

NOTE

LEADING THE WAY IN UNCONSTITUTIONAL DELEGATIONS OF LEGISLATIVE POWER: STATUTORY INCORPORATION OF THE LEED RATING SYSTEM

I. INTRODUCTION

“Green building”¹ was “[o]nce considered to be a part of the Left Coast fringe, along with hot tubs and macramé,” but this perception has changed dramatically in the minds of the American people.² The green building movement has roots in the 1970s, when there was a major push to find innovative ways to collectively consume less oil due to the dramatic increase in prices.³ Today, green building is becoming, if it is not already, part of the mainstream construction industry.⁴ Enthusiasm

1. “Green building” is a term of art that couples environmentally-sustainable construction practices with environmentally-conscious building design. See Christopher P. Perzan, *What You Should Know About Green Building*, CBA REC., Nov. 2006, at 38, 39 (“Green design . . . 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.”). There is, however, much controversy involved with defining green building and no set or accepted definition has become universal. See Jennifer Bowmar & Laurie Wireman, *Hopping on the Green Wagon: How Corporations Can Overcome Potential Political and Legal Pitfalls Associated with Sustainable Initiatives*, 76 U. CIN. L. REV. 1479, 1489 (2008).

2. Patricia Leigh Brown, *It Happened Here First*, N.Y. TIMES, Nov. 17, 2005, at F1; see also Lisa Chamberlain, *Serving Architects, Consultants in Everything Green Become Mainstays*, N.Y. TIMES, Aug. 27, 2008, at C6 (“Going green used to be part of just a handful of organizations’ mission statements, but now it’s become part of everyone’s agenda . . .”) (quoting Ashley Katz, Communications Director for the Green Building Council); William Neuman, *It’s Getting Easier to Be Green*, N.Y. TIMES, Aug. 13, 2006, at J1 (“If faced with the choice of renting or buying two similar apartments . . . consumers increasingly will opt for one with green features, even if it comes at a higher price.”); Robin Pogrebin, *Putting Environmentalism on the Urban Map*, N.Y. TIMES, May 17, 2006, at 7 (“The green building movement is catching on in pockets nationwide.”).

3. See *Green Building: Basic Information*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/greenbuilding/pubs/about.htm#4> (last updated Feb. 16, 2010).

4. See Marc Erpenbeck & Colleen Schiman, *The Past, Present, and Future of Green Building*, NAT. RESOURCES & ENV’T, Fall 2009, at 33, 63 (discussing the possibility of green building becoming standard construction practice).

for green building is not concentrated solely in United States,⁵ but has similarly spread around the globe.⁶ Green building is becoming increasingly common in the construction industry,⁷ and the trend is predicted to continue well into the future.⁸

The green building trend has resulted in lawmaking bodies delegating legislative power to the U.S. Green Building Council (“USGBC”).⁹ The USGBC has become a de facto lawmaker through the incorporation of the Leadership in Energy and Environmental Design (“LEED”) rating system in statutes, ordinances, and executive orders.¹⁰ This is a largely overlooked subversion of our democratic process; the dispersal of lawmaking authority creates a serious lack of accountability to the public, which ultimately amounts to an unconstitutional delegation by our legislatures.¹¹

Legislation continues to be adopted at the state and local levels that mandates compliance with the LEED rating system.¹² The USGBC proudly advertises that governmental bodies across the country are adopting the LEED rating system as their rule and guide for defining green buildings.¹³ The legislation at issue requires buildings to abide by LEED standards to different degrees,¹⁴ but all such green building legislation incorporating LEED standards requires some extent of

5. See Rodney Taylor & Howard Tollin, *Present and Future Risks of the Green Construction Movement: Addressing Risks in the Design, Construction and Operation of Green Buildings*, N.Y. ENVTL. LAW., Summer 2009, at 21, 21-22 (describing how various groups—such as commercial building owners, corporations, state and municipal governments, private construction firms, and workers of all ages—have developed an interest in green building due to its perceived benefits).

6. The green building industry is growing to varying degrees around the world and there are sharp contrasts between green building practices in North America and Europe as compared with those in Asian nations such as China and India. See *id.* at 21.

7. Erpenbeck & Schiman, *supra* note 4, at 33.

8. Taylor & Tollin, *supra* note 5, at 21.

9. See *infra* Part III.B.

10. See *infra* Part III.B.

11. See *infra* Part III.B.

12. See Patricia E. Salkin, *New York Climate Change Report Card: Improvement Needed for More Effective Leadership and Overall Coordination with Local Government*, 80 U. COLO. L. REV. 921, 938 (2009) (describing the LEED rating system as the “most popular rating system” for green building); Edna Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. ENVTL. L.J. 1, 11-12 (2008) (describing how Boston, Massachusetts, Washington, D.C., and Babylon, New York adopted the LEED rating system via statute).

13. See *LEED Rating Systems*, U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222> (last visited Mar. 1, 2011).

14. See Salkin, *supra* note 12, at 939 (“The ordinances also differ in their exact requirements, for example, whether actual certification by the [USGBC] is necessary, which level of LEED criteria must be sought, or whether waivers are available.”).

compliance with criteria set by USGBC and our elected representatives.¹⁵

The American people should be assured that lawmaking power will be retained in our legislative bodies by the court-made nondelegation doctrine, the crux of which is political accountability.¹⁶ Congress, our nation's legislature, is constitutionally permitted to delegate authority to federal agencies, and it has been doing so since the founding of our nation.¹⁷ Past delegations have been to the concordant branches and agencies that are carrying out the will of Congress and thereby the will of the people.¹⁸ However, when too much authority is dispersed by a legislature, the decision-making process and lawmaking function are no longer accountable to the public through their elected legislators.¹⁹

The privatization of government functions does not always result in a serious divergence from our constitutional principles.²⁰ Green building legislation can have a promising future with the assistance of the USGBC. There are advantages to having the USGBC develop the technology and standards for a more environmentally-sound built environment, including the cost of research and development being borne by the private rather than public sector.²¹ The courts will

15. See, e.g., *id.* at 939-41 (describing a variety of green building ordinances, all of which incorporate the LEED rating system).

16. See Thomas R. McCarthy & Richard W. Roberts, Jr., *American Trucking Associations v. Environmental Protection Agency: In Search and In Support of a Strong Nondelegation Doctrine*, 23 WHITTIER L. REV. 137, 178-79 (2001) (“[T]he [nondelegation] doctrine promotes accountability and better social policy, because it requires that Congress be the decision makers to the extent possible.”); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 335-36 (1999) (“[T]he [nondelegation] doctrine is designed to promote a distinctive kind of accountability—the kind of accountability that comes from requiring specific decisions from a deliberative body reflecting the views of representatives from various states of the union.”); Robert Theuerkauf, Note, *An Effort to Revive the Nondelegation Doctrine: D.C. Court of Appeals Makes a Fundamental Mistake and Sets Back Congress and the Environmental Protection Agency’s Efforts to Further Protect Human Welfare*, 39 BRANDEIS L.J. 869, 873 (2001) (“A democratic government stands for the idea of ‘accountable decisionmaking.’”).

17. See Sunstein, *supra* note 16, at 330-32.

18. See Theuerkauf, *supra* note 16, at 873.

19. See *id.* (“One scholar noted that ‘[w]hen Congress legislates policy, its decisionmaking is constrained by the political process. But when Congress delegates its legislative power, it attenuates this constraint.’” (quoting Michael Ezra Fine, Note, *Rethinking the Nondelegation Doctrine*, 62 B.U. L. REV. 257, 258 (1982))).

20. See Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 44 (1995) (“It is now well-settled that cities are free to contract with private entities for the performance of governmental services.”).

21. The USGBC uses its LEED committees and green building experts to assess the implementation of green technology as incorporated in the LEED rating system, thereby bearing the costs of research and development. See *LEED Technical Committee*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1792> (last visited Mar. 1, 2011); *infra* notes 246-47 and accompanying text (discussing how using the LEED standard could shift costs onto the

ultimately have to rule on the future of the USGBC's role in setting the standards for green building legislation.²²

Part II of this Note discusses the background of green building and its growing role in America's public and political landscapes. In particular, Part II examines the USGBC organization in greater detail and its LEED green building rating system. This Part also examines specific examples of the LEED rating system implemented in statutory form. Part III.A provides an overview of the nondelegation doctrine, its history and application. Part III.B applies the nondelegation doctrine to laws incorporating the LEED rating system and highlights some particularly troubling instances of unconstitutional delegations of lawmaking power to the USGBC through the incorporation of the LEED system. Part IV discusses possible benefits and potential drawbacks intrinsic in the privatization of green building regulations; it then goes on to suggest possible solutions for this serious constitutional issue. Part V concludes by emphasizing that our democratic system of government not only allows for, but actively encourages, political discourse and debate; discussion is especially warranted when it comes to the momentous and contentious environmental movement as applied to the growing green building trend in America.

