



***U.S. State & Local Implementation of
International Sustainable Development:
An Expression of the ‘New’ Post-Modern Federalism©***

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I. Introduction: Recalling the Roots of Sustainable Development

1. *Sustainable Development's Objective is to Reconcile Environmental and Social Concerns With Economic Growth*
 - a. Economic, Environmental and Social Concerns are Antagonistic to One Another:
 - i. “Sustainable development was conceived to reconcile [the] profound tension between environmental and developmental concerns at the heart of global policy-making. Its aim is to marry two antagonistic objectives – an end to poverty and underdevelopment, and ecological sustainability – so that the planet, its resources and services are preserved for future generations.”¹
 - b. A ‘Third Way’: ‘Soft’/Market Socialism² as the Political/Philosophical Compromise Between Marxism & Capitalism:
 - i. “[I]n a historical context that we spent most of the 20th century arguing over two doctrines of development. There is the socialist doctrine of development and the capitalist doctrine of development and we spent all our resources battling between these two doctrines. We had the Cold War, we had real wars. [...] And, it wasn't until the Cold War came to an end, 1987 the World Commission on Environment Development put forward *a third doctrine called sustainable development which is about balancing between social equity, the longtime socialist concern, economic vitality, the capitalist concern* and then this new concern that neither paid any attention to which is environmental sustainability. So, we have a new concept for how to develop now and we're just beginning to learn how to put it into practice” (emphasis added).³
2. *The Legal Definition of Sustainable Development Has Evolved Since it was First Introduced*

“Two definitions [of sustainable development] have...permeated the international arena to a greater extent than any others.”

 - a. World Commission on Environment and Development (WCED) Report Our Common Future (1987):⁴

“Synonymous with that which: ‘...meets the needs of the present without compromising the ability of future generations to meet their own needs.’”

 - i. While “endorsed in countless national and international policy documents, it does not feature in any international legal texts.”⁵
 - A. Arguably the ‘Weak’ Version: “premised [...] on a wholly untested faith in the ability of ‘technology’ to override natural constraints on ecological capacity.”⁶
 - b. World Summit on Sustainable Development in Johannesburg (WSSD) (2002):

“Development can only be sustainable if it reflects the concept of ecological limits and intergenerational equity.”⁷

 - ii. It reflects the “‘three pillar’ view of environmental, economic and social issues which need to be integrated and addressed together.”

- iii. “[This definition] has come to be widely reflected in international law.”⁸
 - A. Arguably the ‘Strong’ Version: “means a type of social and economic progress that respects the limits of the natural environment [...] This necessarily means the environmental dimension to sustainable development is of fundamental importance [...]”
- c. The European Union and Sustainable Development:
 - i. “The EU’s practice [...] reflects the economic growth approach embodie[d] in the ecological modernization discourse and is focused on efficiency and environmental impact reduction rather than sustainability.”⁹
 - ii. The 2007 signing of the EU Lisbon Treaty,¹⁰ which reformed the Maastricht Treaty forming the European Union (1992)¹¹ and the Treaty of Rome (1958) forming the European Community, reflected the following change in Article 2 of the definition of “sustainable development:”
 - A. *Before* Lisbon Treaty – “The Community shall have as its task [...] sustainable and non-inflationary *growth respecting the environment* [...]” (emphasis added).¹²
 - B. *After* Lisbon Treaty –
 - I. “The Union shall [...] work for the sustainable development of Europe based *on balanced* economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.”¹³
 - II. “In its relations with the wider world, the Union shall [...] contribute to peace, security, the sustainable development of the Earth [...]”¹⁴
 - III. “The Union’s action on the international scene shall [...] foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.”¹⁵
 - iii. “While ‘sustainable development’ remains undefined, the fact that it is *no longer an adjective modifying ‘economic activities’ equates it with the term used in international law and policy*” (emphasis added).¹⁶
 - iv. “[T]he normative character of a sustainable development principle becomes clear: ‘[d]evelopment is sustainable if it tends to preserve the integrity and continued existence of ecological systems; it is unsustainable if it tends to otherwise’.”¹⁷
 - v. Sustainable development thus becomes an operable legal principle once it reflects its central principle of sustainability, the norm being an ‘*obligation to promote long-term economic prosperity and social justice within the limits of ecological sustainability*’. Such a

conception meets the tests of a legal principle: it reflects a fundamental morality (respect for ecological integrity and intergenerational equity); requires action (protect and restore ecosystems and natural resources); and has legal effect..." (emphasis added).¹⁸

vi. The Bottom Line: "the 'ecological modernisation' approach [must be replaced with a sustainable development paradigm as evoked by the Brundtland Commission."¹⁹

d. The European Union Promotes Sustainable Development Apart From Economic Growth as a UN Collective Security Goal

In 2004, a High-Level Panel of the United Nations issued a report on collective global threats that cited the need to achieve sustainable development to ensure global collective security within the *first* of the report's many sections identifying and discussing collective global threats. As the report reveals, however, *the attainment of sustainable development and economic growth are two distinct goals.*²⁰

e. Ecological Modernisation Theory: A Mix of Modern & Postmodern Themes

i. "[D]ifferent perceptions of sustainability reflect differing views of the human relationship with nature. [T]he root of the differing views of the human–environment relationship are differences in socioeconomic, sociopolitical and ecological contexts. [...] [T]hese contexts are best described by Inglehart's (1997) tripartite typology of societies and social values."²¹

A. "Ecological modernization theory (EMT) supposedly derives its name from the application of modern themes to environmental issues, but actually *contains a mix of modern and postmodern themes*. Mol and Sonnenfeld (2000) identified the major themes of EMT:" (emphasis added).

I. "First, science and technology are seen as helpful in solving environmental problems."

II. "Second, market dynamics are deemed to have a role to play in restructuring society in a more sustainable way."

III. "Third, private and civic-sector arrangements are seen as increasingly important in creating effective *de facto regulations relative to the legislation of nation-states*" (emphasis added).

IV. "Fourth, environmental social movements are observed to play an increasingly participative role in social change, as opposed to a role giving voice to calls for the complete restructuring of society."

V. "Fifth, EMT eschews the complete neglect of either environmental or economic interests in favour of intergenerational solidarity in dealing with the interaction of the two."²²

3. *Sustainable Development Expresses the New Societal Paradigm of Post-Modernism*

a. Post-Modernism

- i. “Postmodernisation occurs when societies cross a certain threshold of affluence such that scarcity of life’s necessities no longer dominates daily decision-making. [...]”
 - A. In terms of politics, *postmodern societies move away from deference to authority* (Nevitte 1996) and the politics of class-based economic interests towards decentralised participatory governance and identity politics (Melucci 1985, 1989). Quality-of-life issues take precedence over survival issues, as evidenced by the rise of social movements such as gay rights, feminism and environmentalism” (emphasis added).^{23 24}
 - B. “*Postmodernism takes environmental stewardship to the global level*. In these societies, trade has created so much specialisation and interdependence that the sustainability of the whole trading system becomes a widespread concern. [...] [T]he global trading system’s relationship with the global natural environment comes to the fore with *concern for issues such as the hole in the ozone layer and climate change*” (emphasis added).²⁵
- ii. “*Postmodernism rejects the reason and individualism that the entire Enlightenment world depends upon*. And so it ends up attacking all of the consequences of the Enlightenment philosophy, from capitalism and liberal forms of government to science and technology...Post-modern’s essentials are the opposite of modernisms” (emphasis added).²⁶
- iii. “Specifically, *Postmodernism attacks the very core of the modern project, questioning the existence of any truth and the ability of human reason to find it*. As a radical alternative, Post-modernism holds that knowledge and belief are products of environment, and that we should speak of contingent ‘narratives’ rather than absolute truths...Thus, a postmodern comparison of narratives replaces the modern search for truth” (emphasis added).²⁷
 - A. “First, Postmodernism rejects any claim of absolute truth as an attempt to impose one worldview over others...There follows a suspicion of certainty and philosophical foundations, and the replacement of absolute ‘meaning’ with relative interpretation.”²⁸
 - B. “Second, *Postmodernism challenges the main tenets of modern political economy*. Thus, the modern nation-state becomes an instrument of centralized repression of minority voices; the supreme authority of reason ends up being but the ‘voice’ of those in power attempting to impose their personal views as ‘the master voice’ over all other narratives; natural rights are not universal values, but a Western concept, imposed on the rest of the world by ‘cultural imperialism’ or even force; free

markets are seen as the freezing of one particular arrangement that benefits those who have power to expand their wealth...” (emphasis added).²⁹

- iv. “*The phrase ‘sustainable development’ links the metanarrative of ‘environmentalism’ and ‘economic development’ in ongoing dynamic tension...‘Sustainable development’ is an intentional oxymoron, a paradox. It is a self-contained deconstruction in which one term endlessly undoes the other [...] ‘Sustainable development’ incorporates the metaphor of ‘trace’ by making opposite concepts explicit and inseparable. Thus, it becomes impossible to conceptualize either ‘development’ or ‘sustainability’ without considering the other. ‘Sustainable development’ is already postmodern*” (emphasis added).³⁰
- v. “*The Introduction of the concept of sustainable development in the scientific discourse on environmental issues wasn’t just a question of a change in vocabulary. The shift from ‘environmental protection’ to ‘sustainable development’ is an expression of a new attitude towards the relations between science, economy and ethics in the postmodern society. Today there is a strong feeling of urgency on environmental issues*” (emphasis added).³¹
 - A. “*Scientific research is no longer considered as a neutral description of the interplay between man and nature, but as part of an urgent need to accomplish certain goals. Research is therefore valued primarily by its capability to serve political decision-making or technological innovations*” (emphasis added).³²
 - B. “*There are some postmodern traits in this new ‘paradigm’. One of these traits is the pragmatism which follows from the postmodern epistemological skepticism: since we can’t know anything for sure, the most important question is not if a certain theory or scientific explanation is true, but whether it works*” (emphasis added).³³
- b. Rio Principle 15 (Europe’s Precautionary Principle) and Post-Modernism

“Having close philosophical relations with post-modernism, the [precautionary principle] PP reflects dissatisfaction with non-transparent, non-participatory, and slow decision-making by technocrats based on conventional scientific paradigms that requires high strength of causal evidence. In this view, regulatory action was often deemed to be ‘too little, too late.’ According to some proponents, the PP would require that the EU institutions open up their regulatory procedures, and take timely and stringent regulatory measures in the face of uncertain science. While evidence is lacking, there is ardent belief in the PP’s power” (emphasis added).³⁴

 - i. “*The PP’s adverse implications are their most visible in its ‘strongest’ version, which is triggered once ‘there is at least prima facie scientific evidence of a hazard,’ rather than a risk. This PP version challenges Enlightenment era regulatory science protocols, and the rationalist*

- approach of risk regulation, in the face of scientific uncertainty. As scientific uncertainty, unfortunately, is ubiquitous, its potential scope of application is enormous” (underlined emphasis added).^{35 36}
- ii. “In this version, the PP creates an administrative presumption of risk which favors *ex ante* regulation, and tends to reverse the administrative and adjudicatory burden of proof (production and persuasion) from government to show potential harm to industry to show no potential of harm. Consequently, since it is impossible to prove the absence of risk, the outcome invariably is that the hazard is regulated” (underlined emphasis added).³⁷
- A. Where the burden of proof initially rests on the regulator, the strict reliance on peer-reviewed scientific evidence is replaced with use of broader, qualitative, rather than quantitative, evidence, and a ‘weight-of-the-evidence,’ rather than ‘strength-of-the-evidence’ approach at the regulatory level.”³⁸
- B. “This PP-driven process equates *a precautionary inference with the best explanation. Where quantitative evidence is not available, the standard of proof for the government shifts from causation to correlation.* In this process, scientific experts are to facilitate greater understanding of the multiple ‘dimensions of mixed questions of fact and law that frequently characterize scientific disputes.’ Furthermore, *regulatory decisions remain open, non-final and subject to continuous reassessment pending new scientific developments*” (emphasis added).³⁹

II. The Roots and Objectives of Local Sustainable Development Initiatives

1. *1992 United Nations Conference on Environment and Development (UNCED)* – “UNCED [the “Earth Summit”] gave birth to a number of international instruments that continue to provide the framework for sustainable development. This included [...] the Rio Declaration on Environment and Development [the ‘Rio Principles’ and...] the groundbreaking Agenda 21, which offered a practical approach to applying sustainable development policies at the local and national level.”⁴⁰
- a. Rio Declaration – “The Rio Declaration established 27 principles intended to guide sustainable development around the world.”⁴¹
- i. Principle 15 – The [Extra-WTO] Precautionary Principle
 “Principle 15 – *the precautionary principle* – is widely accepted as a foundation of environmental law *at both the national and international levels.* It has been tested in a range of courts and jurisdictions, notably *the World Trade Organisation (WTO) arbitral body where initially it was found in some cases that trade rules superseded the precautionary principle;* however in more recent years this has not been the approach adopted by most states and *the principle itself is well established in international jurisprudence and is increasingly becoming more accepted at the national level*” (emphasis added).⁴²

- b. Agenda 21⁴³ - “Agenda 21 was the first UN document to identify roles and responsibilities for stakeholders. The nine chapters on ‘Major Groups’ have had a large impact on the engagement in implementation and monitoring of Agenda 21.”⁴⁴ Agenda 21, Chapter 22, Sec. 5(c) “included the precautionary principle when dealing with radioactive waste. (agreeing that states should make ‘appropriate use of the concept of the precautionary approach’”).⁴⁵
 - c. Chapter 28, Agenda 21 – Agenda 21 made initial *reference to Local Authorities in Chapter 28 of Agenda 21*. This gave local authorities “a legitimate voice at the international environmental level” (emphasis added).⁴⁶ It offered a practical approach to applying sustainable development policies at the local and national level [...] Agenda 21 sought to provide a comprehensive blueprint of action to be taken globally, nationally and locally by organizations of the UN, governments, and major groups.”⁴⁷
 - i. “The focus on cities as a means to address environmental issues was [...] taken up by the European Union and incorporated in Chapter 28 of Agenda 21, which calls for local authorities to establish a Local Agenda 21 (LA21) through participation with their communities and encourages the *establishment of mechanisms to promote cooperation and coordination between local authorities internationally*” (emphasis added).⁴⁸
 - ii. “One of the key features of the post-Rio era has been the growth in transnational networks of subnational governments, with estimates suggesting that there are at least twenty-eight such networks in Europe alone. One of the largest networks, the International Council for Local Environmental Initiatives (ICLEI), was established in 1990 to represent the environmental concerns of local government internationally. ICLEI’s CCP program is one vehicle through which local authorities have developed strategies for controlling GHG emissions.”⁴⁹
 - d. Local Agenda 21 (LA21) - One of the most extensive follow-up programmes to UNCED and is *widely cited as a success in linking global goals to local action*. In 2002, over 6,000 local authorities around the world– the Major Group addressed in Chapter 28 – were found to have adopted some kind of policy or undertaken activities for sustainable development, either as a main priority or as a cross-cutting issue” (emphasis added).⁵⁰
 - i. “However since then no extensive survey has been conducted, and interest seems to have subsided, as sustainable development had to face competition from sectors that promised access to tangible resources, such as climate change.”⁵¹
2. *UNCED Secretary General Maurice Strong’s Promotion of Local Agenda 21*
 The 1992 United Nations Conference on Environment and Development (UNCED) “was the first time that local government engaged with the United Nations and actively represented itself in a summit process. This was the first time local government even aspired to represent itself. The UN had to figure out what we, as local governments, do. Fortunately, *Maurice Strong, the UNCED Secretary General,*

had a deep commitment and extensive background in bringing major elements of civil society into United Nations discussions” (emphasis added).⁵²

