?Q=413466&A=3293.

212. Like NGA, NAAG's members include both "the Attorneys General of the fifty states and the District of Columbia and the chief legal officers of the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands." Nat'l Ass'n of Attorneys Gen., About NAAG, http://www.naag.org/about_naag.php (last visited July 17, 2008). In addition, the U.S. Attorney General is an honorary member. *Id.*

213. *Id.*

214. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006).

governors who belong to NGA and the mayors of USCM, attorneys general rely on the ability to garner votes.

NAAG's focus has long been on improving the quality of lawyering within the public sector and advancing what it perceives to be state-based issues nationally—including (beginning in the mid 1970s) by filing amicus briefs adopted by many attorneys general with the United States Supreme Court and by coordinating litigation efforts across states.[215] NAAG's Supreme Court Project, well-known in legal circles, provides another example of how national actors and decisions help to shape "local" agendas. NAAG's efforts stemmed in part from Warren Burger, then Chief Justice of the United States Supreme Court,[216] who wanted to shore up state advocacy of federalism arguments before his Court; he thought that inexperienced state lawyers fared badly. NAAG's focus on the Supreme Court is echoed by the State and Local Legal Center (SLLC), formed in 1983 by several of the TOGAs discussed here to press state and local arguments to the Court.[217] On several occasions, one can find more than one TOGA joining in the filing of amici briefs.[218]

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215. NAAG describes its mission as "[t]o facilitate interaction among Attorneys General as peers" and "[t]o facilitate the enhanced performance of Attorneys General and their staffs." Nat'l Ass'n of Attorneys Gen., About NAAG, http://www.naag.org/about_naag.php (last visited July 17, 2008). As for its litigation efforts across states, see Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POLITICS 525, 540 (1994); *see also* AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 825 (2002); Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, PUBLIUS, Spring 2003, at 37; Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as* Amicus Curiae, 70 JUDICATURE 298 (1987).

216. *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1602–04 (2006). The Project organizes moot court sessions as well as facilitating amicus brief filings. *See* Clayton, *supra* note 215, at 542–43; Eric N. Waltenburg & Bill Swinford, *The Supreme Court as a Policy Arena: The Strategies and Tactics of State Attorneys General*, 27 POL'Y STUD. J. 242, 248–49 (1999).

217. *See* Kenneth T. Palmer, *Maine's Supreme Judicial Court and the U.S. Supreme Court: Two Decades of Review*, 15 ME. B.J. 140, 141 (2000). Between 1995 and 2001, more than sixty amici briefs were prepared by SLLC and filed in the Court with adherence from several of its member organizations, such as the Council of State Governments, the National Council of State Legislatures, and NACo. *See* Joshua Civin, Public Official Associations: Legal Federalism in Theory and Practice (2001) (unpublished manuscript, on file with authors).

218. *See, e.g.*, Brief of the National League of Cities, Council of State Governments, International City/County Management Association, National Conference of State Legislatures, National Association of Counties, International Municipal Lawyers Association, & U.S. Conference of Mayors as Amici Curiae Supporting Petitioner, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137030. In their brief, the TOGAs argued that the transfer of water containing pre-existing pollutants from one body of water to another was not subject to the Clean Water Act's National Pollutant Discharge Elimination System permit program. *Id.* at 1. They asserted that to hold otherwise would "impose[] a costly and impractical system of regulation on water management authorities." *Id.* The Supreme Court did not decide that

In addition to a focus on the Supreme Court, NAAG has coordinated litigation strategies based on policy guidelines developed by several standing committees working in areas such as antitrust, consumer protection, environmental protection, and securities regulation.[219] As of the 1990s, NAAG had adopted more than one hundred policies on such issues,[220] and during the last decade, state attorneys general garnered attention by filing lawsuits through coordinated litigation efforts. Some of those actions opposed the federal government; the litigation in the Microsoft anti-trust case provides one vivid example.[221] NAAG's regulatory agenda has prompted dissents by some of its members, and in 1999, a group called the Republican Attorneys General Association (RAGA) was formed,[222] and has taken positions different from those of NAAG on issues such as tobacco litigation[223] and consumer protection more generally.[224]

8. Conferences of Chief Justices

Continuing the focus on courts, the Conference of Chief Justices (CCJ) of the state courts is another transjurisdictional group that develops policies and takes positions.[225] Founded in 1949 in St. Louis, Missouri, CCJ traces its origins to

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issue but instead vacated and remanded for further development of the factual record. *Miccosukee*, 541 U.S. at 96–99.

219. *See* Nat'l Ass'n of Attorneys Gen., About NAAG, http://www.naag.org/about_naag.php (last visited July 17, 2008); Clayton, *supra* note 215, at 540. To adopt a policy position, two-thirds of the membership or designees must vote in favor of a resolution. Joseph Zimmerman, *Interstate Cooperation: The Roles of the State Attorneys General*, 28 PUBLIUS 1, 74–75, 77 (1998) [hereinafter Zimmerman, *Interstate Cooperation*]; *see* Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CAL. L. REV. 885, 907 (2007).

220. Zimmerman, *Interstate Cooperation*, *supra* note 219, at 75. More recently, in 2007 NAAG passed resolutions on environmental protection, state insurance regulation, and preventing abuse of pain medication. Nat'l Ass'n of Attorneys Gen., Policy Perspectives: Resolutions, http://www.naag.org/resolutions.php (last visited Aug. 3, 2008).

221. United States v. Microsoft, 87 F. Supp. 2d 30 (D.D.C. 2000). In that case, the U.S. Department of Justice was joined by nineteen state attorneys general and the Attorney General of the District of Columbia in suing the software giant. Richard J. Gilbert & Michael L. Katz, *An Economist's Guide to U.S. v. Microsoft*, 15 J. ECON. PERSPS. 25, 25 (2001). When the United States sought to settle the lawsuit, seven state attorneys general opposed the settlement, arguing that it "failed to adequately reduce Microsoft's illegal monopoly." Press Release, Connecticut Attorney General's Office, Blumenthal, Six Other Attorneys General, Say Microsoft Maintains Monopolistic Power in Software Market (Aug. 30, 2007), *available at* http://ct.gov/ag/cwp/view.asp?A=2788&Q=393742.

222. *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 Comm., Republican Attorneys General Association, http://www.rslc.com/index.php?option=com_content& task=blogcategory&id=19&Itemid=40 (last visited July 13, 2008).

223. *See id.*; *see also* Ronald J. Rychlak, Francis McGovern & William H. Pryor, *Regulation Through Litigation*, 71 MISS. L.J. 613, 628–29 (2001) (chair of RAGA questions the efficacy of tobacco litigation).

224. *See* Provost, *supra* note 215, at 46.

225. *See* NAT'L CTR. FOR STATE COURTS, HISTORY OF THE CONFERENCE OF CHIEF JUSTICES 13, 16–17 (1993) [hereinafter HISTORY OF THE CONFERENCE OF CHIEF JUSTICES], *available at* http://ccj.ncsc.dni.us/HistoryPt1.pdf.

informal discussions among state chief justices who met one another at conferences of two private, law-focused associations—the American Law Institute (ALI) and the American Bar Association (ABA). At its inception, CCJ often tied its meetings to those of the ABA.[226] That overlap shows how members of one TOGA can, through other organizational memberships, serve as conduits to create policy consensus or parallel positions across organizations, jurisdictions, and offices.

In 1971, with the creation of the National Center for State Courts (NCSC) and that organization's support of CCJ,[227] CCJ was able to augment its networking agendas and develop a broader policymaking role.[228] CCJ regularly submits testimony to Congress on bills that affect state courts and also helps states to formulate programs on problems such as domestic violence, drug courts, criminal defendants, evidence, post-conviction remedies, pro se litigation, the treatment of children, court financing, and the salaries and selection of judges.[229]

9. National Conference of Commissioners on Uniform State Laws

Turning to the law that attorneys general and state judges use or debate, many statutes are shaped through the work of the National Conference of Commissioners on Uniform State Law (NCCUSL),[230] the oldest of the TOGAs on our list and the only one founded before the twentieth century. The American Bar Association (itself begun in 1878[231]) played a role in NCCUSL's formation, insofar as it passed a resolution in 1889 affirming the need for uniform state laws. As a result of the resolution, NCCUSL met for the first time in 1892. It shares

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226. *Id.* at 15. CCJ members include each state's highest judicial officer, along with the top judicial official in the District of Columbia, Puerto Rico, American Samoa, Guam, and the Virgin Islands. Conference of Chief Justices, About CCJ, http://ccj.ncsc.dni.us/about.html (last visited July 20, 2008). The Council of State Governments, discussed *infra* pp. 756–58, also supported CCJ strongly in its early years. *See* HISTORY OF THE CONFERENCE OF CHIEF JUSTICES, *supra* note 225, at 16–17.

227. Nat'l Ctr. for State Courts, History, http://www.ncsconline.org/D_About/Background.html (last visited July 20, 2007).

228. HISTORY OF THE CONFERENCE OF CHIEF JUSTICES, *supra* note 225, at 37. The purposes are set forth in Conference of Chief Justices, Bylaws, art. II, § 2.1 (1983), *available at* http://ccj.ncsc.dni.us/bylaws.pdf. Since 1983, CCJ has been a nonprofit corporation. Conference of Chief Justices, About CCJ, http://ccj.ncsc.dni.us/about.html (last visited July 20, 2008). CCJ is governed by a fourteen-member Board of Directors elected from among the membership. The President, President-Elect, First Vice-President, and Second Vice-President are also elected by the membership for one-year terms, and along with the Immediate Past President, serve on the Board of Directors. Conference of Chief Justices, Bylaws, arts. V–VI (1983).

229. *See* Conference of Chief Justices, Policy Statements & Resolutions Categories, http://ccj.ncsc.dni.us/resolutioncategories.html (last visited July 12, 2008).

230. Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 235–36 (1965). NCCUSL is a nonprofit unincorporated association. *See* Nat'l Conference of Comm'rs on Uniform State Laws, List of Commissioners by State, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=16 (last visited July 17, 2008).

231. Am. Bar Ass'n, History of the American Bar Association, http://www.abanet.org/about/history.html (last visited July 11, 2008).

similar goals with international organizations like the Rome Institute and the Hague Conference, which also aim to draft laws to be adopted through voluntary state action.[232] Today, 300 commissioners serve through appointments by states.[233] The commissioners meet to draft model laws (such as the Uniform Commercial Code and the Interstate Agreement on Detainers) that states can enact, either verbatim or with modifications.[234]

10. National Conference of State Legislatures

The National Conference of State Legislatures (NCSL), created in 1975, is, like other TOGAs, the outgrowth of older associations. NCSL resulted from the merger of the National Legislative Conference (founded in 1948), the National Conference of State Legislative Leaders (founded in 1959 by leaders of state legislatures because NLC seemed to focus on staff), and the National Society of State Legislators (founded in the early 1960s by rank-and-file legislators). NCSL could also be seen as a descendant of the American Legislators' Association, founded in 1926. These different groups were understood by their counterparts to focus either more on staff than legislators or vice versa. The goal of the merger was to eliminate both the overlap and competition.[235]

Membership in NCSL is automatic for the legislatures of each state and territory. For legislators and staffers, membership is contingent upon the payment of dues.[236] Reflective of its merger of organizations with somewhat different purposes, the seven-person board allocates four slots for legislators and three for lead staffers,[237] all of whom are elected from a slate of candidates created by legislator and legislative-staff nominating committees.[238] NCSL's concerns are evident from its eleven standing committees, denominated Agriculture, Environment, and Energy; Budgets and Revenue; Communications, Financial

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232. Dunham, *supra* note 230, at 235–36.

233. The number varies per state but is not directly correlated to population. *See* Nat'l Conference of Comm'rs on Uniform State Laws, List of Commissioners by State, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=16 (last visited July 17, 2008).