II. RIDING THE WAVE OF GROWING AWARENESS TO ENVIRONMENTAL CONCERNS: GREEN BUILDING, THE USGBC, AND THE LEED RATING SYSTEM

Green building is becoming a driving force in the development and construction industries due to increased political support²³ and a growing awareness that the American general public is composed of consumers who are more alert to environmental concerns than ever before.²⁴ More and more attention has been focused on the environment since the birth of the environmental movement in the 1960s.²⁵ With the global

USGBC); cf. E. S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 894 (1987) (stating that "cost savings" was one of the top reasons why public officials contract for services).

22. See *infra* Part III.B (arguing that the USGBC has been delegated an unconstitutional level of legislative power).

23. See, e.g., Nat'l Archives & Records Ass'n, *The Greening of the White House*, ADMIN.'S CLIMATE CHANGE PROGRAM, <http://clinton3.nara.gov/Initiatives/Climate/greeningsummary.html> (last visited Mar. 1, 2011) (describing President Bill Clinton's "Greening of the White House Initiative").

24. See, e.g., Brown, *supra* note 2 ("Many architects . . . are now embracing green designs because their clients are demanding it.").

25. See 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 Incentives*, 112 PENN. ST. L. REV. 731, 742 (2008).

construction boom,²⁶ awareness dramatically increased²⁷ regarding the substantial impacts of conventional construction.²⁸ This has resulted in federal agencies showing greater concern for, and more seriously considering, the substantial impacts that our built environment has on climate change.²⁹ This Part lays out the history of the green building movement, the USGBC, and the LEED rating system, and exhibits some instances of how influential the USGBC has become in defining the green building movement through the adoption of LEED standards in law.

A. *The Green Building Movement Gathers Political and Popular Support*

At the heart of its idealistic definitions,³⁰ green building is primarily concerned with decreasing the environmental impacts of construction and reducing the long-term environmental consequences of the built environment.³¹ Initially, the cost of building green may be higher than that of conventional construction,³² but the actual price increase is often less than typically expected.³³ Building owners have learned that green building is not only good for the environment, but more importantly for

26. See Taylor & Tollin, *supra* note 5, at 21 (discussing how building stock is likely to double by 2030 in China).

27. See Brown, *supra* note 2 (describing how the “culture” of architecture has changed to embrace green building).

28. See Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 243 (2008) (describing some of the impacts of conventional construction).

29. See, e.g., *Green Building: Frequent Questions*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/greenbuilding/pubs/faqs.htm#1> (last updated Dec. 22, 2010) (“Reducing the energy use and greenhouse gas emissions produced by buildings is therefore fundamental to the effort to slow the pace of global climate change.”).

30. See Bowmar & Wireman, *supra* note 1, at 1489 (stating that green building is “not universally or consistently defined”).

31. See U.S. GREEN BLDG. COUNCIL, BUILDING MOMENTUM: NATIONAL TRENDS AND PROSPECTS FOR HIGH-PERFORMANCE GREEN BUILDINGS 4-5 (2003), available at http://www.usgbc.org/Docs/Resources/043003_hpgb_whitepaper.pdf (describing green building); Keith H. Hirokawa, *At Home With Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment*, 39 ENVTL. L. 507, 514 (2009) (offering a definition for the term “green building”); see also Taylor & Tollin, *supra* note 5, at 21 (describing green building and how green buildings are different from conventional buildings).

32. See GREG KATS ET AL., THE COSTS AND FINANCIAL BENEFITS OF GREEN BUILDINGS 15 (2003), available at <http://www.usgbc.org/Docs/News/News477.pdf> (“[O]n average, the premium for green buildings is about 2%.”).

33. See Bowmar & Wireman, *supra* note 1, at 1484 (“[I]n reality, the premium cost is unlikely to be cost prohibitive. In fact an extensive study assessing for newly constructed green buildings in California found that the up-front construction cost averaged less than 2% above traditional construction of similar buildings.”).

them, that it is good for building business' bottom line; in just one year, the increased costs associated with green building can be offset by the decrease in the building's operational costs.³⁴

The attentiveness of the general public to the benefits of working³⁵ and living in greener, healthier environments has assisted in spurring the growth of green building.³⁶ Developers and building owners are responding to the public's desires and, more so now, its expectations of a greener built environment.³⁷ Building owners recognize the health³⁸ and financial incentives of building green.³⁹ The building industry acknowledges that there are many positive externalities associated with green buildings, including an improved reputation with the public and fewer conflicts with environmental groups.⁴⁰ Further, businesses benefit when they take environmentally-conscious action because it allows them to stay ahead of the curve of governmentally-imposed environmental regulations.⁴¹

The current trend towards developers making the choice to construct green buildings also sprang from the insight that there are substantial environmental impacts associated with conventional construction techniques.⁴² The seriousness of the considerable

34. See *id.* at 1490-91 ("The upfront costs of constructing . . . a facility with green features may require an initial investment But the decreased costs of operating a facility infused with energy-efficient features can offset the upfront construction costs in as little as one year.").

35. See Taylor & Tollin, *supra* note 5, at 22 ("Workers of all ages . . . expressed a strong preference for working in green buildings . . .").

36. See Matthew J. Parlow, *Greenwashed?: Developers, Environmental Consciousness, and the Case of Playa Vista*, 35 B.C. ENVTL. AFF. L. REV. 513, 521-22 (2008) (describing how changing values with regarding environmental issues has pushed the development of green building).

37. See Taylor & Tollin, *supra* note 5, at 22 (discussing media and public awareness of the health benefits of green buildings, and how that has influenced certain corporations to adopt green building practices); Dana Mattioli, *How Going Green Draws Talent, Cuts Costs*, WALL ST. J., Nov. 13, 2007, at B10 (describing how companies have been adopting green policies in an attempt to attract talent and to cut costs).

38. See Taylor & Tollin, *supra* note 5, at 22 (discussing how workers in green buildings have fewer medical problems and generally miss fewer days of work when looked at in comparison to workers in conventional buildings).

39. Research has shown that green buildings can lead to increased productivity and decreases in medical problems for workers when compared with conventional buildings. See Parlow, *supra* note 36, at 522 (discussing the growing market for green buildings and the noted benefits to worker productivity and decreased absenteeism); see also Taylor & Tollin, *supra* note 5, at 22 (discussing potential financial benefits of green building for private construction).

40. See Bowmar & Wireman, *supra* note 1, at 1487.

41. See *id.*

42. See Bronin, *supra* note 28, at 243-45 (discussing the widespread environmental impacts and costs of conventional construction in contrast with possible alternatives); John L. Sznoppek & William M. Brown, *Materials Flow and Sustainability*, U.S. GEOLOGICAL SURV. (June 1998), <http://pubs.usgs.gov/fs/fs-0068-98/fs-0068-98.pdf> ("Since 1900, use of construction materials such as crushed stone and sand and gravel has increased from about [thirty-five] percent to [sixty]

environmental costs is compounded by the fact that construction is “the nation’s largest manufacturing activity.”⁴³ Conventional construction uses an extensive amount of natural resources during the building process,⁴⁴ and debris from construction projects in America amounts to a staggering 136 million tons per year.⁴⁵ Of this astounding figure, only about twenty to thirty percent of the debris is actually recovered for recycling.⁴⁶ These statistics are difficult to visualize and comprehend when looking at them on paper, but they should not be taken lightly when substantial environmental benefits can be realized by simply building green.⁴⁷

The long-term benefits of owning and operating a green building are both reputational and financial,⁴⁸ and have helped to foster the movement’s continued growth.⁴⁹ The benefits of green buildings include a decreased cost of building operation,⁵⁰ increased productivity of workers,⁵¹ and the maximization of economic and environmental performance.⁵² In contrast, conventional buildings have a greater long-term environmental impact and a less efficient operational ability, ultimately resulting in overall higher costs.⁵³ Building owners understand all of these potential advantages linked with building green, particularly because green building can improve profitability by reducing operating costs⁵⁴ that have been historically associated with building ownership.⁵⁵

percent of total non-food, non-fuel raw materials consumption in the United States.”).

