Local Sustainability Movement
Rides Wave of Evolving Federalism
to ‘Axe’ Private Property Rights

By
Lawrence A. Kogan, Esq.*

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

I. International Sustainable Development and Post-Modernism

The concept of sustainable development (“SD”) originally articulated in 1987 by the United Nations (“UN”) World Commission on Environment and Development has long been recognized as being simultaneously global and local in political scope and ambition. It embodies an ostensibly universally applicable (and, until recently, legally unenforceable) set of twenty-seven intergenerational principles integrating environmental, economic and social concerns enumerated in the 1992 UN Rio Declaration on Environment and Development, including a scientifically progressive and economically harmful Principle 15 known as the “precautionary principle.” In addition, it incorporates a “comprehensive road-map” for national and subnational governmental implementation of those principles known as Agenda 21.

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

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I. International Sustainable Development and Post-Modernism

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

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

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

SD had first been officially embraced and promoted within the United States at the national and international levels via the former Clinton Administration’s President’s Council on Sustainable Development (CSD) and related CSD Task Forces and Reports, and National Security Strategy which had called for promotion of SD abroad. It has since been reaffirmed and expanded by the Obama Administration’s National Security Strategy calling for acceleration of SD, Presidential Policy Directive on Global Development calling for promotion of SD internationally and incorporating the President’s Global Climate Change Initiative, Global Food Security Initiative and Global Health Initiative, the President’s Climate Action Plan, and the interagency Partnership for Sustainable Communities and Environmental Justice Strategy established between the Departments of Housing and Urban Development (“HUD”) and Transportation (“DOT”) and the Environmental Protection Agency (“EPA”).

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

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

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

a. Judicial Deference to Legislative and Executive Expertise

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

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

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

b. Legislative and Executive Preemption of State Interests

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

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

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

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

c. Evolved Federalism and Permitted Assertion of States’ Rights in Domestic Affairs
The Obama Administration also has relied, in part, upon a series of Supreme Court decisions strengthening a state’s right to locally adopt international SD initiatives complimenting, and even, furthering related Executive Branch policies. In doing so, it has learned how to harness the Supreme Court’s more recent anti-New Deal-era post-modern federalism agenda78 pursued by former Chief Justice Rehnquist and current Chief Justice John Roberts, which is intended to curtail an adverse Congress’ preemption of conflicting state laws.79

For example, in New York v. United States,80 the State of New York had challenged the amended Low-Level Radioactive Waste Disposal Act of 1980 which had “required that every state clean up its nuclear waste by 1996.”81 The Court held that “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”82 In United States v. Lopez83 involving a challenge to the Gun-Free School Zones Act of 1990, which precluded as unlawful the possession of firearms in local school zones, the Court held that the statute exceeded Congress’ authority under the Constitution’s Commerce Clause. It reasoned that the statute was a criminal statute, and that the possession of firearms in local school zones did not constitute “an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce.”84 Thereafter, in United States v. Morrison,85 the U.S. Supreme Court held that the Violence Against Women Act of 1994, which “provide[d] a federal civil remedy for the victims of gender-motivated violence,” was unconstitutional under the Commerce Clause and the Fourteenth Amendment. The Court reasoned that “the statute did not regulate an activity that substantially affected interstate commerce[,] nor did it redress harm caused by the state.” 86 It concluded that, “under our federal system,” the criminal remedy for rape which Petitioner had sought “must be provided by the Commonwealth of Virginia and not by the United States.”87 88

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

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

Zschernig had involved an Oregon statute providing for the escheat of the personal property of nonresident aliens who had died intestate unless certain prescribed conditions were satisfied.90 The majority opinion written by former Justice William Douglas had held that the Oregon law was unconstitutional because it entailed the “kind of state involvement in foreign affairs and international relations […] which the Constitution entrusts solely to the Federal Government.”91 Although Justice Harlan agreed with the Court’s conclusion on the ground that a treaty, by virtue of the Constitution’s Supremacy Clause, preempted the Oregon law,92 he objected to its rationale. His concurring opinion argued that the Oregon statute was constitutional on the basis of prior Court precedents “establish[ing] that, in the absence of a conflicting federal policy or violation of the express mandates of the Constitution, the States may legislate in areas of their
traditional competence even though their statutes may have an incidental effect on foreign relations” (emphasis added). 93

