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***Local Sustainability Movement
Rides Wave of Evolving Federalism
to ‘Axe’ Private Property Rights***^{©1}

By

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This article examines Obama administration sustainability initiatives and surveys U.S. Supreme Court federalism jurisprudence in an effort to explain how this White House has exploited the Court's evolving anti-New Deal Federalism to facilitate and accommodate post-modernist local environmental & social sustainability initiatives at the U.S. state and local levels that attenuate private property rights and subjugate them to putative public interests.

I. *International Sustainable Development and Post-Modernism*

The concept of sustainable development (“SD”) originally articulated in 1987 by the United Nations (“UN”) World Commission on Environment and Development² has long been recognized as being simultaneously global and local in political scope and ambition. It embodies an ostensibly universally applicable (and, until recently, legally unenforceable) set of twenty-seven intergenerational principles integrating environmental, economic and social concerns enumerated in the 1992 UN Rio Declaration on Environment and Development,³ including a scientifically progressive and economically harmful Principle 15 known as the “precautionary principle.” In addition, it incorporates a “comprehensive road-map” for national and subnational governmental implementation of those principles⁴ known as Agenda 21.⁵

Chapter 28 of Agenda 21 (“local Agenda 21” or “LA21”)⁶ specifically “encourages the establishment of mechanisms to promote cooperation and coordination between local authorities internationally,” and it has effectively provided state and local authorities with an environmental advocacy platform at the international level. Since the conclusion of the 2002 UN Johannesburg World Summit on Sustainable Development⁷ and the 2007 signing of the European Union Lisbon Treaty,⁸ the SD concept has been reformulated as a legally operable and enforceable norm that obliges national and regional governments “to promote long-term economic prosperity and social justice within the limits of ecological sustainability.”⁹

Those not intimately familiar with SD are unlikely to recognize that it is rooted in an uneasy late twentieth century political and philosophical compromise reached between the modern-era forces of Marxism and capitalism¹⁰ which commentators have spiritedly debated and referred to as the ‘Third Way.’^{11 12 13} Indeed, SD has been explicitly hailed as a “progressive alternative to neoliberalism in the twenty-first century.”¹⁴ The resultant compromise embodied the European post-modernist movement’s key precepts that had evolved broadly since WWII which rejected the Enlightenment-era science, economics, law *and* political philosophies upon which America’s founding principles are based.¹⁵

The precautionary principle’s philosophical underpinnings, for example, are closely related to post-modernism. It focuses on the uncertainties surrounding the intrinsic hazards to human health and the environment posed by novel technologies and industrial substances and activities rather than upon the risks that specific uses, dosages and exposures thereof/to actually engender. It also reverses the legal burden of proof from government to show harm to economic actors to show safety, and reduces the scientific and legal threshold needed to establish harm for regulatory purposes from causation to correlation. Consequently, the precautionary principle directly challenges the conventional modern scientific paradigm that requires high strength of causal evidence,¹⁶ thereby enabling greater and more frequent and disproportionate federal agency regulation of economic and technological activities at the expense of individualism and private property rights. It also has prompted foreign governments to suspend intellectual property right protections to U.S. innovations in order foster broader dissemination and transfer of environmental technologies in service to SD.¹⁷

II. *U.S. Government-Backed International Sustainable Development Initiatives*

SD had first been officially embraced and promoted within the United States at the national and international levels via the former Clinton Administration’s President’s Council on Sustainable Development (CSD)¹⁸ and related CSD Task Forces¹⁹ and Reports,²⁰ and *National Security Strategy* which had called for promotion of SD abroad.²¹ It has since been reaffirmed and expanded by the Obama Administration’s *National Security Strategy* calling for acceleration of SD,²² *Presidential Policy Directive on Global Development* calling for promotion of SD internationally²³ and incorporating the *President’s Global Climate Change Initiative*,²⁴ *Global Food Security Initiative*²⁵ and *Global Health Initiative*,²⁶ the *President’s Climate Action Plan*,²⁷ and the interagency *Partnership for Sustainable Communities*²⁸ and *Environmental Justice Strategy*²⁹ established between the Departments of Housing and Urban Development³⁰ (“HUD”)³¹ and Transportation³² (“DOT”)³³ and the Environmental Protection Agency (“EPA”).³⁴

These White House and Federal agency initiatives have encouraged participation by private and public nongovernmental organizations (“NGOs”) such as the International Council for Local Environmental Initiatives³⁵ (“ICLEI”)³⁶ (which later changed its name and focus for funding purposes to the more broadly orientated “ICLEI - Local Governments for Sustainability”),³⁷ and the International City/County Management Association³⁸ (“ICMA”).³⁹ While these entities have since become leading organizers of local sustainability initiatives in the United States, other national NGOs, as well, have engaged in such endeavors. They include *inter alia* the American Public Works Association⁴⁰ (“APWA”),⁴¹ the American Water Works Association “AWWA”),⁴²

the American Planning Association (“APA”),⁴³ the National League of Cities⁴⁴ (“NLC”) and the National Association of Counties (“NAC”).⁴⁵

During the past six years, in furtherance of a progressive environment-first SD policy agenda, the Obama Administration has ensured that federal agencies directly and indirectly subsidize such entities’ activities. For example, HUD has promoted ICLEI’s *Sustainability Planning Toolkit*⁴⁶ and Clean Air and Climate Protection (CACP) Software (recently replaced by ICLEI’s *ClearPath* suite of software tools).⁴⁷ EPA, meanwhile, has underwritten and popularized ICLEI’s co-authored climate change Adaptation Guidebook⁴⁸ and co-developed Local Government Greenhouse Gas Protocol.⁴⁹ In addition, HUD and EPA have together funded or supported ICMA’s Rural and Sustainable Communities Projects,⁵⁰ Local Government Environmental Assistance Network (“LGEAN”),⁵¹ and national Brownfields Conference.⁵² Clearly, the Obama Administration has remained aware, based on ICLEI’s prior experience, how the federal funding of state and local public and private SD initiatives is critical to their success.⁵³

III. *Federalism Jurisprudence Shows How Local Sustainable Development Initiatives Can Ultimately Strengthen Executive Authority*

a. Judicial Deference to Legislative and Executive Expertise

The U.S. government’s SD initiatives have succeeded, in part, because of the Clinton and Obama Administrations’ close management of the federal bureaucracy, *previous* Congress’ practice of enacting ambiguous legislation (including the Clean Air and Water Acts) that delegated broad interpretive authority to the EPA, and the federal judiciary’s *prior and continued* deference to executive agency regulations implementing such legislation deemed to be a permissible construction of the statute. In other words, the Obama Administration, like the Clinton Administration preceding it, has learned from U.S. federalism jurisprudence how to strengthen the Executive Branch’s hand in state and local SD policymaking without attracting much, if any, congressional or judicial oversight.

The concept of federalism connotes a ‘system of power-sharing’ between a larger political unit and its smaller constituent but partially independent political subdivisions.⁵⁴ More specifically, the Obama Administration has relied on the remnants of New Deal-era Modern Federalism,^{55 56} which had expanded rapidly during the period of former President Johnson’s “Great Society”⁵⁷ with the assistance of former U.S. Supreme Court Chief Justice Earl Warren. New Deal-era Modern Federalism had reflected a political consensus “mandating judicial restraint and deference to Congressional and Executive legislative and policy judgments.”⁵⁸

The U.S. Supreme Court thereafter led by former Chief Justice Warren Burger had upheld this consensus approximately a half a century later to limit judicial oversight of legislative, and consequently, executive decision-making with its seminal decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁵⁹ which has since been expanded by subsequent Supreme Courts. In *Chevron*, the Court held that where “Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent

or ambiguous...the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁶⁰

b. Legislative and Executive Preemption of State Interests

Consistent with New Deal-era Modern Federalism, earlier Supreme Courts dating back to 1941 also had referred to states' rights in the Tenth Amendment⁶¹ as the "residue of state sovereignty."⁶² For example, in *United States v. Darby*,⁶³ the Court had permissively construed the Tenth Amendment "as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."⁶⁴ The U.S. Supreme Court led by former Chief Justice William Rehnquist also had largely upheld this consensus more than half a century later to limit states' ability to enact laws that directly interfered/conflicted with Congress' and the President's authority, respectively, to conduct foreign affairs, in the cases of *Crosby v. NFTC*⁶⁵ and *American Insurance Ass'n v. Garamendi*.^{66 67}