43. Bronin, *supra* note 28, at 243.

44. *Id.*

45. *Id.* at 244.

46. *Buildings and Their Impact on the Environment: A Statistical Study*, U.S. ENVTL. PROT. AGENCY, 6 (Apr. 22, 2009), <http://www.epa.gov/greenbuilding/pubs/gbstats.pdf>.

47. See Bronin, *supra* note 28, at 243-45 (discussing the environmental benefits of green building).

48. See *id.* at 245-46 (describing potential financial benefits of green building); Taylor & Tollin, *supra* note 5, at 22 (describing various reputational benefits of green building).

49. See Bowmar & Wireman, *supra* note 1, at 1489 (arguing that the various environmental, reputational, financial benefits “provide incentives” to engage in green building).

50. *Green Building: Why Build Green?*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/greenbuilding/pubs/whybuild.htm> (last updated Dec. 2, 2010).

51. *Id.*

52. *Id.*

53. See Bowmar & Wireman, *supra* note 1, at 1489 (listing “reduced lifetime operational costs” as an incentive for adopting green building policies); Bronin, *supra* note 28, at 244-45 (arguing that LEED certified buildings consume “substantially less water and energy” than conventional buildings, which translates into decreased operational costs).

54. See *Green Building: Why Build Green?*, *supra* note 50.

55. See Bronin, *supra* note 28, at 244-45 (describing the economic and environmental costs of running conventionally designed buildings after they are constructed).

Building owners have not been the only group to take notice of the benefits of building green. Major political attention was first directed toward the green building movement during the Clinton Administration.⁵⁶ In 1993, President Bill Clinton began promoting the benefits connected with green buildings in his “Greening of the White House” initiative.⁵⁷ The second annual “Greening of the White House” report identified considerable financial incentives that could be achieved by incorporating environmentally-conscious features into the White House and retrofitting existing elements of the building.⁵⁸ It was predictable that a green building program at this level of government had the potential to significantly influence awareness to the environmental movement.⁵⁹ As such, the report was centered on the direct environmental benefits that would result from converting the White House into a “world-class environmental showcase,” and on the inspiration that this environmentally-cognizant program would give to the American public.⁶⁰

President Clinton may have been one of the first major political proponents of green building,⁶¹ but the Oval Office’s enthusiasm has not diminished with the passing of time.⁶² President George W. Bush evidenced his support for green building by requiring federal agencies to comply with environmental standards set out in an executive order.⁶³ Today, the political endorsement of green building continues under President Obama’s administration.⁶⁴ President Obama’s stimulus package contained multiple incentives to encourage the use of environmentally-conscious building features and designs.⁶⁵ The

56. See Erpenbeck & Schiman, *supra* note 4, at 33.

57. See *id.*; Nat’l Archives & Records Ass’n, *supra* note 23 (“President Clinton announced the Greening of the White House Initiative on Earth Day 1993.”).

58. See Nat’l Archives & Records Ass’n, *supra* note 23 (“The Second Annual Report . . . estimated savings of more than \$150,000 per year in energy and water costs, landscaping expenses, and expenditures associated with solid waste. White House Greening measures . . . are saving an additional \$150,000 each year, for a total of approximately \$300,000 annually.”).

59. See *id.* (“Hopefully this report will provide you with the ideas and inspiration to make your home, office, or business more energy efficient, environmentally sound, and comfortable.”).

60. *Id.*

61. See Erpenbeck & Schiman, *supra* note 4, at 33 (describing President Clinton as an early supporter of green building).

62. See *id.* at 63 (“[W]ith the current presidential administration and its plans for the future, it seems as though green building is not a short-term fad.”).

63. Specifically, President Bush ordered that all new construction and major renovations conducted by federal agencies comply with green building standards, and that fifteen percent of existing federal buildings incorporate sustainable elements by 2015. See Strengthening Federal Environmental, Energy, and Transportation Management, Exec. Order No. 13,423, 72 Fed. Reg. 3919 (Jan. 24, 2007).

64. See Erpenbeck & Schiman, *supra* note 4, at 63.

65. See *id.*

longevity of political support will continue to foster the green building industry and is likely to aid in increasing the amount and scope of green building regulations when the real estate market rebounds.⁶⁶

Along with political endorsements, the general public has embraced green building.⁶⁷ The public has not just voiced its approval with empty promises, but many people have also been willing to open their pocketbooks to support going green. Americans seem more prepared and possibly even eager to assume the costs associated with going green.⁶⁸ The growth in public support may be one of the central factors critical to explaining the predictions that show the green building market, for both products and services, was projected to total \$60 billion annually by 2010.⁶⁹

B. *The USGBC Has Been a Driving Force in Green Building*

The USGBC has been a major source of momentum in the promotion and development of green buildings; so much so, that it has largely defined what it means to build green for both the private and public sectors.⁷⁰ The USGBC is a nonprofit organization based in Washington, D.C.⁷¹ that is “working to make green buildings available to everyone within a generation.”⁷² The USGBC seeks to promote and standardize green building⁷³ and has been responsible for defining—for developers and for the public—which buildings will be classified as green under its LEED rating system.⁷⁴

66. *See id.* (“When the economy begins to rebound, and building starts anew, the emergence of more mandatory green-building regulations may grow exponentially.”).

67. *See* Parlow, *supra* note 36, at 521-22 (“In many cities . . . environmental consciousness has become a community value . . . Moreover, as environmental consciousness grows in many communities, so does the market for greener homes.”); Brown, *supra* note 2 (discussing how “more than 9,000 people” attended a recent green building exposition in Atlanta).

68. *See* Pogrebin, *supra* note 2 (discussing the likelihood of the American public demanding a shift towards more environmentally-conscious building designs).

69. *About USGBC*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=124> (last visited Mar. 1, 2011).

70. *See id.* (describing the USGBC’s various programs).

71. *Id.*

72. U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/> (last visited Mar. 1, 2011).

73. Perzan, *supra* note 1, at 39.

74. *See* Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 121, 155 (2009) (“The most commonly used system for measuring building sustainability is the Leadership in Energy and Environmental Design rating system, commonly referred to as LEED.”); Sussman, *supra* note 12, at 10 (“The [USGBC] has emerged as the leader and has been central to the progress of the green building movement in the United States.”).

The USGBC is made up of various types of members, including contractors, builders, building product manufacturers, the federal government, state governments, and local governments, among others.⁷⁵ To become a member of the USGBC, a company or organization must submit a membership application and pay annual dues, in addition to paying any other fees assessed by the board of directors.⁷⁶ Currently, there are over 18,000 companies that are members of the USGBC,⁷⁷ and the number has been steadily increasing, and the trend is likely to continue.⁷⁸

One of the USGBC's most noted accomplishments is the development of the LEED standards that are the most recognizable green building rating system in the United States, furthering the widespread influence of the organization in the green building industry.⁷⁹ The USGBC sets the criteria for determining which buildings will be labeled as green under the LEED system.⁸⁰ The USGBC has also assumed the responsibility of educating the public and professionals on the subject of green building.⁸¹ Through these efforts and the organization's public outreach, the USGBC hopes to bring more environmentally-conscious and cost effective buildings to the American landscape.⁸² Having introduced the USGBC and its functions, the next Part will go on to examine the details of the LEED green building rating system.

75. See U.S. GREEN BLDG. COUNCIL BYLAWS art. 3, § 1 (2009) [hereinafter USGBC BYLAWS], <http://www.usgbc.org/ShowFile.aspx?DocumentID=4875> (dividing member organizations into various "membership groups" which are used for organizational purposes).

76. *Id.*; Chamberlain, *supra* note 2 ("Membership ranges from \$300 for small businesses to \$12,500 for billion-dollar corporations.").

77. *About USGBC*, *supra* note 69.

78. See Chamberlain, *supra* note 2 ("Since its founding, the [USGBC] has grown to more than 16,700 member companies and organizations.").

79. See Perzan, *supra* note 1, at 39; *About USGBC*, *supra* note 69.

80. See *About USGBC*, *supra* note 69 ("The LEED green building certification system is the preeminent program for rating the design, construction and operation of green buildings.").

81. *Id.* ("USGBC provides top quality educational programs on green design, construction, and operations for professionals from all sectors of the building industry.").

82. *Id.* ("[The USGBC is] committed to a prosperous and sustainable future for a nation through cost-effective and energy-saving green buildings.").