- a. Maurice Strong and His Senior People - “[I]n particular Nitin Desai and Joe Wheeler—were in this way visionary in responding positively to my proposals, in November 1990, *to create a parallel Local Agenda 21 process*. Another very helpful person in the UNCED secretariat was Yolanda Kakabadse, the co-ordinator of NGO involvement. She was a supportive coach and door opener...and later became the Environment Minister of Ecuador” (emphasis added).⁵³
- b. Maurice Strong-Jeb Brugmann November 1990 Meeting – agreed to my *November 1990* request for a meeting, and we scheduled a date in January 1991 in Geneva. *ICLEI [International Council for Local Environmental Initiatives, which later changed its name to Local Governments for Sustainability]*⁵⁴ had only been established a few months earlier, in September 1990. *It was at ICLEI’s founding congress in September that I first floated the idea of Local Agenda 21 to the local government community”* (emphasis added).⁵⁵
- c. Maurice Strong Incorporates Local Government into Agenda 21 – thereafter “directed his team to figure out how to add local government into the agenda. By the time Strong participated in the IULA [International Union of Local Authorities] World Congress in June 1991, he was fully promoting the important role of local government. My point here is that *if the UNCED had not been headed by a person so dedicated to civil society involvement in the UN, I don’t think we would have made progress”* (emphasis added).⁵⁶
- d. ICLEI President Jeb Brugmann and Agenda 21, Chapter 28 - “Just before the UN Preparatory Committee (PrepCom) meeting in August 1991, the Quaker UN Office in New York office invited me to participate in a pre-PrepCom briefing with heads of key government delegations that they had organised at a retreat in the mountains outside of Geneva. *I made a presentation on the role of local government and the LA21 idea, and this was positively received. As a result, the idea of a Chapter 28 was generally endorsed at that PrepCom. [...] Following this meeting, I worked with Joe Wheeler at the UN Secretariat to develop a mandate for LA21 that could be incorporated into Agenda 21 as Chapter 28 text. He and I sent drafts of the key paragraphs for Chapter 28 back and forth to each other by fax, so that the next preparatory committee would consider the text. The text as it reads today was endorsed at the last PrepCom meeting”* (emphasis added).⁵⁷
- e. Maurice Strong Contracted With ICLEI - “[A]rranged for ICLEI to be contracted to organise a *Local Government Honours Programme—a sort of UNCED ‘best practices’ programme*. So ICLEI managed this part of the local government involvement as well. So, you can see that Chapter 28 emerged without much difficulty. Strong already had the idea of ‘Major Group’ chapters. *ICLEI provided a practical, concise, adaptable concept of what local governments could do—LA21*. We worked with each other behind the

scenes and convinced key delegation leaders. And this was adopted without controversy” (emphasis added).⁵⁸

i. “Before ICLEI, local governments were largely represented by two umbrella organisations: the International Union of Local Authorities (IULA) and the United Towns Organisation (UTO). But neither of these organisations had a very *prominent environmental focus*, which is *why ICLEI’s founders thought the ICLEI idea made so much sense*” (emphasis added).⁵⁹

3. *Local Governments Institutionalized by Earth Summit*

“The legacy of Earth Summit is that it institutionalised the idea that ‘Major Groups’ of civil society, including *other spheres of government such as local government, have a legitimate claim to participate in UN policy forums*” (emphasis added).⁶⁰

a. City Governments Agree to Phase Out CFCs (Ozone) - “In 1989, a group of 30 American cities gathered at the American Academy of Sciences and Engineering with Sherwood Rolands, who is a chemist who received the Nobel prize for discovering the depletion of the ozone layer and *we held a meeting to determine how cities in the United States could implement the Montreal Protocol to phase out CFC’s at a time when the Bush administration was unwilling to include language in the Clean Air Act to actually put the Montreal Protocol into effect. These 35 cities passed local ordinances to phase out CFC’s in a very rapid time schedule*” (emphasis added).⁶¹

b. ICLEI Cities for Climate Protection Campaign (CCP) - “As [of 2002,] the United Nations is right now negotiating an international treaty on dealing with the Climate Change problem, the cities are at the table. *In the U.S. 45 cities have joined an international “Cities for Climate Protection Campaign” and their commitment as participants in that campaign is to develop a local action plan to reduce their greenhouse gas emissions. The U.S. EPA is giving full support to this activity financially and in other ways and in fact, the cities are reporting to the U.S. EPA on their emissions reduction so the U.S. Government can go to the international arena and claim that the U.S. is complying with its treaty commitments*” (emphasis added).⁶²

c. Local Agenda 21 Activities - “[As of 2002,] [...] we are [...] at the starting point of engaging in a process with the United Nations and governments in actually *designing the policies that we can implement locally in order to achieve global environmental accords and we will be doing the same with Climate. Agenda 21, endorsed a major international campaign called “Local Agenda 21” whereby now more than 2000 cities in more than 60 countries around the world are developing Agenda 21’s for their cities with concrete targets, with concrete budgets on how they are going to implement these things and this is a movement that is now beginning in the U.S. Out of the 4000 or so cities and towns in the United States, there are now only 19 formally in this Local Agenda 21 activities*” (emphasis added).⁶³

i. “You talk about an end run around our constitution and our governing process [...] implementing locally global environmental accords without them being passed by Congress.”⁶⁴

- ii. “*The City*, because of its concentration, allows us to economically invest in the infrastructure we need in order to protect the environment as well as social services.”⁶⁵
 - d. The Need for National Government Funding of Local Government Agenda 21 Initiatives - “I think the whole Rio process will unwind—and the Johannesburg Summit will fail—unless central governments, with Major Groups, begin to seriously address *the need for much closer coordination and partnership between the spheres of government; that is, between national, sub-national and local governments*. In other words, a real ‘summit’ of governments is required. As a start, therefore, the sub-national governments need to be brought into the discussion. [...] Let’s face it: *local strategies for sustainable development are not viable without a supportive policy and fiscal framework at the sub-national and national levels. Likewise, the ‘higher’ levels are both unwilling and incapable of implementing Agenda 21 without intensive engagement at the local level*. The UN has to take a substantial leap beyond its old ‘Government’ and ‘Non-Governmental Organisations’ paradigm in Johannesburg” (emphasis added).⁶⁶
 - i. “[I]t is clear that the ICLEI members depend on funds from their national governments and international institutions to implement climate projects in their communities. [...] Local government representatives from different ICLEI members notice that they are highly dependent on financial flows from the central government to undertake climate projects at the local level in key sectors, such as energy management, public transportation and land use planning. In absence of an ambitious international climate agreement, national governments are not bound to climate change mitigation measures and national as well as international funding for local climate actions will remain uncertain and scarce.
 - A. Consequentially, the ICLEI network has in the past few years focused its activities very much on raising the global level of ambition to reduce GHG emissions and pushed for a wide-ranging international climate agreement.”⁶⁷
 - e. The Need for Government Institutions & Inter-Governmental Partnerships - “*Sustainable development requires the rebuilding and strengthening of government institutions and inter-governmental partnerships, at all levels, to provide and protect public goods and to address market externalities*. Government needs to rediscover itself and its purpose in Johannesburg, and stop letting itself be overshadowed by this 1990s demi-god: the market. [...]
 - i. *Government has to make the market work for these basic human purposes. Poverty eradication. Sustainability. Equity. Government, in the form of the United Nations, needs to show some courage and mettle. Otherwise, sooner or later, people will—and should be—taking to the streets*” (emphasis added).⁶⁸
4. *Local Agenda 21 – Chapter 28 of Agenda 21*⁶⁹

- a. Paragraph 1 - “Because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives. [...] As the level of governance closest to the people, they [*local authorities*] play a vital role in educating, mobilizing and responding to the public to promote sustainable development” (emphasis added).⁷⁰
- b. Paragraph 2 - Each local authority should enter into a dialogue with its citizens, local organizations and private enterprises and adopt ‘a local Agenda 21’. [...] *Local authority programmes, policies, laws and regulations to achieve Agenda 21 objectives would be assessed and modified, based on local programmes adopted*” (emphasis added).⁷¹
- c. Paragraph 4 - “Partnerships should be fostered among relevant organs and organizations such as UNDP, the United Nations Centre for Human Settlements (*Habitat*) and UNEP, the World Bank, regional banks, the International Union of Local Authorities, the World Association of the Major Metropolises, Summit of Great Cities of the World, the United Towns Organization and other relevant partners, with a view to mobilizing increased international support for local authority programmes” (emphasis added).⁷²

III. Key Local Sustainability Organizations and Initiatives

1. *International Council for Local Environmental Initiatives (ICLEI)*
 “ICLEI is the international environmental agency for local governments. It serves as a clearinghouse on sustainable development and environmental protection policies, programs and techniques, initiates joint projects or campaigns among groups of local governments, organizes training programs, and publishes reports and technical manuals” (emphasis added).⁷³
 - a. ICLEI Establishment - “Founded in 1990, ICLEI – Local Governments for Sustainability is today the largest international association of local governments for sustainable development. Membership is constantly growing and today numbers about 1200 local governments, coming from over 70 different countries and representing almost 570 million people.”⁷⁴
 - b. ICLEI Cities for Climate Protection Campaign (CCP):
 - i. “The *Cities for Climate Protection (CCP) Campaign* was initiated by ICLEI in 1993, and was one of the first initiatives recognizing the importance of local action in reducing GHG emissions. Today it counts around 1000 member cities in 50 different countries, with over 200 in the US alone. The Campaign offers participating municipalities a comprehensive methodological framework, organized in five performance milestones, allowing them to plan, implement and monitor a cost-effective CO2 reduction policy, while improving the quality of life for inhabitants. The decision to join the Campaign is also a political statement, in the sense that every member needs to adopt a formal resolution, confirming their political commitment to CO2 reduction efforts” (emphasis added).⁷⁵

- ii. *“The CCP Campaign has been particularly successful in the US not only in terms of its growing membership and the ambitious initiatives undertaken by the CCP cities but also as one of the key drivers behind a broader political movement represented by the US Conference of Mayors Climate Protection Agreement. The Agreement has been launched on 16 February, 2005 – the day when the Kyoto Protocol entered into force and became law for 141 countries that have ratified it. Disappointed with the US government decision to not ratify the Kyoto Protocol, 141 American cities came together under the leadership of Seattle Mayor Greg Nickels and pledged to meet or exceed the 7% GHG reduction target by 2012 from 1990 levels foreseen for the US under the Kyoto Protocol. [...] The CCP Campaign has been instrumental in providing tools needed to implement these commitments, such as a national protocol on local GHG emissions, as well as in mobilizing its member cities to strive for even more ambitious reduction targets.”* (emphasis added).⁷⁶
- iii. Recommendations:
 - A. “Information on global trends and the impacts of any local activity on future generations and other places must be made available as a standard basis for political and economic decision-making.”⁷⁷
 - B. “The effectiveness of local sustainability processes as well as of programmes designed to support them should be enhanced by combining the strengths of as many as possible of the five process types identified in this study.”⁷⁸
 - C. *“The potential of local sustainability processes to prepare radical policy shifts on all levels through political and social innovation must be recognized and further developed”* (emphasis added).⁷⁹
 - D. “By combining classic methods of consultation and participatory policy development with new forms of spontaneous and collective action, local sustainability processes can strengthen their role as test beds of sustainable innovation.”⁸⁰
 - E. “Global programmes for sustainable development have to combine the variety, creativity and adaptability of local strategies with universal national and international support structures” (emphasis added).⁸¹
 - F. *“The global community needs to agree internationally on environmental and social standards enforced through national legislation in order to provide a reliable framework for both the global economy and local sustainability processes”* (emphasis added).⁸²
 - G. “For the Green Economy to become a serious contribution to sustainable development, it has to be linked with social - not

- only technological - *innovation*. Decentralized solutions and *public control over common goods will be key*” (emphasis added).⁸³
- H. “*GDP has to be replaced by a development index which is based on social wellbeing and environmental quality, and at the same time is simple enough to be calculated and communicated on the local, national and international level*” (emphasis added).⁸⁴
- I. “*The future institutional framework for sustainable development of the UN should include local governments as governmental stakeholders and at the same time initiate national and international legislation that supports their efforts*” (emphasis added).⁸⁵
- J. “*International negotiations about emission reductions and access to natural resources should be based on the principle of global environmental justice, thus allowing every world citizen on average to use the same share of global resources*” (emphasis added).⁸⁶
- c. U.S.EPA Funds, References ICLEI Activities, Materials & Products - including the *CCP* and ICLEI/EPA co-developed GHG emissions inventory software protocols, including *CACPS 2009* and the *Local Government Operations Protocol*, in EPA documents, brochures and websites relating to EPA State and Local Cooperation Activities:
- i. “*The International Council for Local Environmental Initiatives’ (ICLEI) Cities for Climate Protection (CCP) campaign includes more than 150 U.S. cities and counties. One of the cities involved in the CCP program, Seattle, has been a leader in action toward reducing greenhouse gas emissions. [...] Many of the cities involved in ICLEI’s CCP program and/or the U.S. Mayors’ Climate Protection Agreement have developed climate action plans that include waste-related climate initiatives*” emphasis added).⁸⁷
- ii. *Many municipalities in Region 5 have signed the U.S. Conference of Mayors Climate Protection Agreement, which calls for communities to take action to reduce greenhouse gases in support of the United Nations Framework Convention on Climate Change Kyoto Protocol. Additionally, some municipalities in Region 5 have joined the Local Governments for Sustainability (also known as ICLEI) Cities for Climate Protection (CCP) Campaign. CCP assists cities in adopting policies and actions to reduce greenhouse gas emissions* (emphasis added).⁸⁸
- iii. “*Municipalities in Action: More than 160 municipalities in the United States have joined the Cities for Climate Protection (CCP) campaign run by Local Governments for Sustainability. CCP members agree to inventory their GHG emissions, set a reduction target, write an action plan to reduce emissions, and implement the plan*” (emphasis added).⁸⁹

- iv. *“Preparing for Climate Change: A Guidebook for Local, Regional and State Governments published by ICLEI–Local Governments for Sustainability (2007), is a framework that communities can use to prepare for and adapt to regional climate changes. The guidebook is designed to take the mystery out of planning for climate impacts by specifying the practical steps and strategies that can be put into place now to build community resilience into the future.”*^{90 91}
- v. *“ICLEI - Local Governments for Sustainability in collaboration with the California Air Resources Board, The California Climate Action Registry, and The Climate Registry, has developed a community greenhouse gas protocol for local government operations in the United States. The protocol is a guidance document that provides a framework for consistent quantification and categorization of greenhouse gas emissions at a local government level. A community-wide protocol is in development”* (emphasis added).⁹²
- vi. *“An EPA representative from the State and Local Climate and Energy Program participates on the steering committee responsible for developing the ICLEI community protocol. ICLEI is lead on this initiative and at this time, EPA will continue to support ICLEI in an effort to leverage existing investments and minimize redundancy”* (emphasis added).⁹³
 - A. *“The U.S. Community Protocol for Accounting and Reporting Greenhouse Gas Emissions (Community Protocol) is designed to inspire and guide U.S. local governments to account for and report on greenhouse gas (GHG) emissions associated with the communities they represent. Building on previous advice provided by ICLEI and others, this Community Protocol represents a new national standard that establishes requirements and recommended best practices for developing community GHG emissions inventories”* (emphasis added).⁹⁴
- vii. *“There are several tools and protocols available that help local governments and other local or state organizations to make inventories consistent and defensible. ICLEI – Local Governments for Sustainability (ICLEI) has a number of tools available to their members. For example, CACP 2009 (Clean Air & Climate Protection Software) is an emissions management tool that calculates and tracks greenhouse gas emissions and reductions, as well as criteria air pollutants, associated with electricity, fuel use, and waste disposal. Learn more about ICLEI tools at: <http://www.icleiusa.org/tools>”* (emphasis added).⁹⁵
 - A. *“The Local Government Operations (LGO) Protocol was developed by a group of environmental organizations, including ICLEI, The Climate Registry, the California Climate Action Registry (CCAR), and the California Air Resources Board (CARB). The LGO Protocol is a program-neutral*