234. For new drafts, the NCCUSL President, who is elected for a two-year term by majority vote of the commissioners present, appoints a committee of at least six commissioners, assisted by a reporter and an ABA advisor. The drafting committees implement a Planned and Coordinated Enactments (PACE) plan to identify the relevant interested groups and obtain input. *See* Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861, 868–69 (1995); Nat'l Conference of Comm'rs on Uniform State Laws, Constitution and Bylaws, art. 21 (1998), *available at* http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18.

235. *See* Karl T. Kurtz, *The History of Us*, 25 STATE LEGISLATURES July/Aug 1999, at 16, *available at* http://www.ncsl.org/programs/pubs/799ncsl.htm.

236. Nat'l Conference of State Legislatures, Bylaws, art. III (2006), *available at* http://www.ncsl.org/public/BylawsCurrent.pdf. The population of each jurisdiction is relevant to determining the amount of dues an individual member must pay. *Id.* art. XIV.

237. *Id.* art. VI, § 1.

238. *See id.* art VII, § 1–4. All of the positions are elected, and each jurisdiction gets one vote. That is, if one jurisdiction has twenty delegates present and another only has five, each jurisdiction only gets one vote. *See id.* art. VII § 9.

Services, and Interstate Commerce; Education; Health; Human Services and Welfare; Labor and Economic Development; Law and Criminal Justice; Legislative Effectiveness; Redistricting and Elections; and Transportation.[239] In the last decade, NCSL has sponsored or hosted sub-organizations and initiatives such as the Center for Ethics in Government, Women's Legislative Network, and Trust for Representative Democracy.[240] When NCSL first began, it received significant support (as had the Conference of Chief Justices) from the Council of State Governments (CSG),[241] and NCSL's bylaws commit it to maintaining a close relationship with CSG, discussed below.[242]

Like NGA and NAAG, some of NCSL's viewpoints have prompted a parallel organization to form. The American Legislative Exchange Council (ALEC) was created in 1973 as an organization for "conservative state lawmakers" and funded in part by the Heritage Foundation.[243] It describes itself as having a membership of 2500, or 35% of all state legislators in the United States.[244]

11. Council of State Governments

The Council of State Governments, founded in 1933,[245] is another TOGA that is also a current incarnation of an older association (the American Legislators'

239. Nat'l Conference of State Legislatures, Frequently Asked Questions About the NCSL Standing Committees, http://www.ncsl.org/standcomm/faq.htm (last visited July 17, 2008).

240. NCSL's Center for Ethics in Government was organized in 1999 and has compiled state-by-state data on legislative ethics laws in seven major categories: gifts, honorariums, nepotism, revolving door, conflict of interest, financial disclosure, and lobbyists. *See* Nat'l Conference of State Legislatures, NCSL Center for Ethics in Government Overview, http://www.ncsl.org/programs/ethics/overview_ethics.htm (last visited July 17, 2008); Nat'l Conference of State Legislatures, Restoring the Public's Trust in Government, http://www.ncsl.org/programs/ethics/restoring_trust.htm (last visited July 17, 2008).

241. *See* Council of State Gov'ts, Frequently Asked Questions, http://www.csg.org/about/faqs.aspx (last visited July 13, 2008); E. Norman Sims, *The Council of State Governments: A National Information Provider*, 3 GOV'T INFO. Q. 407, 407–08 (1986).

242. The two do function separately, however, pursuant to NCSL Bylaws. Nat'l Conference of State Legislatures, Bylaws, art. III (2006), *available at* http://www.ncsl.org/public/BylawsCurrent.pdf.

243. Am. Legislative Exchange Council, History, http://www.alec.org/AM/Template.cfm?Section=History&Template=/CM/HTMLDisplay.cfm&ContentID=3786 (last visited July 11, 2008).

244. *See* Beverly A. Cigler, *Not Just Another Special Interest: Intergovernmental Representation*, *in* INTEREST GROUP POLITICS 131, 141 (Allan J. Cigler & Burdett A. Loomis eds., 4th ed. 1995); *see also* Am. Legislative Exchange Council, Members, http://www.alec.org /AM/Template.cfm?Section=Log_In (last visited July 20, 2008) (giving a number of more than 2000 members).

245. Council of State Gov'ts, About CSG, http://www.csg.org/about/default.aspx (last visited Aug. 10, 2008).

Association (ALA)).[246] CSG, which describes its mission as "promot[ing] excellence in decision-making and leadership skills and champion[ing] state sovereignty,"[247] attributes its creation to a Colorado legislator who wanted to encourage state legislators to share information and to collaborate on projects.[248]

CSG is the broadest of the groups discussed thus far. Elected or appointed state government officials and staffers who serve in the legislative, judicial, and executive branches of state government are automatically eligible for membership.[249] CSG's own structure entails a 165-member governing board composed of fifty-five governors (including the leaders of the American territories, the Commonwealth of Puerto Rico, and the District of Columbia) and two legislators from each chamber in the fifty states and five territories, as well as eight standing committees and four task forces.[250]

CSG is centrally identified through its work on information gathering and dissemination. Each year since 1935 it has published *The Book of the States*, a compendium of tabulated data enabling comparisons on services and resources.[251] Since 1958, CSG also has published its *State News* magazine; in addition, it provides directories of state officials.[252] Like the NCCUSL, CSG can also be a source of legislation: CSG began drafting model bills during World War II under a "Suggested War Legislation" program.[253] Further, CSG (like other TOGAs) has

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246. The ALA was founded in 1925 and had its first meeting in 1926. *See* Henry W. Toll, *The Work of the American Legislators' Association*, 22 AM. POL. SCI. REV. 127, 127 (1928).

247. Council of State Gov'ts, Frequently Asked Questions, http://www.csg.org/about/faqs.aspx (last visited August 10, 2008).

248. Sims, *supra* note 241, at 407–08.

249. Council of State Gov'ts Midwestern Region, Member Services, http://www.csgmidwest.org/memberservices/Services.htm (providing that membership in CSG is "automatic[]" if one is "an elected or appointed state government official" or "a staff member in the executive, legislative or judicial branches of state government") (last visited July 13, 2008).

250. Council of State Gov'ts, Committees and Task Forces, http://www.csg.org/about/committees.aspx (last visited July 13, 2008). The Intergovernmental Affairs Committee is its primary policy arm. Council of State Gov'ts, Intergovernmental Affairs Committee, http://www.csg.org/about/IntergovernmentalAffairsCommittee.aspx (last visited July 13, 2008).

251. Council of State Gov'ts, Reference Publications: The Book of the States, http://storefront.csg.org/index.asp?PageAction=VIEWCATS&Category=7 (last visited July 13, 2008).

252. Council of State Gov'ts, Subscriptions: State News, http://storefront.csg.org/index.asp?PageAction=VIEWCATS&Category=8 (last visited July 13, 2008); Council of State Gov'ts, Reference Publications: State Directories, http://storefront.csg.org/index.asp?PageAction=VIEWCATS&Category=9 (last visited July 13, 2008). The monthly magazine is published ten times in a year.

253. *See* Sims, *supra* note 241, at 410; *see also, e.g.*, COUNCIL OF STATE GOV'TS, 66 SUGGESTED STATE LEGISLATION 7–8 (2007) ("The SSL Committee considers legislation submitted by state officials and staff, CSG Associates and CSG staff. It will consider legislation from other sources, but only when that legislation is submitted through a state official. Other sources include public interest groups and members of the corporate community who are not CSG Associates. Throughout the SSL solicitation, review and

"affiliated" organizations, including the National Association of State Treasurers, the National Hispanic Caucus of State Legislators, and the American Probation and Parole Association.[254]

In terms of climate change, CSG's position resembles a pattern followed by many representative groups aiming to make statements that span sets of interests—resulting in generalizations that could be characterized as moderate or vacuous. CSG concluded that "the need for action on climate change is clear."[255] But, reflective of disagreements within, CSG also stated that:

> Devising the right program, however, is not as obvious. Thus it is important for legislators to carefully weigh the pros and cons of each proposal before making a decision . . . . A proactive approach to climate change by the states also may help spur federal action by making it easier to devise a national solution.[256]

D. Sites and Sources of Funds

As our discussion has reflected, many TOGAs are focused on Washington, D.C., where the majority of their headquarters are sited.[257] Exemplary are the headquarters of the National Governors Association, located in a building called the Hall of the States and filled with affiliated groups—the National Association of X or Y—with specialty concerns ranging from solid waste management to insurance and historical preservation.[258] Of the remaining ten

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selection processes, members of the Committee employ a specific set of criteria to determine which items will appear in the volume: Is the issue a significant one currently facing state governments? Does the issue have national or regional significance? Are fresh and innovative approaches available to address the issue? Is the issue of sufficient complexity that a bill drafter would benefit from having a comprehensive draft available? Does the bill or act represent a practical approach to the problem? Does the bill or act represent a comprehensive approach to the problem or is it tied to a narrow approach that may have limited relevance for many states? Is the structure of the bill or act logically consistent? Are the language of and style of the bill or act clear and unambiguous?").

254. Council of State Gov'ts, CSG Affiliates, http://www.csg.org/about/affiliates.aspx (last visited July 13, 2008). The other affiliates are the Emergency Management Accreditation Program, the Interstate Commission for Adult Offender Supervision, the National Association of Attorneys General, the National Association of Secretaries of State, the National Association of State Chief Administrators, the National Association of State Facilities Administrators, the National Association of State Personnel Executives, the National Association of State Telecommunications Directors, the National Association of Unclaimed Property Administrators, the National Emergency Management Association, the National Lieutenant Governors Association, and the State International Development Organizations. *Id.*

255. Doug Myers, *Not Too Hot to Handle*, STATE NEWS, Sept. 2007, at 31, *available at* http://www.csg.org/pubs/Documents/sn0709NotTooHotToHandle.pdf.

256. *Id.*

257. In this section, we revert to using the proper names to avoid the need to remember what the various abbreviations of different TOGAs denote.

258. *See supra* note 202 and accompanying text. Arnold and Plant see the Hall of the States—which they describe as a "symbol of the maturation of the public official associations in Washington" and refer to as "444" (for its address at 444 North Capital, near

TOGAs detailed above, seven also have D.C. headquarters, while the others are scattered in different states. The Conference of Chief Justices is supported through the National Center for State Courts in Williamsburg, Virginia;[259] the National Conference of Commissioners on Uniform State Laws is headquartered in Chicago,[260] and the Council of State Governments, which once had its office on the campus of the University of Chicago (as did several other public official associations founded in the Progressive era), moved in 1969 to Lexington, Kentucky.[261] Further, unlike some TOGAs, the Council of State Governments also operates through a regional structure with offices in four parts (Eastern, Midwestern, Southern, Western) of the United States as well as in Washington, D.C.[262]

TOGAs are sustained by a mix of funding sources, interweaving public and private, national and local, monies.[263] The proportions depend on the resources available and how certain problems spark interest in both public and private sectors. National agendas swell or drain TOGAs' resources, sometimes directly, such as when the federal government has funded a TOGA to help implement national rules, and sometimes indirectly, such as when a particular national stance enables a TOGA to attract funding from outside sources aiming to change that government policy.

Membership dues are typically paid by the political unit from which the official comes, for example the city or the state, and are sometimes calculated on sliding scales varying with the population of that unit. Both the U.S. Conference of Mayors and the National League of Cities base their dues on the population of

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Union Station)—as a testament to the success of the National Governors Association and its centrality to lobbying in Washington. ARNOLD & PLANT, *supra* note 89, at 172–74.

259. Conference of Chief Justices, Contact Us, http://ccj.ncsc.dni.us/contactus.html (last visited July 12, 2008).

260. Nat'l Conference of Comm'rs on Uniform State Laws, About NCCUSL, http://www.nccusl.org/Update/AboutNCCUSL_desktopdefault.aspx (last visited July 17, 2008).

261. *See* Council of State Gov'ts, CSG Timeline, http://www.csg.org/about/timeline/index.aspx (select 1960s hyperlink) (last visited Aug. 20, 2008); Henry W. Toll, *The Founding of the Council of State Governments: Introduction,* 32 STATE GOV'T 162, 163 (1959); Frederick L. Zimmerman, *Fourteen Creative Years*, 32 STATE GOV'T 164, 169 (1959).