C. The USGBC's LEED Green Building Rating System

The USGBC's LEED rating system is a third-party evaluation of a building's environmental performance.⁸³ The system is designed to allow an independent third-party to evaluate the implementation of LEED standards in the construction of a building.⁸⁴ Some argue that this type of third-party rating system imposes accountability on developers who call their buildings green.⁸⁵

In addition to being internationally recognized,⁸⁶ LEED has become the "nationally accepted benchmark"⁸⁷ for buildings aspiring to label and advertise themselves as green.⁸⁸ Earning a LEED certification rating enables a building to advertise as being devoted to an environmentally-sustainable future.⁸⁹ The environmental gains realized by complying with the LEED standards are joined with the prospects of an increasingly profitable building.⁹⁰ One of the advantages of LEED certification is that nearly all LEED certified buildings incorporate recycled building materials into their construction and provide recycling facilities for the buildings' occupants when construction is completed.⁹¹

The USGBC developed LEED standards for homes, commercial interiors, core and shell,⁹² new construction, schools, healthcare

83. See Perzan, *supra* note 1, at 39 ("The USGBC also functions as an independent, third party, certification body."); *LEED Rating Systems*, *supra* note 13 ("LEED is a third-party certification program . . . for the design, construction, and operation of high-performance green buildings.").

84. See *Building Certification*, GREEN BLDG. CERTIFICATION INST., <http://www.gbci.org/main-nav/building-certification/leed-certification.aspx> (last visited Mar. 1, 2011).

85. Neuman, *supra* note 2 ("Anybody can call a building green, so to impose some accountability, the [USGBC] created a rating system called LEED . . . to measure the degree to which buildings incorporate green practices and materials.").

86. See *Intro—What LEED Is*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1988> (last visited Mar. 1, 2011) ("LEED is an *internationally recognized* green building certification system . . ." (emphasis added)).

87. *LEED Rating Systems*, *supra* note 13; see also Charles J. Kibert, *Policy Instruments for a Sustainable Built Environment*, 17 J. LAND USE & ENVTL. L. 379, 385-86 (2002) ("The U.S. Department of Energy has been a major supporter of the development and implementation of the LEED Standard."); Mireya Navarro, *Rating Group Gets Stricter on Buildings' Energy Use*, N.Y. TIMES, Aug. 31, 2009, at A8 ("LEED certification [is] the country's most recognized seal of approval for green buildings.").

88. See Bowmar & Wireman, *supra* note 1, at 1490 ("By attaining LEED certification on its buildings, a corporation earns the ability to publicize its devotion to operating its facilities according to a nationally recognized and objective set of green standards."); Chamberlain, *supra* note 2 ("[A]pproval from the [USGBC] through its LEED certification program [is] the undisputed calling card of environmental bragging rights.").

89. See Bowmar & Wireman, *supra* note 1, at 1490.

90. *Id.* at 1491.

91. Bronin, *supra* note 28, at 243.

92. "Core and shell covers base building elements such as structure, envelope and the [heating, ventilation, air condition] system." *LEED for Core & Shell*, U.S. GREEN BLDG. COUNCIL,

facilities, retail sites, and neighborhood development.⁹³ LEED provides guidelines with which a building must comply in order to obtain a LEED certification rating.⁹⁴ The rating of a building is dependent upon the amount and types of green features incorporated into the building's design; through the inclusion of environmentally-friendly features approved by the LEED system, a building earns points toward a desired LEED certification rating.⁹⁵ LEED standards set forth features a building can include so that it can attain the title of being labeled as a LEED certified, silver, gold, or platinum building, depending on how many points are awarded for the features' inclusion.⁹⁶ The LEED system analyzes how environmentally-friendly a building is according to criteria defined under the following categories: Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, Indoor Environmental Quality, Locations and Linkages, Awareness and Education, Innovation in Design, and Regional Priority.⁹⁷ The LEED system uses a 110-point scale to calculate a building's environmentally-conscious features according to the aforementioned categories; the incorporation of such features will determine the structure's ultimate LEED certification rating by the points awarded at the end of the project.⁹⁸

The LEED rating system, however, is no longer administered by the USGBC. The USGBC has delegated the power to manage the LEED certification process to the Green Building Certification Institute ("GBCI").⁹⁹ In order to become a LEED certified building, a developer must comply with LEED standards.¹⁰⁰ The GBCI will ultimately certify

<http://www.usgbc.org/DisplayPage.aspx?CMSPageID=295> (last visited Mar. 1, 2011).

93. See *LEED Rating Systems*, *supra* note 13.

94. See Erpenbeck & Schiman, *supra* note 4, at 33 (describing the basic requirements of the LEED rating system).

95. *Id.*

96. See Perzan, *supra* note 1, at 39 ("There are four different levels of certification based on the number of points awarded: certified, silver, gold and platinum."); Neuman, *supra* note 2 ("To receive a LEED rating, completed buildings must be evaluated, and points are awarded for their green features."); *FAQ: LEED for New Construction*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/ShowFile.aspx?DocumentID=3352> (last visited Mar. 1, 2011) (explaining the point breakdown for the various LEED certification levels).

97. See Salkin, *supra* note 74, at 156; *Intro—What LEED Measures*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1989> (last visited Mar. 1, 2011).

98. See *How to Achieve Certification*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1991> (last visited Mar. 1, 2011) ("LEED points are awarded on a 100-point scale, and credits are weighted to reflect their potential environmental impacts. Additionally, 10 bonus credits are available, four of which address regionally specific environmental issues. A project must satisfy all prerequisites and earn a minimum number of points to be certified.").

99. *Id.*

100. See Bowmar & Wireman, *supra* note 1, at 1490 ("Companies serious about incorporating

whether the building complies with the guidelines set forth under the LEED system, and thus the GBCI determines if the building has acquired enough points to attain its desired certification rating.¹⁰¹ It should also be noted that solely incorporating LEED's environmental features is not enough to be considered green under the LEED system; building owners must pay an up-front registration fee in order to have their project certified by the GBCI.¹⁰²

Not all those in favor of green building have embraced the LEED system. Critics of LEED have pointed out that the system does not account for some important factors that influence the environmental impact of a building, such as a building's location.¹⁰³ Further, some allege that certain products and features have been specified to attain points under LEED.¹⁰⁴ As such, critics argue that there is an aspect of "gamesmanship" in being awarded certain points under LEED.¹⁰⁵ Additionally, the long-term sustainability of LEED certified buildings has come under questioning by critics who believe that the system is shortsighted.¹⁰⁶

The criticism has not stopped the LEED committees of the USGBC from determining the LEED standards that will apply to each corresponding building application.¹⁰⁷ LEED committees have the task of "improv[ing] and implement[ing] . . . LEED rating systems."¹⁰⁸ The purposes of each of the LEED committees are distinct; for example, the Steering Committee determines the general direction and policy of the LEED standards,¹⁰⁹ while the Rating System Committee develops the

green elements into their new or existing facilities may seek LEED certification from the [USGBC] for those facilities.").

101. In 2009, the Green Building Certification Institute was given the task of certifying buildings under the LEED rating system. *See About GBCI*, GREEN BLDG. CERTIFICATION INST., <http://www.gbci.org/org-nav/about-gbci/about-gbci.aspx> (last visited Mar. 1, 2011).

102. GREEN BLDG. CERTIFICATION INST., LEED CERTIFICATION POLICY MANUAL 9-10 (2011), available at <https://www.leedonline.com/irj/go/km/docs/documents/usgbc/leed/config/terms/LeedCertificationManual/LEEDCertificationPolicyManual.pdf> (explaining the project registration process). Owners seeking LEED certification must also pay a "certification fee," which is calculated based on the size of the project and the rating system that it is being certified under when they submit their project paperwork for review. *Id.* at 84.

103. *See* Charles J. Kibert & Kevin Grosskopf, *Envisioning Next-Generation Green Buildings*, 23 J. LAND USE & ENVTL. L. 145, 150 (2007); Salkin, *supra* note 74, at 157.

104. *See* Kibert & Grosskopf, *supra* note 103, at 150.

105. *Id.*

106. *See* Salkin, *supra* note 74, at 158 ("[S]ome critics believe that LEED's green building standards simply do not go far enough in requiring building sustainability.").

107. *See LEED Committees*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1750> (last visited Mar. 1, 2011).

