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# “Going Green” the Wrong Way: How Governments Are Unconstitutionally Delegating Their Legislative Powers in Pursuit of Environmental Sustainability

Brandon L. Boxler

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“GOING GREEN” THE WRONG WAY:  
HOW GOVERNMENTS ARE UNCONSTITUTIONALLY  
DELEGATING THEIR LEGISLATIVE POWERS IN PURSUIT  
OF ENVIRONMENTAL SUSTAINABILITY

BRANDON L. BOXLER<sup>1</sup>

INTRODUCTION .....	159
I. INCREASED ENVIRONMENTAL AWARENESS .....	160
II. THE LEED RATING SYSTEM .....	162
III. LEGISLATIVE INITIATIVES .....	163
IV. DELEGATING LAWMAKING POWER TO THE USGBC.....	165
V. CONSTITUTIONAL AND PUBLIC POLICY CONCERNS.....	167
A. THE “WELL ESTABLISHED” RULE AGAINST PRIVATE DELEGATION .....	167
B. STATE CONSTITUTION LEGISLATIVE VESTING CLAUSES .....	169
VI. BRINGING GREEN BUILDING LAWS WITHIN CONSTITUTIONAL LIMITS .....	171
CONCLUSION .....	173

INTRODUCTION

Through either executive or legislative power, state and local governments are rapidly effecting policies that encourage environmental sustainability. Many of these policies have logically targeted buildings and infrastructure, both of which have a significant adverse impact on the environment. In the United States, 38 percent of the nation’s carbon dioxide emissions and 67 percent of its electricity usage come from buildings.<sup>2</sup> New laws and policies are attempting to decrease these figures by requiring construction projects to “go green” and implement sustainable building practices. These legal initiatives have the potential to create substantial environmental benefits by reducing energy consumption, greenhouse gas emissions, and toxic waste. But in a rush to achieve these benefits, many governments have enacted green building laws that lack a firm constitutional basis.

This Article explores the constitutionality of green building laws that require developers to comply with the sustainable construction rating system promulgated by the United States Green Building Council (“USGBC”), a private, non-governmental interest group. The Article

<sup>1</sup> J.D. 2011, William and Mary School of Law; B.A. 2005, magna cum laude, University of Richmond. Beginning this fall, Mr. Boxler will clerk for Judge Edward Earl Carnes on the U.S. Court of Appeals for the Eleventh Circuit. Special thanks to Jill for her endless support and the editors of the *Legislation & Policy Brief* for their hard work preparing this piece for publication.

<sup>2</sup> *Frequent Questions / Green Building*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/greenbuilding/pubs/faqs.htm> (last visited Apr. 23, 2011).

reviews how the USGBC creates the standards for its rating system and then modifies these standards without gaining approval from any governmental body, thereby changing the legal rules with which private citizens and constructors must comply. The Article argues that, because the USGBC can unilaterally change the law, many green building policies undermine political accountability and violate the doctrine of nondelegation. The Article concludes by proposing several ways that governments can enact green building policies without unconstitutionally delegating legislative power or circumventing principles of democratic governance.

#### I. INCREASED ENVIRONMENTAL AWARENESS

The environmental conservation movement is booming. Documentaries such as former Vice President Al Gore's *An Inconvenient Truth* have contributed to the movement's momentum, and grassroots lobbying has also played a significant role in giving the movement mainstream appeal.<sup>3</sup> Environmentalist interest groups are well organized, and their ability to mobilize supporters has given them substantial influence over the political process.<sup>4</sup> In recent years, this influence has grown as environmentalists have supplemented grassroots lobbying with a more traditional and perhaps more powerful technique: campaign contributions. In 2004, environmental interest groups contributed \$2.2 million to political candidates; in 2008, that number jumped to \$5.5 million.<sup>5</sup>

A recent development in the environmental conservation movement is the push for legislation that encourages or mandates "green building," which "is the practice of creating structures and using processes that are environmentally responsible . . ."<sup>6</sup> Green buildings are designed to diminish their adverse environmental impact by "efficiently using energy, water, and other resources."<sup>7</sup> To achieve these goals, engineers and constructors use sustainable materials and imple-

<sup>3</sup> ALAN ROSENTHAL, *THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS, PARTICIPATION, AND POWER IN STATE LEGISLATURES* 230 (1988).

<sup>4</sup> *Id.*

<sup>5</sup> *Environment: Long-Term Contribution Trends*, CENTER FOR RESPONSIVE POL., <http://www.opensecrets.org/industries/totals.php?cycle=2010&ind=Q11> (last visited Apr. 22, 2011). Ninety-five percent of the political contributions in 2008 went to Democrats. *Id.*

<sup>6</sup> *Basic Information / Green Building*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/greenbuilding/pubs/about.htm#1> (last visited Apr. 21, 2011).

<sup>7</sup> *Id.*; see also Christopher P. Perzan, *Environmental Protection: What You Should Know About Green Building*, 20 CHI. BAR ASS'N REC. 38, 39 (Nov. 2006) ("Green design, whether in the context of building construction, product design manufacturing, or some other area, is design that seeks to maximize energy efficiency, minimize resource use and waste production, reduce or eliminate toxic materials in building components, and reduce the overall impact of the building on the environment.").

ment advanced technologies to build and maintain structures with minimal waste.<sup>8</sup>

Similar to the broader environmentalist movement, the popularity of green building is growing.<sup>9</sup> In 2005, the market for green building products and services was approximately \$7 billion.<sup>10</sup> This number is expected to increase to more than \$173.5 billion by the end of 2015<sup>11</sup>—a remarkable 2,379 percent increase in only 10 years. Some of this growth is due to an unprecedented level of governmental initiatives that promote or mandate green construction, often passed at the urging of the environmentalist lobby.<sup>12</sup> All but one of the twenty-five most populated metropolitan regions in the United States are now built around cities with formal green building policies,<sup>13</sup> and all but five states have adopted initiatives to encourage sustainable construc-

<sup>8</sup> See Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 241-42 (2008).