- greenhouse gas protocol designed to help local governments quantify and report operational greenhouse gas emissions” (emphasis added).⁹⁶
- viii. “[O]ur partners over at ICLEI [...] have recently completed a community protocol for accounting and reporting of GHG emissions using traditional lens, as well as hybrid lenses that can take into account emissions that occur in the products that people use but then are made some place else” (emphasis added).⁹⁷
- A. “[A]n adaptation planning process [...] involves some key things such as building support for preparing for climate change amongst our stakeholders, looking at the projected impacts and how those may affect your programs and planning areas, assessing your vulnerability and risk, and then setting goals and deciding what actions to take, and then ultimately implementation and evaluation. The two resources listed there are excellent guides that provide great detailed framework for you to follow in your adaptation planning efforts. *The Preparing for Climate Change guidebook put out by ICLEI is a great resource*” (emphasis added).⁹⁸
- ix. “Many local governments have compiled GHG and/or criteria air pollutant inventories through the auspices of ICLEI’s Cities for Climate Protection [...] Local governments can use the *Clean Air and Climate Protection Software (CACPS)* tool to develop a top-down inventory of both criteria air pollutants and GHGs associated with electricity, fuel use, and waste disposal. CACPS is a Windows-based software tool and database developed by the National Association of Clean Air Agencies (NACAA) and the International Council for Local Environmental Initiatives (ICLEI), with EPA funding. [...] *The Local Government Operations Protocol* was created to help local governments develop consistent and credible emission inventories based on internationally accepted methods. *Developed in partnership* by the California Air Resources Board, California Climate Action Registry, *ICLEI - Local Governments for Sustainability*, and The Climate Registry, it involved a multi-stakeholder technical collaboration that included national, state, and local emissions experts” (boldfaced emphasis added).⁹⁹
- x. “Environmental and Human Health Benefits - To assess air pollution and greenhouse gas effects of clean energy projects, *EPA supports: Clean Air and Climate Protection Software, developed by State and Territorial Air Pollution Program Administrators (STAPPA), Association of Local Air Pollution Control Officials (ALAPCO), and International Council for Local Environmental Initiatives (ICLEI)*” (emphasis added).¹⁰⁰
2. *International City/County Management Association (“ICMA”)*

- a. ICMA & Sustainable Communities - “*ICMA is the premier organization of professional local government leaders building sustainable communities to improve lives worldwide. [...It] provide[s] services, research, publications, data and information, peer and results-oriented assistance, and training and professional development to thousands of city, town, and county leaders and other individuals and organizations throughout the world. The management decisions made by ICMA's members affect millions of people living in thousands of communities, ranging in size from small towns to large metropolitan areas*” (emphasis added).¹⁰¹
- b. ICMA Center for Sustainable Communities Projects - “*ICMA’s Center for Sustainable Communities provides knowledge resources and technical assistance on leading practices at the intersection of sustainability and local government management. [...] The Center for Sustainable Communities leads ICMA's training, education, and technical assistance efforts on issues such as: Data & Technology[;] Economic Development[;] Energy & Environment[;] Social Equity[;] Sustainability Planning*” (emphasis added).^{102 103}
 - i. “*Recent surveys conducted by ICMA have focused on sustainability policies and programs; solar energy zoning, planning permitting, inspection, and financing programs; local food systems; 311 and local government customer service systems; aging in America; and more*” (emphasis added).¹⁰⁴ The ICMA report *Breaking New Ground: Promoting Environmental and Energy Programs in Local Government* presents findings from an International City/County Management Association (ICMA) survey that was sent to over 8,000 local governments across the nation.”¹⁰⁵
- c. U.S.EPA Funds, Partners With ICMA - “*ICMA provides technical assistance and knowledge resources to the small towns and rural communities that are engaged in regional sustainability planning [...] [t]hrough projects with the National Association of Development Organizations (NADO), the U.S. EPA, and others*” (emphasis added).¹⁰⁶
 - i. The ICMA report *Putting Smart Growth to Work in Rural Communities, 2010* was funded by USEPA and coauthored and by ICMA and the USEPA. It “focuses on smart growth strategies that can help guide growth in rural areas while protecting natural and working lands and preserving the rural character of existing communities.”¹⁰⁷
 - ii. “ICMA has operated the Local Government Environmental Assistance Network (LGEAN) for many years *through a cooperative agreement with U.S. Environmental Protection Agency (EPA)*. LGEAN is one of several ‘compliance assistance centers’ that operate to provide information, tools, and services that facilitate environmental compliance, environmental management systems, pollution prevention, waste minimization, and sound financial management by local governments.”¹⁰⁸

- A. *“The U.S. EPA-sponsored Local Government Environmental Assistance Network (LGEAN) provides a one-stop shop for environmental compliance and environmental management information needed by local government practitioners. [...] Funder: U.S. Environmental Protection Agency”* (italicized emphasis added).¹⁰⁹
 - iii. *“Since 2003, ICMA and the US Environmental Protection Agency (EPA) have jointly organized the National Brownfields Conference, regularly attracting local government leaders, developers, end-users of redeveloped brownfields sites, and investors. [...] The National Brownfields Conference is one of the largest educational events sponsored by the U.S. EPA, attracting over 6,000 participants and featuring over 100 dynamic educational sessions, networking and business development opportunities, mobile workshops, walking tours, and volunteer activities to see redevelopment at ground level”* (emphasis added).¹¹⁰
 - A. *“A partnership between the U.S. EPA and ICMA has developed the National Brownfields Conference into the premier international forum focused on redeveloping America’s brownfield properties and promoting environmental revitalization and economic redevelopment. In its 16-year history the conference has grown from being a relatively low-key event into being the hub of information sharing and networking for a wide variety of topics related to sustainability”* (emphasis added).¹¹¹
 - B. *“In 2015, ICMA will work in partnership with the EPA to deliver key aspects of the conference including communication and outreach to potential attendees, educational programming and special events. ICMA will also organize a conference trade show and exhibit hall as well as a sponsorship program. [...] Funder: U.S. Environmental Protection Agency”* (italicized emphasis added).¹¹²
- 3. *U.S.EPA’s Focus on Sustainability* (2011)
 - a. *Sustainability and the U.S. EPA*¹¹³ - Report Prepared by National Research Council/National Academy of Sciences for Integrating Sustainability into EPA Decision-making & Actions

“The U.S. Environmental Protection Agency (EPA) has been working to create programs and examining applications in a variety of areas to better incorporate sustainability into decision making at the agency. To further strengthen the analytic and scientific basis for sustainability as it applies to human health and environmental protection, EPA asked the National Research Council (NRC) to convene a committee under the Science and Technology for Sustainability Program to provide an operational framework for integrating sustainability as one of the key drivers within the regulatory responsibilities of EPA.”^{114 115}

- i. *Inter alia*, the NRC made the following recommendations:
- A. R.2.1 – “EPA should carry out its historical mission to protect human health and the environment in a manner that optimizes the social, environmental, and economic benefits of its decisions.”¹¹⁶
 - B. R.3.1 Key – “EPA should adopt or adapt the comprehensive [...] proposed Sustainability Framework [...] including specific processes for incorporating sustainability into decisions and actions. As part of the framework, *EPA should incorporate upfront, consideration of sustainability options and analyses that cover the three sustainability pillars*, as well as trade-off consideration into its decision making” (emphasis added).¹¹⁷
 - C. R.3.3 Key – “*The committee recommends expressly including the term ‘health’ in the social pillar* to help ensure that EPA regulatory and scientific staff primarily concerned with human-health issues recognize their existing role in sustainability and recommends that EPA pay particular attention to *explaining the role of human health in the social pillar* [...] expressly including health in the social pillar will more clearly communicate outside of EPA the agency’s role in that pillar of sustainability” (emphasis added).¹¹⁸
 - D. R.4.1 Key – “EPA should develop a ‘sustainability tool-box’ that includes a suite of tools for use in the Sustainability Assessment and Management approach. Collectively, *the suite of tools should have the ability to analyze present and future consequences of alternative decision options on the full range of social, environmental, and economic indicators*” (emphasis added).¹¹⁹
 - E. R.4.2 – “*EPA should identify potential future environmental problems*, consider a range of options to address problems, and develop alternative projections of environmental conditions and problems” (emphasis added).¹²⁰
 - F. R.4.3 – “The agency should develop a tiered formalized process, with guidelines, for undertaking the Sustainability Assessment and Management approach to maximize benefits across the three pillars and *to ensure further intergenerational social, environmental, and economic benefits that address environmental justice*” (emphasis added).¹²¹
 - G. R.4.5 – “*EPA should continue to adapt its current method of cost benefit analysis for sustainability* by, among other things, *improving its estimates of the value of ecosystem services*, extending its boundaries by incorporating life-cycle analysis, and better addressing intergenerational and environmental justice considerations” [Social Cost of Carbon?] (emphasis added).¹²²

- H. R.4.6 – “EPA should develop a range of risk assessment methods to better address cumulative risk and intergenerational and environmental justice considerations and to support comparisons of chemicals as part of an alternatives analysis for *green chemistry* applications” (emphasis added).¹²³
- I. R.4.7 – “EPA should expand its environmental indicators to address economic and social issues in collaboration with other federal agencies to address economic and social issues, and consider adopting them and developing appropriate metrics to inform sustainability considerations for state and local actors. Where relevant, these indicators should allow for international comparisons and the rapid adoption and adaptation of best practices from other countries responding to the challenges of sustainability” (emphasis added).¹²⁴
- J. R.5.1 – “EPA should include risk assessment as a tool, when appropriate, as a key input into its sustainability decision making” (emphasis added).¹²⁵
- K. R.6.1 Key – “EPA should institute a focused program of change management to achieve the goal of incorporating sustainability into all agency thinking to optimize the social, environmental, and economic benefits of its decisions, and create a new culture among all EPA employees” (emphasis added).¹²⁶
- L. R.6.3.1 – “Consistent with Executive Order 13514, EPA should implement an internal program to identify key sustainability indicators and associated metrics and implement a tracking and reporting system to demonstrate progress toward the goals of more sustainable operational practices and benchmark performance against other federal or government agencies and private-sector organizations (e.g., nongovernmental organizations)” (emphasis added).¹²⁷
- M. R.6.9.1 – “The committee recommends EPA maximize opportunities to collaborate with other federal agencies, state and local governments, NGOs, and the private sectors by promoting partnerships that ensure EPA is both a voice at the table and a driver for full and careful consideration of sustainability issues in major national initiatives...” (emphasis added).¹²⁸
- N. R.6.10 Key – “The committee recommends that EPA hire multidisciplinary professionals who are proficient in many disciplines, have experience in the development and implementation in the sustainability assessment tools described, and have a working knowledge in all three pillars and their application to environmental issues. The agency should hire leaders and scientists including from outside

*sectors to aid the agency in shifting to a more cross-cutting mind-set” (emphasis added).*¹²⁹

- O. R.7.1 – “EPA should foster a culture of sustainability to increase EPA’s capacity to imagine and implement better solutions and *increase recognition of the economic and social value of the benefits of environmental protection*. Agency staff should be encouraged to seek opportunities to further EPA’s sustainability goals in all decisions and actions” (emphasis added).¹³⁰
- P. R.7.3 – “*To maximize social benefits as well as reduce health risks, EPA should target activities to decrease and eliminate environmental inequities*. Research aimed at elucidating the *cause-and-effect relationship* between an environmental problem and an adverse consequence, especially cumulative impacts, *should be focused on disadvantaged communities* and should seek their engagement and cooperation” (emphasis added).¹³¹

IV. A ‘New’ Paradigm of Federalism Has Been Employed to Facilitate Local Sustainability

1. *The ‘Old’ Paradigm of Dual Federalism Justified the U.S. Supreme Court’s Early 20th Century Ruling Upholding Federal Preemption of States Rights*
 - a. Overview – “[U]ntil the New Deal, the idea of ‘dual federalism’ was the ‘dominant judicial conception of the relationship of the states and the national government.’ Dual federalism was based on the idea that ‘the states and the federal government exercised exclusive control over non-overlapping regions of authority’ (such as national security on the federal side and land use control on the state side), and that it was up to the courts to define and monitor these exclusive spheres of federal and state control” (emphasis added).¹³²
 - i. “Since the rise of the federal regulatory state, however, many argue that the lines between federal and state authority have become mostly blurred, with the federal government and the states engaging in overlapping regulation of a wide range of subjects including education, public health and safety, transportation, and environmental protection. In recent years, there has been significant scholarly work documenting and theorizing this new brand of federalism, using labels such as ‘poly-phonic federalism,’ ‘dynamic federalism,’ ‘empowerment federalism,’ ‘cooperative federalism,’ and ‘interactive federalism.’ While these labels describe concepts of federalism that are not identical, they all describe a situation where federal and state regulation are no longer separate spheres but instead exist as independent, but interacting, sources of authority.”¹³³
 - b. *Missouri v. Holland* (1920)¹³⁴ – “In *Holland*, the Supreme Court considered the constitutionality of federal legislation regulating the hunting of migratory birds. In the lower courts, directly analogous legislation had been struck down

for falling beyond the Commerce Clause powers of the federal government. Before the Court, however, the operative issue was Congress' attempt to avoid that constitutional constraint by ratifying a treaty *that required the United States to adopt just such legislation*. Thus faced with the question of whether the United States could 'violate' the constitutional limits of federalism on the grounds of the treaty power, the Court – per Justice Holmes – held that it could.”^{135 136}

- i. “*Holland* should be understood to follow naturally from the notions of federalism ascendant *at the time of the decision*. In 1920, a conceptual framework of ‘dual federalism’ prevailed in both theory and practice. In the dualist perspective, state and federal governments were understood to enjoy ‘exclusive and non-overlapping spheres of authority.’ As to some subjects, states were empowered to regulate, and the federal government was not; in others, the federal government had free range to act, but states were power-less. *Within this paradigm, the central project of federalism was to define the bounds of state versus federal authority*. In a scheme of dual federalism, thus, the critical task is one of line-drawing” (emphasis added).¹³⁷
- ii. “[I]n *Holland*, the Court held that Congress could essentially avoid the constitutional limits of federalism, pursuant to the treaty power.”¹³⁸

2. *The U.S. Supreme Court Employed the ‘Old’ Paradigm of Dual Federalism to Uphold Opposition to State Engagement in Foreign Affairs*

- a. Overview – “In order to effectively coordinate transnational norms [...] the *traditional regime of dual federalism* simultaneously *emphasized both the importance of a single voice charged to express the nation’s policy externally and the need to empower that speaker to impose said policy internally*. Hence the allocation of authority to the national government to engage in foreign affairs and international norm-creation, and to bind sub-national authorities to the commitments that result” (emphasis added).¹³⁹
- i. The U.S. Supreme Court, on several occasions, addressed States’ ability to enact sanctions in protest to foreign government human rights abuses. In these cases, the central issue had been “the asserted danger of sub-national engagement with questions of foreign affairs.” These cases involved “litigation over Massachusetts’ sanctions legislation against Burma,” “litigation over Illinois’ Sudanese divestment statute,”¹⁴⁰ and litigation over California’s statute dealing with World War II-era insurance policies held by European Jews.¹⁴¹
- b. *Crosby v. NFTC (2000)*¹⁴² - This case involved the enactment in “1996 [by] the Commonwealth of Massachusetts [of] a law that prohibited state or local governments from doing business with companies that were themselves doing business with Burma. The Court held that the state law was preempted by federal legislation imposing sanctions on Burma. Congress had enacted initial sanctions but gave the President the power to end the sanctions if he certified that Burma had made progress on human rights; he also had the power to re-

impose sanctions in case of back-sliding and to suspend sanctions in the interest of national security.”^{143 144}