In *Crosby*, the State of Massachusetts had enacted a law precluding state and local government agencies from conducting business with companies engaged in business in Burma, notwithstanding various legislative and executive actions that Congress and the president had already taken to restrict U.S. government funding of UN activities financing Burma and other forms of direct non-humanitarian aid to Burma, and to prohibit new investment in Burma by 'United States persons.'^{68 69} The Supreme Court held that, since the Massachusetts law had conflicted with these actions and congressional legislation had vested the president, in the interest of national security, with the discretion to suspend or continue sanctions depending on Burma's progress on human rights, it was preempted by the Constitution's Supremacy Clause.⁷⁰

In *Garamendi*, the State of California had enacted the Holocaust Victim Insurance Relief Act (HVIRA), "requiring any insurer doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945."⁷¹ The U.S. Supreme Court held the California law unconstitutional on preemption grounds because there was "a sufficiently clear conflict between HVIRA and the "consistent presidential policy to encourage voluntary settlement funds and disclosure of policy information [via executive agreements with Germany, Austria, and France] in preference to litigation or coercive sanctions."⁷² The Court reasoned that, "the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues...and conflict with the exercise of that authority is a comparably good reason to find preemption of state law."⁷³ The Court, in effect, categorized the result in *Garamendi* as "preemption by executive conduct in foreign affairs."⁷⁴

The Supreme Court's decisions in *Crosby* and *Garamendi* have since influenced lower federal court rulings, such as that of the Illinois federal district court in *NFTC v. Giannoulis*.⁷⁵ In *Giannoulis*, the court issued a permanent injunction precluding the State of Illinois from enforcing the Illinois Act to End Atrocities and Terrorism in the Sudan,⁷⁶ because it had found that the law conflicted with and was broader than the Federal Sudan policy.⁷⁷

c. Evolved Federalism and Permitted Assertion of States' Rights in Domestic Affairs

The Obama Administration also has relied, in part, upon a series of Supreme Court decisions strengthening a state's right to locally adopt international SD initiatives complimenting, and even, furthering related Executive Branch policies. In doing so, it has learned how to harness the Supreme Court's more recent anti-New Deal-era *post-modern federalism agenda*⁷⁸ pursued by former Chief Justice Rehnquist and current Chief Justice John Roberts, which is intended to curtail an adverse Congress' preemption of conflicting state laws.⁷⁹

For example, in *New York v. United States*,⁸⁰ the State of New York had challenged the amended *Low-Level Radioactive Waste Disposal Act of 1980* which had "required that every state clean up its nuclear waste by 1996."⁸¹ The Court held that "Congress may not simply 'commande[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"⁸² In *United States v. Lopez*⁸³ involving a challenge to the *Gun-Free School Zones Act of 1990*, which precluded as unlawful the possession of firearms in local school zones, the Court held that the statute exceeded Congress' authority under the Constitution's Commerce Clause. It reasoned that the statute was a criminal statute, and that the possession of firearms in local school zones did not constitute "an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce."⁸⁴ Thereafter, in *United States v. Morrison*,⁸⁵ the U.S. Supreme Court held that the *Violence Against Women Act of 1994*, which "provide[d] a federal civil remedy for the victims of gender-motivated violence," was unconstitutional under the Commerce Clause and the Fourteenth Amendment. The Court reasoned that "the statute did not regulate an activity that substantially affected interstate commerce[,] nor did it redress harm caused by the state."⁸⁶ It concluded that, "under our federal system," the criminal remedy for rape which Petitioner had sought "must be provided by the Commonwealth of Virginia and not by the United States."^{87 88}

d. Evolved Federalism and Permitted Assertion of States' Rights in Foreign Affairs

Furthermore, the Obama Administration also has relied on the concurring opinion of former Justice John Marshall Harlan, II in the Warren Court's earlier decision in *Zschernig v. Miller*,⁸⁹ the Rehnquist Court's subsequent nonbinding discussion of that opinion in *Garamendi*, and the Roberts Court's more recent holding in *Medellín v. Texas*. Considered together, these cases arguably strengthen states' ability to adopt local SD initiatives over which the President ultimately has last word that can help to shape U.S. foreign affairs consistent with Executive Branch policymaking.

Zschernig had involved an Oregon statute providing for the escheat of the personal property of nonresident aliens who had died intestate unless certain prescribed conditions were satisfied.⁹⁰ The majority opinion written by former Justice William Douglas had held that the Oregon law was unconstitutional because it entailed the "kind of state involvement in foreign affairs and international relations [...] which the Constitution entrusts solely to the Federal Government."⁹¹ Although Justice Harlan agreed with the Court's conclusion on the ground that a treaty, by virtue of the Constitution's Supremacy Clause, preempted the Oregon law,⁹² he objected to its rationale. His concurring opinion argued that the Oregon statute was constitutional on the basis of prior Court precedents "establish[ing] that, in the absence of a conflicting federal policy or violation of the express mandates of the Constitution, *the States may legislate in areas of their*

traditional competence even though their statutes may have an incidental effect on foreign relations” (emphasis added).⁹³

In *Garimendi*, the Court’s majority more closely examined how the rule former Justice Harlan had previously articulated in *Zschernig* would apply. The Court, in dicta, opined that where “state legislation will produce something *more than incidental effect in conflict* with express foreign policy of the National Government,” but nevertheless falls “within ‘areas of...traditional competence’ [...], it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted” (emphasis added).⁹⁴ Several legal commentators have concluded that the Court had effectively established a new “balancing test comparing the degree of conflict with the extent of the state’s interest.”⁹⁵ In their view, this test, which required a “two-step inquiry,”⁹⁶ did *not* strengthen states’ rights. Rather, it potentially broadened the Court’s holding in *Zschernig* by eliminating “its inquiry into the ‘direct’ or ‘incidental’ effects of state laws on foreign relations,”⁹⁷ thereby indirectly expanding the power of the President via executive agreements to unilaterally preempt state laws (without congressional approval) that conflict with his/her conduct of foreign affairs.⁹⁸

In *Medellín v. Texas*,⁹⁹ the Roberts Court considered whether the State of Texas was obliged to enforce an International Court of Justice ruling (*Concerning Avena and Other Mexican Nationals*)¹⁰⁰ which had directed the United States “to provide ‘review and reconsideration of the [criminal] convictions and [death] sentences of the Mexican nationals’” issued under Texas law, where the petitioners had failed to file their claims (writs of habeas corpus) under the Vienna Convention on Consular Relations in a timely manner.¹⁰¹ A Presidential Memorandum had sought to influence¹⁰² how the United States would “‘discharge its international obligations’ under *Avena* ‘by having State courts give effect to the decision.’”¹⁰³ The U.S. Supreme Court ultimately held that “that neither *Avena* nor the President’s Memorandum constitute[d] directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.”¹⁰⁴ It reasoned that “joint action by the Executive and Legislative Branches [...is] require[d] [...to] giv[e] domestic effect to an international treaty obligation under the Constitution—for making law.”¹⁰⁵ Notwithstanding the Court’s holding, Justice Stevens, in his concurring opinion, implored the State of Texas to promptly recognize the critical role it and other states play “in determining the nature and scope of U.S. compliance with its Vienna Convention obligations,”¹⁰⁶ and in “protecting the honor and integrity of the Nation” in international affairs more generally.¹⁰⁷

IV. *Examples of State and Local Sustainable Development Initiatives Enabled by Evolving Federalism Jurisprudence*

To recall, evolving U.S. Supreme Court federalism jurisprudence has arguably encouraged subnational governments to incorporate a number of domestic and international SD principles into state and local regional compacts, development plans, codes, ordinances, standards and community initiatives, and to consequently, make an impact upon domestic and foreign affairs. The following examples illustrate this point.