<sup>9</sup> See, e.g., David Knopf, *Green Homebuilding Gaining Popularity Among Consumers, Builders, Experts Say*, KAN. CITY STAR, Feb. 20, 2008, at LB5 (discussing growth in the green home marketplace); see also Erin Madison, *Commercial Buildings More Energy-Efficient as the Greening of Great Falls Blossoms*, GREAT FALLS TRIB. (Mont.), at B1, Nov. 22, 2009, available at <http://www.greatfallstribune.com/article/20091122/BUSINESS/911220304/Commercial+buildings+more+energy-efficient+as+the+greening+of+Great+Falls+blossoms> (describing how “[g]reen commercial construction is becoming increasingly popular”).

<sup>10</sup> *About USGBC*, USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=124> (last visited Apr. 22, 2011).

<sup>11</sup> *Green Building Market To Hit \$173.5 Billion by 2015*, ENVTL. LEADER, July 1, 2010, <http://www.environmentalleader.com/2010/07/01/green-building-market-to-hit-173-5-billion-by-2015/>; cf. *The Green Building Market and Impact Report 2009*, GREENBUILDINGS.COM, Nov. 5, 2009, <http://www.greenbiz.com/buildings/research/report/2009/11/05/green-building-market-and-impact-report-2009> (“Green building activity has sustained impressive growth during 2009, amid a brutal construction market that has decimated other segments of the construction marketplace.”). See generally Keith H. Hirokawa, *At Home with Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment*, 39 ENVTL. L. 507, 509-10 (2009) (noting that the rise in popularity of the “green building movement” has exceeded “virtually all predictions and expectations of its potential”).

<sup>12</sup> See, e.g., *2009 Conservation Lobby Day*, Mo. VOTES CONSERVATION, <http://www.movotesconservation.org/lobbyday.aspx> (last visited July 29, 2010) (discussing a “Conservation Lobby Day” where environmentalist groups lobbied over ninety state legislators to support conservationist policies, including green building laws); *ECRI Legislative Priorities for 2009 in the RI General Assembly*, ENV’T COUNCIL R.I., <http://www.environmentcouncilri.org/news.html> (last visited July 30, 2010) (listing “Promote Green Buildings” as a lobbying priority for the upcoming legislative session). But see Bronin, *supra* note 7, at 260 (arguing that local interest groups, such as unions and manufacturers of conventional building materials, may prevent city governments from enacting green building policies).

<sup>13</sup> *American Cities Embrace Green Buildings*, ENV’T NEWS SERVICE, Nov. 16, 2009, <http://www.ens-newswire.com/ens/nov2009/2009-11-16-091.asp>; cf. BROOKS RAINWATER, AM. INST. ARCHITECTS, *LOCAL LEADERS IN SUSTAINABILITY: A STUDY OF GREEN BUILDING PROGRAMS IN OUR NATION’S COMMUNITIES 4* (2008), available at <http://green.e-arc.com/images/Green-Building-Study.pdf> (reporting that at least 14 percent of all cities with populations over 50,000 have green building programs).

tion practices.<sup>14</sup> Put simply, the country is in the middle of a "green building revolution."<sup>15</sup>

## II. THE LEED RATING SYSTEM

In response to the increased public and political interest in sustainable construction, several organizations formed to standardize and promote green building techniques. None has been more influential than the USGBC,<sup>16</sup> a private non-profit organization based in Washington, D.C.<sup>17</sup> The USGBC promulgates an internationally recognized set of standards for environmentally sustainable construction called the Leadership in Energy and Environmental Design Green Building Rating System ("LEED").<sup>18</sup> A building may achieve one of four hierarchical LEED ratings—"Certificate Level" to "Platinum Level"—depending on the amount of points it receives.<sup>19</sup> Builders earn points by incorporating green construction and design strategies into a project's completion.<sup>20</sup>

Gaining LEED certification is not easy. Green technologies often cost more than the materials traditionally used on construction projects,<sup>21</sup> and green builders must pay additional design, consulting, and certification fees to achieve a LEED rating.<sup>22</sup> Depending on the level of certification sought, these added costs range from one to ten percent, which can mean millions of dollars for larger commercial projects.<sup>23</sup> The payoff, however, can also be significant.<sup>24</sup> Research indicates that

<sup>14</sup> See *Public Policies Adopting or Referencing LEED*, USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852> (last visited Jan. 22, 2011) (proffering that forty-five states have LEED initiatives, including "legislation, executive orders, resolutions, ordinances, policies, and incentives").

<sup>15</sup> See Susan Carpenter, *Al Gore Calls for a Green Building Revolution*, L.A. TIMES, Nov. 12, 2009, [http://latimesblogs.latimes.com/home\\_blog/2009/11/al-gore-calls-for-a-green-building-revolution.html](http://latimesblogs.latimes.com/home_blog/2009/11/al-gore-calls-for-a-green-building-revolution.html) (describing a speech by the Vice President calling for a green revolution).

<sup>16</sup> See Perzan, *supra* note 6, at 39; see also Brian D. Anderson, *Legal and Business Issues of Green Building*, 79 WIS. LAW. 10, 12 (2006) ("[T]he USGBC has virtually cornered the market on the rating of green commercial buildings.").

<sup>17</sup> USGBC, <http://www.usgbc.org/> (last visited Apr. 24, 2011).

<sup>18</sup> Perzan, *supra* note 6, at 39 ("The USGBC has established a set of standards known as the . . . LEED."); see also Anderson, *supra* note 15, at 12-13 (detailing the creation of LEED).

<sup>19</sup> USGBC, LEED 2009 FOR NEW CONSTRUCTION AND MAJOR RENOVATIONS vii (2009).

<sup>20</sup> *Id.* at vi-vii; see also Perzan, *supra* note 6, at 39 (discussing the point categories of the LEED rating system).

<sup>21</sup> Benjamin S. Kingsley, Note, *Making it Easy To Be Green: Using Impact Fees To Encourage Green Building*, 83 N.Y.U. L. REV. 532, 538-40 (2008).