- c. *American Insurance Ass'n v. Garamendi (2003)*¹⁴⁵ - This case involved the State of California's enactment of a law “requiring any insurer doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945.” California had enacted the law despite U.S. government efforts to negotiate an agreement “about insurance compensation” with the West German government with respect to unpaid claims made under such policies. Said insurance policies, which had been “held by European Jews [, had been...] either confiscated by the Nazis or dishonored by insurers who denied the existence of the policy or claimed that it had lapsed from unpaid premiums. [...] The [Court's] majority found the California law invalid as an interference with presidential foreign policy. According to the majority, the consistent presidential policy had been to encourage voluntary settlement funds in preference to litigation or coercive sanctions. California sought to place more pressure on foreign companies than the president had been willing to exert. This clear conflict between express foreign policy and state law was itself a sufficient basis for preemption. As the Court said, California used ‘an iron fist where the President has consistently chosen kid gloves.’ The majority found the preemption issue particularly clear, given the weakness of the state's interest in terms of traditional state legislative activities.”¹⁴⁶
- d. *NFTC v. Topinka (2007)*¹⁴⁷ - “In announcing its suit, the National Foreign Trade Council (NFTC) spoke of the need for the president to ‘have the flexibility to craft foreign policy that combines incentives and disincentives intended to change the behavior of foreign governments,’ and of the tendency of ‘sanctions imposed by individual states or local governments [to tie] the president's hands.’ Responding to the district court's ruling in its favor in Illinois, the NFTC invoked [the U.S. Supreme Court's prior decision in the Burma case,] *Crosby v. National Foreign Trade Council*: ‘The essence of the ruling was that the President makes foreign policy, not the legislature and the governor of Massachusetts. And, he does not need fifty states, or lots of cities and counties, coming along with sticks and carrots which conflict with his [balance of incentives].’”^{148 149}

3. *Delegated Federalism Has Also Been Employed to Coordinate Federal/State Jurisdiction for Environmental Protection Purposes*

- a. Concurrent Federal & State Jurisdiction - Legal commentators have noted how “[c]oncurrent federal and state jurisdiction has become the norm across an array of subject-matter areas. Patterns of ‘delegated program’ federalism – in which federal regulatory authorities define goals to be pursued (or surpassed) through varied state and local initiatives – are no longer the exception, but the rule” (emphasis added).¹⁵⁰
- i. Environment and Education Law as Examples – “Environmental law is the paradigmatic case of this pattern. But jurisdictional overlap is evident across the breadth of U.S. law and regulation. For all the effort to rationalize corporate versus securities law as *state* versus *federal*

law, the law in action – and increasingly even on the books – makes it difficult to do so. Education law, particularly after adoption of the No Child Left Behind Act, offers yet another case of such overlap” (emphasis in original).¹⁵¹

4. *The Trend in Favor of Growing State and Local Engagement in Foreign Affairs and International Law Nevertheless Continues to Evolve*

Notwithstanding these decisions, there has been “a growing engagement of sub-national authorities in questions of foreign affairs and international law.”¹⁵² Relevant international norms have created a focal point for widespread sub-national engagement [which] has involved a particular dynamic of concurrency in federal and state voice.”¹⁵³

a. This Trend is motivated by a belief that international Law Stifles State & Local Interests - “A certain conventional wisdom has taken hold, which sees some significant tension between international law and institutions on the one hand, and the demands of U.S. federalism on the other. In this fairly common account, *international law at least stifles, if it does not silence, domestic voices beyond those of a narrow set of national actors responsible for the foreign affairs of the United States*” (emphasis added).¹⁵⁴

i. To such extent, the U.S. Supreme Court’s decision in *Holland* has been seen as sanctioning a scheme to utilize international law “to coordinate domestic policy around a preferred national norm – or, less euphemistically, to impose national norms on sub-national authorities.”¹⁵⁵

b. State & Local Initiatives Challenge Conventional Notions of Conducting Foreign Policy - “*Growing state and local initiative in international affairs thus represents an important challenge to our conventional accounts of foreign affairs and international law*. First, it belies notions of foreign affairs and international law as exclusively national in practice. Second, it undermines assertions that such exclusivity is necessary if chaos is not to ensue. *Internally directed coordination by national authorities is thus of declining significance in the realm of foreign affairs and international law*. Yet this need not dictate any decline in externally directed coordination. Such coordination simply takes a different form” (emphasis added).¹⁵⁶

i. “In a growing number of these cases, relevant state and local participation goes well beyond “symbolic” politics – the rubric under which sub-national engagement with foreign affairs and international law is often dismissed.”¹⁵⁷

c. Subnational Authorities Can Participate in the Design & Evolution of International Law - “*While sub-national authorities do not enjoy any veto power over [international law], they can involve themselves actively in its design and evolution, and may even enjoy some significant range of motion within it. International law, in this account, ceases to involve anything uniquely objectionable to sub-national authorities*. They might object to some incident of it on the merits – or perhaps even for its overuse – but not simply because it is international. States and localities thus commonly decry proposed

federal legislation based on its substantive content; likewise, they often dispute the excessive federalization of law in one area or another” (emphasis added).

5. *The Evolution of Environmental Federalism and the Allocation of Responsibility*
 - a. Allocating Environmental Protection Responsibilities Among Federal, State & Local Governments – “Environmental federalism refers to the allocation of responsibilities between federal, state, and local governments for environmental protection. [...It...] encompasses other terms like dual federalism and cooperative federalism.”¹⁵⁸
 - i. “Dual federalism [...] refers to federal and states endeavors that are uncoordinated.”¹⁵⁹
 - ii. “Cooperative federalism [...] seeks to achieve a balance of power between the states and federal government where efforts are integrated.
 - A. Common examples of cooperative federalism include *conditioning receipt of federal funds upon a state’s adoption of regulatory standards or threatening preemption of federal standards if the states do not act*. The core features of a cooperative federalism structure are compliance incentives, federally set minimum standards, federal oversight and enforcement, and state flexibility in customizing and exceeding federal standards” (emphasis added).¹⁶⁰
 - B. “*The CWA is among the most critical regulatory frameworks for sustainable development in the U.S. Its essential objective—to restore and maintain the integrity of the nation’s waters—embraces the sustainability principle of preserving clean water for future generations. To achieve its goals, the CWA relies on cooperative federalism*. Cooperative federalism, when implemented effectively, provides the necessary checks and balances to ensure that WQS are instituted. Under its structure, the states bear primary responsibility for setting WQS, but in the event they fail to do so, the CWA requires the federal government to take control. This ensures that standards will be set—the first step towards protecting water quality.”¹⁶¹
6. *The Evolution of Horizontal/Cooperative Federalism*
 - a. Such Programs Involve Federal-State Collaboration - Cooperative federalism statutes typically outline the contours of a regulatory program and empower states to implement the program in accordance with federal guidelines. Cooperative federalism thus strikes a functional balance between federal preemption on the one hand and decentralization on the other, harnessing “the benefits of diversity in regulatory policy within a federal framework.”¹⁶²
 - b. A Mix of Federal, State & Local Agencies Implement Federal Law - “Thus, rather than adopt preemptive national policies, federal regulatory programs have long embraced “cooperative” regimes that utilize a mix of federal, state, and local agencies to implement federal law. [...]

- i. ‘Cooperative federalism programs set forth some uniform federal standards—as embodied in the statute, federal agency regulations, or both—but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements. This power allows states to experiment with different approaches and tailor federal law to local conditions.’¹⁶³
- 7. *Local Horizontal*¹⁶⁴ *and Diagonal Federalism*^{165 166} *Generate Less Formalized Coordinated Policy-making*
 - a. Observations

“[R]ecent years have seen a growing practice of a kind of group standard-setting among sub-national authorities. Coordination has not been lacking, but has arisen from an array of more or less formalized associations of state and local officials. [...] Sub-national entities are actively coordinating with one another to address policy questions of common interest.”^{167 168}
 - b. Horizontal Federalism Networks

“The National League of Cities, the National Governors’ Association, the U.S. Conference of Mayors, the National Association of Attorneys General, the National Conference of State Legislatures, and the National Conference of Chief Justices of State Courts. Similar associations operate across national borders, including United Cities and Local Governments, a transnational association of municipalities, and the International Carbon Action Partnership, in which ten U.S. states and two Canadian provinces have joined a number of national governments to promote a ‘cap-and-trade’ system for carbon emissions.”¹⁶⁹

 - i. ‘Subnational and Majoritarian-Based Importation and Domestication of Foreign Law

Some commentators have referred to these initiatives as the “subnational and majoritarian-based importation and domestication of ‘foreign’ law,” and to the groups that undertake them as “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 [- i.e.,...] ‘translocal organizations of government actors’ [i.e., as] ‘TOGAs.’”¹⁷⁰

 - A. “[T]he 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*” (emphasis added).¹⁷¹
 - B. “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.”¹⁷²

- ii. De facto Group Standard-Setting by Subnational Authorities
“Dynamics of group standard-setting [...] involve the active pursuit of coordination. *Sub-national authorities, in this dynamic, rely on various group structures and processes – networks of a sort – to foster necessary coordination in their otherwise atomistic decision-making.* Externally directed coordination can thus be secured – but simply by a different means. Given as much, such patterns may represent an attractive approach in areas where coordination is a pressing need, such as foreign affairs and international law.”¹⁷³

V. State & Local Government Horizontal & Diagonal Initiatives Shape a ‘New’ Paradigm of Federalism

1. Examples of ‘New’ Horizontal & Diagonal Federalism ¹⁷⁴
 - a. Sudan Accountability & Divestment Act of 2007 (“SADA”)
Congress created the opportunity for states and localities to address the atrocities in Sudan. The U.S. Conference of Mayors, no fewer than five States and other local governments took steps to prohibit investments in the Sudan to condemn/sanction the Sudanese Government for human rights atrocities committed in the Sudan. These actions plus lobbying from the State of Illinois, prompted Congress to enact SADA which permitted state and local divestment measures.
 - i. “In the face of ongoing human rights atrocities in Sudan, perpetrated at least under the blind eye of the Sudanese government, if not with its blessing and support, the U.S. Conference of Mayors and states including Arizona, California, Illinois, Louisiana, and New Jersey, among other subnational authorities, ha[d] taken various steps to sanction or condemn the Sudanese government. Among these, Illinois enacted particularly strong legislation, including a series divestment provisions that barred the state treasurer and state pension funds from investing in (1) entities affiliated with the Sudanese government, (2) companies doing business in Sudan, or (3) banks that do not impose reporting requirements on their loan applicants regarding their of associations with the Sudanese government.”^{175 176}
 - ii. Congress had enacted SADA following the NFTC’s successful judicial challenge of the Illinois sanctions regime in the case of *National Foreign Trade Council v. Giannoulas*.¹⁷⁷
 - A. “Citing the decision in *Crosby v. National Foreign Trade Council* in which the Supreme Court struck down Massachusetts legislation barring state entities from purchasing

goods or services from companies doing business in Burma – National Foreign Trade Council challenged the Illinois act, securing a favorable decision from the U.S. District Court for the Northern District of Illinois.”¹⁷⁸

b. Medellín v. Texas (2008)¹⁷⁹ and the Vienna Convention on Consular Relations¹⁸⁰

This decision functionally placed responsibility on the States to determine the nature and scope of the U.S. compliance with the *Avena* consular diplomat treaty decision. Although the U.S. Supreme Court held that Texas needn’t enforce the ICJ decision in *Avena* and other Mexican nationals regarding the rights of Mexican nationals sentenced to death in Texas under the Vienna Convention on Consular Relations, neither a Presidential memorandum nor the *Avena* decision was held to preempt State limitations on the use of successive habeas corpus petitions.

- i. In *Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*,¹⁸¹ “the ICJ had directed the United States to provide ‘review and reconsideration of the convictions and sentences of the Mexican nationals,’ without regard to any procedural default arising from their failure to raise their Vienna Convention claims in a timely fashion.”¹⁸²
- ii. “The underlying issue in *Medellín* concerned U.S. compliance with an order issued by the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*, regarding the Vienna Convention rights of a group of Mexican nationals sentenced to death in state criminal proceedings. [...] Given the conviction of the Mexican nationals in state court, however, the analysis in *Medellín* focused on whether the U.S. response to the ICJ decision could be dictated by the president – as he sought to do with a memorandum directing state courts to comply with the decision – or had to be left to the states to determine. As to this question, *the Supreme Court ruled for the State of Texas, holding that ‘neither Avena nor the President’s Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions.’* In holding as much, the Court did not dispute that ‘the ICJ’s judgment in *Avena* creates an international law obligation on the part of the United States.’ Absent joint action by the federal executive and legislative branches, however, compliance with that obligation was not for the federal courts to secure” (emphasis added).¹⁸³
- iii. *The “Court can essentially be understood to have sanctioned a critical role for the State of Texas – and the states generally – in determining the nature and scope of U.S. compliance with its Vienna Convention obligations”* (emphasis added).¹⁸⁴ Justice Stevens’ concurrence in this decision strongly suggests such a conclusion:
 - A. “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*” (emphasis added).¹⁸⁵

c. Regional Kyoto Protocol Cap & Trade Initiatives

“More than 800 mayors representing 80 million Americans had endorsed the Kyoto Protocol. At the state level, ten states have joined with the Canadian provinces of British Columbia and Manitoba, the European Commission, individual European countries, and New Zealand to promote transnational ‘cap-and-trade’ initiatives [Climate Protection Agreement (2005)]¹⁸⁶.”¹⁸⁷

i. “U.S. Mayors have signed a revised climate protection agreement¹⁸⁸ that for the first time focuses on local actions to adapt cities to changing climate conditions. [...] The Agreement also urges federal and state governments to enact bipartisan legislation, policies and programs to assist mayors in their efforts to lead the nation toward energy independence.”¹⁸⁹

d. Great Lakes Sustainable Waters Resources Agreement and the Great Lakes - St. Lawrence River Basin Water Resources Compact – “Eight states joined two other Canadian provinces-Ontario and Quebec-in what was termed a Great Lakes Agreement to regulate water diverted from the Great Lakes.”¹⁹⁰

i. Great Lakes Sustainable Waters Resources Agreement (2005)^{191 192}

ii. Great Lakes -St. Lawrence River Basin Water Resources Compact¹⁹³

e. Regional Greenhouse Gas Initiative (“RGGI”) – “During November 2007, Regional Greenhouse Gas Initiative, Inc. (RGGI), ‘a 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 ‘for a mandatory emissions reduction program will take place on September 10, 2008 [...] The states participating in RGGI have agreed to participate in quarterly uniform regional auctions for the allowances that each state will be offering for sale.’”¹⁹⁴

i. “The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont to cap and reduce power sector CO2 emissions.”¹⁹⁵

A. On November 29, 2011, New Jersey withdrew from the MOU, effective January 1, 2012.¹⁹⁶

ii. “RGGI is composed of individual CO2 Budget Trading Programs in each participating state. Through independent regulations, based on the

- RGGI Model Rule (2013) and the Summary of RGGI Model Rule Changes, each state’s CO2 Budget Trading Program limits emissions of CO2 from electric power plants, issues CO2 allowances and establishes participation in regional CO2 allowance auctions.”¹⁹⁷
- iii. “RGGI is the first mandatory, market-based CO2 emissions reduction program in the United States.”¹⁹⁸
 - iv. “EU Member States had been working within the United States [at the state and local levels] to promote adoption of Precautionary Principle-based legislation and regulations,” including RGGI.¹⁹⁹
- f. Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)²⁰⁰
- States and localities also had responded “to the failure of the United States to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). By 2004, 44 U.S. cities, 18 counties and 16 States considered or passed legislation related to CEDAW. Some implemented CEDAW as a matter of local law.”²⁰¹
- i. “The US signed CEDAW in 1979, but the US Senate has not ratified it despite on-going advocacy in favor of ratification from diverse civil society organizations working at the national level. *Los Angeles has since adopted a similar ordinance to San Francisco.* Mayors of both San Francisco and Los Angeles believe that the CEDAW ordinances have materially improved the lives of women in their municipalities and fostered more transparent and accountable governance. [...]” (emphasis added).²⁰²
- g. Compare: The Ongoing Battle of Sustainable Building Codes – **Local Governance Giving Way to State Governance**
- i. “Land use regulation is generally considered part of a state’s inherent police powers. Historically, however, states have delegated virtually all of that authority to local governments. [...] While a few states subsequently took back some of that delegated authority to avoid parochial decisions, protect natural resources, or address other statewide issues, the bulk of land use and zoning authority has remained with local governments.”²⁰³
 - ii. “*This dominance of local control over land use and zoning is beginning to change as states attempt to respond to climate change. State efforts to reduce GHG emissions include (1) putting in place state-wide caps on emissions and mandating that electric distribution utilities obtain renewable energy, (2) promoting or mandating ‘green buildings,’ and (3) overriding local zoning restrictions that limit the ability of landowners to use solar panels, wind turbines, and other sources of renewable energy. In many cases, local governments have been as active as state governments in this area, using their zoning authority to mandate green building development and eliminate barriers to renewable energy. But states are beginning to override local zoning laws that interfere with green development, and this indicates a*

shift away from local governments as the sole authority for land use” (emphasis added).²⁰⁴