262. *See* Council of State Gov'ts Eastern Region, http://www.csgeast.org/ (last visited July 13, 2008); Council of State Gov'ts Midwestern Region, http://www.csgmidwest.org/ (last visited July 13, 2008); Council of State Gov'ts Southern Region, http://www.slcatlanta.org/ (last visited July 13, 2008); Council of State Gov'ts Western Region, http://www.csg.org/regions/WesternRegion.aspx (last visited July 13, 2008); Council of State Gov'ts Washington D.C., http://www.csg.org/regions/WashingtonDC.aspx (last visited July 13, 2008). This structure could reflect that CSG's focus is information gathering and dissemination rather than lobbying. Hays, *supra* note 141, at 1085 (quoting a CSG staffer, "We leave the lobbying to NCSL and NGA.").

263. *See* ARNOLD & PLANT, *supra* note 89, at 23–25 (discussing funding ranging from insurance pools to conferences and newsletters, as well as the constant quest for more resources).

each city itself.[264] State funds also often support attendance at conferences and programs; those who work as Commissioners drafting uniform laws, for example, are supported primarily through state appropriations.[265]

Some TOGAs get significant funding from the national government, typically through targeted grants for particular kinds of programs or services, often aimed at implementing federal legislative programs. As discussed above, when cities were seen as central venues for federal projects to alleviate poverty, federal support for the U.S. Conference of Mayors grew and then, when federal policymakers adopted a different approach, declined.[266] The import of private sources—both foundations and corporate—varies, depending on both the TOGA and whether, in a particular set of years, federal funds are plentiful. One illustration is a partnership between the U.S. Conference of Mayors and Wal-Mart to support the Mayors Climate Protection Agreement; the corporation sponsors an awards program to honor mayors who implement innovative programs to decrease energy dependency and reduce emissions.[267]

In addition, some organizations charge their own constituencies for services. For example, the Council of State Governments reports that about 30% of its budget comes from its "entrepreneurial efforts," which include the sale of publications, investments, conference revenues, and contributions.[268] State appropriations comprise more than 40% of its budget, and grants make up roughly 30%. Similarly, the National Association of Attorneys General reports an array of

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264. *See* U.S. Conference of Mayors, Membership Dues, http://usmayors.org/uscm/about/membership/dues.html (last visited July 17, 2003); Nat'l League of Cities, 2008 Membership Rate, http://www.nlc.org/ASSETS/ 8B2D67276B974695B5E144D6C8301398/2008%20Rate%20for%20Website.pdf (last visited July 20, 2008). NGA is mostly funded by member states' dues (based on a sliding scale by population). Its Center for Best Practices is funded through federal grants and contracts and through private foundation grants, including some directly from corporations. Nugent, *supra* note 194, at 156; Nat'l Governors Ass'n, FAQ, http://www.nga.org/portal/site/nga/menuitem.00d24ffe1f8c39568a278110501010a0/?vgnextoid=711f328c82562010VgnVCM1000001a01010aRCRD (last visited July 17, 2008). As for the National Association of Counties, membership dues accounted for 18% of its 2006–2007 revenues. *See* NAT'L ASS'N OF COUNTIES, NACO ANNUAL REPORT 2006–2007, at 12 (2007), *available at* http://www.naco.org/Template.cfm?Section=Annual_Report&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25196.

265. *See* Nat'l Conference of Comm'rs on Uniform State Laws, Frequently Asked Questions about NCCUSL, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61 (last visited July 17, 2008).

266. Similarly, ups and downs of federal support are reflected in the budget of the National League of Cities; after Presidents Reagan's first term, during which federal grant monies were extremely scarce, grants began to pick up and became an important source of funding. *See* Kurtz, *supra* note 235.

267. *See* U.S. Conference of Mayors, Mayors Climate Protection Center: Partners, http://www.usmayors.org/climateprotection/partners.htm (last visited July 20, 2008).

268. Council of State Gov'ts, Frequently Asked Questions, http://www.csg.org/about/faqs.aspx (last visited July 13, 2008). At its inception, the Council of State Government's main funding source was dues from members of the American Legislators Association; by 1985, about 70% of its budget came from state appropriations, with the remainder split between grants and sales of publication. *See* Sims, *supra* note 241, at 408.

funding sources, including dues based on a sliding scale correlated with "eight population groupings," federal grants, funds generated through meetings and seminars, the sale of the Association's publications, and special project funds.[269]

Of course, the picture we have sketched of a mix of financial support for TOGAs is also true of the subnational units that are the pipeline to TOGAs' membership. Local governments receive about a third of their funding from states, states obtain significant resources from the national government,[270] subnational units regularly charge for services, and public/private "partnerships" at the city, state, and national levels are commonplace.[271]

E. "Representation" of Jurisdictional Levels and Government Actors

All the TOGAs detailed above describe themselves as advancing the interests of either a set of government officials or a group of governments. Having thickened the description of these organizations, we turn now to explore what it means for them to function in "representative" capacities. The questions we must address are how TOGAs' "interests" are defined and to whom efforts to forward those interests are targeted.

1. Interests

A standard assumption (reflected in the literature on environmental federalism, with its metaphor of races to the bottom or top) is that subnational units are self-maximizers—raising a question about what maximization means. One aspect that appears to be constant over centuries and differing political formations is that governments seek to provide both peace and security. Under market economics, prosperity is added to that list, as governments aspire to economic stability and growth, in part to protect the safety and wellbeing of those within their jurisdiction.

Further, under the federal structure in the United States (but not as an inevitable artifact of a federal structure[272]), subnational governments in the United States have been assigned primary responsibility for providing public services such as police, fire, and schools. While their ability to discharge those functions is affected by events both within and beyond their jurisdictions, the results (to be

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269. Nat'l Ass'n of Att'ys Gen., How Is NAAG Funded?, http://www.naag.org/how_is_naag_funded.php (last visited July 17, 2008).

270. *See* U.S. CENSUS BUREAU, CONSOLIDATED FEDERAL FUNDS REPORT FOR FISCAL YEAR 2005: STATE AND COUNTY AREAS 1 tbl. 1 (2007), *available at* http://www.census.gov/prod/2007pubs/cffr-05.pdf.

271. The federal government has, for example, entered into a public-private partnership that facilitated its construction of the Thurgood Marshall Building, across from Union Station in Washington, D.C. This building houses the administrative and research wings of the federal courts. *See* 40 U.S.C. §§ 6502–6507 (2006).

272. Comparative federalists point to models of Germany and Canada as offering different allocations of power. *See, e.g.*, Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 732, 754–59 (2004); Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981). *See generally* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998).

claimed or attributed as accomplishments or failures) are often made plain. As a consequence, some of the political science literature focuses on subnational governments as service providers and growth maximizers.[273] For example, one study of the testimony submitted to Congress by the "Big Five" (National Governors Association, National Conference of State Legislatures, National Association of Countries, National League of Cities, and U.S. Conference of Mayors) reported that budgets, taxes, transportation, social services, and housing were their top concerns.[274] But that engagement need not be seen as constant; depending on the issue and the TOGA, the policymaking role can be perennial, episodic, idiosyncratic, or cyclical.

Such generalities do not necessarily explain the terms of particular policies. While environmentalism was once seen as costly and burdensome, it is now modeled as economically advantageous, insofar as being "green" is a way to attract people, services, and commerce in "workable" spaces that do not impose huge investments of time to move from work to home. Yet, as *Massachusetts v. EPA* illustrates, some states see increased federal regulation of gas emissions as forwarding their interests, while others do not. The economic base of Massachusetts, the named petitioner in that case, differs from that of Michigan, which has been the home of several automobile manufacturers and which intervened on behalf of the federal government.

Unlike NGOs formally posited to sit outside government and committed to the development of civil society, TOGAs are defined by the fact that their members are insiders, embedded in a particular set of arrangements that generate identities. All of these government actors are invested in being seen as competent "professionals," engendering that identity through setting standards through formal accreditation, ethical codes, or technical certification.[275] Because what distinguishes TOGAs from NGOs is that TOGA members are part of the fabric of extant institutions within a political structure, one can assume a level of commitment by TOGAs to the status quo. Yet even that assumption needs to be cabined. Probing the agendas reveals some TOGAs that, despite consisting of government officials, often oppose government regulation and might be loosely called anti-government.

Another source of the divergences among TOGAs' "interests" comes from the different circumstances of their members. Some are elected officials, ever conscious of the need for reelection and thus looking for ways in which to impress voters. Others hold appointed offices and could well be modeled (in good Weberian fashion[276]) as bureaucrats seeking to entrench and to expand their authority. As for the entity-members, the very existence of one TOGA for towns (the National Association of Towns and Townships), as contrasted with another for smaller cities (the National League of Cities) and yet another for larger cities (the

273. Hays, *supra* note 141, at 1082–84.

274. *Id.* at 1087–88.

275. ARNOLD & PLANT, *supra* note 89, at 31–41.

276. *See* Max Weber, *Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196–97 (H.H. Gerth & C. Wright Mills eds., 1998).

U.S. Conference of Mayors) reveals that, as to some issues, the size and density of population alters understandings of what positions promote self-interest.

2. Interdependences and Interactions

One important facet of what TOGAs do is described as technical—giving or gaining information about how, at a practical level, to undertake a given activity, to comply with legal obligations, or to take advantage of opportunities. The many service-specific TOGAs—from insurance commissioners to park managers—exemplify the need for such information and advice. A second facet is reformist, aiming to change some aspects of the status quo through law or policy innovations. A third is communicative, as TOGAs signal their views either to entities in hierarchical relationships to their jurisdictions, the private sector, or to the residents of the places from which their members come.

As for their audiences, the list of the eleven TOGAs we put into a table needs to be reenvisioned as a multidimensional grid, across which TOGAs communicate both vertically, horizontally and, as Daniel Farber noted, diagonally. As exemplified by the U.S. Conference of Mayors, some of the work of TOGAs is to lobby one another; some TOGAs regularly produce resolutions for adoption, both internally and then by other TOGAs. That horizontal coordination is often complemented (and sometimes driven) by efforts to affect national policy, described as vertically aimed at the federal government or derived from the federal government and to be spread via TOGAs horizontally.[277] The work of disseminating and receiving information can be used to improve members of a TOGA's own governance capacities or abilities, to enhance that TOGA's stature, to market its services or define itself as a specialist, or to shelter policy or legal innovations for itself or its members by obtaining approval from others. Moreover, just as subnational units ought not to be conceived of only in the singular, the same is true of TOGAs—they too are often involved in joint or overlapping ventures. As we suggested earlier, all of this work must be seen as dynamic and interactive. Some political scientists describe that facet as "embedded autonomy" (a degree of self-governance under a federated system)[278] that can make TOGAs especially relevant to national policy formulation.[279]

Models derived from game theorists, social network analysts, and political scientists are relevant to analyses of TOGAs' import. For example, two political scientists have tagged some of TOGAs' policy dissemination as "bottom-up federalism,"[280] as they identified how local initiatives sometimes prompt

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277. For example, as of 2000, four states and twenty-six municipalities had enacted economic sanction laws, aimed at Burma, Nigeria, and other countries, and those parallel provisions had been developed through networks of local officials and activists. *See* Guay, *supra* note 82, at 357.

278. *See, e.g.*, PETER EVANS, EMBEDDED AUTONOMY STATES AND INDUSTRIAL TRANSFORMATION (1995).

279. *See* Johnson, *Associated Municipalities*, *supra* note 88, at 570.

280. Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825, 826 (2006) (noting also the absence of information on these organizations and their impacts); *see also* Janet Koven Levit, *Bottom-Up Lawmaking through a Pluralist Lens: The ICC Banking*

parallel action at the state or nation level or across the country (so-called "snowball effects"). At other times, action at one level of government can take pressure off at another level.[281] As discussed above, TOGAs can also have "signaling" effects. One example comes from an analysis of the National Commission on Uniform State Laws, which could be modeled as informing Congress about the degree of uniformity of practice around the United States. That researcher argued that Congress could infer from the states' adoption of uniform laws that a national rule reflecting those uniform practices would be acceptable as a political matter and potentially beneficial as a practical matter.[282] Others, schooled in network analyses, focus on TOGAs' roles in centralizing and diffusing knowledge functioning akin to other social movement actors pressing for new lawmaking.[283]

TOGAs are both the sources of policies and conduits for their dissemination. The TOGAs that we have discussed are generally focused on making plain the capacities of subnational units—as well as their limits. As locally-grounded actors, TOGAs are generally leery of initiatives that impose burdens or obligations on their subnational units, and several TOGAs have a track record of opposition to "unfunded mandates" or costly regulatory regimes.[284] Not surprisingly, TOGAs often seek to obtain infusions of federal funds for actors at their level.[285] Specific examples come from case studies of the effects of different TOGAs on lawmaking. Illustrative is the discussion of the role of the National Governors Association on legislation related to family support, child care, affordable housing, and welfare policies.[286]

In addition to seeking to provide services for their populations and to protect their governments from burdens, TOGAs have sometimes identified collective action problems for which national solutions are required. One example is the climate change policies discussed above. Another example, apt for those steeped in the federal courts' jurisprudence, involves governors' efforts to obtain

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Commission and the Transnational Regulation of Letters of Credit, University of Tulsa Legal Studies Research Paper No. 2007-01, *available at* SSRN: http://ssrn.com/abstract=1018497; Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006) [hereinafter Ahdieh, *Dialectical Regulation*].

281. Shipan & Volden, *supra* note 280, at 827.

282. *See* Nim Razook, *Uniform Private Laws, National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 38 AM. BUS L. J. 41, 80 (2000) (positing that Congress can "discern whether the states, through their regulatory regimes, are creating net, negative social costs and whether uniform regulations, uniformly adopted, are capable of remedying this problem").

283. *See generally* Kazys Varnelis & Anne Friedberg, *Place: Networked Place*, *in* NETWORKED PUBLICS (Kazys Varnelis ed.) (forthcoming 2008), *available at* http://networkedpublics.org/book/place; YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2007). These approaches consider the impact of digital communications that alter hierarchical structures.

284. *See, e.g.*, U.S. CONFERENCE OF MAYORS, STRONG CITIES, STRONG FAMILIES, FOR A STRONG AMERICA: MAYORS' 10-POINT PLAN 10 (2007).

285. *See, e.g.*, *id.* at 5.

286. *See, e.g.*, Hicks, *supra* note 82, at 57–107; Nugent, *supra* note 194, at 262–66.

help from Congress to deal with low-level nuclear waste disposal. The legislation that grew out of the governors' lobbying efforts illustrates some of the innovative efforts to police collective action, but the litigation that subsequently resulted produced an opinion constraining federalism's options. As discussed below, the statute was held unconstitutional in *New York v. United States*, an occasion on which the Supreme Court developed its "anti-commandeering" doctrine.[287]

3. Translocal Transnationalism

One feature of many TOGAs is the promotion of economic self-interest, and one direction TOGAs have taken to improve their local economies is to develop transnational agendas promoting cross-border trade, investment, and tourism.[288] Many of these international activities involve officials' journeys abroad to enhance economic opportunities for their specific locality or to compare notes with their counterparts in a globalizing world. A subset includes equality and human rights.

A grid putting TOGAs on a map that mimics the boundaries of the United States would thus miss the degree to which TOGAs enter into accords and forge links with other subnational entities around the world in a fashion that goes beyond the national government's ability to "control, supervise, or even monitor."[289] As detailed in the context of the Kyoto Protocol and CEDAW, some TOGA initiatives are expressive, aimed at shifting national policy, while others are programmatic, generating obligations. Through their internationalization, some of what was once "foreign" becomes "domestic," just as some issues thought of as "local" become "national" and then can also be recast as "local."

F. Forwarding Democratic Federalism's Virtues?

The existence and the twentieth-century proliferation of TOGAs underscore the limits of a conception of federalism exemplified at the outset by the categoricalism of the COMPASS Report's response to proposed U.S. ratification of the Kyoto Protocol. Rather than boxes of "federal," "state," "local," and "foreign," we find layers of regulatory regimes with both economic and practical interdependencies—rendering implausible claims that any activity or organization is "truly local" or "truly national."[290] The federal government relies on state and local governments to implement many of its programs, and these various

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287. 505 U.S. 144 (1992). In that case, the Court reviewed the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985. *Id.* at 149. The Act was based largely on a proposal submitted to Congress by the National Governors Association, which outlined a system under which states would share the responsibility for disposing of nuclear waste on a regional basis. *See id.* at 151–52; *see also infra* notes 335–36 and accompanying text.

288. *See, e.g.*, Nat'l Governors Ass'n, Policy Position EDC-17: Governors' Principles on International Trade and Investment (Mar. 5, 2007), *available at* http://www.nga.org/portal/site/nga/menuitem.8358ec82f5b198d18a278110501010a0/?vgnextoid=e1442f9655321110VgnVCM1000001a01010aRCRD.

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

290. *See supra* notes 17–24 and accompanying text.

governments are intertwined with private investment, both foreign and domestic. In lieu of an insistence on exclusive areas of competencies, the focus should be on understanding these interdependencies, some of which can enhance the capacities of more than one level of government.[291]

Instead of finding such overlaps disquieting, we ought to celebrate the generativity. In many respects, TOGAs are exemplary of federalist ambitions, for they embody federalism's political commitment to redundancy and multiple levels of authority limiting centralized power.[292] By amplifying state and local voices through these networks and thereby generating political capital for the jurisdictional office-holders and entities they denote, the views of differing kinds of subnational actors are made known.[293] Given their interactive horizontal effects, one could focus on sequences (with images of "dominos" toppling, as Professor Kirsten Engel has suggested[294]) or see TOGAs' activities as joint ventures. On this account, TOGAs serve both subnational and national interests in our constitutionally-federated structure.[295]

Further, if one takes a nation-centric approach, TOGAs can be viewed as providing useful information to the federal government by serving as conduits to and from the center and periphery. Some TOGAs draft bills that serve as models for federal statutes. As noted above, when states are willing to adopt uniform provisions, national lawmakers learn that the costs of imposing a uniform rule are not likely to be great,[296] and can do so or rely on the concurrency produced horizontally.

TOGAs also offer the national government mechanisms for implementation that may otherwise be lacking when policies are promulgated from a distance. One aspect of the technical assistance that TOGAs provide is the translation of federal requirements into parlance and practices understandable to those with subnational perspectives and priorities. TOGAs often run teaching programs to assist officials in efforts to comply with national rules. Indeed, TOGAs sometimes compete with one another for federal funds to do so.

Given that local and state actors can have higher visibility in their communities than do officials working in federal agencies, the political capital of TOGAs' members can be implicated by successes or failures of policies. Further, and in light of different turnover rates of national, state, and local officials, the

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291. *See* Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007) [hereinafter Ahdieh, *From Federalism to Intersystemic Governance*].

292. *See generally* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

293. Johnson also notes how shared problems prompt opportunities for cooperation and how cooperation helps to produce collective solutions. Johnson, *Associated Municipalities*, *supra* note 88, at 570.

294. Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 189 (2005).

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

296. *See* Razook, *supra* note 282, at 51.

investment of subnational actors in (or their hostility to) a particular federal mandate can affect its success. When local or state officials see a federal program as advancing their interests, they may surpass national actors in devising ways to make it effective. TOGAs can both be conduits to localities on national policies and serve as "feedback loops"[297] to propose modifications of policies[298]—thereby enhancing the dialogic features of federalism.[299]

In addition to providing creative sources of information for one another and for the national government, TOGAs can serve as role models for the development of alternative arrangements within the federation. Because the TOGAs discussed here are *national* organizations of *state or local* actors that are not run by the federal government, they teach us that many problems can be addressed by entities that are national but not "federal," even as they generate nationwide responses by coordinating subnational officials. We might extrapolate from their examples to craft more such organizations. For instance, rather than rely on the federal courts to deal with litigation entailing "national" concerns but arising under state substantive law, we could develop another set of courts for such interjurisdictional disputes. Thus, unlike the tack taken by Congress in the Class Action Fairness Act of 2005 (CAFA),[300] which removed state-based class actions from state to federal court, one could have looked to the Conference of Chief Justices and to the National Association of Attorneys General to help craft regional institutions of judges from states around the nation, supported through both national and state funds, and accessible to consumer and mass tort plaintiffs across the country.

We are not the first to identify the potential for national but non-federal courts. In the early 1960s, when some states were dismayed by the Supreme Court's decision in *Baker v. Carr*[301] and the subsequent reapportionment of state legislatures, three relevant federal constitutional amendments were put forth at the January 1963 meeting of the Council of State Governments. One amendment would have restricted federal court authority to order the reapportionment of state legislatures. The second sought to change the Article V amendment process, such that Congress would be obliged to refer amendments directly to the states for ratification upon the request of thirty-four legislatures. Third, the Council proposed an amendment to establish a "Court of the Union," consisting of all state supreme court chief justices, and to be convened at the request of five legislatures. That court was to have the power to review the constitutionality of the Supreme Court's federalism decisions and could overrule the Court by a simple majority. Although Chief Justice Warren, the U.S. Conference of Mayors, and the National

297. *See generally* Razook, *supra* note 282.

298. Hills has also argued that lobbying groups of various kinds help to create national agendas and sometimes press Congress to act when it might otherwise not. *See* Hills, *supra* note 91, at 19–28.

299. *See* Cover & Alienikoff, *supra* note 55. They examined the ways in which habeas corpus jurisdiction in the federal courts enables a form of dialogue between court systems..

300. Pub. L. No. 109-2, 119 Stat. 4, 12 (2005) (codified in scattered sections of 28 U.S.C.).

301. 369 U.S. 186 (1962).

Association of Attorneys General opposed these amendments, the Council came two votes short of the thirty-four states needed to endorse its call for a constitutional convention.[302] To be clear, we do not endorse CSG's specific proposal or the criticisms of the Warren Court on which it was based, but the suggested Court of the Union does provide an example of creative thinking about an alternative federalism structure, and efforts to revamp federalist practices should neither be discouraged nor associated with a particular ideological valence.

Moving from ideas about courts generated through TOGAs to the role TOGAs play more generally, these organizations are responsive to a perceived democratic deficit within the United States Senate. In light of population and resource disparities among states, the Senate is criticized as failing on various metrics and particularly as generating unfair bargaining conditions.[303] Translocal work could mimic those problems, but because some TOGAs—the National Association of Towns and Townships, for example—are designed to amplify the voices of smaller subnational units, they could collectively provide some counterbalance. More generally, TOGAs can function within a framework of liberal constitutional concerns about the need to check concentrated power.

As one of many sets of groups that form a web of associative activity,[304] we could conceptualize TOGAs' work within pluralist theory as improving deliberative democracy by bringing in not only more voices but a particularly interesting set of voices. These are, after all, "interest groups" whose "special interest" derives from their job level and jurisdiction-specific functions as public servants, and these groups are generally committed to distribute benefits to a level of government rather than to obtain special and specific earmarks for a given locality. TOGAs could both enhance governmental competency and help to shape commitment to a common good and the public sphere more than might other associations or private, single-issue groups. As we noted at the outset, such groups are designated by acronyms, such as "SIGs" (special interest groups) and "PIGs" (public interest groups), that suggest their potential to capture or derail policymaking to serve their own, narrow ends. TOGAs, by contrast, have a broader and longer-term set of commitments. They help bring onto the national stage points of view that are structurally embedded in the problems of states and localities. And, pressed by constituents with needs and functioning as administrators having to deliver, these organizations could be a font of many kinds

302. *See* GUNTHER, *supra* note 145, at 208–10, 232; ARNOLD & PLANT, *supra* note 89, at 166–68 (1994). *See generally* JOHN R. VILE, REWRITING THE UNITED STATES CONSTITUTION: AN EXAMINATION OF PROPOSALS FROM RECONSTRUCTION TO THE PRESENT 97–99 (1991).