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

In Medellín v. Texas, 99 the Roberts Court considered whether the State of Texas was obliged to enforce an International Court of Justice ruling (Concerning Avena and Other Mexican Nationals) 100 which had directed the United States “to provide ‘review and reconsideration of the [criminal] convictions and [death] sentences of the Mexican nationals’” issued under Texas law, where the petitioners had failed to file their claims (writs of habeas corpus) under the Vienna Convention on Consular Relations in a timely manner. 101 A Presidential Memorandum had sought to influence 102 how the United States would “discharge its international obligations” under Avena by having State courts give effect to the decision.” 103 The U.S. Supreme Court ultimately held that “that neither Avena nor the President’s Memorandum constitute[d] directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.” 104 It reasoned that “joint action by the Executive and Legislative Branches […] is] require[d] […] to giv[e] domestic effect to an international treaty obligation under the Constitution—for making law.” 105 Notwithstanding the Court’s holding, Justice Stevens, in his concurring opinion, implored the State of Texas to promptly recognize the critical role it and other states play “in determining the nature and scope of U.S. compliance with its Vienna Convention obligations,” 106 and in “protecting the honor and integrity of the Nation” in international affairs more generally. 107

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

To recall, evolving U.S. Supreme Court federalism jurisprudence has arguably encouraged subnational governments to incorporate a number of domestic and international SD principles into state and local regional compacts, development plans, codes, ordinances, standards and community initiatives, and to consequently, make an impact upon domestic and foreign affairs. The following examples illustrate this point.
Dissatisfied with “the failure of the United States to ratify the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) [...] three cities—Berkeley (2012), Los Angeles (2004), and San Francisco (2003)—have implemented local ordinances that incorporate the provisions of [...] (CEDAW) into local law (known as “CEDAW ordinances”). These ordinances address discrimination against women broadly, as well as the prevention of violence against women specifically.” The Obama Administration has clearly expressed its support for local implementation of CEDAW. A number of other municipalities have adopted CEDAW resolutions based on the model proposed by the U.S. Conference of Mayors, supporting U.S. ratification of CEDAW and calling for city councils to adopt ordinances incorporating CEDAW principles into local law.

During May 2003, former New York Governor George Pataki invited northeastern states to join New York in a regional market for greenhouse gas reductions. During February 2006, he announced the signing of a regional Memorandum of Understanding for the Regional Greenhouse Gas Initiative (“RGGI”), a mandatory agreement entered into initially by seven northeastern states (New York, Connecticut, Delaware, Maine, New Hampshire, New Jersey, and Vermont). The RGGI cooperative agreed “to implement a [mandatory] cap-and-trade program to lower carbon dioxide (CO2) emissions.” During November 2007, the RGGI “nonprofit corporation formed to provide technical and scientific advisory services” to all participating RGGI states ‘in the development and implementation of the CO2 Budget Trading Program,’ announced that the nation’s first auction of carbon offset credits and allowances [would take place in 2008].” As of 2014, nine northeastern states are participating in RGGI. RGGI’s apparent success has spawned the development of other interstate cooperative climate initiatives, including the Western Climate Initiative, the Pacific Coast Collaborative, the Midwest Greenhouse Gas Reduction Accord, the Transportation and Climate Initiative, and North America 2050.