- A. “States and cities have committed to various GHG emission-reduction goals through caps or mandates on power plants. For instance, California adopted a statewide cap on GHG emissions in 2006, setting a goal of reducing state emissions to their 1990 levels by 2020, a cut of twenty-five percent.”²⁰⁵
 - B. “Legislatures in at least twenty-two states require electric utilities to obtain some of their electricity supply from renewable sources.”²⁰⁶
 - C. “Massachusetts, New Hampshire, Oregon, and Washington have emission caps and offset programs for new and existing power plants.”²⁰⁷
 - D. “Ten northeastern states are currently signatories to the Regional Greenhouse Gas Initiative (“RGGI”), which establishes limits on CO2 emissions from fossil fuel-fired electricity generation, and states in other regions are in the process of establishing similar programs.”²⁰⁸
- iii. “Efforts by state and local governments to encourage or require ‘green’ construction are also widespread. Green buildings are ‘high performance buildings that (1) use energy, water, and materials more efficiently and (2) use measures relating to siting, design, construction, operation, maintenance, and removal to reduce the building’s impact on [...] the environment.’ *The benchmark for green buildings today is the nonprofit U.S. Green Building Council’s Leadership in Energy and Environmental Design (“LEED”) program. The LEED program evaluates the sustainable features of new construction through a point system, focusing on factors such as location and siting, water efficiency, energy and atmosphere, materials and resources, indoor environmental air quality, and innovation in design. Property owners can petition the U.S. Green Building Council for certification at a silver, gold, or platinum level*” (emphasis added).²⁰⁹
- A. “California, Washington, and Connecticut, mandate that all state government buildings meet LEED criteria.”²¹⁰
 - B. “[O]ver seventy local governments, most notably Boston, Chicago, and New York City, have implemented green building requirements *for municipal government buildings*. Overall, forty-five states and numerous school districts and universities have adopted various LEED initiatives in the form of legislation, executive orders, resolutions, ordinances, policies, and incentives” (emphasis added).²¹¹
 - C. “While adoption of LEED standards for government buildings is now widespread, *requiring LEED certification or other green building requirements for private construction is not*. To be sure, some localities have made efforts to require either

LEED certification or other forms of energy efficiency or use of recycled materials in all new buildings over a certain size. *So far, however, mandatory green building requirements at the state and local level remain rare, largely because they impose additional costs on developers and reduce a developer's ability to obtain benefits from the local government in exchange for implementing green building features*" (emphasis added).²¹²

D. Cf. Commonwealth of Pennsylvania – “In 2004, Pennsylvania adopted a Uniform Construction Code (‘UCC’)s as the common building code for all municipalities in Pennsylvania. The UCC, in itself, does not prevent local governments from passing green building regulations related to the building code as long as: the requirements are equal to or more stringent than the UCC; the local government secures approval from Pennsylvania’s Department of Labor and Industry; and the local government provides appropriate public notice.”²¹³

I. “In *Schuylkill Township v. Pennsylvania Builders Ass'n*,²¹⁴ the Commonwealth Court held that townships must prove that "conditions there were so different from the statewide norm that the uniform standards were not appropriate to use in the Township" in order to satisfy the ‘clear and convincing’ standard for an exception to the UCC. This case [was subsequently] [...] appeal[ed] to the Pennsylvania Supreme Court to determine whether the Pennsylvania law implementing the UCC ‘requires a municipality to prove that there are unusual local circumstances or conditions atypical of other municipalities that would justify’ an exception to the UCC.”²¹⁵

II. The Pennsylvania Supreme Court ultimately affirmed the Commonwealth Court’s decision on appeal.²¹⁶

iv. “With regard to energy efficient appliances, *some states and municipalities have adopted the federal ENERGY STAR program sponsored by EPA and DOE to help save energy costs and reduce GHG emissions through energy efficient products and practices*” (emphasis added).²¹⁷

A. “*Many states and municipalities have enacted ordinances encouraging or requiring that appliances in new construction or new buildings themselves be certified as ENERGY STAR, and at least forty states have enacted building energy codes requiring new and existing buildings undergoing major renovations to meet minimum energy efficiency requirements*” (emphasis added).²¹⁸

B. “Additionally, in recent years *states have taken some steps to prevent local governments from discouraging or prohibiting*

*property owner efforts to implement renewable-energy or green building practices that conflict with land use restrictions. Some states, notably California, Connecticut, and Arizona, have prohibited local governments from using aesthetic zoning to prevent the use of solar panels or other energy efficient or water efficient improvements. Likewise, a Washington court recently upheld the application of a state law allowing the governor to override local zoning decisions that prohibit wind turbines. These developments are significant in that they show states taking back some authority from local governments in the area of land use and zoning for purposes of implementing policies to promote sustainable development and renewable energy” (emphasis added).*²¹⁹

2. *Other Examples of U.S. State & Municipal Adoption of Precautionary Principle-based Local Agenda 21 Initiatives*

a. Biotech-Related Foods, Feed, and Seed; Hazardous Substances; Climate/Energy Efficiency Initiatives –

“During [2005-2008, state governments...] ha[d] been focusing on three broad subject matter areas: (1) biotech-related foods, feed, and seed; (2) hazardous substances such as high volume toxic chemicals, cosmetics, brominated flame retardants and the products containing them, metals found in appliances and electronics, and the collection, recycling, and disposal of such e-waste; and (3) carbon dioxide emissions, mandatory renewable energy standards, and energy efficiency mandates related to climate change and energy. Additionally, each subject area closely corresponds to onerous and expensive EU [sustainable development-orientated] regional regulations or directives known by the following acronyms—GMOs, RoHS, WEEE, Cosmetics, and REACH.”²²⁰

i. “[A] number of U.S. states since 2003 have introduced and/or adopted legislation that, like the EU pre-market authorization, traceability, and labeling rules imposed on biotech food, feed, and related products and processes, strictly regulates the market access of such products. In addition, numerous states and municipalities have proposed seed liability legislation that holds manufacturers and farmers responsible in the event of accidental cross-pollination. And, other states have proposed outright moratoria on the planting of genetically modified (GM) crops and use of biotechnology on animals within their jurisdictions.”²²¹

b. Toxic Chemicals and Other Hazardous Substances Initiatives –

“A number of U.S. states have considered or adopted legislation that mirrors or otherwise references EU chemicals and substances regulations and directives. [...] One such regime is the EU ‘RoHS’ Directive—Restriction of Hazardous Substances. Its stated aim is to reduce and eventually eliminate the amount of chemical pollutants that could potentially leak out of certain products disposed of in landfills. The restriction applies to certain levels of Lead (Pb), Mercury (HG), Hexavalent Chromium (CRVI), Cadmium (Cd),

and several fire retardant chemicals, including Polybrominated Biphenyls (PBBs) and Polybrominated diphenyl ethers (PBDEs). Manufacturers incorporate fire retardants into many different products. The RoHS covers ten categories of electrical products sold or produced and requires producers and sellers to provide substitutes for these substances even if they do not currently exist.”²²²

ii. “Similarly, a number of U.S. states have considered and/or adopted waste disposal, “take-back,” and recycling legislation that mirrors the EU regional Directive on Waste from Electrical and Electronic Equipment (“WEEE”). The WEEE requires manufacturers of these and other products to arrange and pay for the collection, recycling, and reuse of their products. California has unabashedly taken the lead in promoting chemicals management among the states.”²²³

c. Greenhouse Gas Emissions Control Initiatives –

“Those states and municipalities which have remained true to the Precautionary Principle-based orthodoxy of the United Nations’ Kyoto Protocol have proposed and adopted a veritable ‘witches-brew’ of initiatives without providing scientific evidence for their need or economic analyses of their impact on state and municipal economies.”²²⁴

i. “Some aim directly at curbing ‘at-source’ greenhouse gas (GHG) – mostly carbon dioxide – emissions believed to be harmful to both human health and the environment, as well as a primary cause of global warming. Others impose mandatory “fuel-switching” to preferred alternative energy sources (favored renewable portfolio standards) and/or strict energy efficiency and energy conservation requirements. These regulations can be broken down into four different forms: • State Bills and Legislation • Governor-Executive Orders, Agreements, and Rulemakings • Multi-State Initiatives and Policy Resolutions • Local and Municipal Ordinances.”²²⁵

d. Clean Waters/Oceans Policy Initiatives –

“During October 2004, California Governor Schwarzenegger first announced a statewide Ocean Action Plan consisting of a series of newly enacted laws. Chief among them, the California Ocean Protection Act (COPA) intended to establish a U.S. national standard for the management of ocean and coastal resources. The plan’s overall objectives are to: ‘[i]ncrease the abundance and diversity of California’s oceans, bays, estuaries and coastal wetlands[; m]ake water in these bodies cleaner[, p]rovide a marine and estuarine environment that Californians can productively and safely enjoy[; and s]upport ocean dependent economic activities.’ In addition, ‘[i]t directs the assessment of the ocean’s economic contribution to California and the nation[,] [...] develops a forward looking strategy for research, education, and technical advances and [...] improves the stewardship of ocean resources.”²²⁶

i. “Furthermore, the action plan calls for the cabinet-level California Ocean Protection Council, created by COPA, to monitor California’s interests in *Precautionary Principle-informed* international

- organizations, such as the International Maritime Organization, and *international environmental treaties, such as the UN Law of the Sea Convention (UNCLOS), whose ratification by the U.S. Congress without adequate public review and investigation*²²⁷ [former] Governor Schwarzenegger support[ed]. Interestingly, the action plan expressly reference[d] the Precautionary Principle-based environmental and marine laws of the European Union as providing a model of the high level of ocean stewardship to which the State of California aspires” (emphasis added).²²⁸
- ii. “Schwarzenegger followed up this agenda with an announcement, in October 2007, that he had enacted several additional ocean resource protection laws. The laws ‘will maintain and improve the quality of California’s marine environment promote ocean and coastal research, further develop fisheries management plans and guard against the threat of aquatic invasive species.’”²²⁹
- e. Implementation of the Precautionary Principle by U.S. Municipalities –
 “Cities and counties on the West Coast have been the prime movers in adopting the extra-WTO Precautionary Principle. In particular, the jurisdictions in and around San Francisco, Portland, and Seattle have pioneered the enactment of the extra-WTO Precautionary Principle as a governing philosophy.”²³⁰
- i. “Since 2003, the cities of Oakland, Berkeley, and Palo Alto, and Marin and Mendocino Counties, all have adopted or proposed ordinances implementing the extra-WTO Precautionary Principle.”²³¹
 - ii. “[I]n 2004, [...] the Portland City Council and Multnomah County adopted the Precautionary Principle in the development of a new Toxics Reduction Strategy.”²³²
 - iii. “Seattle also adopted the Precautionary Principle as a governing environmental strategy in January 2005 as part of the city’s ‘Comprehensive Plan Towards a Sustainable Seattle.’”²³³
 - iv. In November 2008, “Lyndhurst [...] a municipality of 20,000 people in Bergen County, an old industrial town located in the Meadowlands of northern N.J. [...] adopted a precautionary principle ordinance to guide municipal policy. [...] Section 22-8.1 of Ordinance 2674 reads, ‘The following Precautionary Principle shall be established as the policy of the Township of Lyndhurst: ‘When an activity raises threats of harm to human health, or the environment precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.’ (Wingspread Statement, 1998)”²³⁴
3. *Domestic & Foreign Policy Implications of New Post-Modern Federalism*
- a. State & Local Authorities Acquire Opportunity to be Heard - “*In these cases, rather than silencing sub-national authorities, the discourse of foreign affairs and international law might instead be seen as giving them an opportunity to be heard. It creates, in essence, opportunities for state and local authorities to give wider voice to their policy priorities and interests. In this dynamic, rather*

- than operating as obstacle or constraint, international law, norms, and institutions offer a venue for sub-national authorities to promote their interests” (emphasis added).²³⁵
- b. Subnational Voices Help to Shape U.S. Foreign Affairs & International Law - “The introduction of sub-national voices to the shaping of U.S. foreign affairs and international law *must necessarily impact our engagement with the world. As ‘foreign affairs’ become intertwined with ‘local affairs,’ and the states and localities begin to speak to questions of foreign affairs and international law, a singular voice of U.S. foreign policy becomes increasingly difficult to identify.* Enactment of the Sudan Accountability and Divestment Act and the Court’s decision in *Medellín* highlight as much” (emphasis added).²³⁶
 - c. Subnational Engagement in Foreign Affairs & International Law Cannot be Dictated - “[T]he coordination dynamic at work in the engagement of sub-national authorities with foreign affairs and international law is *horizontal* in nature. Coordination can be achieved, and perhaps can even be expected; it simply cannot be dictated” (underlined emphasis added).²³⁷
 - d. State & Local Authorities’ Policy Coordination at National or Transnational Levels Akin to Group Standard-Setting - In the fields of “climate change [...] food safety, the rights of women, and human rights generally [...] state and local authorities have come together to agree on common policies and to coordinate efforts at promoting their policy choices among other states and localities, at the national level, *or even transnationally. Such efforts might fairly be understood as cases of group standard-setting – mechanisms by which aligned, or at least relatively aligned, policies can be articulated and established.* Rather than the *de jure* standard-setting of national-level decision-making, or the policy-making chaos commonly predicted to arise from devolution of decision-making to sub-national authorities, here we find something different. *Policy alignment is accomplished without resort to centralized coordination*” (emphasis added).²³⁸
 - e. Subnational Horizontal Coordination in Foreign Affairs Can be Effective - “*The familiar notion that a single, national voice is necessary for effective foreign affairs also proves false. Coordination can be achieved, even with the engagement of a multiplicity of state and local voices in foreign affairs.* By contrast with conventional, top-down coordination, this new coordination of foreign affairs is simply horizontal in nature” (emphasis added).²³⁹
 - i. The unleashing of 50 U.S. States and countless more U.S. Cities (orientated toward free market economics, the rule of law, individualism/economic freedom and the protection of exclusive private property rights) into international treaty and global standard-setting forums and initiatives in a coordinated fashion could potentially provide the U.S. with a sufficient counterweight against the overwhelming majority of Nations within the international community that operate pursuant Napoleonic civil law or Communist law and welfare state or socialist market economic systems.^{240 241}

- f. Use of U.S. States & Municipalities as Laboratories for Social Change²⁴² Helps to Create the Perception of an Ostensible Environmental Crisis; However, it has Created a U.S. Constitutional Crisis With Respect to Private Property Rights (Tangible as well as Intangible²⁴³) - This new paradigm of federalism conveys the impression that there is a national environmental crisis that must be immediately addressed. However, “[t]here is no environmental crisis as claimed.²⁴⁴ There is instead a U.S. constitutional crisis concerning private property rights.”²⁴⁵
- i. “The common law and U.S. constitutional tradition – everything is allowed unless it is forbidden – must be compared with the Napoleonic civil law tradition – codifies what the State allows and bans everything else. The traditional foreign policy agenda has expanded to include a variety of social, cultural, labor, environmental and health issues. As a result, there is more regulation of private activity. There is an effort to secure the aggregate communal preference and social esteem. Politics is changing such that what people’s preferences are informed largely by what people perceive to be the preferences of others. There is use of media representations of peoples’ perceptions to effectuate change – e.g., risk perception.”²⁴⁶
 - ii. “*The Facts - Environmentalists and European governments [have been] actively promoting adoption of EU [sustainable development] environmental, health and safety laws, regulations and standards within the U.S., and many of you are who are progressives are proud of this accomplishment.* The message seems to be that ‘people want regulation’ based on a perception of others’ preferences shaped by States, media and norm entrepreneurs who shape public messages. This results in a ‘norm cascade’. Such messengers argue that there is implied authority in the U.S. Constitution to regulate global warming and the general welfare, that there is a ‘Government Protector-in-Chief,’ and that there is an implied ‘property clause’ to protect federal property” (emphasis added).²⁴⁷
 - iii. “In *New York v. United States*,²⁴⁸ the [U.S. Supreme] Court held that Congress may not ‘commandeer’ state regulatory processes by ordering states to enact or administer a federal regulatory program [...] [T]he Court’s opinion by Justice O’Connor declares that it makes no difference whether federalism constraints derive from limitations inherent in the Tenth Amendment, or instead from the absence of power delegated to Congress under Article I; ‘the Tenth Amendment thus directs us to determine [...] whether an incident of state sovereignty is protected by a limitation on an Article I power.’”²⁴⁹
 - A. “In rejecting arguments that New York’s sovereignty could not have been infringed because its representatives had participated in developing the compromise legislation and had consented to its enactment, the Court declared that ‘[t]he Constitution does not protect the sovereignty of States for the benefit of the States

or State governments, [but instead] for the protection of individuals.’ Consequently, ‘State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution’” (emphasis added).²⁵⁰

- iv. “Washington State courts have allowed the precautionary principle to encroach upon the essential nexus test in the context of land use exactions. The essential nexus test requires the government to establish a cause-and-effect connection between development and an identified public problem before placing conditions on development. The precautionary principle, however, endorses regulation of land use in the absence of causation. Although United States Supreme Court precedent requires the government to prove causal connections, recent Washington case law shows that this test of causation is morphing into a less scrutinizing means-end test of rationality. This shift was evident in the recent case of *Citizens’ Alliance for Property Rights v. Sims*. In that case, *Washington courts found the government’s generalized scientific assessments to satisfy the essential nexus test, even though the science did not establish a causal connection between clearing of rural properties and environmental harm due to stormwater runoff*” (emphasis added).²⁵¹

ENDNOTES

¹ 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: <http://www.lawtext.com/lawtextweb/default.jsp?PageID=2&PublicationID=6&pubSection=4#16>;

https://www.academia.edu/525231/EU_Law_and_Sustainability_in_Focus_Will_the_Lisbon_Treaty_Lead_to_The_Sustainable_Development_of_Europe.*Id.*

² See Wikipedia, *Market Socialism*, available at: http://en.wikipedia.org/wiki/Market_socialism.