<sup>22</sup> *Id.* at 539.

<sup>23</sup> *Id.*

<sup>24</sup> See Perzan, *supra* note 6, at 39 (discussing how the cost savings of green buildings, such as improved energy efficiency, "can help developers recoup the initial costs over a fairly short period of time"); see also Stuart D. Kaplow, *Does a Green Building Need a Green Lease?*, 38 U. BALT. L. REV. 375, 377-79 (2009) (noting that LEED buildings can command a higher rental rate and sell for more money per square foot than non-LEED properties, and explaining the "dollars and cents case" to justify construction of green buildings).

LEED certification improves a building's value, long-term operating expenses, and occupancy rates.<sup>25</sup>

Due in part to these long-term cost savings, many private companies became interested in green buildings around the turn of the twenty-first century when the USGBC first published the LEED rating system.<sup>26</sup> Another, more cynical reason for this interest was the positive publicity that attends green building projects.<sup>27</sup> Companies recognized that constructing LEED-certified buildings often attracted favorable media attention that could improve their corporate images. In addition to creating workplaces that were certified to be "environmentally responsible, profitable, and healthy," businesses also gained new marketing tools to sell their corporate brand to consumers who were becoming increasingly environmentally aware.<sup>28</sup> By 2003, businesses such as the Ford Motor Company and Warner Brothers were vying for the honor and publicity of constructing "the world's greenest building."<sup>29</sup>

### III. LEGISLATIVE INITIATIVES

It did not take long for lawmakers to recognize the fiscal, public relations, and political advantages of supporting and ultimately enact-

<sup>25</sup> See Stephen T. Del Percio, Comment, *The Skyscraper, Green Design, & the LEED Green Building Rating System: The Creation of Uniform Sustainable Standards for the 21st Century or the Perpetuation of an Architectural Fiction?*, 28 ENVIRONS. ENVTL. L. & POL'Y J. 117, 135-36 (2004); see also Andrew C. Burr, *CoStar Study Finds Energy Star, LEED Bldgs. Outperform Peers*, CoSTAR GROUP, Mar. 26, 2008, <http://www.costar.com/News/Article/CoStar-Study-Finds-Energy-Star-LEED-Bldgs-Outperform-Peers/99818> (reporting that LEED-certified buildings "command rent premiums of \$11.33 per square foot over their non-LEED peers and have 4.1 percent higher occupancy"); Janet Frankston, *Emory University Sees 'Green' Building as Good Investment*, ATLANTA J. CONST., Mar. 15, 2004, <http://www.accessmylibrary.com/article-1G1-118628769/emory-university-sees-green.html> ("Emory spent an extra \$570,000 to make its new Whitehead biomedical research building environmentally friendly, but the university expects to get that money back within six years."); *Green Buildings Bring Higher Rental Rates, Burnham-Moores Center Study Finds*, DAILY COM. NEWS, Feb. 15, 2008, <http://dconline.com/article/id26427>.

<sup>26</sup> Barnaby J. Federer, *Environmentally Conscious Developers Try To Turn Green Into Platinum*, N.Y. TIMES, Aug. 25, 2004, <http://www.nytimes.com/2004/08/25/business/commercial-real-estate-environmentally-conscious-developers-try-turn-green-into.html>; see also Peter Lehner, *Changing Markets To Address Climate Change*, 35 B.C. ENVTL. AFF. L. REV. 385, 386-88 (2008) (discussing the various ways that corporations have focused on becoming more responsible environmental actors).

<sup>27</sup> See, e.g., *Giant Eagle Becomes First LEED-Certified Supermarket in the U.S. Brunswick Store Earns First Environmentally Friendly Supermarket Designation*, PR NEWswire, Dec. 22, 2004, [http://www.accessmylibrary.com/coms2/summary\\_0286-18300784\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-18300784_ITM); *Lake Champlain Chocolates Opens LEED-Certified Packaging & Distribution Facility*, BUS. WIRE, Sept. 19, 2006, <http://www.businesswire.com/news/google/20060919005076/en>; *Office Depot To Build LEED-Certified Store*, MORTGAGE BANKING, Nov. 1, 2007, <http://www.highbeam.com/doc/1G1-172556560.html>.

<sup>28</sup> *Building a Green Business Future*, CABLE NEWS NETWORK, July 13, 2004, <http://www.cnn.com/2004/BUSINESS/07/08/go.greenbuildings/index.html>.

<sup>29</sup> *Id.* The Staples store chain provides a more recent example. The company has refocused its brand identity on environmental sustainability with the goal of attracting a broader consumer base by building "brand equity over a long period of time." *How Staples Is Building a Sustainable Brand*, BRANDWEEK, Nov. 5, 2009, [http://www.brandweek.com/bw/content\\_display/news-and-features/direct/e31b17430d49aa1ec38e9b3d409cb58faf9](http://www.brandweek.com/bw/content_display/news-and-features/direct/e31b17430d49aa1ec38e9b3d409cb58faf9).

ing sustainable building policies.<sup>30</sup> Within ten years of LEED's promulgation, more than thirty states had enacted policies to encourage or mandate some form of green building.<sup>31</sup> Local governments have experienced a similar wave of green building momentum; in 2008 alone, several hundred cities and municipalities implemented sustainable construction policies.<sup>32</sup> Anchorage, Annapolis, Cambridge, and San Francisco are just a few cities that now require certain construction projects to comply with LEED standards.<sup>33</sup>

Rhode Island is one of the states that has recently enacted a green building statute. In November 2009, Governor Donald Carcieri signed into law the Green Buildings Act, which provides that "[a]ll major facility projects of public agencies shall be designed and constructed to at least the LEED certified or an equivalent high performance green building standard."<sup>34</sup> Rhode Island's law is similar to the green building statutes of other jurisdictions.<sup>35</sup>

Another way that states have enacted green building policies is through executive orders. Former Virginia Governor Tim Kaine, for example, signed an executive order requiring all new government buildings greater than 5,000 square feet to conform with LEED silver certification standards.<sup>36</sup> Governors in Arizona,<sup>37</sup> Florida,<sup>38</sup> and other

<sup>30</sup> Cf. Bronin, *supra* note 7, at 246-47 (discussing the various reasons why governments would want to incorporate green building strategies into public projects).