303. *See, e.g.*, Baker, *Putting the Safeguards Back*, *supra* note 78, at 955–56, 966–67; Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 860 (2007).

304. *See* Davidson, *supra* note 79, at 970; JOSEPH ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 164–88 (1992); William A. Galston & Geoffrey L. Tibbets, *Reinventing Federalism: The Clinton/Gore Program for a New Partnership Among the Federal, State, Local, and Tribal Governments*, PUBLIUS, Summer 1994, at 23.

of policy innovations, responsive to the dysfunction of the national government more generally.

But while there is much to celebrate, TOGAs ought also to give federalism enthusiasts some pause. Federalism is argued to be a desirable political structure because it locates power at multiple levels and in theory produces variety and policy competition. But the sharing of policies through TOGAs could generate uniformity, as is easily exemplified by the National Commission on Uniform State Laws (which aims to do just that) and by the 800 mayors signing on to a shared approach to climate change. If federalism is valued for producing diverse responses tailored to local conditions, translocalism may in practice dampen this diversity. And, for federalism skeptics, TOGAs may well provide evidence, from the "bottom up," that diversity is less useful in certain areas.[305]

VII. LAW'S OPTIONS

We have detailed some of translocal transnationalism's long history. Further, we have demonstrated that, on some metrics, it has political legitimacy as expressed through TOGAs and endorsed by elected officials at the subnational level. We then sketched some of the ways that political scientists and social movement theorists have analyzed these forms of organization, crossing both public and private boundaries as well as jurisdictional levels of government.

Lawyers, however, ask other questions. Even if TOGAs are historically rooted and majoritarian in some of their workings, issues remain about what law could and should do in response. Hence we need to consider whether, from the standpoint of the constitutional structure of federalism in the United States, translocalism is a phenomenon that ought to be the subject of lawmaking and if so, what kind of regulatory interventions could be appropriately undertaken by courts or legislatures in the federal or state systems.

Our responses require a prefatory caveat. Others may well probe whether the substantive policies that various TOGAs develop, promote, or implement are usefully designed to achieve their goals. For example, is the Climate Protection Agreement endorsed by 800 mayors responsive to the problem of global warming such that its techniques and ambitions are the right ones to embrace?[306] The utility of TOGAs on that metric is not, however, our focus, although attitudes about the wisdom of their interventions constitute one factor relevant to our questions about whether they should be accorded special legal status. Another factor is empirical:

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305. *See generally* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

306. *See, e.g.*, Stewart, *States and Cities as Actors in Global Climate Regulation*, *supra* note 45, at 682. Stewart joins other commentators who have endorsed "plural" sources of law. *See, e.g.*, Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 301–04 (2007); Ahdieh, *Dialectical Regulation*, *supra* note 280; Ahdieh, *From Federalism to Intersystemic Governance*, *supra* note 291; Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248 (2005). Questions of how to develop policy in this area have been taken up across the disciplines. *See* Daniel J. Kevles, *The Contested Earth: Science, Equity and the Environment*, 137 DÆDALUS, Spring 2008, at 80, 94–95.

what effect do TOGAs have on practices themselves? On democratic activities? To date, little research tracks and analyzes the legal implications of the policies, interconnections, and effects of various TOGAs. A richer record ought to inform one's enthusiasm for using law to inscribe or circumscribe TOGAs' activities. Therefore, while we urge that law take TOGAs into account, appreciate their potential, and develop models of different modes of legal recognition and regulation, we do not offer particular interventions as universal prescriptions.

A. From Legality to Privilege: Conferring Special Standing for TOGAs Through Doctrine and Statutes

A first question is whether to conceive of TOGAs as *illegal* in the sense that they are de facto compacts made outside the parameters of the Compact Clause of the U.S. Constitution. A formalist response is that the status of TOGAs as private associations of governmental officials immunizes them from such accusations; the Compact Clause prohibition addresses only states qua states, which are precluded from entering "into any Agreement or Compact with another State, or with a foreign Power," without congressional approval.[307] A doctrinal response is that the Supreme Court has gone further by approving multistate agreements as permissibly residing outside the strictures of the Compact Clause.[308] Thus, absent a major revision in constitutional interpretation, these institutional configurations can continue to function in much the way that they have.

But to conclude that TOGAs are unobjectionable under contemporary interpretations of the Compact Clause is not to decide the question of whether governments should enable or regulate those who join them on behalf of, and as identified by, their jurisdictions. More than tolerating TOGAs, federal and state laws could (and in our view should) endorse, support, and provide special recognition of them. Below, we rely on a mix drawn from extant doctrine and legislation to identify the distinct roles TOGAs can play as litigants in federal court and as policymakers in national regulatory regimes. We leave for another day the parallel and important questions of how state and municipal laws can engage TOGAs.

1. Standing

TOGAs should have access to courts to enforce federal statutory rights. This proposition could be seen as novel but it can also find roots in two Supreme Court decisions related to standing in environmental litigation. One already mentioned is the Supreme Court's 2007 holding in *Massachusetts v. EPA*,[309] recognizing states as litigants. The second is a 1972 decision in *Sierra Club v. Morton*,[310] declining to accord standing to the Sierra Club. The majority in *Massachusetts v. EPA* looked to its own sovereign immunity jurisprudence, which insulated states as defendants, to shape a parallel proposition that posited states to

307. U.S. CONST. art. I, § 10, cl. 3.

308. *See, e.g.*, U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 *passim* (1978).

309. 127 S. Ct. 1438 (2007).

310. 405 U.S. 727, 741 (1972).

be specially situated plaintiffs. The Court reasoned that states' "quasi-sovereign interests" ought to render them eligible for recognition as plaintiffs, possessed of the kind of "injury-in-fact" required under the Court's standing doctrine.[311] The Court did not reach what the amici brief of the U.S. Conference of Mayors argued, that cities ought also to be understood as empowered to serve as plaintiffs as well.[312]

At issue in the 1970s Sierra Club litigation was whether the Secretary of the Interior had violated federal statutes by issuing permits for the Disney Corporation to build a major hotel complex in the Sierra Madre Mountains, a federally-protected area.[313] The plaintiff, Sierra Club, could have asserted (and subsequently did) that individual members of its group used the area to hike or camp, but instead it sought to establish the proposition that organizations dedicated to the environment could be recognized under the Administrative Procedure Act as "aggrieved" by adverse decisions.[314] The case was important because it was one of the first occasions on which the Court recognized that a party could suffer harm beyond economic or physical damage and thus that aesthetic and recreational injuries were cognizable.

Nevertheless, the Court declined to permit either all public interest groups or just environmental groups to bring federal lawsuits on a theory that they served the function of "private attorneys general."[315] Rather, the majority opinion by Justice Stewart insisted that the Sierra Club had to show that the organization or its members had experienced an injury directly. (Subsequent cases have laid out tests by which organizations can do so.[316]) Justice Blackmun's dissent objected that environmental cases were special and that the Court's requirement that a camper or hiker must come forward was an unnecessary impediment to the enforcement of federal rights.[317] Justice Douglas (a noted outdoor and environmental enthusiast) argued what Christopher Stone characterized as a claim that "trees should have standing."[318]

TOGAs offer another option. They sit between governments and NGOs, and in environmental litigation and elsewhere, law ought to accord them special

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311. 127 S. Ct. at 1454 (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

312. *See* Brief of U.S. Conference of Mayors, *supra* note 127.

313. Specifically, the Sierra Club alleged violations of 16 U.S.C. §§ 1, 41, 43, 45c, 497, and public-hearing regulations promulgated by the Forest Service and the Department of the Interior. *Sierra Club*, 405 U.S. at 730 n.2.

314. *See Sierra Club*, 405 U.S. at 732–35. On remand, the Sierra Club averred that its members used the area for recreational purposes. *See* Sierra Club v. Morton, 348 F. Supp. 219, 220 (N.D. Cal. 1972). The Disney complex was never built. *See generally* JOHN L. HARPER, MINERAL KING: PUBLIC CONCERN WITH GOVERNMENT POLICY (1982).

315. *See Sierra Club*, 405 U.S. at 737–41.

316. *See, e.g.*, Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996).

317. *See Sierra Club*, 405 U.S. at 755–60 (Blackmun, J., dissenting).

318. *See* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (Oxford Univ. Press 1996) (1974).

status as parties, at least as to the enforcement of rights against the federal government. They should be recognized as appropriate plaintiffs or intervenors as of right, akin to the status accorded the Attorney General of the United States, who is authorized to intervene when federal statutes are challenged.[319] A role for TOGAs could be provided through case law or statute, and a statutory precedent comes from the Class Action Fairness Act of 2005 (CAFA), invoked above as illustrative of a decision to centralize power in the federal courts rather than permit other institutions to decide cross-jurisdictional cases.[320]

CAFA illustrates the tendency to conceive of problems as either "state" or "federal," and to miss the alternative of creating non-federal national courts to resolve multi-state disputes. But, as a result of lobbying by TOGAs, and specifically the National Association of Attorneys General, Congress wrote into CAFA special protections and statutory standing for state and federal officials. Recall that CAFA federalizes class actions by removing to federal courts certain cases involving specified numbers of plaintiffs and monetary value that arise under state law and are pending in state court.[321] The bill was opposed by the Conference of Chief Justices of the State Courts,[322] the National Conference of State Legislatures,[323] and by a collective of more than a dozen state attorneys general who objected that the Act "unduly limits the right of individuals to seek redress for corporate wrongdoing in their state courts."[324] In addition to that subgroup of state

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319. *See* FED. R. CIV. P. 24(a).

320. Pub. L. No. 109-2, 119 Stat. 4, 12 (2005) (codified in scattered sections of 28 U.S.C.).

321. For a recent examination of CAFA, see generally *Symposium: Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. (forthcoming 2008). Edward Purcell provides a rich historical treatment of the Act in *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008). For an examination of the Act addressing the import of translocal actors, see Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008).

322. *See* Letter from Annice M. Wagner, President, Conference of Chief Justices, to Hon. Patrick Leahy, Chairman, Senate Comm. on the Judiciary (Mar. 28, 2002), *available at* http://www.citizen.org/documents/CCJLetter.pdf. That letter argued that, "[a]bsent hard evidence of the inability of the state judicial systems to hear and decide fairly class actions brought in state courts," CAFA was not warranted. This letter was invoked in a statement of minority views issued by Senators Leahy, Kennedy, Biden, Feingold, and Durbin in opposition to CAFA. *See* S. REP. NO. 109-14, at 82 n.2 (2005).

323. *See* Letter from Michael Balboni, Chair, Nat'l Conference of State Legislatures Law and Criminal Justice Comm., to U.S. Senate (Feb. 2, 2005), *available at* http://www.citizen.org/documents/NCSLClassActionLetter2-05.pdf (asserting that CAFA "undermines our system of federalism, disrespects our state court system, and clearly preempts carefully crafted state judicial processes . . . regarding the treatment of class action lawsuits").

324. Letter from Eliot Spitzer, Attorney General of the State of New York; W.A. Drew Edmondson, Attorney General of the State of Oklahoma; Bill Lockyer, Attorney General of the State of California; Lisa Madigan, Attorney General of the State of Illinois; Tom Miller, Attorney General of the State of Iowa; Gregory D. Stumbo, Attorney General of the State of Kentucky; G. Steven Rowe, Attorney General of the State of Maine; J.

attorneys general, the National Association of Attorneys General sought to have CAFA specify that it would not apply to "any civil action brought by, or on behalf of, any attorney general."[325]

Congress did not adopt the NAAG proposal verbatim, but CAFA does exempt from federalization any case filed "on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action."[326] Furthermore, CAFA insulates state actors as defendants; cases in which "the primary defendants are States, State officials, or other governmental entities against which the district court may be foreclosed from ordering relief" cannot be removed from state to federal court.[327] In addition, CAFA gives new opportunities to state attorneys general to participate in class actions by mandating that settlements cannot be approved until public officials have been notified about proposed agreements.[328] Those officials can therefore affect both processes and outcomes in cases.[329]

Opponents of proposals to enable litigation often raise concerns about how to ensure appropriate enforcement and deter frivolous claims. Our suggestion that TOGAs be granted, through both adjudication and legislation, access to courts rests on the fact that they are jurisdictionally-based institutions advancing a mélange of interests. Because they have intra-member obligations of transparency and limited resources, they have to be selective about when to participate in litigation. Moreover, as illustrated by TOGAs' ventures in amici filings and their advocacy on different sides in pending cases, they can inform judges while also making plain that subnational institutions do not all agree on what federalism permits its different units to do.