³ See Joan Veon, *Transcript of Radio Program Interview With Jeb Brugmann From Rio+5* (1997) <http://www.ninehundred.net/~jveon/2JBWCTN.html>.

⁴ See United Nations World Commission on Environment and Development, *Our Common Future*, UN Document A/42/427 (1987), available at: <http://www.un-documents.net/wced-ocf.htm> (also known as the “Brundtland Report” – i.e., the prime author of this document was former Norwegian Prime Minister, Gro Harlem Brundtland).

⁵ 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), *supra* at p. 285.

⁶ *Id.*, at p. 284.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*, at p. 293.

¹⁰ See *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (Dec. 17, 2007), O.J. 2007/C 306/01, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>.

¹¹ See *Treaty on the European Union* (Feb. 7, 1992), available at: http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf.

¹² *Id.*, at Article 2.

¹³ See *Treaty of Lisbon*, *supra* at Art. 2(e).

¹⁴ *Id.*, at Art. 2.5.

¹⁵ *Id.*, at Art. 10A.1(d).

¹⁶ 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), *supra* at p. 294.

¹⁷ *Id.*, at p. 297.

¹⁸ *Id.*, at pp. 297-298.

¹⁹ *Id.*, at p. 298.

²⁰ See United Nations, *Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility* (2004), at pp. 25-27, available at: http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf.

²¹ See Robert Boutilier, *Views of Sustainable Development: a Typology of Stakeholders' Conflicting Perspectives*, Chap. 1, in “New Horizons in Research on Sustainable Organisations” (Greenleaf Publ. 2005), at p. 23, available at: <http://www.greenleaf-publishing.com/content/pdfs/nhbout.pdf> and <http://www.greenleaf-publishing.com/productdetail.kmod?productid=73>. See also *Id.*, at p. 22 (“Inglehart described the differences among three economic and political systems on three dimensions: authority; economy; and values. Societies dominated by traditional values combine the steady-state economics of subsistence agriculture with an all pervasive tribal and religious authority. They hold religious and *communal values*. Societies dominated by *modern values combine a dynamic industrial economy with the authority of a rational–legal nation-state*. Their values highlight achievement motivation and the *disciplined drive for material success*. Societies with a high proportion of people subscribing to *postmodern values combine the post-industrial economics of information- and service-based work with the authority of participatory democracy, global governance networks and autonomous ethical decision-making*. They value tolerance, self-expression, trust and individual rights. Inglehart did not find any societies that were dominated by postmodern values, but the Scandinavian countries came closest”) (emphasis added). *Id.*

²² *Id.*

²³ *Id.*, at 22-23 (“The movement from traditional to modern values is part of the process of modernization. The movement from modern values to postmodern values is called postmodernisation (Harvey 1990; Jameson 1991; McGowan 1991). [...] The progression from traditional to modern to postmodern is one that has been observed *only in*

the history of Western societies. We do not know if other societies will necessarily follow the same progression) (emphasis added). *Id.*

²⁴ See *Id.*, at p. 25 (“The traditional view of the human–environment interface emphasises the local environment. [...] Therefore, such societies must continually seek a sustainable balance between human needs and the natural environment. [...] [T]he freedom subsistence dependence on the immediate natural environment that comes with modernisation. Trade in resources from distant natural environments allows for population concentrations in urban areas that are far beyond the carrying capacities of the natural environment in those locales. [...] [I]t implies the distinctly modern perspective that local environments can be endlessly harvested and polluted without danger because nature always renews itself. It follows that there need be no limits on economic growth. By contrast, traditional and postmodern perspectives emphasise balance instead of growth. [...] [B]oth traditional and postmodern views endorse the need for ecological stewardship while modern societies operate on assumptions of unlimited growth. [...] Because they trade over long distances, modern societies can spread their environmental risks across the natural environments inhabited by themselves and all their trading partners.”) *Id.*

²⁵ *Id.*, at p. 26 (emphasis added).

²⁶ See Stephen R.C. Hicks, *Explaining Postmodernism: Skepticism and Socialism from Rousseau to Foucault*, Scholargy Publ. © 2004), available at: <http://www.stephenhicks.org/wp-content/uploads/2009/10/hicks-ep-full.pdf>.

²⁷ See Nikolay Wenzel, *Ideology, Constitutional Culture and Institutional Change: The EU Constitution as Reflection of Europe’s Emergent Postmodernism*, Romanian Economic and Business Review – Vol. 2, No. 3 (2007), at p. 38, available at: http://econpapers.repec.org/article/raujournal/v_3a2_3ay_3a2007_3ai_3a3_3ap_3a25-47.htm.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Barbara Stark, *Sustainable Development and Postmodern International Law: Greener Globalization?*, 27 William & Mary Environmental Law and Policy Review 137 (2002), at pp. 151, 154, available at: <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1181&context=wmelpr>.

³¹ See Lise-Lotte Hellöre and Björn Vikström, *Newspapers on Sustainable Development – a Postmodern Business Perspective*, 14 Electronic Journal of Business Ethics and Organization Studies, 21 (2009), at p. 23, available at: http://ejbo.jyu.fi/pdf/ejbo_vol14_no2_pages_21-30.pdf.

³² *Id.*

³³ *Id.*

³⁴ 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.

³⁵ *Id.*

³⁶ 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> (“If they subscribe to Enlightenment-era science, they should legitimately ask whether the myriad scientific uncertainties discussed in the Intergovernmental Panel on Climate Change (IPCC) assessment reports, and by extension, the administration’s national climate assessments, provide reason to question whether science has clearly identified the necessary causal links definitively establishing that humankind’s activities are primarily, if not exclusively, responsible for all or most current global warming—both observed prior and future computer modeled global warming. If however, they subscribe to what ‘futurist’ Jeremy Rifkin describes as ‘a radical new approach to science and technology based on the principle of sustainable development and global stewardship of the Earth’s environment’ premised on ‘[t]he precautionary principle, [which] is designed to allow government authorities to respond pre-emptively, as well as after damage is inflicted, with a lower threshold of scientific certainty than has been the rule of thumb in the past,’ they are likely to interpret the uncertainties reflected in the IPCC and administration-developed climate science assessments differently. It would certainly explain why the President has argued that immediate regulatory actions are necessary, notwithstanding the current costs, because the possible future endangerment to human health, the environment and the economy posed by inaction is unacceptable.”) *Id.*

³⁷ 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), *supra* at pp. 499-500.

³⁸ *Id.*, at p. 500.

³⁹ *Id.*

⁴⁰ 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>.

⁴¹ *Id.*

⁴² *Id.*, at p. 10.

⁴³ See 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>.

⁴⁴ *Id.*, at p. 6.

⁴⁵ See Mary Stevens, *The Precautionary Principle in the International Arena*, *Sustainable Development Law and Policy*, (Spring/Summer 2002), 13, 15 at fn 13, available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1278&context=sdlp>.

⁴⁶ 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>.

⁴⁷ 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* (2012), *supra* at p. 1.

⁴⁸ See Michele M. Betsill and Harriet Bulkeley, *Cities and the Multilevel Governance of Global Climate Change*, 12 *Global Governance* (2006) at 141, 142-143, available at: http://sciencepolicy.colorado.edu/students/envs_4100/betsill_2006.pdf.

⁴⁹ *Id.*, at p. 143.

⁵⁰ 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), *supra* at p. 6.

⁵¹ *Id.*

⁵² 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. 252.

⁵³ *Id.*, at p. 253 (“She is now [2002] the President of the World Conservation Union.”) *Id.*

⁵⁴ See Citizen Review Online, *US Cities, Counties begin to listen to citizens and withdraw from ICLEI* (2011), available at: <http://www.citizenreviewonline.org/ICLEI.html> (“According to their website: ‘The organization's name is ‘ICLEI - Local Governments for Sustainability.’ In 2003, ICLEI's Members voted to revise the organization's mission, charter and name to better reflect the current challenges local governments are facing. The ‘International Council for Local Environmental Initiatives’ became ‘ICLEI - Local Governments for Sustainability’ with a broader mandate to address sustainability issues.’”) *Id.*

⁵⁵ *Id.* (“I remember calling ICLEI’s first Chairman, Sir John Chatfield, in late 1990 to secure his support for a meeting with Mr Strong. When I explained my intentions regarding the Local Agenda 21 proposal he said, ‘Yes, but Jeb, just what is this Local Agenda 21?’ I think that he, like many, had doubts about the name and its implications. In the meeting, Strong gave the ‘green light’ to develop the Local Agenda 21 (LA21) idea and to work with his team to find a way to integrate it into the UNCED and the draft Agenda 21. [...] *The LA21 idea would not have gone very far; however, had Strong and his team not been working on a whole section of Agenda 21 dedicated to the roles of different ‘Major Groups’.* During the meeting, we started the process of convincing him to include local government as a Major Group. This meeting was followed by meetings with the head of International Union of Local Authorities (IULA) and the Mayor of Montreal (emphasis added). *Id.*

⁵⁶ *Id.*, at p. 254.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*, at p. 255.

⁶⁰ *Id.*

⁶¹ See Joan Veon, *Transcript of Radio Program Interview With Jeb Brugmann From Rio+5* (1997), *supra* at Statement of Joan Voent, interviewing Jeb Brugmann. See also Statement of Jeb Brugmann, *supra* (“We were surprised, because we were aware that we were having an impact but we never thought of a direct relationship between local government and

the U.S. which is an organization of countries. I got involved with local government in the early 1980s as part of this broader peace and human rights movement.”) *Id.*

⁶² *Id.*, Statement of Jeb Brugmann.

⁶³ *Id.*, Statement of Jeb Brugmann.

⁶⁴ See Joan Veon, *Transcript of Radio Program Interview With Jeb Brugmann From Rio+5* (1997), *supra* at Statement of Joan Voenn, interviewing Jeb Brugmann.

⁶⁵ *Id.*, Statement of Jeb Brugmann (“It is be creating high density that we can finance public transportation systems, recycling systems, all of these things so we want to reap the opportunity of the city to protect the environment.”) *Id.*

⁶⁶ 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.

⁶⁷ See Thomas Hickmann, *The Reconfiguration of Authority in Global Climate Policy-Making: The Interplay between Bottom-Up Governance Arrangements and the International Climate Regime*, presented at the ECPR General Conference (Bordeaux, France Sept. 4-7, 2013), Panel 135: “Fragmentation and Integrity in Global Climate Governance,” at p. 11, available at: <http://www.ecpr.eu/Filestore/PaperProposal/c2ce86c7-e582-4ab9-ae6f-00bbb28c35ae.pdf>.

⁶⁸ 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. 256.

⁶⁹ See UN Documents Cooperation Circles, *Agenda 21, Chapter 28 - Local Authorities' Initiatives In Support Of Agenda 21*, available at: <http://www.un-documents.net/a21-28.htm>.

⁷⁰ *Id.*, at par. 1.

⁷¹ *Id.*, at par. 2.

⁷² *Id.*, at par. 4.

⁷³ See Sustainable Communities Online, *International Council for Local Environmental Initiatives (ICLEI)*, available at: <http://www.sustainable.org/creating-community/inventories-and-indicators/149-international-council-for-local-environmental-initiatives-iclei>.

⁷⁴ 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/>.

⁷⁵ *Id.*, at p. 37.

⁷⁶ *Id.*

⁷⁷ *Id.*, at p. 76.

⁷⁸ *Id.*

⁷⁹ *Id.*, at p. 77.

⁸⁰ *Id.*

⁸¹ *Id.*, at p. 79.

⁸² *Id.*

⁸³ *Id.*, at p. 80.

⁸⁴ *Id.*

⁸⁵ *Id.*, at p. 81.

⁸⁶ *Id.*

⁸⁷ See United States Environmental Protection Agency, *Overview of State and Local Climate and Waste Reduction Initiatives*, available at: <http://www.epa.gov/waste/consERVE/smm/wastewise/pubs/overview.pdf>.

⁸⁸ See United States Environmental Protection Agency, Region 5 Climate Change, *Where You Live - What are Municipalities Doing to Address Climate Change?*, available at: <http://epa.gov/r5climatechange/whereyoulive.html>.

⁸⁹ See United States Environmental Protection Agency, Region 4, *Source Reduction and Recycling: A Role in Preventing Global Climate Change*, available at: http://www.epa.gov/region4/rcra/mgtoolkit/documents/Climate_Change_Fact_Sheet.pdf.

⁹⁰ See United States Environmental Protection Agency, State and Local Climate and Energy Program, *Impacts & Adaptation – Resources*, available at: <http://www.epa.gov/statelocalclimate/state/topics/impacts-adaption.html>. See also U.S. EPA State and Local Climate and Energy Program, U.S. EPA’s State Climate and Energy Technical Forum & Local Climate and Energy Webcast Series, *Climate Change Adaptation for State and Local Governments Overcoming the Uncertainty Barrier to Adaptation* (April 17, 2013), at pp. 7, 11, available at: <http://www.epa.gov/statelocalclimate/documents/pdf/april-17-1-welcome-and-introduction.pdf>.

⁹¹ See, e.g., United States Environmental Protection Agency, *State Climate and Energy Technical Forum Held in Conjunction with Local Climate and Energy Webcast Series* (Dec. 15, 2010), at pp. 6-7, 16, 27-30, available at: http://www.epa.gov/statelocalclimate/documents/pdf/adaptationpart2_transcript_12-15-2010.pdf;

⁹² See United States Environmental Protection Agency, State and Local Climate and Energy Program, *Tools – Inventory Tools: Local Government Greenhouse Gas Protocol*, available at: <http://www.epa.gov/statelocalclimate/local/activities/ghg-inventory.html>.

⁹³ See United States Environmental Protection Agency, Unanswered Questions from U.S. EPA’s Local Climate and Energy Program Webcast Climate Action Planning, *Response #1 to Questions for Neelam Patel and Dan Wallach* (EPA) (Nov. 17, 2011) at p. 3, available at: http://www.epa.gov/statelocalclimate/documents/pdf/qanda2_paper_11-17-2011.pdf.