<sup>31</sup> See *Government Resources*, USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779> (last visited Apr. 22, 2011) (noting that forty-five states have LEED initiatives); see also Bronin, *supra* note 7, at 268 (discussing the financial incentives states have created to encourage sustainable building initiatives); Stephen Del Percio, *Revisiting Allied Tube and Noerr: The Antitrust Implications of Green Building Legislation & Case Law Considerations for Policymakers*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 239, 239 (2009) ("Over the past five years, green building legislation has been enacted across the country at the state and local levels with heightened frequency to combat what many legislators and their constituents believe to be an imminent threat resulting from global climate change."); cf. Perzan, *supra* note 6, at 43 ("The pace at which the development and adoption of the green building standards has occurred is remarkable.").

<sup>32</sup> See Kaplow, *supra* note 24, at 381 & n.38.

<sup>33</sup> ANCHORAGE, ALASKA, MUN. CODE tit. 23.05.050 (2008); ANNAPOLIS, MD., MUN. CODE tit. 17, ch. 17.14.040 (2010); CAMBRIDGE, MASS., MUN. CODE art. 22.000 (2010); S.F., CAL., BUILDING CODE ch. 13C, § 1303C101.3 (2010).

<sup>34</sup> R.I. GEN. LAWS ANN. § 37-24-1 (Supp. 2010).

<sup>35</sup> Oklahoma, for example, requires all public buildings over 10,000 square feet to follow LEED guidelines or a similar green building standard. OKLA. STAT. tit. 61, § 213 (2009). Similarly, Washington requires all public projects, regardless of size, to "be designed, constructed, and certified to at least the LEED silver standard." WASH. REV. CODE. ANN. § 39.35D.030 (West Supp. 2010).

<sup>36</sup> Va. Exec. Order No. 82, June 10, 2009.

<sup>37</sup> Ariz. Exec. Order No. 2005-05, Feb. 11, 2005 (requiring all state-funded buildings to achieve LEED silver certification).

<sup>38</sup> Fla. Exec. Order No. 07-126, July 13, 2007 (requiring all new public construction projects to meet LEED platinum certification).

states<sup>39</sup> have issued similar orders directing new publicly-funded construction projects to achieve some form of LEED certification.<sup>40</sup>

#### IV. DELEGATING LAWMAKING POWER TO THE USGBC

The states' recent flood of green policymaking is admirable, yet it is also imperfect. As more states and localities rush to enact or strengthen green building laws, legislators often overlook the importance of carefully constructing these statutes. Many governments, for example, have passed laws that establish a system of penalties and incentives for privately constructed buildings that achieve or fail to achieve LEED certification. The problem with these statutes is that the LEED rating system is created and updated by a non-governmental organization: the USGBC. Thus, the USGBC has the power to alter a statutory scheme that awards or penalizes citizens based on the LEED rating system. In other words, the USGBC has the power to change *the law*.

Consider New Mexico's green building statute. It provides a "sustainable building tax credit" to all LEED-certified commercial and residential construction projects.<sup>41</sup> Commercial buildings that reach LEED silver certification receive a \$3.50 tax credit per square foot for the first 10,000 feet.<sup>42</sup> If the commercial building reaches platinum certification, the tax credit nearly doubles.<sup>43</sup> The New Mexico statute provides an

<sup>39</sup> See, e.g., Ind. Exec. Order No. 08-14, June 24, 2008 (requiring all new state buildings to achieve LEED silver certification); Mich. Exec. Order No. 2005-4, Apr. 22, 2005 (requiring all state-funded construction to satisfy LEED guidelines); R.I. Exec. Order No. 05-14, Aug. 22, 2005 (requiring all new construction and renovations of public schools to achieve LEED silver certification).

<sup>40</sup> Relatedly, another author has suggested that there are "potential antitrust implications of adopting the LEED rating system into state and local level legislation." Del Percio, *supra* note 31, at 242. This argument is rooted in the fact that LEED, like other rating systems, excludes certain types of products, materials, and industries from its compliance requirements. Thus, according to Del Percio, when governments require newly constructed buildings to receive LEED certification, they "enshrin[e] these biases into legislation." Stephen T. Del Percio, *Legal Issues Arising Out of Green Building Legislation*, ENTREPRENEUR, [http://entrepreneur.com/tradejournals/article/192452490\\_2.html](http://entrepreneur.com/tradejournals/article/192452490_2.html) (last visited Apr. 25, 2011). Although a full analysis of Del Percio's argument is beyond the scope of this Article, it is worth noting that official government actions are immune from antitrust liability *even if* they unreasonably restrain trade. *Parker v. Brown*, 317 U.S. 341, 368 (1942); see also *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991); *Hoover v. Ronwin*, 466 U.S. 558, 579-80 (1984). The incorporation of LEED standards into state law is a governmental action that would receive this immunity. And because government actions are immune from antitrust liability, they cannot be used to buttress an antitrust claim against a private organization, as Del Percio suggests. Private and public actions are siloed for the purpose of antitrust analyses. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (holding that a Clayton Act plaintiff could receive damages for the anticompetitive actions that a private organization performed when *drafting* a model electric code, but that "no damages [may be] imposed for the *incorporation* of that Code by any government") (emphasis added); see also *Mass. Sch. of Law at Andover, Inc. v. ABA*, 107 F.3d 1026, 1036 n.8 (3d Cir. 1997) (explaining that the *Allied* Court "specifically excluded from consideration any injury resulting from the adoption of the challenged standards by any government and dealt *only* with the independent marketplace effect of the defendant's conduct") (emphasis added).

<sup>41</sup> N.M. STAT. ANN. § 7-2-18.19 (West Supp. 2010).