108. *Id.*

109. *See LEED Steering Committee*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1636> (last visited Mar. 1, 2011) ("The LEED Steering Committee

actual LEED rating system criteria and the points awarded for compliance.¹¹⁰ In general, the USGBC committees work to update and implement changes to the LEED certification requirements.¹¹¹

The LEED committees are made up of volunteer members of the building and construction industries.¹¹² While openings on the LEED committees are advertised on the USGBC website, membership is limited strictly to those who are “regular employees of USGBC member organizations.”¹¹³ Once the LEED committees develop standards for a particular building application, they are then approved by the USGBC membership.¹¹⁴ Having explored the basics of the LEED rating system, the next Part of this Note will examine various attempts to implement the aforementioned LEED standards into law.

D. LEED Becomes Law

A prime example of green building legislation is the adoption of the LEED rating system by statute in Connecticut.¹¹⁵ According to the Connecticut statute, the construction of new state facilities with projected costs of more than \$5 million, renovations to state facilities that will cost in excess of \$2 million, new construction of buildings which cost \$5 million or more and which receive \$2 million or more in state funding, and renovation of public schools costing more than \$2 million fall within the realm of the statute.¹¹⁶ These buildings all must comply with the LEED silver standard (or its equivalent) for the specific project type.¹¹⁷

[is] . . . charged with developing and maintaining LEED as a leadership tool, preserving the integrity of the LEED rating system, and ensuring the use of the consensus process to evolve LEED in accordance with the mission, guiding principles, and strategic plan of USGBC.”)

110. See *LEED Rating System Committees*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1786> (last visited Mar. 1, 2011).

111. See Salkin, *supra* note 74, at 156; *LEED Committees*, *supra* note 107.

112. See *LEED Committees*, *supra* note 107; *LEED Rating Systems*, *supra* note 13 (“LEED rating systems are developed through an open, consensus-based process led by LEED committees. Each volunteer committee is composed of a diverse group of practitioners and experts representing a cross-section of the building and construction industry.”).

113. *How to Participate in USGBC Committees and Working Groups*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1749> (last visited Mar. 1, 2011).

114. See *LEED Rating System Committees*, *supra* note 110 (“The LEED Rating System Committees have primary responsibility for the development and implementation of LEED credits for a specific building type or market sector. Once a pilot program has been completed and the rating system has been approved by USGBC membership, the committee is disbanded.”).

115. See CONN. GEN. STAT. ANN. § 16a-38k(a) (West 2007 & Supp. 2010).

116. See *id.*

117. See *id.*

Similarly, the New York legislature has also statutorily adopted LEED, although in an indirect fashion.¹¹⁸ The New York legislature enacted laws incorporating the LEED system¹¹⁹ that have tax consequences and other implications for developers. Specifically, the New York Tax Law allows buildings complying with LEED-inspired green building standards to receive tax credits.¹²⁰

Other examples of adoption of LEED standards have occurred on a local level. Again in New York, but this time in New York City, buildings costing the city \$2 million or more must comply with, at a minimum, the LEED silver rating.¹²¹ Scottsdale, Arizona has implemented a similar initiative, but instead requires all new “occupied” city buildings to comply with the more rigorous LEED gold rating.¹²²

Green building policy has come from the federal, state, and local levels with few checks placed on the dispersed power.¹²³ Because the green building movement is relatively new and the regulations are constantly evolving, there has been admittedly little time for criticism or review of green building regulations.¹²⁴ As the public awareness of, and

118. See N.Y. TAX LAW § 19(e)(3)(A) (McKinney 2005 & Supp. 2010) (requiring that the New York Department of Environmental Conservation’s (“DEC”) new regulations be “informed by the LEED rating system”).

119. *Id.*; see also Erpenbeck & Schiman, *supra* note 4, at 35 (discussing how former Governor George Pataki’s Executive Order No. 111 mandates “any new state construction and/or substantial renovations [to] employ LEED guidelines as practicable”).

120. See N.Y. TAX LAW §§ 19(a)(1)(A), (a)(2)–(7), (e)(3)(A) (stating that a taxpayer whose building meets specified requirements “shall be allowed a green building credit” against the taxes on that building, explaining the components of that tax credit, and requiring the DEC to adopt LEED-based standards).

121. See N.Y.C. LOCAL LAW No. 86, § 2 (2005), http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf (amending the New York City Charter to require that new construction and major renovations of city funded buildings costing \$2 million or more to the city treasury “be designed and constructed to comply with green building standards not less stringent than the standards prescribed for buildings designed in accordance with the LEED green building rating system to achieve a LEED silver or higher rating”).

122. SCOTTSDALE, ARIZ. RES. NO. 6644, § 2 (2005), <http://www.scottsdaleaz.gov/Assets/Public+Website/greenbuilding/Resolution+6644.pdf>; see also Erpenbeck & Schiman, *supra* note 4, at 34 (“In the public sector, Scottsdale’s standards for new city buildings and renovations were the first to adopt a LEED Gold requirement.”); Press Release, Anthony Floyd, Scottsdale City Council, Scottsdale Becomes First City in the Nation to Adopt Gold Standard for Energy and Environment Design (Mar. 23, 2005), <http://www.scottsdaleaz.gov/greenbuilding/leed> (“On March 22, 2005, Scottsdale City Council unanimously approved Resolution No. 6644 establishing the Green Building (LEED) Policy for new city buildings and remodels. This action makes Scottsdale the first city in the nation to adopt a LEED Gold policy.”).

123. Cf. Kibert, *supra* note 87, at 385-86 (discussing the efforts by the federal and local governments to implement green building policies in the United States).

124. See Carl J. Circo, *Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 55, 61 (2009) (“Governmental green building programs are still in an experimental stage. . . . New programs and features appear

enthusiasm for, green buildings continues to grow, we can only expect more governmentally-mandated green building laws.¹²⁵ As the next part of this Note will discuss, the fervor surrounding the green building movement has left many of the usual safeguards of democratic accountability behind, resulting in an unconstitutional delegation of legislative power to the USGBC through the incorporation of the LEED rating system in law.¹²⁶

III. THE NONDELEGATION DOCTRINE AND ITS APPLICATION TO STATUTES INCORPORATING THE LEED GREEN BUILDING RATING SYSTEM

The green building movement has jumpstarted a nationwide trend of imposing mandatory green building requirements.¹²⁷ The implementation of green building legislation may be in the early stages of development, but there are already government regulations and mandates coming from varying levels of government.¹²⁸ The enacted green building laws range from simply requiring that publicity be drawn to the benefits of green building, to the creation of agencies to provide technical assistance to developers who wish or are required to build green.¹²⁹ With this in mind, Part III.A will examine the constitutional underpinnings of the nondelegation doctrine and how courts have applied the doctrine in the past. Part III.B will then apply the nondelegation doctrine to laws incorporating the LEED rating system.

A. *An Examination of the Nondelegation Doctrine*

There is an underlying presumption¹³⁰ that legislatures may not use their lawmaking authority as a channel to delegate legislative power to other bodies or branches of government.¹³¹ The presumption has

regularly, and most of the programs . . . continue to evolve.” (footnote omitted)).

125. See Perzan, *supra* note 1, at 43.

126. See *infra* Part III.B.

127. See Erpenbeck & Schiman, *supra* note 4, at 34.

128. See Bronin, *supra* note 28, at 255 (“[A] handful of localities currently promote green building . . . They do so by issuing mandates, writing optional codes, comprehensively re-evaluating certain existing laws, and granting green-building projects certain procedural benefits.”); Circo, *supra* note 124, at 61 (explaining how green building programs are still in the “experimental stage”).

129. See Circo, *supra* note 124, at 62-63.

130. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 606-07 (1992) (discussing the “presumption” against excessive delegations of legislative power under Article I).

131. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *Field v. Clark*, 143 U.S. 649, 692 (1892); see also Gary J. Greco, Note, *Standards or Safeguards: A Survey of the Delegation*

constitutional underpinnings,¹³² which have in turn resulted in the court-made nondelegation doctrine.¹³³ The Constitution limits the powers granted to the government by the people and, therefore, a legislature must have some constitutional basis for shifting its lawmaking authority to another branch or body in order to stay within the bounds of constitutionality.¹³⁴

The premise of the separation of powers embedded in our constitutional system¹³⁵ makes the nondelegation doctrine an essential element to ensuring that the lawmaking organs of government are operating within the constraints imposed by the Constitution.¹³⁶ Similarly, the nondelegation doctrine is a way for the courts to aid in promoting accountability in our democratic society.¹³⁷ The principle that our elected legislators control our nation's lawmaking functions has

Doctrine in the States, 8 ADMIN. L.J. AM. U. 567, 570 (1994) (“Under a traditional non-delegation theory, the legislature cannot delegate any of its lawmaking power to another branch of government.” (footnote omitted)).