⁹⁴ See ICLEI Local Governments for Sustainability USA, *Community Protocol Overview*, available at: <http://www.icleiusa.org/tools/ghg-protocol/community-protocol/community-protocol-overview>.

⁹⁵ See United States Environmental Protection Agency, “Unanswered Questions from U.S. EPA’s Local Climate and Energy Program Webcast: Climate Action Plan Evaluation,” at *Response to Question #1 - Questions for Neelam Patel* (EPA) (Dec. 7, 2011), at p. 8, available at: http://www.epa.gov/statelocalclimate/documents/pdf/qanda2_transcript_12-7-2011.pdf.

⁹⁶ *Id.*

⁹⁷ See United States Environmental Protection Agency, “Connecting Climate and Waste to Sustainable Materials Management,” *Presentation of Shannon Davis - EPA Region 9*, at p. 11, available at: <http://www.epa.gov/statelocalclimate/documents/pdf/2-shannon-davis-epa-transcript.pdf>.

⁹⁸ See United States Environmental Protection Agency, Climate Change Adaptation for State and Local Governments Achieving Buy-In for Adaptation Webcast Transcript, *Presentation of Emma Zinsmeister EPA Office of Air and Radiation* (March 21, 2013), at p. 5, available at: <http://www.epa.gov/statelocalclimate/documents/pdf/adaptation-webcast-transcript-3-21.pdf>.

⁹⁹ See United States Environmental Protection Agency, Assessing the Multiple Benefits of Clean Energy: A Resource for States, EPA-430-R-11-014 (Rev. Sept. 2011), at pp. 100, 103, 104, available at: http://epa.gov/statelocalclimate/documents/pdf/epa_assessing_benefits.pdf. See also *Id.*, at p. 113 (“ICLEI updated and re-released this software in April 2009.”) *Id.*

¹⁰⁰ See United States Environmental Protection Agency, *Clean Energy-Environment Guide to Action: Policies, Best Practices, and Action Steps for States* (April 2006), at p. 2-6, available at: http://www.epa.gov/statelocalclimate/documents/pdf/guide_action_full.pdf.

¹⁰¹ See International City/County Management Association (ICMA), *Organization Overview*, available at: http://icma.org/en/icma/about/organization_overview.

¹⁰² See ICMA Program Centers, *About Us*, available at: http://icma.org/en/results/sustainable_communities/about.

¹⁰³ See ICMA, *Sustainable Communities Projects*, available at: http://icma.org/m/en/results/sustainable_communities/projects.

¹⁰⁴ *Id.*, See e.g., James H. Svara, 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>; ICMA, *Local Government Sustainability Policies and Programs, 2010* (2010), available at: http://icma.org/m/en/icma/knowledge_network/documents/kn/Document/301646/ICMA_2010_Sustainability_Survey_Results.

¹⁰⁵ See IBM Center for Business of Government, *Breaking New Ground: Promoting Environmental and Energy Programs in Local Government*, available at: <http://www.businessofgovernment.org/report/breaking-new-ground-promoting-environmental-and-energy-programs-local-government>.

¹⁰⁶ See ICMA, *Small Towns, Rural Communities and Sustainability Projects*, available at: http://icma.org/m/en/results/sustainable_communities/projects/small_towns_rural_communities_and_sustainability.

¹⁰⁷ See Nadejda Mishkovsky, Anna Read, Tad McGalliard, Matthew Dalbey and Stephanie Bertaina, *Putting Smart Growth to Work in Rural Communities*, ICMA (2010), available at: http://icma.org/m/en/icma/knowledge_network/documents/kn/Document/301483/Putting_Smart_Growth_to_Work_in_R

[ural Communities](#) (“ACKNOWLEDGEMENTS - This report was developed under Cooperative Agreement No. PI-83233801 awarded by the U.S. Environmental Protection Agency. [...] The report was written by Nadejda Mishkovsky, an independent consultant; *Matthew Dalbey and Stephanie Bertaina of EPA*; and Anna Read and Tad McGalliard of ICMA”) (emphasis added).

¹⁰⁸ See ICMA Sustainable and Rural Communities Projects, *Local Government Environmental Assistance Network (LGEAN)*, available at: http://icma.org/m/en/results/sustainable_communities/projects/lgean.

¹⁰⁹ *Id.*

¹¹⁰ See ICMA National Brownfields Conference, *Brownfields 2015 – Sustainable Communities Start Here*, available at: http://icma.org/m/en/results/sustainable_communities/projects/brownfields_conference.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See National Research Council Committee on Incorporating Sustainability in the U.S. Environmental Protection Agency, *Sustainability and the U.S. EPA*, National Academies Press (Wash., D.C., 2011), available at: http://www.nap.edu/download.php?record_id=13152# and <https://download.nap.edu/catalog/13152/sustainability-and-the-us-epa>.

¹¹⁴ *Id.*, at Preface, p. vii, p. 1.

¹¹⁵ The U.S.EPA asked the NRC to answer the following four questions: 1) “What should be the operational framework for sustainability for EPA?”; 2) “How can the EPA decision-making process rooted in the risk-assessment/risk management (RA/RM) paradigm be integrated into this new sustainability framework?”; 3) “What scientific and analytical tools are needed to support the framework?”; and 4) What expertise is needed to support the framework?” *Id.*, at pp. 1-2.

¹¹⁶ *Id.*, at p. 29.

¹¹⁷ *Id.*, at p. 49.

¹¹⁸ *Id.*, at p. 50.

¹¹⁹ *Id.*, at p. 72.

¹²⁰ *Id.*

¹²¹ *Id.*, at pp. 72-73.

¹²² *Id.*, at p. 73.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*, at p. 90.

¹²⁶ *Id.*, at p. 106.

¹²⁷ *Id.*

¹²⁸ *Id.*, at p. 108.

¹²⁹ *Id.*

¹³⁰ *Id.*, at p. 122.

¹³¹ *Id.*, at p. 123.

¹³² Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 *Harvard Environmental Law Review* 335, 356-357 (2010), available at: http://www.law.harvard.edu/students/orgs/elr/vol34_2/335-368.pdf.

¹³³ *Id.*, at p. 357.

¹³⁴ See *Missouri v. Holland*, 252 U.S. 416 (1920).

¹³⁵ See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *Missouri Law Review* 1185, 1200-1201 (2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331472. See also *Id.*, at 1201, fn 74 (“As Justice Holmes put it: Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.”) *Id.*

¹³⁶ See Oyez, *Missouri v. Holland*, available at: http://www.oyez.org/cases/1901-1939/1919/1919_609 (“In December 1916, the United States and Great Britain entered into a treaty to protect a number of migratory birds in the U.S. and Canada. Congress passed the Migratory Bird Treaty Act in 1918 in order to facilitate enforcement of the treaty. When

Ray P. Holland, the U.S. Game Warden, threatened to arrest citizens of Missouri for violating the Act, the state of Missouri challenged the treaty. [...] In a 7-to-2 decision, the Court held that the national interest in protecting the wildlife could be protected only by national action. The Court noted that the birds the government sought to protect had no permanent habitats within individual states and argued that '[b]ut for the treaty and the statute there soon might be no birds for any powers to deal with.' The Court thus upheld the exercise of the treaty power and thus found no violation of the Tenth Amendment." *Id.*

¹³⁷ *Id.*, at 1201.

¹³⁸ *Id.*, at 1205.

¹³⁹ *Id.*, at 1204-1205.

¹⁴⁰ *Id.*, at 1212.

¹⁴¹ See Daniel A. Farber, *Climate Change, Federalism and the Constitution*, 50 Arizona Law Review 879, 905, available at: <http://www.arizonalawreview.org/pdf/50-3/50arizrev879.pdf>.

¹⁴² See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

¹⁴³ See Daniel A. Farber, *Climate Change, Federalism and the Constitution*, 50 Arizona Law Review 879 (2008), *supra* at 904-905 ("This Article argues for a bifurcated approach to the constitutional authority of states to pursue climate change mitigation. Courts should reject regulations that violate clear statutory preemption clauses, discriminate against interstate commerce, ban transactions under federal cap-and-trade schemes, or directly interfere with international agreements. In the remaining cases, this Article advocates adoption of a strong presumption of validity for state climate change regulation.") *Id.*, at Abstract, p. 879.

¹⁴⁴ *Id.* at 905 ("The Court found it implausible that Congress would have given such broad authority to the President while allowing states to undermine the effect of his decisions. Also, the state sanctions went further than the federal sanctions. Hence, the Court concluded that the state law interfered with the President's statutory discretion to control economic sanctions against Burma. Moreover, the Court also held that the state law conflicted with the congressional directive for the President to help develop a multinational Burma strategy. In effect, the state law would have undermined the President's ability to engage in effective diplomacy. Indeed, the state law had already resulted in World Trade Organization complaints against the United States, causing conflict rather than promoting international cooperation in dealing with Burma. As the Court said, the state law 'compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.'")

¹⁴⁵ See *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003).

¹⁴⁶ See Daniel A. Farber, *Climate Change, Federalism and the Constitution*, 50 Arizona Law Review 879 (2008), *supra* at 906 ("Under the agreement, the German government agreed to establish a foundation with ten billion deutschmarks of funding to compensate the victims of insurance company recalcitrance, while the U.S. government pledged to try to get U.S. state and local governments (and courts) to respect the agreement as a complete settlement. The agreement did not purport to invalidate state laws, and clearly did not invalidate those laws in and of itself") *Id.*, at 905-906.

¹⁴⁷ See *National Foreign Trade Council, Inc. v. Topinka*, Case No. 1:2006cv04251 (Il. ND 2007), available at: http://www.gpo.gov/fdsys/pkg/USCOURTS-ilnd-1_06-cv-04251/pdf/USCOURTS-ilnd-1_06-cv-04251-1.pdf.

¹⁴⁸ See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185, 1212 (2008), *supra* citing *NFTC v. Crosby*, 530 U.S. 363 (2000) and *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003) (in which the Supreme Court "offered an expansive account of federal power in the realm of foreign affairs, within which sub-national action was significantly constrained.") *Id.*, at 1196, fn 54.

¹⁴⁹ See National Foreign Trade, Council, *Seven States Consider Sanctions Legislation As NFTC Moves against Illinois Law on Sudan*, Press Release (8/17/06), available at: <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&id=236&articleid=2601&category=All>.

¹⁵⁰ *Id.* at p. 1202, citing Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) ("In both categories, he argues, the Court should be seen as defending a "dual federalist" allocation of exclusive, non-overlapping jurisdiction, be it to the states (in the Court's federalism cases) or to the federal government (in its preemption cases)). See also *id.*, citing William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1565-66 (2007)

¹⁵¹ See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185 (2008), *supra* at 1202.

¹⁵² See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185, 1212 (2008), *supra* at 1198, fn 67 ("Of course, the underlying facts that precipitated *Crosby*

and *Garamendi*, as opposed to the doctrine enshrined in the cases' holdings, supports my account of increasing state and local engagement with foreign affairs and international law. That states and localities have persisted in such engagement even after those decisions, and have now begun to find support for that engagement, from both Congress and the Court, might be seen as even stronger evidence of the proposition that sub-national engagement is on the rise and is coming to be more widely accepted.") *Id.*

¹⁵³ See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, Emory Law and Economics Research Paper No. 08-30, Emory Public Law Research Paper No. 08-43, Princeton Law and Public Affairs Working Paper No. 08-008, Columbia University Law School Public Law & Legal Theory Research Paper No. 08-184, (2008) (hereinafter referred to as "Robert Ahdieh Working Papers), at pp. 7-8, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272967.

¹⁵⁴ See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *Missouri Law Review* 1185, 1205 (2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331472.

¹⁵⁵ *Id.*, at 1206 ("In *Holland*, thus, the federal legislation in question essentially predated the treaty obligation that the Court held to authorize its adoption. [...] [Negotiation and adoption of the relevant treaty was not motivated by any international impulse. Rather, it arose out of [a] sense that such a treaty was the best means to defend the underlying U.S. legislation against constitutional challenge. In *Holland*, thus, international law became simply a vehicle to advance domestic policy ends. Rather than internally directed coordination as the means, and externally directed coordination the ends, just the opposite was the case in *Holland*. International law functioned as the means to coordinate domestic policy around a preferred national norm – or, less euphemistically, to impose national norms on sub-national authorities") (emphasis added). *Id.*

¹⁵⁶ See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *Missouri Law Review* 1185 (2008), *supra* at 1186.

¹⁵⁷ *Id.*, at 1187 citing Robert Stumberg, *Preemption & Human Rights: Local Options After Crosby v. NFTC*, 32 *LAW & POL'Y INT'L BUS.* 109, 157 (2000).

¹⁵⁸ See Bonnie A. Malloy, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6 *Environmental & Energy Law & Policy Journal* 63, 80 (2012), available at: <https://www.law.uh.edu/eelpj/publications/6-1/Malloy.pdf>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*, at pp. 80-81.

¹⁶¹ *Id.*, at p. 102.

¹⁶² See Patricia E. Salkin and Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 *Hofstra Law Review* 1049, 1053-1054 (2009), available at: http://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v37n04_cc6.salkin.final.pdf.

¹⁶³ *Id.*, at 1082-1083, citing Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 *N.Y.U. L. REV.* 1692, 1696 (2001).

¹⁶⁴ See Judith Resnik, Joshua Civin and Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)* (2008), 50 *Arizona Law Review* 709, 727 (2008), available at: <http://www.arizonalawreview.org/pdf/50-3/50arizrev709.pdf> ("The term 'horizontal federalism'--state to state interaction-has recently gathered some attention within the legal academy as a useful way to characterize exchanges mediated through the Full Faith and Credit Clause, the Dormant Commerce Clause, and the Fourteenth Amendment.") *Id.*, citing Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 *J. PUB. ADMIN. RES. & THEORY* 535, 536 (2004).

¹⁶⁵ *Id.*, citing 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> ("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 [...] Daniel Farber suggested we call 'diagonal federalism' [...]")

¹⁶⁶ See Hari M. Osofski, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 *Alabama Law Review* 237, 241 (2011), available at: http://www.law.ua.edu/pubs/lrarticles/Volume%2062/Issue%202/OSOFSKY-Diagonal_Federalism.pdf ("The Article makes an original contribution to the scholarly literatures on climate change and on federalism through its development of a theory of diagonal federalism and application of that theory to the Obama Administration's current efforts. The

Article provides an in-depth examination of the Obama Administration's approach to the reduction of motor vehicle greenhouse gas emissions to analyze the nuances of current crosscutting initiatives and provide a model for rethinking their appropriateness and effectiveness") (emphasis added). *Id.*

¹⁶⁷ *Id.*, at 1218.

¹⁶⁸ See also *Id.*, at 270-271 ("Dynamic environmental federalism scholarship analyzes a number of issues that arise in this first [large international] dimension of scale. Some of this literature focuses on how to incorporate the smallest or largest levels of governance into the traditional federal-state conversation. In the climate change context, the smaller-scale conversation typically focuses on how subnational entities, such as cities or states, should be integrated into national and international management of the problem. Kirsten Engel, David Hodas, Alice Kaswan, and Barry Rabe, for instance, are among the scholars who have explored questions of state and local climate change regulation as part of dynamic federalism analyses. Sarah Krakoff has looked even smaller, to consider sublocal activities, and Michael Vandenbergh, Jack Barkenbus, and Jonathan Gilligan even smaller than that, to focus on multiscalar regulatory actions directed at individuals and households. The larger-scale conversation, on the other hand, generally analyzes how federalism schemes should take globalization into account. Tseming Yang and Robert Percival, as well as Robert Ahdieh, among many others, have grappled with these questions in different variations. Some scholars have also examined the full range of the scale issue. For instance, Judith Resnik's work has analyzed the way in which the local and international interact in a climate change federalism model.") *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See Judith Resnik, Joshua Civil and Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)* (2008), 50 *Arizona Law Review* 709 (2008), *supra* at 711. See also Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *Missouri Law Review* 1185 (2008), *supra* at 1218 ("Coordination has not been lacking, but has arisen from an array of more or less formalized associations of state and local officials. In recent work, Judith Resnik has thus highlighted substantial evidence of what she terms 'horizontal federalism' and 'translocal institutionalism.' In these cases, sub-national entities are actively coordinating with one another to address policy questions of common interest.") *Id.*

¹⁷¹ See Judith Resnik, Joshua Civil and Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)* (2008), 50 *Arizona Law Review* 709 (2008), *supra* at 784.