<sup>42</sup> *Id.* § 7-2-18.19(C).

<sup>43</sup> *Id.*



even greater incentive to taxpayers constructing new residential properties: LEED silver buildings receive a \$5.00 per square foot tax credit; platinum certification is worth \$9.00 per square foot.<sup>44</sup> Other state green building statutes are similar to New Mexico's, and incentivize or penalize private actors based on whether their construction projects achieve a particular LEED rating.<sup>45</sup>

The District of Columbia's Green Building Act also deserves a brief mention.<sup>46</sup> Starting in 2012, this Act will require all private development projects to furnish surety performance bonds to the District in an amount up to \$3 million.<sup>47</sup> If the project fails to achieve LEED certification, the bond is forfeited to the District as a penalty.<sup>48</sup> This statute may establish the country's largest fiscal penalty for new construction projects that do not comply with LEED standards.<sup>49</sup>

The problem with these laws that operate contingently upon LEED certification is that LEED standards change.<sup>50</sup> "As new methods of recycling, materials reuse, and energy conservation are developed, the design of green buildings will also change."<sup>51</sup> The USGBC frequently alters its rating system to reflect these new scientific advances.<sup>52</sup> Accordingly, what a building must accomplish to achieve LEED certification varies from year to year. These variations *de facto* alter the legal standards of green building laws that mandate LEED compliance. Many states and localities, therefore, have delegated to the USGBC the unencumbered power to change the law. Such delegations are not only bad public policy, they are often unconstitutional.

<sup>44</sup> *Id.* § 7-2-18.19(D).

<sup>45</sup> See, e.g., CONN. GEN. STAT. § 12-217mm (Supp. 2010) (creating a tax credit for all "new construction or major renovation of a building . . . certified by the LEED Green Building Rating System"); N.C. GEN. STAT. § 153A-340 (2010) (authorizing cities and counties to create fees and rebates for new building construction projects in order to "encourage construction that uses sustainable design principles"); N.Y. PUB. AUTH. LAW § 1872 (McKinney Supp. 2011) (creating a "green residential building program" that provides grants and "incentive payments" to residential building owners who achieve certain LEED certifications); VA. CODE ANN. § 58.1-3221.2 (2010) (requiring localities to tax energy efficient buildings at a lower rate).

<sup>46</sup> D.C. CODE § 6-1451.01-6-1451.11 (2009).

<sup>47</sup> *Id.* § 6-1451.05.

<sup>48</sup> See *id.* See generally Chris Cheatham, *White Paper: Revisions to Performance Bond Requirement of the D.C. Green Building Act* (2009), available at <http://www.greenbuildinglawupdate.com/uploads/file/DC%20White%20Paper%20FINAL%20PDF.pdf> (discussing the virtues and vices of the District's performance bond enforcement mechanism).

<sup>49</sup> See Eujung Park, *The U.S. Federal Green Building Policy*, 8 SUSTAINABLE DEV. L. & POL'Y 71, 71 (2007).

<sup>50</sup> See Sarah B. Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 344 (2010) ("The USGBC's LEED standards are not static.").

<sup>51</sup> *Id.*

<sup>52</sup> See *LEED Rating System Development*, USGBC, <https://www.usgbc.org/ShowFile.aspx?DocumentID=8447> ("The hallmark of LEED and its ability to affect market transformation is its continuous improvement cycle that enables the rating system to increase in scope and stringency as market readiness increases and new technologies become widely available.") (last visited Apr. 26, 2011).

## V. CONSTITUTIONAL AND PUBLIC POLICY CONCERNS

### A. THE “WELL ESTABLISHED” RULE AGAINST PRIVATE DELEGATION

Ever since *Carter v. Carter Coal Co.*,<sup>53</sup> courts have consistently accepted the constitutionality of federal government delegations to private actors.<sup>54</sup> The U.S. Supreme Court, for example, upheld the constitutionality of the Agricultural Adjustment Act of 1938,<sup>55</sup> which gave crop producers the power to block or approve federally recommended quotas.<sup>56</sup> Similarly, the D.C. Circuit rejected a challenge to the Davis-Bacon Act,<sup>57</sup> which required government contractors to pay their workers an hourly wage at or above the rate that the local union established.<sup>58</sup>

State and local government delegations, by contrast, continue to undergo searching judicial scrutiny.<sup>59</sup> Many state courts have invalidated private delegations that survived, or would survive, federal court review.<sup>60</sup> The Arizona Supreme Court, for example, invalidated the state’s “Little Davis-Bacon Act,” which charged a private commission with the responsibility of setting a wage rate that contractors on state public works projects must pay their employees.<sup>61</sup> The court reasoned that “[i]t is a well established theory that a legislature may not delegate its authority to private persons over whom the legislature has no supervision or control.”<sup>62</sup> Thus, because the legislature retained no control over the commission’s wage determinations, the statute was an “unlawful delegation of legislative power.”<sup>63</sup>

<sup>53</sup> 298 U.S. 238, 311 (1935) (invalidating a statute that delegated power to producers and miners to fix hours and wages because the delegation was “so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment”).

<sup>54</sup> *But cf.* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 560 (1997) (Brennan, J., dissenting) (“The Government is free, of course, to ‘privatize’ some functions it would otherwise perform. But such privatization ought not automatically release those who perform government functions from constitutional obligations.”).

<sup>55</sup> Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281-1407 (2006).

<sup>56</sup> *See Mulford v. Smith*, 307 U.S. 38, 43 (1939) (noting that a quota proclamation will not go into effect if it is opposed by at least one-third of crop producers).

<sup>57</sup> 40 U.S.C. § 276(a) (1982).

<sup>58</sup> *See Bldg. & Constr. Trades Dept. AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983).

<sup>59</sup> *See, e.g., FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000) (declaring unconstitutional portions of the Texas Water Code that delegated legislative powers to private landowners).

<sup>60</sup> *Cf. A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 155-56 (2000) (observing that “the Supreme Court has had no modern opportunities” to strengthen the private nondelegation doctrine since *Carter Coal*, but noting that many state courts have “recently reaffirmed the importance of the doctrine”).