Dissatisfied with “the failure of the United States to ratify the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) [...] [t]hree cities—Berkeley (2012),¹⁰⁸ Los Angeles (2004),¹⁰⁹ and San Francisco (2003)¹¹⁰—have implemented local ordinances that incorporate the provisions of [...] (CEDAW) into local law (known as “CEDAW ordinances”). These ordinances address discrimination against women broadly, as well as the prevention of violence against women specifically.”¹¹¹ The Obama Administration has clearly expressed its support for local implementation of CEDAW.¹¹² A number of other municipalities have adopted CEDAW resolutions based on the model proposed by the U.S. Conference of Mayors,¹¹³ supporting U.S. ratification of CEDAW and calling for city councils to adopt ordinances incorporating CEDAW principles into local law

During May 2003, former New York Governor George Pataki invited northeastern states to join New York in a regional market for greenhouse gas reductions. During February 2006, he announced the signing of a regional Memorandum of Understanding for the Regional Greenhouse Gas Initiative (“RGGI”), a mandatory agreement entered into initially by seven northeastern states (New York, Connecticut, Delaware, Maine, New Hampshire, New Jersey, and Vermont). The RGGI cooperative agreed “to implement a [mandatory] cap-and-trade program to lower carbon dioxide (CO₂) emissions.”¹¹⁴ During November 2007, the RGGI “‘nonprofit corporation formed to provide technical and scientific advisory services’ to all participating RGGI states ‘in the development and implementation of the CO₂ Budget Trading Program,’ announced that the nation’s first auction of carbon offset credits and allowances [would take place in 2008.]”¹¹⁵ As of 2014, nine northeastern states are participating in RGGI.¹¹⁶ RGGI’s apparent success has spawned the development of other interstate cooperative climate initiatives, including the Western Climate Initiative, the Pacific Coast Collaborative, the Midwest Greenhouse Gas Reduction Accord, the Transportation and Climate Initiative, and North America 2050.¹¹⁷

Dissatisfied with Congress’ failure to adopt national climate change legislation, the U.S. Conference of Mayors (USCM), during 2005, crafted a Climate Protection Agreement. It encouraged “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.” It also “called upon federal and state governments to comply with Kyoto targets and [...] urged Congress to pass bipartisan legislation to create an emissions trading system and ‘clear emissions limits’ for greenhouse gases.”¹¹⁸ ¹¹⁹ As of 2014, “1060 mayors from the 50 states, the District of Columbia and Puerto Rico, representing a total population of over 88,962,982 citizens,” have endorsed the agreement.¹²⁰

During 2005, eight U.S. states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin) and two Canadian provinces (Ontario and Quebec) concerned about transboundary water pollution entered into two Great Lakes Agreements that regulated water diverted from the Great Lakes.¹²¹ They included Great Lakes Sustainable Waters Resources Agreement¹²² ¹²³ and the Great Lakes -St. Lawrence River Basin Water Resources Compact.¹²⁴

Dissatisfied with the Illinois federal district court’s adverse ruling in *National Foreign Trade Council v. Giannoulias*, the States of Illinois, Arizona, California, Louisiana, and New Jersey, along with the U.S. Conference of Mayors, successfully lobbied Congress to pass the Sudan

Accountability & Divestment Act of 2007 (“SADA”), which was enacted into law on December 31, 2007. “SADA explicitly authorize[d] state and local divestment measures against Sudan,” and consequently, influenced both U.S. domestic and foreign policy.¹²⁵

In addition to these illustrative examples, since, at least 2005, U.S. state and local governments have proposed and/or adopted numerous other SD-related initiatives, many of which have been modeled after similar European Union initiatives and incorporated into local law. All of these SD initiatives are premised, as a matter of science and law, on Europe’s post-modernist precautionary principle, and they are intended, in the absence of causal evidence of harm to human health and the environment, to ensure environmental protection of the air, oceans and domestic navigable waters and to curtail the use of intrinsically harmful substances, products, technologies and industrial activities. These include *inter alia*: 1) biotech-related food, feed, and seed products and technologies; 2) hazardous substances such as high volume toxic chemicals, cosmetics, brominated flame retardants and the products containing them, metals found in appliances and electronics without the collection, recycling, and disposal of such e-waste; and 3) fossil fuels and fossil-fuel-derivatives, in favor of renewable sources of solar, wind and biomass energy.¹²⁶

Lastly, the traditional “dominance and control” local authorities have exercised over land use and zoning has begun to wane. State and city governments have increasingly commenced climate change and other SD-related initiatives that have resulted in the promotion and mandating of “‘green building’ development,” the “overrid[ing of] local zoning laws that interfere with green development,” and the invalidation of “local zoning restrictions that limit the ability of landowners to use solar panels, wind turbines, and other sources of renewable energy.”¹²⁷

V. *Conclusion: Local Sustainability Initiatives Potentially Increase Executive Authority and States’ Rights at the Expense of Individual Liberty*

As previously discussed, the U.S. Supreme Court, in *New York v. United States*, ruled that “Congress may not ‘commandeer’ state regulatory processes by ordering states to enact or administer a federal regulatory program.”¹²⁸ In addition, former Justice Sandra Day O’Conner, the opinion’s author, also emphasized that “‘State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution’”¹²⁹ Apparently sensing that states could be co-opted by an ambitious Congress and/or President at the expense of the natural law freedoms recognized in the Bill of Rights and the equal protection under the law guaranteed by the 14th Amendment,¹³⁰ Justice O’Conner declared that U.S. constitutional federalism is intended to ensure the supremacy of individual liberty over the rights of the states and the federal government.

“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘*Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power*’” (emphasis added).¹³¹

“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front*” (emphasis added).¹³²

Perhaps, this White House and its progressive acolytes in federal, state and local government should keep this Supreme Court admonition in mind as they endeavor to enact into law post-modernist international SD initiatives premised on Europe’s precautionary principle that reject empirical science, rule of law, neoliberal economics and private property rights.¹³³

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ENDOTES

¹ This article is based largely on the annotated outline prepared by this author as a supplement to the presentation he delivered at the [Eighteenth Annual National Conference on Private Property Rights of the Property Rights Foundation of America](#). See Lawrence A. Kogan, *U.S. State & Local Implementation of International Sustainable Development: An Expression of the ‘New’ Post-Modern Federalism*, Institute for Trade, Standards and Sustainable Development, presented at The Eighteenth Annual National Conference on Private Property Rights, “Property Rights for Freedom & Prosperity,” Segment: “The Dangers of Internationalists Designing Land use Controls,” (Albany, NY, Oct. 25, 2014), available at:

<https://nebula.wsimg.com/f50d3508fe164240603e13c622c99558?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>. The title to this article was inspired, in part, by the sport of surfing. See, e.g., Surflines, *Surfing A to Z – Axed*, available at: http://www.surflines.com/surfing-a-to-z/axed-definition_68674/; Surflines, *Surfology Glossary*, available at: http://www.surflines.com/surfology/surfology_glossary_index.cfm. However, the verb to ‘Axe’ has other meanings. See also Oxford Dictionaries, *Axe*, available at: <http://www.oxforddictionaries.com/definition/english/axe>.

² See United Nations, *Report of the World Commission on Environment and Development: Our Common Future*, Transmitted to the General Assembly as an Annex to document A/42/427 - Development and International Cooperation: Environment (1987), available at: <http://www.un-documents.net/wced-ocf.htm>.

³ See United Nations Environment Programme, *Rio Declaration on Environment and Development*, available at: <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

⁴ See United Nations Department of Economic and Social Affairs Division for Sustainable Development, *Sustainable Development in the 21st Century (SD21): Review of Implementation of Agenda 21 and the Rio Principles – Synthesis*, prepared by Stakeholder Forum for a Sustainable Future (Jan. 2012), at p. 1, available at: <http://www.uncsd2012.org/content/documents/194Synthesis%20Agenda%2021%20and%20Rio%20principles.pdf>.

⁵ See United Nations, Sustainable Development, United Nations Conference on Environment & Development, *Agenda 21* (Rio de Janeiro, Brazil, June 3-14 1992), available at: <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

⁶ See Leslie Hom, *The Making of Local Agenda 21: An Interview with Jeb Brugmann*, *Local Environment*, Vol. 7, No. 3, 251, 252 (2002), available at: <http://www.freedomadvocates.org/download/research/makingofa21.pdf>.