Dissatisfied with Congress’ failure to adopt national climate change legislation, the U.S. Conference of Mayors (USCM), during 2005, crafted a Climate Protection Agreement. It encouraged “mayors to ‘meet or exceed the Kyoto Protocol targets…in their own operations and communities’ through initiatives such as retrofitting city facilities, promoting mass transit, and maintaining healthy urban forests.” It also “called upon federal and state governments to comply with Kyoto targets and […] urged Congress to pass bipartisan legislation to create an emissions trading system and ‘clear emissions limits’ for greenhouse gases.” As of 2014, “1060 mayors from the 50 states, the District of Columbia and Puerto Rico, representing a total population of over 88,962,982 citizens,” have endorsed the agreement.

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

Dissatisfied with the Illinois federal district court’s adverse ruling in National Foreign Trade Council v. Giannoulias, the States of Illinois, Arizona, California, Louisiana, and New Jersey, along with the U.S. Conference of Mayors, successfully lobbied Congress to pass the Sudan
Accountability & Divestment Act of 2007 (“SADA”), which was enacted into law on December 31, 2007. “SADA explicitly authorize[d] state and local divestment measures against Sudan,” and consequently, influenced both U.S. domestic and foreign policy.125

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

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

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

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

“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power’” (emphasis added).131
“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front” (emphasis added).\textsuperscript{132}

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

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\textbf{ENDOTES}


\textsuperscript{9} \textit{Id.}, at p. 297, citing \textit{See} Klaus Bosselmann, \textit{The Principle of Sustainability: Transforming Law and Governance} (Ashgate Publ. 2008), at p. 53, available at: https://books.google.com/books?id=zyqrd9-8BaEC&pg=PA53&lpg=PA53&dq=%22to+promote+long-
term+economic+prosperity+and+social+justice+within+limits+of+ecological+sustainability


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://ieblu.wslq.com/9335ac90ce6cf852e01a6e0a29784?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.


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


This era arguably commenced on April 12, 1937, with the U.S. Supreme Court’s decision in
United States v. Carolene Products, 304 U.S. 144, 152 (1938), the U.S. Supreme Court had held that economic “regulatory legislation
restrictive understanding of the commerce power.” See Bradley C. Bobertz, Blowing the Whistle on Postmodern Federalism, 21 Pace Envtl. L. Rev. 83, 88 (2004),
(discussing in part, how New Deal era laws and programs had had “an expansive view of Congress’s power to legislate in the public interest.”) Id.
48 See ICLEI–Local Governments for Sustainability USA, Sustainability Planning Toolkit (Dec. 2009), available at:
http://www.icfcom.org/m/en/results/sustainable_communities/projects/brownfields_conference available at:
49 See International City/County Management Association, Small Towns, Rural Communities and Sustainability,
50 See Leslie Hom, The Making of Local Agenda 21: An Interview with Jeb Brugmann, Local Environment, Vol. 7,
No. 3, 251 (2002), supra at p. 255; See Adrien Labaye, ICLEI and Global Climate Change: A Local Governments’
Organizational Attempt to Reframe the Problem of Global Environmental Change (2010), MA International
Organization: intergovernmental and non-governmental Organizations, Institut d’Études Politiques de Grenoble,
51 See Bradley C. Bobertz, Blowing the Whistle on Postmodern Federalism, 21 Pace Envtl. L. Rev. 83, 88 (2004),
available at: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1233&context=pelr.
52 See International City/County Management Association, Local Government Environmental Assistance Network
53 See Leslie Hom, The Making of Local Agenda 21: An Interview with Jeb Brugmann, Local Environment, Vol. 7,
No. 3, 251 (2002), supra at p. 255; See Adrien Labaye, ICLEI and Global Climate Change: A Local Governments’
Organizational Attempt to Reframe the Problem of Global Environmental Change (2010), MA International
Organization: intergovernmental and non-governmental Organizations, Institut d’Études Politiques de Grenoble,
54 See Adam Cohen, What’s New in the Legal World? A Growing Campaign to Undo the New Deal, New York
(discussing, in part, how New Deal era laws and programs had had “an expansive view of Congress’s power to legislate in the public interest.”) Id.
55 This era arguably commenced on April 12, 1937, with the U.S. Supreme Court’s decision in National Labor
Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), in which “the Court abandoned an overly
restrictive understanding of the commerce power.” See Bradley C. Bobertz, Blowing the Whistle on Postmodern
Federalism, 21 Pace Envtl. L. Rev. 83 (2004), supra at p. 94. It thereafter proceeded to uphold the constitutionality
of “most forms of congressional action, including the enactment of environmental laws” under the Commerce
Clause and Section V of the Constitution’s Fourteenth Amendment. For example, in United States v. Carolene
Products, 304 U.S. 144, 152 (1938), the U.S. Supreme Court had held that economic “regulatory legislation
affecting ordinary commercial transactions [was] not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it [was] of such a character as to preclude the assumption that it rest[ed] upon some rational basis within the knowledge and experience of the legislators.”