<sup>61</sup> *Indus. Comm’n of Ariz. v. C & D Pipeline, Inc.*, 607 P.2d 383, 384 (Ariz. Ct. App. 1979).

<sup>62</sup> *Id.* at 385.

<sup>63</sup> *Id.* at 386; *see also Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 199 A.2d 266, 267-68 (Pa. 1964) (“Price regulatory power vests only in the elected legislative body. It may in limited ways be delegated to other responsible governmental agencies, such as public service or utility commissions . . . However, it may not be delegated to private persons. The vesting of a discretionary regulatory power over prices, rates or wages, in private persons violates the essential concept of a democratic society and is constitutionally invalid.”). *But see Kenai Peninsula Borough Sch. Dist. v. Kenai Peninsula Educ. Ass’n*, 572 P.2d 416, 420 (Alaska 1977) (“While courts

The Arizona Supreme Court decision is notable because it provided no specific constitutional basis for invalidating the legislature's private delegation. The court simply struck down the statute because it violated a "well established" rule against governmental delegations to private actors.<sup>64</sup> This judicial approach is consistent with that of other state courts, which rarely cite to a specific constitutional source when invalidating private legislative delegations.<sup>65</sup> Rather, these courts are wary of such delegations because private actors are politically unaccountable for the choices they make with the public power delegated to them.<sup>66</sup>

Green building laws that require compliance with the LEED rating system are thus not necessarily invalid because they violate a particular clause of a state constitution. Instead, the problem with such statutes is that they circumvent the principles of political accountability that are essential to democratic governance. Put another way, these green building laws may not directly violate a constitutional provision, but they are so antithetical to democratic ideals that courts should not let them stand.

This policy rationale makes sense. Members of the USGBC who create and promulgate the LEED standards are not public officials. They are not elected by the public at large, appointed by a public official, or employed by the government in any way. Nor are they subject to the Freedom of Information Act or required to create their rating system in the open, transparent process that society demands of state actors.<sup>67</sup> In short, LEED Steering Committee members have little or no accountability to the general public.<sup>68</sup> Their charge is simply to develop, main-

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in an earlier era often held laws unconstitutional on the ground that they delegated legislative power to private persons or groups . . . the trend has been to uphold such delegations, even when the power is delegated to a group with an economic interest in the decisions to be made.").

<sup>64</sup> *Indus. Comm'n of Ariz.*, 607 P.2d at 385; cf. *Thompson v. Smith*, 154 S.E. 579, 584 (Va. 1930) (stating that the rule prohibiting certain delegations of legislative power is predicated on "a fundamental principle of our system of government").

<sup>65</sup> See, e.g., *Ins. Co. of N. Am. v. Kueckelhan*, 425 P.2d 669, 682 (Wash. 1967) (Hale, J., dissenting) ("The illegality consists . . . in a violation of the constitution that designedly protects us from those unspecified and unidentifiable hazards to self government lurking in a delivery of the powers of government into the hands of private persons or corporations.").

<sup>66</sup> Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit, and Charitable Corporations*, 56 AM. U. L. REV. 455, 462 (2005).

<sup>67</sup> See Schindler, *supra* note 50, at 342-43; cf. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1304 (2003) ("Public law scholars worry that privatization may enable government to avoid its traditional legal obligations, leading to an erosion of public law norms and a systematic failure of public accountability.").

<sup>68</sup> See Bronin, *supra* note 7, at 242 ("LEED is run by a non-profit organization with no accountability to any level of government for changes that may occur in LEED standards over time."); see also Dan Walters, *Private Law Undercuts Democracy*, SACRAMENTO BEE, Aug. 6, 2007, at A3 ("[T]he standards [the USGBC] decrees and the methods it uses to draft those decrees are matters of its internal politics—including influence from those who support it financially—and are shielded from input by the outside world.").

tain, and update the LEED rating system,<sup>69</sup> not to do what is best for “the people.”

This lack of public accountability is the key problem with states delegating some of their legislative function to the USGBC. As the Texas Supreme Court described when striking down a statute giving a private organization the power to levy fines:

[T]he private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.<sup>70</sup>

In sum, poorly crafted green building laws can give the USGBC unchecked public powers that defy the political objectives of democratic governance.

#### B. STATE CONSTITUTION LEGISLATIVE VESTING CLAUSES

In addition to the “well established” rule against private delegation in the states,<sup>71</sup> some courts source their discontent for private delegations in constitutional provisions that vest lawmaking power in the state legislature.<sup>72</sup> Virginia’s constitution is typical: “[t]he legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates.”<sup>73</sup> The Supreme Court of Virginia recently relied on this vesting clause when it struck down a law delegating the power of taxation to an unelected body.<sup>74</sup>

<sup>69</sup> See USGBC: LEED Steering Committee, USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1636> (last visited Apr. 22, 2011).

<sup>70</sup> Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997).

<sup>71</sup> Indus. Comm’n of Ariz. v. C & D Pipeline, Inc., 607 P.2d 383, 385 (Ariz. Ct. App. 1979).

<sup>72</sup> See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 650 (1986).

Due process clauses of state constitutions are another source that courts use to limit private delegations. The argument typically advanced is that “[i]f a delegation creates the opportunity for private interest to dominate the use of governmental power, then those against whom the power is used may well have suffered deprivations without due process.” *Id.* at 661; see also *Jordan v. State Bd. of Ins.*, 334 S.W.2d 278 (Tex. 1960). Other courts source the unconstitutionality of private delegations within principles of separation of powers. See, e.g., *Hous. Auth. of Dallas v. Higginbotham*, 143 S.W.2d 79 (Tex. 1940).

<sup>73</sup> VA. CONST. art. I, § 1; cf. CONN. CONST. art. III, § 1 (“The legislative power of this state shall be vested in two distinct houses or branches; the one to be styled the senate, the other the house of representatives, and both together the general assembly.”).