⁷ See United Nations, World Summit on Sustainable Development, *Documents - Plan of Implementation*, available at: http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm.

⁸ See Frances Aldson, *EU Law and Sustainability in Focus: Will the Lisbon Treaty Lead to ‘The Sustainable Development of Europe’?* 23 *Environmental Law & Management* 5 284 (2011), at p. 284, available at: https://www.academia.edu/525231/EU_Law_and_Sustainability_in_Focus_Will_the_Lisbon_Treaty_Lead_to_The_Sustainable_Development_of_Europe.

⁹ *Id.*, at p. 297, citing See Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate Publ. 2008), at p. 53, available at: <https://books.google.com/books?id=zvqrd9-8BaEC&pg=PA53&lpg=PA53&dq=%22to+promote+long->

[term+economic+prosperity+and+social+justice+within+the+limits+of+ecological+sustainability%22&source=bl&ots=T UarLkHL9&sig=Rc 3ATy84s6E-e8E4H cfyuMmCM&hl=en&sa=X&ei=Mh-jVMn3DNSgyATE7IGoAw&ved=0CB4Q6AEwAA#v=onepage&q=%22to%20promote%20long-term%20economic%20prosperity%20and%20social%20justice%20within%20the%20limits%20of%20ecological%20sustainability%22&f=false.](http://www.ninehundred.net/~jveon/2JBWCTN.html)

¹⁰ See Joan Veon, *Transcript of Radio Program Interview With Jeb Brugmann From Rio+5* (1997) <http://www.ninehundred.net/~jveon/2JBWCTN.html>; Joy Hardy, *Engaging Uncertainty in Environmental Education: Postmodern/Poststructural Possibilities*, 7 *The International Journal of the Humanities* (2009), at p. 64, excepts available at: <https://nebula.wsimg.com/e6647bf352d5d1f65892a8dac3bec374?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (discussing how “education for sustainable development and critical education for the environment draw upon the critical theories of Marx and Habermas.”) *Id.*; Paul Burkett, *Marx’s Vision of Sustainable Human Development*, *MonthlyReview.org* (10/1/05), available at: <http://monthlyreview.org/2005/10/01/marxs-vision-of-sustainable-human-development/>; George Liodakis, *Material, Social and Theoretical Aspects of Sustainable Development*, presented at World Economics Associations Sustainability Conference (Sept. 24-Oct. 21, 2012), at pp. 7, 10, available at: http://sustainabilityconference2012.worldeconomicassociation.org/wp-content/uploads/WEASustainabilityConference2012_Liodakis.pdf (noting how “Marx’s fruitful insight led him to depict the relation between nature and society as a metabolic relation increasingly disrupted by the development of capitalism, both in agriculture and industry [...]. This insight has served as the basis for a considerable recent literature concerning this growing metabolic rift and its implications for a sustainable and ecologically compatible development. [...] As argued throughout this paper, however, due to the essential features of capitalism, it is impossible to have reforms of capitalism adequate to the task of creating conditions of social and ecological sustainability, not to speak of a truly sustainable human development.”)

¹¹ See, e.g., Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (John Wiley & Sons 2013), available at: https://books.google.com/books?id=MFbQFiEIntUC&dq=UK+%2B+Third+Way+%2B+sustainable+development&source=gs_navlinks_s (first published in 1998 by Blackwell Publ., USA, at: <http://www.amazon.com/The-Third-Way-Renewal-Democracy/dp/0745622674>); Richard N. Cooper, *Book Review of Anthony Giddens, The Third Way: The Renewal of Social Democracy*, *Foreign Affairs* (March/April 1999), available at: <http://www.foreignaffairs.com/articles/54673/richard-n-cooper/the-third-way-the-renewal-of-social-democracy>; Times Higher Education, *Giddens Defends Third-way Politics*, TES Global Ltd. (Nov. 1, 1999), available at: <http://www.timeshighereducation.co.uk/news/giddens-defends-third-way-politics/148571.article>; BBC News, *UK Politics: What is the Third Way?*, BBC Online Network (Sept. 27, 1999), available at: <http://news.bbc.co.uk/2/hi/458626.stm>; Anthony Gibbons, *The Global Third Way Debate* (John Wiley & Sons 2001), available at: http://books.google.com/books/about/The_Global_Third_Way_Debate.html?id=yWxUZ5zYQd4C; Anne Mellbye, *A Brief History of the Third Way*, *The Guardian* (Feb. 10, 2003), available at: <http://www.theguardian.com/politics/2003/feb/10/labour.uk1>; Steve Bastow and James Martin, *Third Way Discourse: European Ideologies in the Twentieth Century*, (Edinburgh Univ. Press, 2003), available at: https://books.google.com/books?id=0J9DpxWxi14C&dq=sustainable+development+%2B+third+way&source=gs_navlinks_s Cf. *The Economist*, *The Third Way Revealed* (Sept. 17, 1998), available at: <http://www.economist.com/node/165553> (vehemently criticizing the Anthony Giddens book); Robert Higgs, *The So-Called Third Way*, *The Independent Review* (Spring 2000), available at: <http://www.independent.org/publications/tir/article.asp?a=267> (vehemently criticizing the Anthony Giddens book).

¹² See, e.g., John Huckle, *An Analysis of New Labour’s Policy on Education for Sustainable Development with Particular Reference to Socially Critical Approaches*, 14 *Environmental Education Research* 65 (Feb. 11, 2008), available at: http://www.tandfonline.com/doi/full/10.1080/13504620701843392#.VKVxJ_nF-Sp and <http://john.huckle.org.uk/download/2881/EERWeba.doc>; Mark Goodwin and Mark Whitehead, *Interpreting the Regulatory Geography of Sustainable Development: The Rise of the Sustainable City in the UK*, Chap. 14, “Human Settlement” Vol. IV, in *Encyclopedia of Life Support Systems* (EOLSS) (9/18/06), available at: <http://www.eolss.net/Sample-Chapters/C14/E1-18-09-06.pdf>; Anne Bartlett, *Greening London: Sustainability, Politics and the Third Way*, Chap. 14, “Human Settlement Vol. IV, in *Encyclopedia of Life Support Systems* (EOLSS) (9/18/03), available at: <http://www.eolss.net/Sample-Chapters/C14/E1-18-09-03.pdf>. See also Roger

Pielke, *A Third Way*, *Book Review of The Politics of Climate Change* by Anthony Giddens, *Nature* (June 18, 2009), available at: <http://www.nature.com/climate/2009/0907/full/climate.2009.61.html>.

¹³ Cf. Center for Economic and Social Justice, *Just Third Way: Why Do We Need a Just Third Way?*, available at: <http://www.cesj.org/learn/just-third-way/why-we-need-just-third-way/>; Center for Economic and Social Justice, *A Quick Comparison of Capitalism, Socialism and the 'Just Third Way'* (Oct. 2013), available at: http://www.cesj.org/wp-content/uploads/2013/10/JTW_Comparison_Matrix2013.pdf.

¹⁴ See Lena Sommestad, *Economics of Sustainable Development – A Progressive Alternative to Neoliberalism in the Twenty-First Century*, in “Market and State in European Social Democracy Progressive Perspectives on Developing a Social and Sustainable Market Model,” Friedrich Ebert Stiftung (Anke Hassel and Christoph Pohlmann (Eds.) (July 2010), at pp. 16-20, available at: <http://library.fes.de/pdf-files/id/ipa/07338.pdf>.

¹⁵ See Lawrence A. Kogan and Richard D. Otis, Jr., *Science for the Picking*, Canada Free Press (July 26, 2014), available at: <http://canadafreepress.com/index.php/article/science-for-the-picking>. See also Jim Lakely, *Science for the Picking*, Somewhat Reasonable Blog, Heartland Institute (July 27, 2014), available at: <http://blog.heartland.org/2014/07/science-for-the-picking/>.