132. See Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1376 (1996).

133. See *Touby v. United States*, 500 U.S. 160, 164-65 (1991); see also Eskridge & Frickey, *supra* note 130, at 606-07 (discussing the constitutional underpinnings of the nondelegation doctrine, and how the doctrine has developed into “a canon of statutory interpretation rather than . . . an enforceable constitutional doctrine”).

134. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337 (2002) (“[T]he correct constitutional question with respect to delegation is not, ‘Does any clause of the Constitution expressly or implicitly *forbid* the delegation of legislative authority?’ The correct question is, ‘Does any clause of the Constitution expressly or implicitly *permit* the delegation of legislative authority?’”).

135. See *Springer v. Phil. Is.*, 277 U.S. 189, 201-02 (1928) (explaining how separation of powers is “implicit” from the structure of the Constitution).

136. See *Touby*, 500 U.S. at 165 (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.” (quoting *Mistretta*, 488 U.S. at 371)); *Mistretta*, 488 U.S. at 371-72 (arguing that the nondelegation doctrine is essential to ensuring the integrity of the government); Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More Than “A Dime's Worth of Difference.”* 49 CATH. U. L. REV. 337, 341 (2000) (“The doctrine of nondelegation of legislative authority is merely one manifestation of the constitutional separation of powers.”); Theuerkauf, *supra* note 16, at 873 (“The nondelegation doctrine is entrenched in the separation of powers principle that accompanies our tripartite form of government.”); see also Greco, *supra* note 131, at 569 (“The separation of powers doctrine confers exclusive powers upon each of the three branches of government. The doctrine of checks and balances requires the legislature to impose limits on the executive agency charged with carrying out any delegation of lawmaking power.” (footnote omitted)).

137. See Sunstein, *supra* note 16, at 336 (“[T]he nondelegation doctrine should be associated . . . with the . . . goal of ensuring . . . not only accountability but also reflectiveness. The vesting of lawmaking power in Congress is designed to ensure . . . that government power cannot be brought to bear on individuals unless diverse representatives . . . have managed to agree on the details.”).

been a critical lynchpin of our governmental structure since the nation's founding.¹³⁸

The Constitution sets forth the framework for the allocation of power within our government. Article I, Section 1 states: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."¹³⁹ The Necessary and Proper Clause extends Congress's legislative authority by allowing it "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the Constitution.¹⁴⁰ Taken together, these clauses empower Congress to take legislative action and to assign the power to execute the law, but they implicitly forbid Congress from conferring discretion upon other bodies the authority to determine what the law should be.¹⁴¹ The central facet of the nondelegation doctrine is that the power to make the law belongs in the hands of the elected representatives in the legislature.¹⁴²

The Supreme Court and the high courts of several states have reaffirmed the premise that there are limits on a legislature's ability to

138. See David Schoenbrod, *Politics and the Principle that Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL. 239, 240 (2003) ("[T]he Framers adopted a Constitution that barred any new tax unless a majority of the representatives in a directly elected legislature personally took responsibility for it. This Constitution required legislators to take responsibility not only for tax laws, but all other laws regulating the people . . ."); Greco, *supra* note 131, at 570 ("The [F]ramers adopted the [nondelegation] doctrine to avoid the exercise of arbitrary power by any one branch of government."). But see Sunstein, *supra* note 16, at 331 (arguing that the "standard view" of the nondelegation doctrine as a "core part of the original constitution" is inconsistent with the text of the Constitution, as well as early congressional and Supreme Court practice).

139. U.S. CONST. art. I, § 1; *cf.* CAL. CONST. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly . . ."); 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."); N.Y. CONST. art. III, § 1 ("The legislative power of this state shall be vested in the senate and assembly."); WASH. CONST. art. II, § 1 ("The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington . . .").

140. U.S. CONST. art. I, § 8, cl. 18.

141. See *Loving v. United States*, 517 U.S. 748, 758 (1996) (stating that just because Article I, Section 1 vests lawmaking power solely with Congress "does not mean . . . that only Congress can make a rule of prospective force"); Amar, *supra* note 132, at 1360-61 (discussing Congressional delegation of power in relation to the Necessary and Proper Clause); Sunstein, *supra* note 16, at 331 (arguing that Article I, Section 1 stands for the proposition that Congress cannot delegate its legislative duties "even if Congress and the public want to do so"). But see Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2104-05 (2004) (arguing that using Article I, Section 1 as the textual basis for the nondelegation doctrine is not supported by the text or history of the constitution, and that such "textual basis" arguments for the nondelegation doctrine have "done nothing to secure its enforcement").

142. *Loving*, 517 U.S. at 758.

delegate the authority to make law.¹⁴³ For example, the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States*¹⁴⁴ held that “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested.”¹⁴⁵ This is particularly the case where trade organizations are involved in the regulatory scheme and have been delegated the ability to make law:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.¹⁴⁶

On the federal level, Congress cannot give a “blank check” to another body to make law, especially when the power is concentrated in the hands of an interest group.¹⁴⁷ More generally, Congress cannot abdicate its lawmaking power, vested in it by the Constitution, because the

143. See *United States v. Mazurie*, 419 U.S. 544, 556 (1975) (“This Court has recognized limits on the authority of Congress to delegate its legislative power.” (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935))); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935) (stating that Congress is not allowed to delegate its lawmaking duties, and that the necessity of certain delegations of power “cannot be allowed to obscure the limitations of the authority to delegate”); see also *Boreali v. Axelrod*, 517 N.E.2d 1350, 1354 (N.Y. 1987) (stating that the power to make law shall not be delegated, but that power may be granted to administrative agencies in the execution of laws); *Levine v. Whalen*, 349 N.E.2d 820, 822 (N.Y. 1976) (same); *State v. Gilroy*, 221 P.2d 549, 552 (Wash. 1950) (“[R]egulation by delegation of authority is subject to the limitation that the law providing for the delegation must also prescribe an accompanying rule of action or lay down a guide or standard whereby the exercise of discretion may be measured.”). But see *Amar*, *supra* note 132, at 1361 (discussing how the Supreme Court has not struck down congressional delegations since 1935). See generally *Greco*, *supra* note 131 (discussing the federal and state applications of the nondelegation doctrines).

144. 295 U.S. 495 (1935).

145. *Id.* at 529; see also *Packer Collegiate Inst. v. Univ. of N.Y.*, 81 N.E.2d 80, 82 (N.Y. 1948) (“The Supreme Court has repeatedly denied the power of Congress to delegate its lawmaking function, while permitting it to delegate the power to determine the existence of the facts which make the law applicable or inapplicable, and to fill in the details of regulation.”). But see *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (“But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”).

146. *Schechter*, 295 U.S. at 537.

147. *Sunstein*, *supra* note 16, at 331.

several states surrendered that power through ratification of the Constitution.¹⁴⁸

However, as with other doctrines, there are always exceptions: executives and governmental agencies can, within the bounds of the Constitution, be delegated certain and specific powers when executing the legislature's will.¹⁴⁹ When a legislature delegates power, there must be reasonable restraints placed upon the authority dispensed.¹⁵⁰ The test put forth by the Supreme Court is whether Congress has set forth an "intelligible principle" with which the concordant branch or governmental agency must comply.¹⁵¹

Furthermore, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁵² the Court discussed both explicit and implicit delegations to governmental agencies in the context of its discussion on reviewing agency interpretations of statutes they administer.¹⁵³ The Court stated that when Congress promulgates standards by statute to be interpreted and applied by an administrative agency, the agency's interpretation should be upheld as long as it is reasonable and Congress has not otherwise spoken on the matter.¹⁵⁴ This decision was based on

148. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 207, 209 (1824) ("Congress cannot enable a state to legislate . . ."); Amar, *supra* note 132, at 1365 (stating that *Gibbons* stands for the proposition that "Congress could not enable States to legislate when the Constitution disabled them from doing so").

149. See *City of Amsterdam v. Hellsby*, 332 N.E.2d 290, 293 (N.Y. 1975) ("[T]here is no constitutional prohibition against the legislative delegation of power, with reasonable safeguards and standards, to an agency or commission established to administer an enactment.")

150. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935) ("In creating . . . an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function." (quoting *Wichita R.R. & Light Co. v. Pub. Util. Comm'n*, 260 U.S. 48, 59 (1922))).

151. See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an *intelligible principle* to which the person or body . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power." (emphasis added)); see also *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (quoting *J. W. Hampton*, 276 U.S. at 409)); *Yakus v. United States*, 321 U.S. 414, 426 (1944) ("Only if we could say that there is an absence of standards for guidance of the Administrator's action . . . would we be justified in overriding its choice of means for effecting its declared purpose . . ."); David M. Driesen, *Loose Canons: Statutory Constructions and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 14 (2002) (describing how the intelligible principle doctrine relates to the nondelegation doctrine); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1726-27 (2002) ("A delegation of legislative power . . . is commonly said to occur when the statutory grant of authority lacks an 'intelligible principle' that provides a sufficient degree of direction in the exercise of statutory authority.")

152. 467 U.S. 837 (1984).

153. *Id.* at 842-44.

154. See *id.* at 843-44 ("If Congress . . . explicitly left a gap for the agency to fill . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [I]f the . . . delegation . . . is implicit . . . a court may not substitute

the Court's history of deferring to an agency's statutory interpretation due to its supposed expertise in the field being regulated.¹⁵⁵

The Supreme Court's interpretation of delegations of legislative authority can be analogized with similar state court constitutional interpretations of delegations by state legislatures.¹⁵⁶ Such a parallel relationship stems from the federal and state constitutions' similarities.¹⁵⁷ On the state level, legislatures are restricted from delegating their powers to lesser bodies of government.¹⁵⁸ The general principle guiding delegations of legislative authority at the state level is a showing that the legislation imposes "adequate standards . . . to channel the exercise of that power."¹⁵⁹ State courts, however, are less likely to uphold legislative delegations than the Supreme Court.¹⁶⁰

Another similarity between the federal and state constitutions is the limitation on legislative delegations when power is reserved for, or vested to, lower levels of government.¹⁶¹ At the state level this is evidenced by "Home Rule" provisions.¹⁶² "Home Rule" provisions vest authority in a local level of government, such as a city, and permits the municipality to exert lawmaking authority while restricting that of the

its own construction . . . for a reasonable interpretation . . . of an agency.").

155. *See id.* at 844-45.

156. *Compare* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935) (stating that Congress may not delegate constitutional lawmaking functions), *with* Trs. of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co., 83 N.E. 693, 699 (N.Y. 1908) (stating the "principle" that a legislature may not delegate legislative powers).

157. *Compare* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."), *with* N.Y. CONST. art. III, § 1 ("The legislative power of this state shall be vested in the senate and assembly."). *See also* Antonin Scalia, *How Democracy Swept the World*, WALL ST. J., Sept. 7, 1999, at A24 ("And to a greater or lesser degree, the same lawmaking inefficiencies [attributable to the Constitution] are built into the constitutions of the states . . .").

158. *See* Stone v. Mississippi, 101 U.S. 814, 820 (1879) (stating that the powers remaining with the state government under the Constitution cannot be delegated away to agencies over which the state has no control).

159. *Suffolk Cnty. Builders Ass'n v. Cnty. of Suffolk*, 389 N.E.2d 133, 136 (N.Y. 1979) (citing *Levine v. Whalen*, 349 N.E.2d 820, 822 (N.Y. 1976)).

160. *See* Greco, *supra* note 131, at 578 ("The state supreme courts historically have used the delegation doctrine to a greater extent than the U.S. Supreme Court to strike down legislative delegations of power. Traditionally, while the federal government almost always has found broad delegations constitutional, the state courts have upheld broad delegations of power more reluctantly." (footnote omitted)).

161. *Compare* 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."), *with* N.Y. CONST. art. IX, § 2 (laying out the powers of "local governments" and how those powers relate to those of the state legislature).

162. *Mooney v. Cohen*, 4 N.E.2d 73, 74 (N.Y. 1936).

state in limited areas, such as land use or other realms deemed to be strictly local affairs.¹⁶³

These intricacies all come within the legal framework of a nondelegation analysis, whether it is in relation to an act of Congress, that of a state legislature, or even an ordinance promulgated by a local legislative body.¹⁶⁴ At every level of government, the nondelegation doctrine requires a determination of whether a legislative act has simply delegated the power to execute law, which is permissible, or if an act delegates the power to actually determine what the law is, which is unconstitutional.¹⁶⁵

For example, in *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*,¹⁶⁶ the New York Court of Appeals had to determine whether the legislature could constitutionally delegate the authority to shut down a nuclear power plant to the Long Island Power Authority (“LIPA”), an agency created by the legislature.¹⁶⁷ The legislation in question provided for LIPA to supplant the previous energy supplier through the acquisition of its assets and for LIPA to perform specific tasks as designated in the act.¹⁶⁸ The court held that the authority delegated to the agency by the act was not an unconstitutional delegation because LIPA was bound by standards set forth by the legislature.¹⁶⁹ The court further noted that LIPA was a “specialized entity” created by the legislature to carry out specific objectives because of its expertise.¹⁷⁰

Thus, power delegated to execute law is not analogous to power delegated to make law; only the latter delegation is unconstitutional.¹⁷¹

163. See *id.* at 74 (discussing the “Home Rule” provision of New York’s Constitution and how it delegates legislative power between the state and local governments).

164. See *id.* (discussing delegation issues arising between state and local government under New York’s Constitution); see generally Greco, *supra* note 131 (discussing the application of the nondelegation doctrine in the federal and state systems).

165. See *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’rs of Clinton Cnty.*, 1 Ohio St. 77, 88-89 (1852) (“The true distinction, therefore, is, between the delegation of power to make the law . . . and conferring an authority or discretion as to its execution The first [cannot] be done; to the latter no valid objection can be made.”); see also *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928) (“The true distinction, therefore, is, between the delegation of power to make the law . . . and conferring an authority or discretion as to its execution The first [cannot] be done; to the latter no valid objection can be made.” (quoting *Cincinnati*, 1 Ohio St. at 88-89)); *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 582 N.E.2d 568, 573 (N.Y. 1991) (stating that an agency’s actions in closing a nuclear facility did not interfere with a nondelegable legislative function); *Nicholas v. Kahn*, 389 N.E.2d 1086, 1090 (N.Y. 1979) (stating that a legislature may delegate enforcement to an agency after it has set a proper standard).

166. 582 N.E.2d 568.

167. *Id.* at 570.

168. *Id.* at 570-71.

169. *Id.* at 573, 575.

170. *Id.* at 572.

171. See *supra* note 165 and accompanying text.

The nondelegation doctrine does not mandate that authority properly delegated cannot be further bestowed upon a lesser administrative body through subdelegation to carry out the law.¹⁷² The question of the constitutionality of the delegation then becomes one of degree.¹⁷³ Courts understand that “the difficulty . . . of these policy determinations mandates that the legislative body be permitted to provide for the implementation of basic policy through the use of specialized agencies concentrating upon one particular problem at a time.”¹⁷⁴ The Supreme Court has held that policy objectives can be carried out by specialized governmental agencies created by the legislature, but that this can only be accomplished within the bounds of the Constitution.¹⁷⁵ Simply put, a legislature cannot delegate its lawmaking function that has been vested in it by a constitution.¹⁷⁶ The analysis of the constitutionality of a legislative delegation concerns first, whether a constitution will permit the legislature to delegate a task to another body and second, whether the organ delegated such power has acted within bounds of the authority granted to it.¹⁷⁷

Delegated power becomes ever more problematic the further it is decentralized from the legislative body because the devolution makes it increasingly difficult for the legislative reclamation of the dispensed control.¹⁷⁸ Thus, the nondelegation doctrine serves the key constitutional objective of ensuring that power be accounted for and controlled by our elected representatives in government.¹⁷⁹ Having outlined the nondelegation doctrine, the following section will apply the doctrine to green building laws incorporating the LEED rating system.

172. See *Suffolk Cnty. Builders Ass’n v. Cnty. of Suffolk*, 389 N.E.2d 133, 136 (N.Y. 1979).

173. See *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971); *Suffolk Cnty. Builders Ass’n*, 389 N.E.2d at 136.

174. *Nicholas v. Kahn*, 389 N.E.2d 1086, 1090 (N.Y. 1979).