<sup>74</sup> *Marshall v. N. Va. Transp. Auth.*, 657 S.E.2d 71, 78-79 (Va. 2008) (holding that the vesting clause of the Virginia Constitution permits delegation of taxing authority to only a legislative body of elected officials).

State constitutional vesting clauses reflect the democratic value that "the people" have voluntarily submitted to the power of the legislature.<sup>75</sup> Thus, when the legislature transfers its lawmaking authority to a private organization, the people become bound by laws to which they did not voluntarily submit.<sup>76</sup> This transfer of lawmaking power is precisely what many green building laws entail.

Importantly, state constitution vesting clauses do not prohibit legislatures from ever delegating their lawmaking power. Administrative law is filled with examples of states constitutionally transferring some of their authority to agencies that promulgate rules and regulations.<sup>77</sup> These delegations, however, are *intragovernmental*. Governments may delegate their authority to subordinate agencies, offices, or municipalities without violating their state's vesting clause.<sup>78</sup> But when they delegate rulemaking authority to a non-governmental body such as the USGBC, the legislative power transfers outside the transparent public realm and into the opaque private realm. For that reason, private lawmaking delegations violate the vesting clause; public delegations do not.<sup>79</sup>

One example of the distinction between private and public delegations is *Fink v. Cole*.<sup>80</sup> There, New York passed a law that delegated to a private association the discretionary power to "license owners, train-

<sup>75</sup> See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 381-82 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) ("Political Power is that Power which every Man, having in the state of Nature, has given up into the hands of the Society, and therein to the Governours, whom the Society hath set over it self . . ."); see also Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 4 (1982) ("Locke's insistence that legislators cannot delegate their legislative authority derives from an ancient rule of agency law: power entrusted to an agent as a consequence of his special fitness cannot be delegated, because such a delegation would be inconsistent with the purposes of the initial transfer.").

<sup>76</sup> See LOCKE, *supra* note 75, at 382-83 ("[The] power to make Laws . . . has its Original only from Compact and Agreement, and the mutual Consent of those who make up the Community."); see also *People ex rel. Chi. Dryer Co. v. City of Chicago*, 109 N.E.2d 201, 206 (Ill. 1952) ("The legislature cannot abdicate its functions or subject citizens and their interests to any but lawfully public agencies, and a delegation of any sovereign power of government to private citizens cannot be sustained nor their assumption of it justified.").

<sup>77</sup> See generally Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987) (discussing the potential revival of the delegation doctrine).

<sup>78</sup> *E.g., Marshall*, 657 S.E.2d at 79 ("The General Assembly may by special act delegate the power of taxation to any county, city, town or regional government.").

<sup>79</sup> This discussion of state vesting clauses is admittedly overly simplistic. Some state courts may give the government leeway in delegating legislative power to the private sector or may place restraints on the government's ability to delegate powers to subordinate government agencies. The Commonwealth of Virginia, for example, allows the General Assembly to delegate legislative power only if it also provides sufficient guidance for how to use such power. See, e.g., *Bell v. Dorey Elec. Co.*, 448 S.E.2d 622, 623 (Va. 1994) ("[D]elegations of legislative power are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power."); *Ames v. Town of Painter*, 389 S.E.2d 702, 703-06 (Va. 1990) (requiring that the Board's decision be supported by a record). Regardless, no state green building laws provide any guidance to the USGBC, so these limited cases of acceptable delegation are inapposite.

<sup>80</sup> 97 N.E.2d 873 (N.Y. 1951).

ers, and jockeys at steeplechases and hunts.”<sup>81</sup> The New York Supreme Court struck down the statute as an “unconstitutional relinquishment of legislative power”<sup>82</sup> because it created “essentially a sovereign power” whose members were “neither chosen by, nor responsible to the State government.”<sup>83</sup> The court went on to explain, however, that the legislature’s delegation of this licensing power to a governmental agency *would* survive vesting clause scrutiny.<sup>84</sup>

Green building laws fail for the same reason as the statute in *Fink*: they vest lawmaking power in a private group that is not politically accountable to the general public. *Fink* is also illustrative because it highlights an easy way for states and localities to avoid this constitutional repugnancy—namely, by delegating the power to establish green building standards to a subordinate political agency rather than to the USGBC.

#### VI. BRINGING GREEN BUILDING LAWS WITHIN CONSTITUTIONAL LIMITS

None of this discussion is meant to suggest that governmental reliance on the private sector to assist with setting green building standards is *per se* unconstitutional. Indeed, utilizing standards that the private sector develops can have substantial public policy benefits, not the least of which is flexibility. Bureaucracy typically does not constrain private organizations in the same way as it does state and local governments.<sup>85</sup> Free from this institutional bondage, private organizations can respond to scientific and technological advances in ways that the government cannot.<sup>86</sup> Other policy advantages of using private sector standards include reducing partisan political influence, utilizing private expertise, and conserving limited public resources.<sup>87</sup>

For these functional reasons, governments frequently turn to the private sector to assist with lawmaking.<sup>88</sup> Many states, for example, have legislatively adopted a version of the National Electric Code,

<sup>81</sup> *Id.* at 874.

<sup>82</sup> *Id.* at 876.

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* (implying that, if the licensing power had been transferred to a governmental agency instead of a private corporation, the delegation would not violate the state constitution’s vesting clause).

<sup>85</sup> Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 180 & n.76 (1989).

<sup>86</sup> Lawrence, *supra* note 72, at 654-59; cf. Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U.L. REV. 62, 85-86 (1990) (describing the ability to rely on the expertise of private groups as one advantage of legislative delegation).

<sup>87</sup> Abramson, *supra* note 85, at 179-81; see also Lawrence, *supra* note 72, at 656-57 (“The availability of special expertise may continue as a reason for private delegation . . . . Persons with certain kinds of expertise may be too expensive for government to employ or may prefer less structured work environments than government can offer. Private delegation may be a practical method of obtaining that sort of otherwise unavailable expertise.”).