In addition to authorizing TOGAs as plaintiffs, we should also consider protecting them as defendants. In contrast to the examples of *Massachusetts v. EPA* and CAFA, several cases familiar within federal courts' jurisprudence illustrate the law's refusal to make special accommodations for entities that can be analogized to TOGAs. For example, in *Hess v. Port Authority Trans-Hudson*

Joseph Curran, Attorney General of the State of Maryland; Tom Reilly, Attorney General of the State of Massachusetts; Mike Hatch, Attorney General of the State of Minnesota; Patricia A. Madrid, Attorney General of the State of New Mexico; Hardy Myers, Attorney General of the State of Oregon; William H. Sorrell, Attorney General of the State of Vermont; Darrell McGraw, Attorney General of the State of West Virginia., to Hon. Bill Frist, Senate Majority Leader, and Hon. Harry Reid, Senate Minority Leader (Feb. 7, 2005), *printed in* 151 CONG. REC. H644-45 (daily ed. Feb. 16, 2005).

325. *See* 151 CONG. REC. S1215-16 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor) (proposing an amendment to the bill).

326. 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (Supp. V 2005). The distinction is not trivial in that a state attorney general must rely on specific statutes to resist federalization rather than his or her inherent power to act on behalf of the state.

327. *Id.* § 1332(d)(5)(A) (Supp. V 2005). Also excluded are cases involving proposed classes of fewer than one hundred members. *Id.* § 1332(d)(5)(B).

328. *Id.* § 1715(d) (Supp. V 2005).

329. *See* William B. Rubenstein, The Public Role in Private Governance: Some Reflections on CAFA's Early Experience 3, 5–8 (Nov. 19, 2007) (unpublished manuscript, on file with authors).

Corporation, the Court declined to recognize immunity from suit for the Port Authority, which was created by an interstate compact that enables New York and New Jersey to work together on shared transportation challenges.[330] While we are critical of the constitutionalization of the doctrine of state sovereign immunity,[331] if state sovereign immunity is to be recognized, then its conceptual predicate—that constraints on liability for states are judicious—should be applied to interstate compacts and, in some instances, to TOGAs. A common-law immunity doctrine that accords TOGAs presumptive shelter from litigation—akin to the "good faith immunity" provided to executive officers—should be explored, with the caveat that were the law of immunity to shrink for states and their officials, then TOGA law should contract as well.

2. Deference

Federalism jurisprudence should also take TOGAs' existence into account in another respect. Here we build on an idea put forth more than fifty years ago by Herbert Wechsler. He argued that because states were represented in Congress, the judiciary should be reluctant to step in at the behest of state and local actors to review congressional statutes affecting state powers.[332] Wechsler urged courts to leave questions about the proper degree of national regulation to political exchanges in the legislative arena. The paradigm that prompted Wechsler's article was shaped by cases in which states went to the federal courts to obtain judicial protection from congressional legislation. In today's paradigm, private business organizations (such as the National Foreign Trade Council (NFTC), or car manufacturers), often joined or supported by the federal government, go to federal court to get protection from localities that have enacted emissions controls, banned purchases from Burma, or mandated divestment from Sudan.[333] The claim is that local or state regulation is preempted.

We suggest that Wechsler's idea—reformatted to entail "the political safeguards of translocalism"—ought to affect courts' decisions about whether to find that federal law displaces local actions. Absent a clear statement from Congress directing preemption, the judiciary ought to be reluctant to ban local majoritarian activities—such as the Mayors Climate Protection Agreement, San Francisco CEDAW adoption, or Darfur divestment. Indeed, local actions could have a stronger claim to judicial deference than the congressional actions

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330. 513 U.S. 30 (1994). In *Hess*, the majority concluded that the doctrine of sovereign immunity did not preclude the Port Authority from having to defend claims for money damages under the Federal Employers' Liability Act. *See id.* at 52.

331. *See generally* 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).

332. 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, 546, 559–60 (1954).

333. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007); Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

addressed in Wechsler's article. Critics have argued that Wechsler's approach fails to recognize that Congress is not a level playing field:[334] the Senate gives equal votes to disparately situated states with widely varying populations, and some states can dominate others. A presumption in favor of leaving state and local legislation and resolutions in place responds to those criticisms by permitting subnational variation to thrive through state and local political processes.

Turning to the national level, we propose that congressional legislation that has TOGAs' imprimatur also deserves more protection from judicial review. Here we draw upon the Supreme Court's decision in *New York v. United States*,[335] finding unconstitutional a congressionally crafted "take title" penalty for a state's failure to cooperate in disposing of low-level nuclear waste. The underlying statute was proposed by the National Governors Association.[336] A new legal rule should give special deference to such a proposal from NGA. Provided that a federal statute is supported by a sufficient (perhaps unanimous) group of governors, courts ought to presume the statute is federalist-respectful and state-regarding and be reluctant to permit a later-unhappy state from backing out of the commitments imposed.

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334. *See, e.g.*, Baker, *Putting the Safeguards Back*, *supra* note 78, at 955–56, 966–67.

335. 505 U.S. 144 (1992).

336. *Id.* at 151–52. The Low-Level Radioactive Waste Policy Act of 1980 closely tracked a forty-one page report unanimously endorsed by the National Governors Association. *See* H.R. Rep. No. 99-314, pt. 2 at 18 (1985); H.R. Rep. No. 96-1382, pt. 1 at 34–35 (1980). After the 1980 Act's passage, states began negotiating regional compacts for nuclear-waste disposal, and extensive hearings were held in Congress regarding these compacts. *See, e.g.*, *Low-Level Radioactive Waste Regional Compacts: Hearings Before the Subcomm. on Energy Conservation and Power of the H. Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1982). These hearings resulted in a "stalemate" over the creation of new disposal sites, precluding congressional approval of the compacts. *See Low-Level Waste Legislation: Hearings Before the Subcomm. on Energy and the Environment of the H. Comm. on Interior and Insular Affairs*, 99th Cong., 2 (1985) [hereinafter *Mar. 1985 Low-Level Waste Hearings*] (statement of Rep. Udall). Representative Morris Udall of Arizona worked closely with the National Governors Association and sited states to see if a settlement could be achieved. *See* 131 CONG. REC. H11,403 (daily ed. Dec. 9, 1985) (statement of Rep. Udall). Representative Udall's bill ultimately "represent[ed] the diligent negotiating undertaken by that group" and "embodie[d]" the "fundamentals of their settlement." *Id.* Senator Strom Thurmond of South Carolina introduced a bill embodying this compromise along with "enforceable milestones" and "real teeth" to ensure "continuing progress toward opening new sites." *Low-Level Radioactive Waste: Hearings Before the Subcomm. On Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong. 160 (1985) (testimony of Gov. Riley). This bill was supported, at least in principle, not only by the sited states, but also by a number of unsited states—including New York, which later litigated against it. *See Mar. 1985 Low-Level Waste Hearings* at 1981 (statement of Charles Guinn, Deputy Commissioner for Policy and Planning of the New York State Energy Office) ("Milestones which were suggested during the interregional discussions included host state selection, site identification and license application. Appropriate penalties could be developed for failure to meet these milestones."). This bill became the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985), the subject of the case *New York v. United States*.

3. Regulatory Rights

An argument for according TOGA-based work special recognition in litigation could also be a predicate for providing TOGAs recognition in the policymaking process. We turn then to examples of legislation and executive orders that have built in consultation with, or regulatory waivers for, subnational lawmakers. During the second half of the twentieth century, legislation and executive orders did so through what was called the Advisory Commission on Intergovernmental Relations (ACIR)—a "permanent bipartisan commission"—established in 1959.[337] We pause here to explore some of the details of ACIR and its deployment under different administrations over a few decades to show the political dynamics that developed as actors in the ACIR process sometimes used TOGAs to advance their visions of how to allocate funds and authority in relationship to national or local control. The ups and downs of ACIR reveal how culture, attitudes, and the political agendas of national actors altered the import of consultation with TOGAs.

In 1953, during the Eisenhower Administration, Congress authorized a "two year study by the Temporary Commission on Intergovernmental Relations" to review the relationships among national, state, and local governments.[338] That Commission recommended a permanent focus on "interlevel relations," and out of the recommendation came ACIR.[339] At its inception, ACIR had a multifaceted mission, including "mak[ing] available technical assistance to the executive and legislative branches of the Federal Government in the review of proposed legislation to determine its overall effect on the Federal system" and "[b]ring[ing] together representatives of the Federal, State, and local governments for consideration of common problems."[340] To do so, ACIR's governing board

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337. Pub. L. No. 86-380, § 1, 73 Stat. 703, 703 (1959).

338. ARNOLD & PLANT, *supra* note 89, at 110–11.

339. *Id.*

340. Pub. L. No. 86-380, § 2(1), (4), 73 Stat. 703, 703–04, (1959). ACIR consisted of a twenty-six member commission, charged with giving "continuing attention to intergovernmental problems." *Id.* §§ 2, 3(a). ACIR required that the Commission:

> (1) bring together representatives of the Federal, State, and local governments for consideration of common problems;
> (2) provide a forum for discussing the administration and coordination of Federal grant and other programs requiring intergovernmental cooperation;
> (3) give critical attention to the conditions and controls involved in the administration of Federal grant programs;
> (4) make available technical assistance to the executive and legislative branches of the Federal Government in the review of proposed legislation to determine its overall effect on the Federal system;
> (5) encourage discussion and study at an early stage of emerging public problems that are likely to require intergovernmental cooperation;
> (6) recommend, within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government; and
> (7) recommend methods of coordinating and simplifying tax laws and administrative practices to achieve a more orderly and less competitive

included members of Congress, federal officials, citizens, and four governors; in addition, relying on nominations by TOGAs, the President appointed three state legislators, four mayors, and three county officials to the ACIR Board. In its early years, ACIR staff did research on the structure of state and local government and the impact of federal policy on state and local governments.[341] Some commentators credit ACIR with helping to shape the Intergovernmental Cooperation Act of 1968 and the Intergovernmental Personnel Act of 1970.[342]

In an executive circular issued in 1966, President Lyndon Johnson provided ACIR a more formal role in the development of regulation. That order—creating what came to be known as the A-85 process—required federal agencies to consult with state and local officials in the development and implementation of major programs and regulations that affected states and localities.[343] Major TOGAs (the National Governors Association, the Council of State Governments, the International City/County Management Association, the National Association of Counties, the National League of Cities, and the U. S. Conference of Mayors) were specifically named as official liaison groups. Federal agencies channeled information on proposed regulations to ACIR; the Commission forwarded it to the TOGAs; and the TOGAs are said to have consulted their members and sent comments back to the agencies via ACIR. According to some accounts, when TOGAs identified problems, federal agencies were required to negotiate with them.[344]

Under the Nixon presidency, "[d]irect access to the White House was the goal" of many of the TOGAs discussed here, and the newly-created Office of Management and Budget (OMB) became a central contact.[345] The Nixon administration's embrace of "revenue sharing" helped it to generate support aimed "to blunt the partisanship of traditional Democratic power bases in state and local governments, especially in big cities."[346] In other words, intergovernmental relations were imbedded in partisan politics, such that members of each of the major parties championed agendas aimed at garnering support for their vantage points. The A-85 process operated through 1978, when the Carter Administration replaced it with a more decentralized consultation process, prompted in part by

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fiscal relationship between the levels of government and to reduce the burden of compliance for taxpayers.