¹⁶ See Lucas Bergkamp and Lawrence Kogan, *Trade, the Precautionary Principle and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership*, EJRR, issue 4 (2013), p. 493, 499, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376753

¹⁷ See Lawrence A. Kogan, *Global Efforts to ‘Rebalance’ Private and Public Interests in Intellectual Property: Chaos IS the New Normal*, (Revised & Supplemented) Presentation on the Panel “International Changes in IP: Is it Chaos or the New Normal?,” *Annual Meeting of the Intellectual Property Law Section of the New York State Bar Association*, New York, NY (Jan. 28, 2014), at pp. 11, 15-16, available at: <https://nebula.wsimg.com/933ac90cc6cf852eb0ac6e0aa6c29784?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (discussing how “governments around the world have more flexibility and have readily chosen to exercise the option of employing ‘public interest’ grounds beyond the strictures of government product authorization, market access and/or procurement regulations, as the preferred basis for monitoring, overseeing and ultimately governing exclusively private party contractual relations. For example, even where private parties have not otherwise committed an illegal act, governments have increasingly come to view a party’s refusal to license an expanding list of technologies as creating a conflict with the public interest that justifies government intervention.) Id. See also Id., at pp. 15-16 (opining that “the emergence and evolution of postmodern international sustainable development law is likely a key putative cause of the growing restrictions imposed by governments (individually and collectively under the auspices of multilateral and regional intergovernmental organizations) on IP rights, assets and uses around the world.”) Id.

¹⁸ See U.S. National Archives, The Clinton White House, *The President’s Council on Sustainable Development*, available at: <http://clinton4.nara.gov/PCSD/>.

¹⁹ See U.S. National Archives, The Clinton White House, The President’s Council on Sustainable Development, *Task Forces*, available at: <http://clinton2.nara.gov/PCSD/tforce/>.

²⁰ See U.S. National Archives, The Clinton White House, The President’s Council on Sustainable Development, *Publications*, available at: <http://clinton2.nara.gov/PCSD/Publications/>.

²¹ See U.S. National Archives, The Clinton White House, Executive Office of the President, *A National Security Strategy for A New Century* (May 1997), available at: <http://clinton2.nara.gov/WH/EOP/NSC/Strategy/>.

²² See The White House, *National Security Strategy* (May 2010), at pp. 33-34, available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

²³ See The White House, Office of the Press Secretary, *Fact Sheet: U.S. Global Development Policy* (Sept. 22, 2010), available at: <http://www.whitehouse.gov/the-press-office/2010/09/22/fact-sheet-us-global-development-policy>.

²⁴ See The White House, *President Obama’s Development Policy and the Global Climate Change Initiative* (2010), available at: http://www.whitehouse.gov/sites/default/files/Climate_Fact_Sheet.pdf.

²⁵ See The White House, *President Obama’s Global Development Policy and Global Food Security* (2010), available at: http://www.whitehouse.gov/sites/default/files/Food_Security_Fact_Sheet.pdf.

²⁶ See The White House, *President Obama’s Global Development Policy and Global Health Initiative* (2010), available at: http://www.whitehouse.gov/sites/default/files/Global_Health_Fact_Sheet.pdf.

²⁷ See The Executive Office of the President, *President’s Climate Action Plan* (June 2013), at Sec. I, p.6; Sec. IV, pp. 9-10, available at: <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf> (setting forth, in part, the President’s plans for cutting carbon pollution from power plants and for curbing hydrofluorocarbon (HFC) and methane emissions, each of which require EPA participation).

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- ²⁸ See Partnership for Sustainable Communities, *An Interagency Partnership HUD-DOT-EPA*, available at: <http://www.sustainablecommunities.gov/>.
- ²⁹ See United States Environmental Protection Agency, Environmental Justice, *Environmental Justice Equals Healthy, Sustainable, and Equitable Communities*, available at: <http://www.epa.gov/compliance/ej/sustainability/index.html>.
- ³⁰ See U.S. Department of Housing and Urban Development, Office of Sustainable Communities, *Sustainable Communities Initiative*, available at: <http://portal.hud.gov/hudportal/HUD?src=/hudprograms/sci>; U.S. Department of Housing and Urban Development, *Sustainable Communities Resource Center*, available at: <http://archives.huduser.org/scrc/sustainability/about.html>.
- ³¹ See U.S. Department of Housing and Urban Development, *Preferred Sustainability Status*, available at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_resilience/OSHC_Preferred_Sustainability_Status; U.S. Department of Housing and Urban Development, *Policy Guidance for Existing Sustainable Communities Grantees*, available at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_resilience/policy-guidance.
- ³² See U.S. Department of Transportation, Federal Highway Administration, *Transit and Environmental Sustainability*, available at: <http://www.fta.dot.gov/13835.html>.
- ³³ See U.S. Department of Transportation, Federal Highway Administration, *Sustainable Highways Initiative*, available at: <http://www.sustainablehighways.dot.gov/>.
- ³⁴ See United States Environmental Protection Agency, *Sustainability*, available at: <http://www.epa.gov/sustainability/>.
- ³⁵ See ICLEI – Local Governments for Sustainability, *Local Sustainability 2012: Taking Stock and Moving Forward – Global Review* (2012), at p. 12, available at: <http://local2012.iclei.org/local-sustainability-study/>.
- ³⁶ See ICLEI, Local Governments for Sustainability, *Rio + 20 – Local Initiatives Changed Global Thinking About Sustainable Development*, available at: <http://local2012.iclei.org/local-sustainability-study/>.
- ³⁷ See ICLEI – Local Governments for Sustainability, *Africa – About Us*, available at: <http://africa.iclei.org/about-us.html>.
- ³⁸ See International City/County Management Association, *Center for Sustainable Communities - About Us*, available at: http://icma.org/en/results/sustainable_communities/about. See also ICMA, *Sustainable Communities Projects*, available at: http://icma.org/m/en/results/sustainable_communities/projects; James H. Svava, Anna Read and Evelina Moulder, *Breaking New Ground: Promoting Environmental and Energy Programs in Local Government*, IBM Center for the Business of Government (Conserving Energy and the Environment Series 2011), available at: <http://www.businessofgovernment.org/sites/default/files/Promoting%20Environmental%20and%20Energy%20Programs%20in%20Local%20Government.pdf>.
- ³⁹ See International City/County Management Association, *Organization Overview*, available at: http://icma.org/en/icma/about/organization_overview.
- ⁴⁰ See American Public Works Association, *Center for Sustainability*, available at: <http://www.apwa.net/centerforsustainability>.
- ⁴¹ See American Public Works Association, *APWA at a Glance*, available at: <http://www2.apwa.net/Documents/Publications/APWAAtAGlance.pdf>.
- ⁴² See American Water Works Association, *Sustainability*, available at: <http://www.awwa.org/about-us/policy-statements/policy-statement/articleid/217/sustainability.aspx>; American Water Works Association, *Sustainable Water Management Conference*, available at: <http://www.awwa.org/conferences-education/conferences/sustainable-water-management.aspx>.
- ⁴³ See American Planning Association, *APA Green Team*, available at: <https://www.planning.org/apaataglance/greenteam/>.
- ⁴⁴ See National League of Cities, *Sustainable Cities Institute*, available at: <http://www.sustainablecitiesinstitute.org/>; National League of Cities, *Sustainable Cities Institute - Sustainability Strategies*, available at: <http://www.sustainablecitiesinstitute.org/topics/water-and-green-infrastructure/green-infrastructure-101/gi-sustainability-strategies>.
- ⁴⁵ See National Association of Counties, *2012 Emerging Sustainability Strategies in America's Counties*, Newsroom (2012), available at: http://www.naco.org/newsroom/pubs/Documents/2012_Emerging_Sustainability_Strategies_Publication.pdf; Rob Pressley, *NACo Merges Green Government, Resilient Counties Initiatives*, National Association of Counties, 46 County News No. 18 (Sept. 22, 2014), available at:

<http://www.naco.org/newsroom/countynews/Current%20Issue/9-22-2014/Pages/NACo-merges-Green-Government-Resilient-Counties-initiatives.aspx> (discussing how “[t]he new program will be called “Resilient Counties: Strategies for Sustainable Communities.”) *Id.*

⁴⁶ See ICLEI—Local Governments for Sustainability USA, *Sustainability Planning Toolkit* (Dec. 2009), available at: http://www.hud.gov/offices/cpd/about/conplan/pdf/iclei_sustainability_planning_toolkit.pdf.