<sup>88</sup> See generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 546-49 (2000) (discussing the private sector’s participation in governance).

which is promulgated by a private association.<sup>89</sup> Similarly, most states have enacted portions of the model codes drafted by the American Law Institute or the National Conference of Commissions on Uniform State Laws. Such adoptions turn "a technical and complex task often quite beyond the competence of many city councils or even state legislatures over to a specialized private group."<sup>90</sup> And by adopting into law the guidelines of a specialized trade association or think-tank, governments gain the work product of industry experts without spending time or money to understand the intricacies of a specialized field or to maneuver a technically complex bill through the legislative process.

These laws survive constitutional scrutiny only because they adopt a *particular version* of a private organization's technical code.<sup>91</sup> This version-specific—or reproductive—adoption is different than an adoption of *any* guidelines the organization may promulgate in the future. The distinction is critical.<sup>92</sup> When state legislatures adopt a specific version of privately developed standards into law, they do not transfer any future lawmaking power to the private sector. Such legislative action is similar to passing a law that a lobbyist or concerned citizen drafted. By contrast, when legislatures adopt a non-specific version of privately developed standards, they *de facto* codify any and all future laws that a lobbyist or citizen writes. The difference is who exercises the final lawmaking power: the government must retain control over what standards ultimately become law.

Put within the context of green building policy, governments *may* adopt statutes requiring builders to comply with "LEED version 2.1,"<sup>93</sup> for example, but they *may not* adopt statutes requiring builders to comply with "LEED standards."<sup>94</sup> In other words, if states or localities adopt a particular version of the LEED rating system, then they enact into law a static, fixed set of rules, much like when they adopt a portion of the most recent Model Penal Code. But by adopting "LEED standards" generally, governments enact no rules at all; rather, they enact a dynamic set of guidelines that the USGBC may unilaterally alter in the future. To remain on constitutionally firm footing, then, legislatures

<sup>89</sup> See Lawrence, *supra* note 72, at 689 (describing the states' delegation of lawmaking power to the National Fire Protection Agency).

<sup>90</sup> *Id.*

<sup>91</sup> *E.g.*, State v. Crawford, 177 P. 360 (Kan. 1919).

<sup>92</sup> This distinction may also explain why courts have declared wage reference statutes to be unconstitutional delegations of lawmaking power. See *supra* notes 61–63 and accompanying text.

<sup>93</sup> See, *e.g.*, CALABASAS, CAL., MUN. CODE tit. 17, § 17.34.010 (2010) ("The city will use the Leadership in Energy and Environmental Design rating system . . . to assess the environmental sensitivity of new structures in the city that is subject to this chapter. *The Calabasas-LEED system is the United States Green Building Council's LEED Rating System Version 2.0.*") (emphasis added).

<sup>94</sup> Statutes that require compliance with "LEED standards" may also be unlawfully vague. Cf. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 522-23 (2d ed. 2007) ("Building and development codes can be challenged on the basis that they are so vague that they constitute an unlawful delegation of legislative power.").

should avoid broad language requiring compliance with “LEED standards” and should instead require compliance with a specific version of the LEED rating system.

But even this solution falls short of fully returning green building laws to a healthy democratic process because it provides little opportunity for constituents to influence the substantive terms of the ultimate policy. An even better legislative paradigm would be for governments to use a particular LEED version as a model code and then amend those green building standards to better reflect the interests of their constituents.<sup>95</sup> This method has the additional benefit of permitting legislatures to consider the unique zoning, demographic, and geographic demands of their jurisdictions when setting targets for sustainable construction.<sup>96</sup> By doing so, the government would design a unique green building statute that uses the USGBC’s expertise without deferring to the judgments of a private actor at the expense of an open, transparent, and participatory lawmaking process.<sup>97</sup>

#### CONCLUSION

Conceptually, green building laws are good public policy. They not only promote environmental conservation, they also create jobs and strengthen the long-term outlook of the economy.<sup>98</sup> But legislators must carefully fashion these statutes. By requiring construction projects to satisfy “LEED standards,” some green building laws remove political accountability, transparency, and legitimacy from the legislative process and unconstitutionally delegate public power to the private sector. In order to return these laws to sound constitutional footing, state legislatures should delegate their standard-setting power to a public agency, adopt into law a specific version of the LEED rating system, or use the system as a starting point for the development of jurisdiction-specific green building policies. Only then can states reap the benefits

<sup>95</sup> Cf. Carl J. Circo, *Using Mandates and Incentives To Promote Sustainable Construction and Green Building Projects in the Private Sector: A Call for More State Land Use Policy Initiatives*, 112 PENN ST. L. REV. 731, 763 (2008) (explaining that “LEED standards are only intended to be relevant in limited circumstances,” and noting that some green building policies are “unsuitable” for all building codes); Kingsley, *supra* note 20, at 547-49 (explaining the downside of inflexible green building standards, including a “negative effect[] on development”).

<sup>96</sup> An example of this “model code” approach is Indianapolis, Indiana, which permits developers to receive a 30 percent rebate if they incorporate certain green building technologies, yet does not require compliance with the full ambit of LEED standards. Indianapolis Green Building Incentive Policy, INDY.GOV, Aug. 1, 2010, <http://www.indy.gov/eGov/City/DCE/Documents/Indianapolis%20Green%20Building%20Incentive%20Policy%20-%20Updated%208-01-10.pdf>.

<sup>97</sup> Cf. Schindler, *supra* note 50, at 342 (“Encouraging local governments to design their own green building regimes, which take into account their own localities’ concerns and desires, will help to achieve the regime goal of legitimate process, resulting in greater public notice, incentive to participate, and voice.”).

<sup>98</sup> See, e.g., Press Release, USGBC, *New Study: Green Building To Support Nearly 8 Million U.S. Jobs Over Next 4 Years* (Nov. 11, 2009) (“[G]reen building will support 7.9 million U.S. jobs and pump \$554 billion into the American economy . . . over the next four years.”).



of sustainable construction without compromising the democratic values that underlie the American system of government.