60 467 U.S. at 842-843.

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

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

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

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


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


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


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

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

80 505 U.S. at 150-151.
87 Id.
90 389 U.S. at 429.
91 Id., at 436. See also Id., at 442-443 (holding that “[o]ur system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference[…]and that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.”)
92 Id., at 462 (“I therefore concur in the judgment of the Court upon the sole ground that the application of the Oregon statute in this case conflicts with the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany.”) Id.
93 Id., at 459 (finding that “Oregon ha[d] so legislated in the course of regulating the descent and distribution of estates of Oregon decedents, a matter traditionally within the power of a State”). See also accompanying fn 2/25.
94 See American Insurance Ass’n v. Garamendi, 539 U.S. at 419-420, fn 11.
96 Initially, a court should question “whether the state is ‘tak[ing] a position on a matter of foreign policy’ without a ‘serious claim to be addressing a traditional state responsibility. […] In such a case […] Zschernig’s dormant foreign affairs exclusion might apply” because the state’s actions would fall outside the protection of the Constitution which “vests[ ] power over ‘foreign policy’ in the federal government,” and more specifically, in the President. Id., at pp. 926-927. If the state satisfies the threshold inquiry, a court should then undertake a “conflict preemption analysis [in which] the strength and clarity required of the conflict[…]with federal policy defined by the executive branch]…will vary with the strength of the state’s interest” (i.e., the greater the state’s interest, the greater the conflict necessary to trigger preemption). Id., at p. 928.
98 Id., at pp. 939-941.
101 See Medellín v. Texas, slip op. at 2.
See Medellín v. Texas, slip op. (Stevens J., concur. opinion), at 4 (“By issuing a memorandum declaring that state courts should give effect to the judgment in Avena, the President made a commendable attempt to induce the States to discharge the Nation’s obligation.”) Id.

See slip op. at 32.


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


See Hope Lewis, ‘New’ Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework, in “Bringing Human Rights Home” (Cynthia Soohoo, Catherine Albisa and Martha F. Davis (Eds.)) (Greenwood Publ. Grp. ©2008) at Chap. 5, pp. 138-139, available at: https://books.google.com/books?id=CO5j1ksjRDQC&pg=RA1-PA138&dq=los%20angeles%20%2B%20CEDAW%20ordinance&source=bl&ots=dqYybbDWDN&sig=du6VDbtvDPX1sK8qxcFjAdxNewI&hl=en&sa=X&ei=aRSiVM5VZ5IBPqlgKAD&ved=0CE4Q6AEwCA#v=onepage&q=los%20angeles%20%2B%20CEDAW%20ordinance&f=false (discussing how, during December 2003, “the Los Angeles City Council unanimously passed” a similar ordinance that “provided for local implementation of CEDAW. […] In 2004, a state-level CEDAW modeled on the San Francisco law was also passed by the California Assembly, but was vetoed by Governor Schwarzenegger.”) Id.


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


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


See also Great Lakes-St. Lawrence Water Resources Regional Body, Agreements, available at: http://www.glsrRegionalbody.org/GLSRBAgreements.aspx.

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


Id., at 2431-32.

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