⁴⁷ See U.S. Department of Transportation, Federal Highway Administration, *Handbook for Estimating Transportation Greenhouse Gases for Integration into the Planning Process, Chapter 9 – References*, available at: http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications_and_tools/ghg_handbook/chapter09.cfm (referring and linking to *inter alia* to “ICLEI, Clean Air and Climate Protection (CACP) Software 2009”) *Id.*; ICLEI - Local Governments for Sustainability, *Tools*, available at: <http://www.icleiusa.org/tools>; ICLEI - Local Governments for Sustainability, Programs, *Climate Pathways - ClearPath*, available at: http://www.icleiusa.org/climate_and_energy/climate_mitigation_guidance and http://www.icleiusa.org/climate_and_energy/climate_mitigation_guidance/clearpath.

⁴⁸ See United States Environmental Protection Agency, State and Local Climate and Energy Program, *Impacts and Adaptation - Resources*, available at: <http://www.epa.gov/statelocalclimate/state/topics/impacts-adaption.html> (referencing as an “Adaptation Guidebook” and linking to: ICLEI – Local Governments for Sustainability and Center for Science in the Earth System (The Climate Impacts Group), Joint Institute for the Study of the Atmosphere and Ocean, University of Washington, *Preparing for Climate Change: A Guidebook for Local, Regional, and State Governments* (Sept. 2007), available at: <http://www.icleiusa.org/action-center/planning/adaptation-guidebook>.

⁴⁹ See United States Environmental Protection Agency, State and Local Climate and Energy Program, *Developing a Greenhouse Gas Inventory – Tools – Inventory Tools*, available at: <http://www.epa.gov/statelocalclimate/local/activities/ghg-inventory.html> (referencing as a “Local Government Greenhouse Gas Protocol” and linking to a “community greenhouse gas protocol developed by ICLEI – Local Governments for Sustainability in collaboration with the California Air Resources Board, The California Climate Action Registry, and The Climate Registry). See also ICLEI – Local Governments for Sustainability, Tools, GHG Accounting Protocols, *Community Protocol - U.S. Community Protocol for Accounting and Reporting of Greenhouse Gas Emissions*, available at: <http://www.icleiusa.org/tools/ghg-protocol/community-protocol/us-community-protocol-for-accounting-and-reporting-of-greenhouse-gas-emissions>.

⁵⁰ See International City/County Management Association, *Small Towns, Rural Communities and Sustainability*, available at: http://icma.org/m/en/results/sustainable_communities/projects/small_towns_rural_communities_and_sustainability.

⁵¹ See International City/County Management Association, *Local Government Environmental Assistance Network (LGEAN)*, available at: http://icma.org/m/en/results/sustainable_communities/projects/lgean.

⁵² See International City/County Management Association, National Brownfields Conference, *Brownfields 2015 – Sustainable Communities Start Here*, available at: http://icma.org/m/en/results/sustainable_communities/projects/brownfields_conference.

⁵³ See Leslie Hom, *The Making of Local Agenda 21: An Interview with Jeb Brugmann*, *Local Environment*, Vol. 7, No. 3, 251 (2002), *supra* at p. 255; See Adrien Labaye, *ICLEI and Global Climate Change: A Local Governments’ Organizational Attempt to Reframe the Problem of Global Environmental Change* (2010), MA International Organization: intergovernmental and non-governmental Organizations, Institut d’Études Politiques de Grenoble, UNIVERSITÉ PIERRE MENDES FRANCE, at pp. 53-54, available at: <http://dumas.ccsd.cnrs.fr/dumas-00825484/document>.

⁵⁴ See Bradley C. Bobertz, *Blowing the Whistle on Postmodern Federalism*, 21 *Pace Envtl. L. Rev.* 83, 88 (2004), available at: <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1233&context=pelr>.

⁵⁵ See Adam Cohen, *What's New in the Legal World? A Growing Campaign to Undo the New Deal*, *New York Times Op-Ed* (Dec. 14, 2004), available at: http://www.nytimes.com/2004/12/14/opinion/14tue4.html?_r=1& (discussing, in part, how New Deal era laws and programs had had “an expansive view of Congress's power to legislate in the public interest.”) *Id.*

⁵⁶ This era arguably commenced on April 12, 1937, with the U.S. Supreme Court’s decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), in which “the Court abandoned an overly restrictive understanding of the commerce power.” See Bradley C. Bobertz, *Blowing the Whistle on Postmodern Federalism*, 21 *Pace Envtl. L. Rev.* 83 (2004), *supra* at p. 94. It thereafter proceeded to uphold the constitutionality of “most forms of congressional action, including the enactment of environmental laws” under the Commerce Clause and Section V of the Constitution’s Fourteenth Amendment. For example, in *United States v. Carolene Products*, 304 U.S. 144, 152 (1938), the U.S. Supreme Court had held that economic “regulatory legislation

affecting ordinary commercial transactions [was] not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it [was] of such a character as to preclude the assumption that it rest[ed] upon some rational basis within the knowledge and experience of the legislators.” *Id.*

⁵⁷ See The White House, About the White House, *Presidents*, 36. Lyndon B. Johnson, available at: <http://www.whitehouse.gov/about/presidents/lyndonbjohnson>.

⁵⁸ See Simon Lazarus, *John Roberts’ Supreme Court Is the Most Meddlesome in U.S. History: How Radical Libertarianism is Reshaping the Bench*, *The New Republic* (July 10, 2014), available at: <http://www.newrepublic.com/article/118648/john-roberts-supreme-court-most-meddlesome-us-history> (referring to this phenomenon as “the post-New Deal consensus”).

⁵⁹ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁶⁰ 467 U.S. at 842-843.

⁶¹ See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”)

⁶² See Bradley C. Bobertz, *Blowing the Whistle on Postmodern Federalism*, 21 *Pace Envtl. L. Rev.* 83 (2004), *supra* at p. 94.

⁶³ See *United States v. Darby*, 312 U.S. 100 (1941).

⁶⁴ *Id.* at p. 91 (quoting *United States v. Darby*, 312 U.S. at 124).

⁶⁵ See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). See also Daniel A. Farber, *Climate Change, Federalism and the Constitution*, 50 *Arizona Law Review* 879, 904-905 (2008), *supra* at 904-905, available at: <http://www.arizonalawreview.org/pdf/50-3/50arizrev879.pdf>.

⁶⁶ See *American Insurance Ass’n v. Garamendi*, 539 U.S. 396 (2003).

⁶⁷ See Daniel A. Farber, *Climate Change, Federalism and the Constitution*, 50 *Arizona Law Review* 879 (2008), *supra* at 904-906; Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 *Wm. & Mary L. Rev.* 825 (2004), available at: <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1276&context=wmlr>. See also Alexandria R. Strauss, *Supremacy of the Supremacy Clause: A Garamendi-Based Framework for Assessing State Law That Intersects with U.S. Foreign Policy*, 83 *Fordham L. Rev.* 417 (2014), at 430-434, available at: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5029&context=flr>.

⁶⁸ See Michael F. Martin, *U.S. Sanctions on Burma: Issues for the 113th Congress*, Congressional Research Service (CRS) Report for Congress R42939 (Jan. 11, 2013), at pp. 7-8, available at: <http://www.fas.org/sgp/crs/row/R42939.pdf> (“During the 1990s, Congress considered a number of bills and resolutions calling for additional sanctions on Burma. Most of those measures failed to emerge from committee, with a few notable exceptions [...] Section 570 of the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208) [inter alia] ...required the President to prohibit new investments in Burma by U.S. persons.”) *Id.*

⁶⁹ See *Crosby v. NFTC*, 530 U.S. at 370 (“On May 20, 1997, the President issued the Burma Executive Order, Exec. Order No. 13047, 3 CFR 202 (1997 Comp).” *Id.*

⁷⁰ 530 U.S. at 388.