¹⁷² *Id.*, at 738 citing 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).

¹⁷³ See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *Missouri Law Review* 1185 (2008), *supra* at 1217.

¹⁷⁴ *Id.*, at 1214 ("As to both Sudanese sanctions and *Medellín*, thus, resistance to the participation of sub-national authorities in foreign affairs and international law was grounded in a 'chaos theory' of sorts. The engagement of foreign states, the logic goes, cannot be conducted at multiple levels. As an exercise in externally directed coordination, it requires internally directed coordination. No other path to coordination is viable.") *Id.*

¹⁷⁵ See Robert B. Ahdieh Working Papers, *supra* at pp. 7-8.

¹⁷⁶ See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *Missouri Law Review* 1185, *supra* at 1193. ("With some prompting by Illinois' Senate delegation, on December 31, 2007, Congress enacted the Sudan Accountability and Divestment Act of 2007 (SADA) into law. In sharp contrast with past sanctions regimes, SADA explicitly authorizes state and local divestment measures against Sudan. '[A] State or local government may adopt and enforce measures . . . to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in, persons that the State or local government determines . . . are conducting or have direct investments in business operations' in Sudan.") *Id.*

¹⁷⁷ See *Nat'l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

¹⁷⁸ *Id.*

¹⁷⁹ See *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

- ¹⁸⁰ See United Nations, *Vienna Convention on Consular Relations* (1963), available at: http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.
- ¹⁸¹ See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).
- ¹⁸² See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185, *supra* at 1194, citing *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) at 72.
- ¹⁸³ See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185, *supra* at 1194-1195.
- ¹⁸⁴ *Id.*, at 1195.
- ¹⁸⁵ *Id.*, at 1195-1196, citing *Medellín*, 128 S. Ct. 1374 (Stevens, J., concurring).
- ¹⁸⁶ See 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>; Earth Policy Institute, *US Mayors Pledge to Cut Greenhouse Gases While Bush Administration Takes No Action* (May 12, 2006), available at: http://www.citymayors.com/environment/usmayors_kyoto.html.
- ¹⁸⁷ See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185, *supra* at 1196; See Robert B. Ahdieh Working Papers, *supra* at p. 10.
- ¹⁸⁸ See The United States Conference of Mayors, *The U.S. Mayors Climate Protection Agreement* (As presented to the 82nd Annual U.S. Conference of Mayors Meeting, Dallas, 2014), available at: <http://usmayors.org/climateagreement/Final%20USCM%202014%20Mayors%20Climate%20Protection%20Agreement.pdf>.
- ¹⁸⁹ 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/>.
- ¹⁹⁰ See Judith Resnik, Joshua Civin and Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 Arizona Law Review 709 (2008), *supra* at 719-720..
- ¹⁹¹ 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
- ¹⁹² See also Great Lakes - St. Lawrence Water Resources Regional Body, *Agreements*, available at: <http://www.glsregionalbody.org/GLSLRBAgreements.aspx> (“On December 13, 2005, the Great Lakes Governors of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin, and the Premiers of Ontario and Québec signed the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement, and the Governors endorsed the companion Great Lakes—St. Lawrence River Basin Water Resources Compact.”) *Id.*
- ¹⁹³ *Id.*; See also *The Great Lakes-St. Lawrence River Basin Water Resources Compact* (Dec. 13, 2005), available at: http://www.glsregionalbody.org/Docs/Agreements/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf.
- ¹⁹⁴ 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
- ¹⁹⁵ See Regional Greenhouse Gas Initiative, *Program Design*, available at: <http://www.rggi.org/design>.
- ¹⁹⁶ See Regional Greenhouse Gas Initiative, *Program Design Archive*, available at: <http://www.rggi.org/design/history>.
- ¹⁹⁷ *Id.*
- ¹⁹⁸ *Id.*
- ¹⁹⁹ See Lawrence A. Kogan and Slavi Pachovski, *RGGI is Europe’s ‘Back-Door-Man’: How Europe Relies on the Northeast Greenhouse Gas Initiative to Influence U.S. Climate Change Policy* (Nov. 21, 2005), available at: <https://nebula.wsimg.com/e817dd73a97145c5e905c9a231dd8018?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>. See also Press Release, Institute for Trade, Standards & Sustainable Dev., *Britain Leads EU Charge to Undermine U.S. Climate Change Policy: News Article Confirms that Europe, Through Britain, Seeks to Influence U.S. Climate Change Policy Through the Back-Door of State & Local Policymaking* (Jul. 17, 2006), available at: <http://nebula.wsimg.com/6ce3ac76d5725788958172275bcaad7c?AccessKeyId=39A2DC689E4CA87C906D&disposition>

[n=0&alloworigin=1](https://www.itssd.org/); Lawrence A. Kogan, *Beware of the Flying Dutchman When Traveling to Brussels*, Institute for Trade, Standards and Sustainable Development (Aug. 2006), available at: <https://nebula.wsimg.com/d28568d37a3eafc4af396de7b0f39fe6?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁰⁰ See United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW], available at: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

²⁰¹ See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Missouri Law Review 1185 (2008), *supra* at 1196.

²⁰² See Cities for CEDAW, *Welcome to the Cities for CEDAW Weblog* (Jun 15, 2014), available at: <https://citiesforcedaw.wordpress.com/2014/06/05/welcome-to-the-cities-for-cedaw-weblog/> (“By engaging 98 additional U.S. cities in implementing CEDAW, this campaign hopes to increase awareness of, strong support for CEDAW implementation and demonstrate its usefulness as a tool for achieving gender equity: in political participation and representation, in income and earnings, in access to healthcare throughout the life cycle and in public and personal safety. This mobilization of civic engagement for Mayoral action in 2015 should create conditions under which the U.S. senate will ratify CEDAW.”) *Id.*

²⁰³ See Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 Harvard Environmental Law Review 335 (2010), *supra* at pp. 341-342 (“Land use regulation is generally considered part of a state’s inherent police powers. Historically, however, states have delegated virtually all of that authority to local governments. This began in the 1920s, after the federal government published a Standard State Zoning Enabling Act which states subsequently adopted and which granted local governments the exclusive power to zone and to set building and development standards. While a few states subsequently took back some of that delegated authority to avoid parochial decisions, protect natural resources, or address other statewide issues, the bulk of land use and zoning authority has remained with local governments. Moreover, while the federal environmental laws place some restrictions on land use to the extent those uses may adversely affect air quality, water quality, or endangered species, Congress has been very careful to stay away from the direct regulation of land use. Indeed, in the 1970s, when EPA attempted to impose land use and transportation controls in the Los Angeles area to address air pollution, Congress quickly responded to strong political and public backlash by stripping EPA of any authority to include such controls in plans to address statewide air quality.”) *Id.*

²⁰⁴ *Id.*, at p. 342.

²⁰⁵ *Id.*, at p. 343.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*, at pp. 343-344.

²¹² *Id.*, at p. 344.

²¹³ See Shari Shapiro, *Who Should Regulate? Federalism and Conflict in Regulation of Green Buildings*, 34 William & Mary Environmental Law & Policy Review 257, 269-270 (2009), available at: <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1007&context=wmelpr>. See also *Id.*, at p. 270 (“Pennsylvania’s Department of Labor and Industry evaluates proposed changes based on the following criteria: (i) that certain clear and convincing local climatic, geologic, topographic or public health and safety circumstances or conditions justify the exception; (ii) the exception shall be adequate for the purpose intended and shall meet a standard of performance equal to or greater than that prescribed by the Uniform Construction Code; (iii) the exception would not diminish or threaten the health, safety and welfare of the public; and (iv) the exception would not be inconsistent with the legislative findings and purpose described in section 102.”) *Id.*, citing 35 PA. STAT. ANN. § 7210.503 (j)(2)(i)-(iv) (West Supp. 2009).

²¹⁴ See *Schuylkill Twp. v. Pa. Builders Ass’n*, 935 A.2d 575,583 (Pa. Commw. Ct. 2007).

²¹⁵ *Id.*, at p. 270.

²¹⁶ See *Schuylkill Twp. v. Penn. Builders Ass’n*, 7 A.3d 249, 254-255 (Pa. 2010) (“Here, the Commonwealth Court notably perceived: “[The Secretary] simply required the Township to show that conditions there were so different from the

statewide norm that the uniform standards were not appropriate to use in the Township. This was an appropriate inquiry in determining whether local circumstances and conditions justify an exception.’ *Schuylkill Township*, at 583. Evidence showed adherence to the UCC would have been unsafe in Marcus Hook and Carroll Valley Borough, but the Township has failed to show the same potential risk here; it presented no clear and convincing evidence of local conditions jeopardizing public safety such as would justify an exception to the UCC. The Township offers the same evidence it presented to the Secretary, which the trial court and Commonwealth Court reviewed and held substantially supported the Secretary’s factual findings. [...] One may look to municipalities which have successfully enacted sprinkler ordinances for examples of what local circumstances or conditions justify exceeding the UCC under § 7210.503(j)(2)(i); conversely, the local circumstances or conditions herein do not warrant a UCC exception. The Township’s argument that the UCC was merely intended to set a floor, which municipalities may surpass when local conditions warrant it, is meritless. By adopting the UCC, the Legislature intended for uniformity to be the standard, not the exception. The Township’s position conflicts with the UCC, and the facts here stand in great contrast to the facts which justified successful sprinkler ordinances.”) *Id.*

²¹⁷ See Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 *Harvard Environmental Law Review* 335 (2010), *supra* at p. 344.

²¹⁸ *Id.*, at pp. 344-345.

²¹⁹ *Id.*, at p. 345.

²²⁰ 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, 533 (2008), available at: <https://nebula.wsimg.com/1db38ca6345f6bf88b5b35ec35113e24?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²²¹ *Id.*, at pp. 533-534 (summarizing the detailed discussion at pp. 534-553).

²²² *Id.*, at p. 554 (summarizing the discussion at pp. 555-568).

²²³ *Id.*

²²⁴ *Id.*, at p. 568.

²²⁵ *Id.*, at pp. 568-569 (summarizing the discussion at pp. 569-585).

²²⁶ *Id.*, at pp. 585-586.

²²⁷ See Lawrence A. Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe’s Precautionary Principle as U.S. Law*, 7 *Santa Clara J. Int’l L.* 23 (2009), available at: <http://digitalcommons.law.scu.edu/scujil/vol7/iss1/2/>.

²²⁸ *Id.*, at pp. 586-587.

²²⁹ *Id.*, at pp. 587-588.

²³⁰ *Id.*, at p. 592.

²³¹ *Id.*, at p. 593.

²³² *Id.*, at p. 594.

²³³ *Id.*

²³⁴ See Peter Montague, *Town of Lyndhurst Adopts the Precautionary Principle*, *Rachel’s Precaution Reporter* #168 (Nov. 12, 2008), available at: http://www.precaution.org/lib/08/prn_lyndhurst_passes_pp_law.081111.htm.

²³⁵ See Robert Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *Missouri Law Review* 1185 (2008), *supra* at 1209.

²³⁶ *Id.*, at 1210.

²³⁷ *Id.*, at 1211.

²³⁸ *Id.*, at 1219.

²³⁹ *Id.*, at 1221.

²⁴⁰ See Lawrence A. Kogan, *Post-Hearing Written Testimony Prepared Upon Request for U.S. House Science Committee, Subcommittee on Environment, Technology and Standards*, Institute for Trade, Standards and Sustainable Development, (June 3, 2005), available at:

<https://nebula.wsimg.com/15a335ee438efe90535058957d4301d9?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>. See also ITSSD Staff, *Former House Science Committee Staffer Solicited ITSSD Post-Hearing Testimony On EU & China Use of Standards as Trade Barriers, But Ignored Findings*, *ITSSD Journal on International Standards* (March 2, 2008), available at:

<http://itssdinternationalstandards.blogspot.com/2008/03/former-house-science->

[committee-staffer.html](#) (presenting evidence of an e-mail exchange reflecting a solicitation for post-hearing testimony made by former House Science Committee Senior Staffer Olwen Huxley to ITSSD’s CEO during April-May 2005). *Id.*

²⁴¹ See Institute for Trade, Standards and Sustainable Development, *ITSSD Comments in Response to American National Standards Institute ("ANSI") Five-Year U.S. Standards Strategy Review* (April 18, 2005), available at: <https://nebula.wsimg.com/02a328254d63377cf34f1f90df0ab021?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁴² See Temple University Beasley School of Law, *States as Laboratories for Social Change*, A Symposium Sponsored by The Temple Political & Civil Rights Law Review (Oct. 20, 2007), available at: <https://nebula.wsimg.com/45c0669e9bd64ca71e80aabc2176586e?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>. See also *Schedule of Temple Political & Civil Rights Law Review Annual Symposium: STATES AS LABORATORIES FOR SOCIAL CHANGE* (Oct. 20, 2007) at “Panel 3 – Global Warming,” available at: <https://nebula.wsimg.com/ef9f62c1381b7f270367ec42f50d625e?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁴³ 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.*

²⁴⁴ See Lawrence A. Kogan, *What We Should Fear From ‘Negative’ Fear-Based Sustainable Development*, presented at the First Annual Good Neighbor Forum, Greeley, Colorado (Feb. 24, 2007), available at: <https://nebula.wsimg.com/35115e964f753066b2cb4bdf9610bd83?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>. See also Lawrence A. Kogan, *What We Should Fear From ‘Negative’ Fear-Based Sustainable Development - Background Research and Opening Remarks*, presented at the First Good Neighbor Forum, Greeley, CO (Feb. 24, 2007), available at: <https://nebula.wsimg.com/f4781d2a2429aeee7fd360e05213c372?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁴⁵ See Lawrence A. Kogan, *Advocating Individual Rights-Based Federalism Amid a Quickly Converging World*, Outline of Prepared Presentation for The Temple Political & Civil Rights Law Review Symposium: “States as Laboratories for Social Change,” The Temple University Beasley School of Law Philadelphia, PA (Oct. 20, 2007), at p. 1, available at: <https://nebula.wsimg.com/606ba0a5f0e4adc876dfb6749b1fa569?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*, at p. 5. See also Lawrence A. Kogan, *RESEARCH SUPPORTING Advocating Individual Rights-Based Federalism Amid a Quickly Converging World*, Outline of Prepared Presentation for The Temple Political & Civil Rights Law Review Symposium: “States as Laboratories for Social Change,” at The Temple University Beasley School of Law Philadelphia, PA (Oct. 20, 2007), available at: <https://nebula.wsimg.com/4f7589634446f88ad2a63019e1dc9246?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁴⁸ See *New York v. United States*, 112 S. Ct. 2408 (1992).

²⁴⁹ See Lawrence A. Kogan, *RESEARCH SUPPORTING Advocating Individual Rights-Based Federalism Amid a Quickly Converging World*, Outline of Prepared Presentation for The Temple Political & Civil Rights Law Review

Symposium: “States as Laboratories for Social Change,” at The Temple University Beasley School of Law Philadelphia, PA (Oct. 20, 2007), *supra* at p. 18.

²⁵⁰ *Id.*, at pp. 18-19, citing *New York v. United States*, 112 S. Ct. at 2431-32. See also 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* at 530.

²⁵¹ See Brian T. Hodges and Daniel A. Himebaugh, *Have Washington Courts Lost Essential Nexus to the Precautionary Principle? Citizens’ Alliance for Property Rights v. Sims*, 40 Lewis & Clark Environmental Law Review Issue 3 (2014), at Abstract, available at: <http://elawreview.org/articles/volume-40/issue-40-3/have-washington-courts-lost-essential-nexus-to-the-precautionary-principle-citizens-alliance-for-property-rights-v-sims/>.