Id. § 2.

341. *See* ARNOLD & PLANT, *supra* note 89, at 111. ACIR did "pioneering" studies on fiscal disparities among jurisdictions, allocation of federal functions, sub-state regionalism, interlocal agreements, criminal justice, property taxes, and building codes. *Id.*

342. *Id.*

343. Bureau of the Budget, Circular No. A-85 (June 28, 1967).

344. *See* HAIDER, *supra* note 82, at 114–43; GUNTHER, *supra* note 145, at 230–33; *see also* ARNOLD & PLANT, *supra* note 89, at 111.

345. ARNOLD & PLANT, *supra* note 89, at 115.

346. *Id.* at 117.

concerns that TOGAs were functioning as "advisory committees" in violation of the Federal Advisory Committee Act.[347]

In the 1980s, President Reagan took another approach through a series of Executive Orders that left each agency free to develop its own intergovernmental consultation process "to the extent practicable," but overall the Reagan administration emphasized federal-state over federal-local interchanges.[348] In the meantime, ACIR was reported to advocate positions that increasingly fit with the Reagan Administration's devolutionary approach to federalism.[349] That advocacy prompted some TOGAs to distance themselves from ACIR.[350] The Clinton administration had conflicts, fueled by TOGAs, with Congress over the Executive's attempts to enhance agency discretion, and in the end retained agency-by-agency mechanisms for intergovernmental consultation; those techniques continued even after ACIR disbanded in 1996.[351]

We have detailed some of the evolution and demise of ACIR because, over the course of its existence, it exemplified different options for inserting

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347. GUNTHER, *supra* note 145, at 232; Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT, AND REFORM 209–12 (1984).

348. *See* Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987); Exec. Order No. 12,372, 3 C.F.R. 197 (1983); and Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981). According to Arnold and Plant, the 1987 executive order "eliminated the identity of all local governments!" ARNOLD & PLANT, *supra* note 89, at 123; *see also* Brian E. Bailey, Note, *Federalism: An Antidote to Congress's Separation of Powers Anxiety and Executive Order 13,083*, 75 IND. L.J. 333 (2000).

349. For example, a 1984 ACIR report focused on the "extensive federal regulatory controls" imposed on states and localities by the federal government during the 1960s and 1970s and the need to restore a "constitutional balance" limiting national authority. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 347, at vii, 245–321. That report criticized the federal courts' failures to constrain the "[r]egulatory [p]roclivities of Congress or the Executive Branch." *Id.* at 249. In response, the Report made many recommendations, including that national laws "not be construed to preempt any field against state action unless this intent is stated" and "when a national minimum standard is imposed . . . where uniformity is not imperative, the rights of states to set more rigorous standards should be carefully preserved," *id.* at 260; that funds be provided for mandates, *id.* at 265–70; and that support be given to the State and Local Legal Center so it could monitor issues and present "common state and local interests before the federal courts," *id.* at 270.

350. *See* ARNOLD & PLANT, *supra* note 89, at 128–29. Arnold and Plant comment that in the 1960s and 1970s, ACIR had "stressed effective roles for state and local governments as viable, creative parts of the federal system," but that in the 1980s, "ACIR switched to a conservative agenda of constitutional amendments . . . and public choice as political as well as economic theory. The ideological underpinning matched the policies of the Reagan years." *Id.* at 128.

351. *See* Bailey, *supra* note 348, at 333–40 (describing the Clinton Executive Order issued and withdrawn); Treasury, Postal Services and General Government Appropriations Act of 1996, Pub. L. No. 104-52, 109 Stat. 468 (1995) (providing for the "prompt and orderly termination" of the ACIR). For post-1996 agency consultation, see Exec. Order No. 13,083, 3 C.F.R. 3095 (May 14, 1998); Exec. Order No. 13,095, 63 Fed. Reg. 42,565 (Aug. 5, 1998); Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

TOGAs into the federal regulatory regime, as well as ways in which national administrations can try to enlist TOGAs to serve their ends. Tradeoffs are evident. From a majoritarian standpoint, encouraging states and localities to channel their transnationalism through TOGAs could produce more policymaking consensus among diverse coalitions of subnational actors. But what could be lost are individual actions on the part of certain states or localities that can spark innovation even if those innovators also are outliers ahead of or behind any sort of emergent national consensus. Crafting a contemporary version of ACIR would require a reevaluation of which TOGAs ought to be named participants, whether representation outside the channels of state and local organizations would be desirable, and how to structure individualized contacts between federal officials and specific localities and states.

Another statutory model for putting TOGAs into regulatory power is the Unfunded Mandates Reform Act of 1995.[352] The Act alters congressional procedures to require consideration of the impact of proposed legislation on states and localities, and provides that any member of Congress can raise a point of order objecting to consideration on federalism grounds. Only if the objection is waived by a majority of the chamber can debate on the bill continue.[353] Hearkening back to the ACIR and A-85 process, the Unfunded Mandates Act process could be revised to require input from TOGAs in the federalism impact analysis.

ACIR represents a model of a statute that brings various TOGAs together, albeit recombining them by pulling in representatives from various sectors. Other kinds of regulatory exemptions are asymmetrical, in that federal statutes permit federal agencies to waive the applicability of rules for certain (rather than all) subnational units under specified circumstances.[354] The Clean Air Act's approach to state standards for vehicles and mobile sorts of air pollution is another model. Although the Act generally does not allow states to "adopt or attempt to enforce" their own vehicle emissions standards, as noted above, it carves out an exception for California, the only state that had adopted such standards prior to the Clean Air Act's enactment.[355] Under certain circumstances, the Environmental Protection Agency is authorized to grant California a waiver for stricter enforcement standards than those imposed by the federal government.[356] Under this provision, since 1967 California has been given more than fifty waivers, which have enabled it to serve as "a laboratory for the demonstration of cutting edge emission control

352. 2 U.S.C. §§ 1501–71 (2006).

353. *See* 2 U.S.C. § 658d(a)(1) (2006); Elizabeth Garrett, *States in a Federal System: Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1117–18 (1997).

354. *See, e.g.*, Education Flexibility Partnership Act of 1999, as amended, 20 U.S.C. 5891b(b) (2006) (authorizing Secretary of Education to delegate to states authority to waive certain federal education requirements for local school districts).

355. 42 U.S.C. § 7543 (2006).

356. *Id.* § 7543(b).

technologies."[357] Furthermore, under the Act's "piggyback" provision, other states may adopt standards identical to those for which California receives a waiver.[358]

We could imagine federal statutes that provide similar recognition to states or localities that have been particularly innovative in other areas of policy development—for instance, Seattle as the progenitor of the transnational Mayors Climate Protection Agreement, or San Francisco for CEDAW. Or Congress could impose a requirement that the federal government grant a waiver from application of federal law only if more than one—or five, or thirty—states signaled their intention to depart from the national standard. Congress could also build in encouragement for transnational networks of translocal actors, for instance by permitting states or localities to enact heightened emissions standards if they could provide evidence that one or more foreign nations or subnational governments outside the United States has already adopted such a law.

The caveat here is that waiver mechanisms, as currently formulated, give a great deal of power to federal agencies, and the agencies' discharge of those responsibilities has been contested. After the Bush Administration refused to grant California a waiver under the Clean Air Act for new regulations adopted by the state to require new motor vehicles to reduce emission of greenhouse gases, California filed suit.[359] As further evidence of translocal co-venturing, California is supported in this litigation by fifteen states that hope to take advantage of the Clean Air Act's piggyback provision and implement standards comparable to California's.[360] This asymmetrical federalism (which is central to the federalist structure of the United Kingdom) suggests the possibility of carve-outs for policymaking in particular areas where some but not all subnational government actors and/or TOGAs are seen as uniquely situated in relation to a given problem.

4. Insulation from Preemption

Another statute that recognizes roles for subnational lawmaking comes out of recent conflicts over laws enacted by many localities that, as discussed above, refuse to buy goods from or invest in countries that engage in human rights violations. In the winter of 2007, a federal district court found illegal the actions that the State of Illinois has taken in response to genocide in Darfur; that state—

357. James E. McCarthy, CRS Report for Congress: *California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act*, No. RL34099, at 2 (updated Oct. 1, 2007).

358. 42 U.S.C § 7507 (2006); *see also* McCarthy, *supra* note 357, at 4 n.9.

359. *See* Felicity Barringer, *California Sues E.P.A. Over Denial of Waiver*, N.Y. TIMES, Jan. 3, 2008, at A14; *see also* Cal. A.B. 1493 (codified at CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2003)); CAL. AIR RES. BD., REGULATIONS (2004).

360. *See* McCarthy, *supra* note 357, at 5–6. In separate lawsuits, some have argued that, even if California were to receive a Clean Air Act waiver, its heightened standards are preempted by another federal statute, the Energy Policy and Conservation Act. *See, e.g.*, Central Valley Chrysler Jeep, Inc. v. Witherspoon, 456 F. Supp. 2d 1160 (E.D. Cal. 2006); Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151, (E.D. Cal. 2007); *see also* McCarthy, *supra* note 357, at 12–14.

like several others—had divested its assets in companies doing business there.[361] That case fits within a series across a wide spectrum in which the federal government pressed expansive understandings of the President's authority over energy policy, over environmental policy, and over "foreign" affairs.

Federal preemption is the major legal doctrinal mechanism used to preclude local decisionmaking. While some of its expansion comes from judicial rulings, Congress has also considered and sometimes enacted legislation mandating preemption.[362] Not surprisingly, the U.S. Conference of Mayors and the National Conference of State Legislatures regularly oppose such measures, and both TOGAs have urged Congress to make preemption the exception rather than the rule.[363]

By and large, the federal judiciary has over the last decades been both deferential to claims of national preemption and generative in its own right. Federal courts have shaped a legal regime preferring the singularity of national power, through judicial expansion of the doctrines of foreign affairs preemption, the dormant Commerce Clause, and federal agency preemption. Undergirding these decisions are questions of separation of powers, the judicial role, and federalist commitments.

We join others (including, in this symposium, Daniel Farber[364]) in arguing that preclusion is often neither required nor appropriate. As is likely plain from our rejection of categorical federalism, our view is that, as a matter of constitutional law, many local and state actions with national, foreign, and transnational effects are permissible—and unavoidable. The text of the Constitution is radically under-directive and much of the development of the idea of exclusive realms for executive or congressional action comes from judicial extrapolation that we think is wrong as matter of doctrine, and wrong as a matter of federalism. Translating these views into legal doctrine requires revisiting the

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

362. One recent monograph identified dozens of such bills. *See* MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION, H. COMM. ON GOVERNMENT REFORM, 109TH CONG., CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS 17–37 (Comm. Print 2006), *available at* http://oversight.house.gov/documents/20060606095331-23055.pdf.

363. *See id.* at 19 & n.70 (citing Letter from Michael Balboni, Chair, National Conference of State Legislatures Comm. on Law and Criminal Justice, to Hon. Bill Frist, Senate Majority Leader, and Hon. Harry Reid, Senate Minority Leader, in which NCSL opposed federal preemption of state statutes governing the liability of car rental companies) (Apr. 26, 2005)); Ed Somers, *Gun Immunity Considered by Congress*, U.S. MAYOR NEWSPAPER, May 9, 2005, http://www.usmayors.org/uscm/us_mayor_newspaper/documents/05_09_05/guns.asp.