⁷¹ See *American Insurance Ass’n v. Garamendi*, 539 U.S. at 397.

⁷² 539 U.S. at 398, 421. See also *Id.*, at 427 (concluding that California’s effort “to use an iron fist where the President ha[d] consistently chosen kid gloves...[had stood] in the way of [the President’s] diplomatic objectives.”)

⁷³ *Id.*, at 425.

⁷⁴ *Id.*, at 428.

⁷⁵ See *National Foreign Trade Council, Inc. v. Topinka*, Case No. 1:2006cv04251 (II. ND 2007); *Nat’l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

⁷⁶ The Illinois Act had prohibited certain investments in the government of Sudan and companies doing business in or with Sudan because of human rights atrocities the Government of Sudan was known to have committed.

⁷⁷ See *Nat’l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d at 741-742.

⁷⁸ See Bradley C. Bobertz, *Blowing the Whistle on Postmodern Federalism*, 21 *Pace Envtl. L. Rev.* 83 (2004), *supra* at pp. 90, 94 (discussing how the era of Post-Modern Federalism is said to have commenced on April 25, 1995, with the U.S. Supreme Court’s decision in *United States v. Lopez*, and how, during the past twenty years, the U.S. Supreme Court has effectively abandoned the “presumption of legislative rationality” that federal courts had previously employed beginning in the New Deal Era to uphold the constitutionality of “most forms of congressional action.”) *Id.*

⁷⁹ See Adam Cohen, *What’s New in the Legal World? A Growing Campaign to Undo the New Deal*, *New York Times Op-Ed* (Dec. 14, 2004), *supra* (discussing, in part, how “States’ rights conservatives’...attacks on the post-

1937 view of the Constitution are becoming more mainstream among Republicans,” and how “the Supreme Court[’s] [likely rightward] drift[...in the [ensuing] four years [...] could not only roll back Congress’s Commerce Clause powers, but also revive other dangerous doctrines.”) *Id.* See also Simon Lazarus, *John Roberts’ Supreme Court Is the Most Meddlesome in U.S. History: How Radical Libertarianism is Reshaping the Bench*, The New Republic (July 10, 2014), *supra* (discussing how the Roberts Court had reviewed “important decisions about regulation and the economy this term” by addressing “below-the-radar questions of statutory interpretation and judicial deference to agency decisions” in an effort to “replac[e] *Carolene Products*-style rational basis deference with active judicial micro-management,” citing its review of “President Obama’s global warming program” as one of several examples.) *Id.*

⁸⁰ See *New York v. United States*, 505 U.S. 144, 65 112 S. Ct. 2408 (1992).

⁸¹ 505 U.S. at 150-151.

⁸² *Id.*, at 161, quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288 (1981).

⁸³ See *United States v. Lopez*, 514 U.S. 549 (1995).

⁸⁴ See OYEZ, *United States v. Lopez*, The Oyez Project at IIT Chicago-Kent College of Law, available at: http://www.oyez.org/cases/1990-1999/1994/1994_93_1260.

⁸⁵ See *United States v. Morrison*, 529 U.S. 598 (2000).

⁸⁶ See OYEZ, *United States v. Morrison*, The Oyez Project at IIT Chicago-Kent College of Law, available at: http://www.oyez.org/cases/1990-1999/1999/1999_99_5.

⁸⁷ *Id.*

⁸⁸ See Erwin Chemerinsky, *Keynote Address: Laboratories of Democracy: Federalism and State Law Independency Speech*, No. 5 - 2005 Symposium, 41 *Willamette Law Review* 827, 833-835 (2005), available at: <http://www.willamette.edu/wucl/resources/journals/review/publications/archive.html> and <http://www.willamette.edu/wucl/pdf/review/41-5/chemerinsky.pdf>.

⁸⁹ See *Zschernig v. Miller*, 389 U. S. 429 (1968).

⁹⁰ 389 U.S. at 429.

⁹¹ *Id.*, at 436. See also *Id.*, at 442-443 (holding that “[o]ur system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference...[and that] the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.”)

⁹² *Id.*, at 462 (“I therefore concur in the judgment of the Court upon the sole ground that the application of the Oregon statute in this case conflicts with the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany.”) *Id.*

⁹³ *Id.*, at 459 (finding that “Oregon ha[d] so legislated in the course of regulating the descent and distribution of estates of Oregon decedents, a matter traditionally within the power of a State”). See also accompanying fn 2/25.

⁹⁴ See *American Insurance Ass’n v. Garamendi*, 539 U.S. at 419-420, fn 11.

⁹⁵ See Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 *Wm. & Mary L. Rev.* 825, 928 (2004), available at: <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1276&context=wmlr>; Alexandria R. Strauss, *Supremacy of the Supremacy Clause: A Garamendi-Based Framework for Assessing State Law That Intersects with U.S. Foreign Policy*, 83 *Fordham L. Rev.* 417 (2014), *supra* at 434-435.

⁹⁶ Initially, a court should question “whether the state is ‘tak[ing] a position on a matter of foreign policy’ without a ‘serious claim to be addressing a traditional state responsibility. [...] In such a case [...] *Zschernig*’s dormant foreign affairs exclusion might apply” because the state’s actions would fall outside the protection of the Constitution which “vests[] power over ‘foreign policy’ in the federal government,” and more specifically, in the President. *Id.*, at pp. 926-927. If the state satisfies the threshold inquiry, a court should then undertake “a conflict preemption analysis [in which] the strength and clarity required of the conflict...[(with federal policy defined by the executive branch)]...will vary with the strength of the state’s interest” (i.e., the greater the state’s interest, the greater the conflict necessary to trigger preemption). *Id.*, at p. 928.

⁹⁷ See Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 *Wm. & Mary L. Rev.* 825 (2004), *supra* at pp. 928, 929.

⁹⁸ *Id.*, at pp. 939-941.

⁹⁹ See *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

¹⁰⁰ See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

¹⁰¹ See *Medellín v. Texas*, slip op. at 2.

¹⁰² See *Medellín v. Texas*, slip op. (Stevens J., concur. opinion), at 4 (“By issuing a memorandum declaring that state courts should give effect to the judgment in *Avena*, the President made a commendable attempt to induce the States to discharge the Nation’s obligation.”) *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See slip op. at 32.

¹⁰⁶ See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185, 1195 (2008), available at: <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3800&context=mlr>.

¹⁰⁷ See *Medellín v. Texas*, slip op. (Stevens J., concur. opinion), at 4. (“Under the express terms of the Supremacy Clause, the United States’ obligation to ‘undertak[e] to comply’ with the ICJ’s decision falls on each of the States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas’ duty in this respect is all the greater since it was Texas that – by failing to provide consular notice in accordance with the Vienna Convention – ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another.”) *Id.*

¹⁰⁸ See Rita Maran, *CEDAW Goes Local in California – and Beyond?*, IntLawGrrls.com (Dec. 7, 2012), available at: <http://www.intlawgrrls.com/2012/12/cedaw-goes-local-in-california-and.html> (discussing how, on March 17, 2012, the City of Berkeley, California adopted Ordinance 7,224-N.S., which “added Chapter 13.20, ‘Adopting the Operative Principles of the United Nations Convention on the Elimination of All Forms of Discrimination against Women,’ to the Berkeley Municipal Code.”) *Id.* See also Office of the City Clerk, City of Berkeley, *Chapter 13.20 ADOPTING THE OPERATIVE PRINCIPLES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (as of Nov. 18, 2014), available at: <http://codepublishing.com/CA/Berkeley/cgi/NewSmartCompile.pl?path=Berkeley13/Berkeley1320/Berkeley1320090.html>.