364. *See* Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 881 (2008) [hereinafter Farber, *Climate Change*]; *see also* Judith Resnik *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 41–42 (2007) [hereinafter Resnik, *Foreign as Domestic Affairs*]. A clear statement rule is also proposed by Adelman and Engel for environmental preemption. *See* David E. Adelman & Kristen H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008).

growing presumption in favor of executive or congressional preemption. The presumption should be flipped in favor of local initiatives. As we discussed above, we would put the burden on Congress to provide a "clear statement" of its preemptive provision and its boundaries, and would not permit preemption based on general claims made by the executive branch officials of a need for exclusive authority to act.[365]

But to conclude that cities or states can generate policies with effects beyond their borders is not to decide the regulatory question about whether judicially or legislatively mandated parameters should seek to channel that power. Localities and states sought protection for their efforts related to Sudan and succeeded in some ways, and perhaps not in others, when Congress enacted the Sudan Accountability and Divestment Act (SADA), which became law in December of 2007.[366] The statute provides that "[n]otwithstanding any other provisions of law, a State or local government may adopt and enforce measures . . . to divest assets . . . [from persons or companies qualifying] as having direct investments in business operations [in Sudan]."[367] Yet the license the Act gives to subnational entities (as well as universities) to divest is limited. Businesses receive protection from subnational entities' divestiture directives through a notice and response period that offers opportunities to ascertain if businesses are investing in Sudan in forbidden ways. In addition, asset managers receive safe harbors from lawsuits under the securities and pension laws.[368]

Under SADA, the federal government has to divest from Sudan in its contracting, the SEC and Treasury have some oversight, and the President gets both to waive the contracting divestment requirements if "the national interest" so requires and to terminate the law upon a certification that Sudan has stopped the horrors.[369] Yet, when signing the legislation, the President insisted that he retained "exclusive authority to conduct foreign relations."[370] Furthermore, after the Act's passage, the National Conference of State Legislatures issued a statement asking the Senate Committee on Banking, Housing, and Urban Affairs for federal assistance. The organization asserted that SADA placed too much of an obligation on states to identify companies making illicit investments.[371] Meanwhile, the National Foreign Trade Council (NFTC), which successfully challenged the

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365. *See* Farber, *Climate Change*, *supra* note 364, at 912; Resnik, *Foreign as Domestic Affairs*, *supra* note 364, at 41–42; Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations and the Decentralization of Foreign Policy*, 40 AKRON. L. REV. 647, 713–15 (2007).

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

367. *Id.* § 3(b), 121 Stat. at 2518.

368. *See id.* §§ 3(e), 4, 121 Stat. at 2519–20.

369. *See id.* §§ 6, 12, 121 Stat. 2520–21, 2523.

370. Statement on Signing the Sudan Accountability and Divestment Act of 2007 (Dec. 31, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/12/20071231.html.

371. *See* Letter from Phillip Frye, Rep. of N.C. and Chair of the Nat'l Conf. of State Legislatures Labor and Econ. Dev. Comm., to Senator Christopher Dodd, Chairman, Committee on Banking, Housing and Urban Affairs (Jan. 16, 2008), *available at* http://www.ncsl.org/standcomm/sclaborecon/SudanLetter011608.htm.

divesture efforts of Illinois, described the bill as "effectively limiting the scope of state and local government efforts to divest." Although NFTC asserted that SADA was "unconstitutional," it nonetheless described the Act as "one of the more thoughtful approaches" to divestiture.[372] SADA is useful here to underscore that statutory interventions which engage subnational units are bargained for and, depending on the configuration when legislation is enacted, the outcomes may give more or less scope to or protections for TOGA-based innovations.

B. Aggregate Concerns: Regulating TOGAs by Structuring Representation and Forcing Disclosure

We turn now from ways to build in roles for TOGAs to questions about superintendence of them. A major vehicle for such oversight is the potential control imposed by each individual jurisdiction that joins a TOGA. Again, we defer those questions to another time, for our focus here is on national—albeit not necessarily federal—law.

Inside the political and social science literature, TOGAs are labeled "intergovernmental lobbies."[373] But that term is a misnomer, as would be the appellation "NGO." Each TOGA is not itself a formal part of any government but rather an association of governments or of their officials. (The real intergovernmental lobby is Congress itself). TOGAs are, of course, "interest" groups, but as we explored above, discerning whether they are agents or principals is a complex endeavor.[374] Who decides what issues they take up and the positions that they advance?

Such questions are familiar in both political and legal scholarship addressing representation and groups. The challenges of bonding representatives to those they represent and enabling the represented in turn to monitor their named leaders are commonplace in organizational, political, and class action theory. In the context of state-to-state action, as we have noted, a key issue is "horizontal aggrandizement," in which states with certain resources can overwhelm others.[375]

That problem can be translated to the TOGA context; the concerns are that collective activities can undermine accountability in much the same way that Justice O'Connor has criticized state-federal schemes for potentially masking responsibility for decisionmaking.[376] Here, disaggregation of the set of organizations that fall within the rubric of TOGAs is in order, for there are grounds to differentiate among TOGAs. We charted eleven above, and those descriptions suggest the degree to which membership, affiliation, and policymaking varies. For example, the National Association of Counties reports that it represents three-fourths of all counties.[377]

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372. *See* Jennifer Cummings, NFTC, USA*Engage Comment on Sudan Bill, Jan. 2, 2008, http://www.usaengage.org/index.php?option=content&task=view&id=226&Itemid=61.

373. *See* sources cited *supra* notes 82, 140–41.

374. *See supra* notes 83–99 and accompanying text.

375. *See* Baker, *Putting the Safeguards Back*, *supra* note 78, at 955–56, 966–67.

376. *See* Gregory v. Ashcroft, 501 U.S. 452, 456–64 (1991).

377. *See* Nat'l Ass'n of Counties, County Membership, http://www.naco.org/Template.cfm?Section=County_Membership&Template=/cffiles/naco/county_membership.cfm (last visited July 17, 2008).

By contrast, the National League of Cities has 1600 dues-payers—of which some could be leagues of small cities—out of a total of 19,000 cities. Thus, it is unclear what percentage of cities is "represented" in the National League of Cities in the sense of affirmatively affiliating with the organization. Moreover, some TOGAs make policies through executive officials or are staff-driven, while others have opportunities for "sign-ons," permitting specific endorsements on particular issues.[378]

Regulatory responses can draw from experiences with class actions and corporations, in which disclosure, transparency, and accountability are mandated under the supervision of a federal judge or an agency. Given, however, that TOGAs are quasi-governmental and aim to serve as counterweights to federal authority, we would prefer to see such regulatory regimes developed by TOGAs themselves and the subnational entities from which they stem. TOGAs vary in their rules regarding when and how to use their voice or to advance policies on behalf of their membership. Regulatory regimes could make some of these practices mandatory by requiring that TOGAs develop mechanisms to clarify how they formulate positions and whether policies are the artifacts of their executive committees, fall within the purview of staff, or require affirmative assent from all members.[379] (Overregulation is an unattractive risk, given that TOGAs ought to be seen as participants in the set of associational freedoms essential to democracy.) Regulatory regimes need not only be supervisory; another possible way to encourage particular structures would be to provide subsidies, such as tax credits or additional funding, for TOGAs.

C. Federalist Precepts: Concurrency, Redundancy, and Multiple Jurisdictional Affiliations

To conclude, we bring together what this overview instructs about the interactions among sovereigntism, federalism, translocalism, and transnationalism. First, the relevant public-sector based participants in policy debates extend beyond the three branches of the national government and the states, acting alone or coordinated through Congress. Translocal organizations like the National League of Cities, the U.S. Conference of Mayors, and the collectives of state attorneys general, governors, and state legislators are all exemplary of the multiplication of "national" players, rooted in states and localities yet reaching across them. Currents of laws from abroad have affected U.S. norms before, but the proliferation of translocal and transnational organizations and new technologies make these exchanges more rapid and widespread. We can certainly understand the claims made by sovereigntists about the utility of solidifying national identity through law, the need for national economic and energy policies, and the potential

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378. *See* Nat'l Ass'n of Attorneys Gen., Sign-On Letters, http://www.naag.org/sign-on_letters.php (last visited July 17, 2008) ("Sign-On letters are policy-oriented letters that are sent to members of Congress or Congressional committees expressing the viewpoint of the [signing attorneys general].").

379. One model, rich with regulation, comes from the ABA, which has formal limits on how "policy" is made and when it can file amicus briefs. *See* Am. Bar Ass'n, Standing Committee on Amicus Curiae Briefs, http://www.abanet.org/amicus/ (last visited July 12, 2008).

costs of fragmentation,[380] but multiple and interacting legal regimes cannot be avoided.

Second, that multiplicity is part of the federalism vision, which seeks solace in the knowledge that competition about ideas and responses exists at the national level and enlivens debates about the shape of regulation. The underlying issues of how to protect safety and wellbeing and how to recognize individuals' liberty, equality, and dignitary interests are genuinely difficult, and disagreements are informed by engaging these many TOGAs. We have called for legal interventions to do more, in order to build concurrent and redundant structures, for we believe that TOGAs enrich the public sphere because they are identified through affiliations with jurisdictional levels and populated by actors choosing to work in the public sector.

Third, as we have detailed, to be enthusiastic about multiple layers of policymaking on these issues is not to suggest that positions taken by TOGAs or through their transnational work are necessarily to be celebrated, any more than one can presume that national regulation is inevitably wise. Further, in terms of democratic theory and concerns about fairness, transparency, and accountability, more evaluation and likely regulation should help to frame the representative roles of TOGAs engaged in policymaking.

Concurrent with a narrative of the growing range of issues with which TOGAs engage comes a vivid insistence by some segments to reinscribe central control, expressed not only in efforts to limit the use of "foreign" law but also domestically through CAFA and preemption. Our fourth point is that this effort to assert exclusivist sovereign control, unaffected by local or transnational rules, cannot succeed. The President may—when signing the Sudan Accountability and Divestment Act—insist on his own authority; COMPASS may argue that sovereignty prohibits transnational environmental ventures; Congress may federalize state-based class action claims; and federal judges may find—and are finding—many local actions preempted.

But, as all of these rulemakers try to classify a set of problems as "national," the world in which they are operating belies that category. The mayors taking on climate change are acting because the problems are local as well as global. As the U.S. Conference of Mayors insisted in its amici brief in *Massachusetts v. EPA*, each of the city plaintiffs could show concrete and specific injuries from global warming, as storms eroded their infrastructures and changed the conditions under which their residents lived.[381] To place these issues in boxes is to miss their impact outside those boundaries. The category "national" is unstable, as are distinctions between "commerce" and "manufacturing," between "direct" and "indirect" effects on commerce, between what falls within or beyond

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380. *See, e.g.*, David J. Bederman, *Diversity and Permeability in Transnational Governance*, 57 EMORY L.J. 201 (2007); Paul B. Stephan, *What Story Got Wrong—Federalism, Localism Opportunism and International Law*, 50 MO. L. REV. (forthcoming 2008); *see also* Thomas W. Hazlett, *Federal Preemption in Cellular Phone Regulation*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS, at 113, 113–33 (Richard A. Epstein & Michael S. Greve eds., 2007).

381. *See* Brief of U.S. Conference of Mayors, *supra* note 127, at 23–29.

the "police powers" of states, and between what is "domestic" and what is "foreign."

A sense of the sovereign center, equated with the national government of the United States, exercising exclusive authority to set regulatory parameters, is ephemeral. Pulls from localities and states, working hard to help people obtain goods and services with a measure of prosperity and security, and the transformation of political orders outside our borders, demonstrate that most of our problems—the economy, the environment, physical safety, and national security—do not respect the boundaries of our shores. Watching the movements back and forth between nationalization and devolution in arenas ranging from the environment and energy, to banking, securities, and insurance and on to education and marriage laws, it seems apt to borrow from William Butler Yeats, for "the center cannot hold." But in the context of U.S. federalism, the wobble at the center was and is part of the point, for "the national" sovereign was not supposed to contain or constrain all exercises of power to make decisions of policy and principles.

TOGAs thicken the means by which subnational units can connect and communicate. Unlike the "PIGs," "SIGs," and the more neutrally denominated NGOs, TOGAs are formed by individuals committed across various substantive issues to forms of collective functioning we call government. Legal sovereigntist appreciation of law as a generative form of affiliation ought to be harnessed in service of support for TOGAs, populated by those affiliated through and identified by federalist jurisdictional relationships.