¹⁰⁹ See Hope Lewis, ‘New’ Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework, in “Bringing Human Rights Home” (Cynthia Soohoo, Catherine Albisa and Martha F. Davis (Eds.)) (Greenwood Publ. Grp. ©2008) at Chap. 5, pp. 138-139, available at: https://books.google.com/books?id=CO5j1ksjRDOC&pg=RA1-PA138&lpg=RA1-PA138&dq=los+angeles+%2B+CEDAW+ordinance&source=bl&ots=dqYYbbDWDN&sig=du6VDktvDPX1sK8qx cFjADsNewI&hl=en&sa=X&ei=aRSiVM5VzZ_IBPqIqKAD&ved=0CE4Q6AEwCA#v=onepage&q=los%20angeles%20%2B%20CEDAW%20ordinance&f=false (discussing how, during December 2003, “the Los Angeles City Council unanimously passed” a similar ordinance that “provided for local implementation of CEDAW. [...] In 2004, a state-level CEDAW modeled on the San Francisco law was also passed by the California Assembly, but was vetoed by Governor Schwarzenegger.”) *Id.*

¹¹⁰ See Working Group on the Ratification of U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *CEDAW in the United States: Why a Treaty for the Rights of Women?* (2005), available at: <http://www.wedo.org/wp-content/uploads/cedaw-factsheet.pdf> (“[T]he city of San Francisco, California, enacted a local ordinance in 1998 based on the convention’s principles. The ordinance requires the city to protect women’s human rights, including the elimination of discrimination against women and girls.”) *Id.* See also Gretchen Sidhu, *San Francisco Plunges Ahead in Adopting a Cedaw Treaty Of Its Own*, Chicago Tribune (Aug. 2, 1998), available at: http://articles.chicagotribune.com/1998-08-02/features/9808020347_1_cedaw-discrimination-city-agencies.

¹¹¹ See Columbia Law School Human Rights Institute and University of Miami School of Law Human Rights Clinic, *Recognizing Freedom From Domestic Violence and Violence Against Women as a Fundamental Human Right: Local Resolutions, Presidential Proclamations, and Other Statements of Principle* (Nov. 25, 2014), at p. 2, available at: <http://www.law.miami.edu/human-rights-clinic/pdf/2014/local-resolutions-2014.pdf>.

¹¹² See Berkeley Law University of California, *CEDAW: US Ratification and Local Implementation Efforts*, available at: <https://www.law.berkeley.edu/8285.htm>.

¹¹³ See United States Conference of Mayors, 82nd Annual Meeting, *2014 Adopted Resolutions - N SUPPORT OF CITIES FOR CEDAW INITIATIVE AND ENCOURAGING CITIES TO IMPLEMENT THE PRINCIPLES OF THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (June 2014), available at: http://www.usmayors.org/resolutions/82nd_Conference/csj18.asp.

¹¹⁴ See New York Office of the Governor, *N.Y. Gov. Pataki Announces Power Plant CO2 Emissions Agreement*, PollutionOnline.com (Feb. 17, 2006), available at: <http://www.pollutiononline.com/doc/ny-gov-pataki-announces-power-plant-co2-emiss-0001>; Lawrence A. Kogan, *Exporting Precaution: How Europe’s Risk-Free Regulatory*

Agenda Threatens American Free Enterprise, Washington Legal Foundation Monograph (Nov. 2005), at pp. 54-60, available at: http://www.wlf.org/publishing/publication_detail.asp?id=1701

¹¹⁵ See Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export the U.S. Can Do Without*, 17 Temple Political & Civil Rights Law Review 491, 523 (2008), available at: <https://nebula.wsimg.com/1db38ca6345f6bf88b5b35ec35113e24?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>; See also

¹¹⁶ During 2011, ten states had been participating in RGGI - Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. However, on November 29, 2011, New Jersey withdrew from the MOU, effective January 1, 2012. See Regional Greenhouse Gas Initiative, *Program Design Archive*, available at: <http://www.rggi.org/design/history>. See also Regional Greenhouse Gas Initiative, *Program Design*, available at: <http://www.rggi.org/design>.

¹¹⁷ See Center for Climate and Energy Solutions, *Multi-state Climate Initiatives*, available at: <http://www.c2es.org/us-states-regions/regional-climate-initiatives>. C2ES is likely funded, in part, by Barclays Capital, Northeast Utilities, Royal Dutch Shell, and General Electric Company. See Center for Climate and Energy Solutions, *About – Board of Directors*, available at: <http://www.c2es.org/about/board>.

¹¹⁸ See Judith Resnik, Joshua Civin and Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignty, Federalism, and Translocal Organizations of Government Actors (TOGAs)* (2008), 50 Arizona Law Review 709, 718 (2008), available at: <http://www.arizonalawreview.org/pdf/50-3/50arizrev709.pdf>; The United States Conference of Mayors, *The U.S. Mayors Climate Protection Agreement* (As endorsed by the 73rd Annual U.S. Conference of Mayors meeting, Chicago, 2005), available at: <http://www.usmayors.org/climateprotection/documents/mcpagreement.pdf>; Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185, *supra* at 1196.

¹¹⁹ See Joanna Schroeder, *U.S. Mayors Expand Climate Protection Agreement*, DomesticFuel.com (June 25, 2014), available at: <http://domesticfuel.com/2014/06/25/u-s-mayors-expand-climate-protection-agreement/> (discussing how, during 2014, U.S. Mayors had expanded and revised their climate protection agreement so that it “focuses [also] on local actions to adapt cities to changing climate conditions.”) *Id.*

¹²⁰ See The U.S. Conference of Mayors, Mayors’ Climate Protection Center, *List of Participating Mayors*, available at: <http://www.usmayors.org/climateprotection/list.asp>.

¹²¹ See Judith Resnik, Joshua Civin and Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignty, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 Arizona Law Review 709 (2008), *supra* at 719-720.

¹²² See *The 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

¹²³ See also Great Lakes - St. Lawrence Water Resources Regional Body, *Agreements*, available at: <http://www.glsrregionalbody.org/GLSLRBAgreements.aspx>.

¹²⁴ *Id.*; See also *The Great Lakes-St. Lawrence River Basin Water Resources Compact* (Dec. 13, 2005), available at: http://www.glsrregionalbody.org/Docs/Agreements/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf.

¹²⁵ See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185, *supra* at 1193.

¹²⁶ See Lawrence A. Kogan, *Exporting Precaution: How Europe’s Risk-Free Regulatory Agenda Threatens American Free Enterprise*, Washington Legal Foundation Monograph (Nov. 2005), *supra*; Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export the U.S. Can Do Without*, 17 Temple Political & Civil Rights Law Review 491 (2008), *supra*.

¹²⁷ See Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 Harvard Environmental Law Review 335, 341-344 (2010), available at: http://www.law.harvard.edu/students/orgs/elr/vol34_2/335-368.pdf.

¹²⁸ See *New York v. United States*, 112 S. Ct. 2408 (1992).

¹²⁹ *Id.*, at 2431-32.

¹³⁰ See National Constitution Center, *10 Huge Supreme Court Cases About the 14th Amendment*, Constitution Daily (July 9, 2014), available at: <http://blog.constitutioncenter.org/2014/07/10-huge-supreme-court-cases-about-the-14th-amendment/>.

¹³¹ *Id.*, quoting *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S.Ct. 2546, 2570, 115 L.Ed.2d 640 (1991) (Blackmun, J., dissenting).

¹³² *Id.*, quoting *Gregory v. Ashcroft*, 501 U.S., at 458, 111 S.Ct., at 2400 (1991), and referencing *The Federalist* No. 51, p. 323.

¹³³ See, e.g., Institute for Trade, Standards and Sustainable Development, *Invasion of the Property Snatchers* (Oct. 31, 2006), available at: <http://nebula.wsimg.com/8088808a02bf53014f9d0d19e555f6e7?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>; PRNewswire, *U.S. Property Rights Are Under International Assault: The ITSSD Identifies How U.S. Internationalists Are Assisting Activist Groups and Foreign Governments to Weaken U.S. Private Property Rights Via Regulation and Compulsory Licensing*, Institute for Trade, Standards and Sustainable Development (Oct. 31, 2006), available at: <http://www.prnewswire.com/news-releases/us-property-rights-are-under-international-assault-56639992.html>; Lawrence A. Kogan, *U.S. Private Property Rights Under International Assault*, presented at the 10th Annual Property Rights Foundation of America Conference, “Private Property Rights – The Record & The Vision,” (Albany, NY, Oct. 14, 2006), available at: <http://prfamerica.org/speeches/10th/USPrivatePropertyRightsUnderIntlAssault.html>.