175. See *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

176. See *Mooney v. Cohen*, 4 N.E.2d 73, 74 (N.Y. 1936) (citing *Trs. of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 83 N.E. 693, 699 (N.Y. 1908)) (discussing how legislatures “cannot abdicate its constitutional powers and duties”); *Theuerkauf*, *supra* note 16, at 873 (“The nondelegation doctrine is simply based on the idea that Congress may not delegate the legislative power granted to it by the Constitution to administrative agencies.”).

177. See *Connally*, 337 F. Supp. at 745-46.

178. See *Amar*, *supra* note 132, at 1378-82 (discussing how difficulty in recovering delegated power serves as a “significant part” of the reasoning behind the nondelegation doctrine).

179. See *Sunstein*, *supra* note 16, at 337.

B. *Delegations of Legislative Power to the USGBC Through Statutes Incorporating LEED*

Legislatures,¹⁸⁰ as well as executives in certain situations,¹⁸¹ have delegated lawmaking authority to the USGBC, which is likely unconstitutional. Legislative bodies, at the state and local levels, have failed to recognize or even acknowledge that the USGBC is not under government control when incorporating its LEED rating system into the law.¹⁸² In a typical case involving a delegation of legislative power, authority is shifted from one branch of government to another¹⁸³ or to an administrative entity.¹⁸⁴ However, this is not the case with statutes and ordinances adopting the LEED rating system because the USGBC is a private company not subject to government control.¹⁸⁵ Problematically, the USGBC has been implicitly delegated the power to make the law and set the standards with which green buildings must comply.¹⁸⁶ This is problematic because the legislation that has been enacted does not impose any reasonable safeguards or accountability on the USGBC relating to the power that our legislative bodies have granted to it.¹⁸⁷

To some extent, various tiers of government have begun requiring that new building construction and renovations conform to the LEED green building standards.¹⁸⁸ At first glance, this appears to be a positive step for the environmental movement, as mandating compliance with environmentally-conscious building standards will promote overall

180. See *supra* Part II.D (discussing legislative attempts to adopt LEED standards).

181. See, e.g., Erpenbeck & Schiman, *supra* note 4, at 34 (discussing how California's governor issued an executive order mandating that new government buildings meet LEED silver standards).

182. See *About USGBC*, *supra* note 69 (stating that the USGBC is a private "non-profit organization"); see also CONN. GEN. STAT. ANN. § 16a-38k(a) (West 2007 & Supp. 2010) (requiring new government buildings to comply with LEED standards, but not acknowledging that the USGBC is a private organization); SCOTTSDALE, ARIZ. RES. NO. 6644, § 2 (2005), <http://www.scottsdaleaz.gov/Assets/Public+Website/greenbuilding/Resolution+6644.pdf> (same).

183. See *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 401-02 (1928) (examining a statute delegating authority to the President of the United States).

184. See *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 582 N.E.2d 568, 570-71 (N.Y. 1991) (examining a statute delegating authority to an administrative agency).

185. See *About USGBC*, *supra* note 69.

186. See *infra* notes 192-233 and accompanying text (discussing various adoptions of LEED standards, and how they grant the USGBC legislative power).

187. See *infra* notes 237-43 and accompanying text.

188. See Erpenbeck & Schiman, *supra* note 4, at 33-35 (discussing the mandating LEED standards for new construction at different levels of state and local government); Salkin, *supra* note 74, at 157 ("The LEED rating systems have been very successful, and they have been incorporated into numerous pieces of state and local legislation."); Taylor & Tollin, *supra* note 5, at 22 ("Several states, counties and cities have passed legislation that requires all new public buildings in their jurisdictions to be LEED certified." (footnote omitted)).

environmental sustainability.¹⁸⁹ However, when legislatures give the power to set green building standards that are then incorporated in law to a nongovernmental agency, a legislative delegation issue arises.¹⁹⁰ This is especially true when multiple states have mandated compliance with the LEED standards.¹⁹¹

The State of Washington took the lead in delegating lawmaking power in 2005 when it became the first state to mandate that the construction of new buildings comply with the LEED silver standard.¹⁹² The Washington statute applies not only to state agency buildings, but also to many buildings that receive state funding.¹⁹³ The statute codifies power granted to USGBC and allows the organization to set the green building criteria by which the state and those receiving state funding are legislatively mandated to abide.¹⁹⁴ In fact, the definitional section of the Washington statute directly acknowledges that the USGBC is responsible for the standards set forth in the LEED rating system.¹⁹⁵ As the LEED committees determine the requirements for complying with the LEED silver standard,¹⁹⁶ the Washington legislature has effectively delegated the power to dictate the green building standards with which the buildings covered by the statute must comply, with no discernable principle for the USGBC to hold to when making those standards.¹⁹⁷

In Connecticut, the legislature has also implicitly delegated lawmaking authority to the USGBC by mandating compliance with a LEED silver certification (or an equivalent standard) for state projects in particular circumstances.¹⁹⁸ However, the LEED standards are

189. See *Green Building: Why Build Green*, *supra* note 50 (explaining the environmental benefits of green building).

190. See *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281, 285-87 (1908) (examining and upholding a legislative delegation of regulatory authority to a private organization).

191. See Bronin, *supra* note 28, at 247-48 (“Several states, including California, Washington, and Connecticut, have mandated that all state buildings meet LEED criteria.”).

192. See Erpenbeck & Schiman, *supra* note 4, at 33; Eunjung Park, *The U.S. Federal Green Building Policy*, SUSTAINABLE DEV. L. & POL’Y, Fall 2007, at 71, 71 (“In 2005, the State of Washington became the first state to adopt legislation requiring all state-funded buildings over 5,000 square feet to obtain the [LEED] silver standard . . .”).

193. WASH. REV. CODE ANN. § 39.35D.030(1)-(2) (West Supp. 2009) (“All major facility projects of public agencies . . . [and all] major facility projects of any entity other than a public agency or public school district receiving any funding in a state capital budget must be designed, constructed, and certified to at least the LEED silver standard.”).

194. See *id.* §§ 39.35D.020(4), 39.35D.030(1)-(2).

195. See *id.* § 39.35D.020(4) (“‘LEED silver standard’ means the [USGBC] leadership in energy and environmental design green building rating standard, referred to as silver standard.”).

196. See *LEED Committees*, *supra* note 107.

197. See WASH. REV. CODE ANN. §§ 39.35D.020(4), 39.35D.030(1)-(2).

198. CONN. GEN. STAT. ANN. § 16a-38k(a) (West 2007 & Supp. 2010) (mandating that new state authorized buildings “shall comply with or exceed compliance with the silver building rating of the [LEED’s] rating system for new commercial construction and major renovation projects, as

flexible,¹⁹⁹ and can only be altered by the committees of the USGBC, not the legislature that has demanded compliance,²⁰⁰ which thereby grants the USGBC power to make the law.

The Connecticut statute allows the USGBC to change the LEED silver standard by not expressly prohibiting such a modification,²⁰¹ and requiring new construction projects to comply with whatever new standards the USGBC promulgates.²⁰² The statute does not refer to a particular version of the LEED silver standard.²⁰³ Thus, the Connecticut legislature has unconstitutionally delegated the power to determine the baseline criteria of—and thereby set the law for—green building projects covered by the statute to the USGBC and its committees.²⁰⁴ The statute does not merely charge the USGBC or the LEED committees with the duty of executing the law or determining if a building complies with the law, but instead it empowers to the USGBC to determine the law through the evolving criteria of the LEED silver standard, which serves as the baseline standard for projects covered under this statute.²⁰⁵

Interestingly, the Connecticut legislature may have recognized and attempted to remedy the unconstitutional delegation embodied in the statute. The second prong of the statute requires the state to eventually adopt its own green building criteria while using the LEED standards as a reference.²⁰⁶ Specifically, the Connecticut legislature prescribed that government agencies must ultimately adopt their own standards based

established by the [USGBC], or an equivalent standard”).

199. The LEED Committees of the USGBC develop and implement changes to the LEED certification standards. See *LEED Committees*, *supra* note 107.

200. See Kibert & Grosskopf, *supra* note 103, at 150 (“LEED-NC is not based on what might be called a scientific approach for its structure. The categories, points, and ratings are based on the consensus of the committee that developed it.”); *LEED Rating System Committees*, *supra* note 110 (explaining how LEED standards are established by USGBC committees).

201. Compare CONN. GEN. STAT. ANN. § 16a-38k(a) (requiring compliance with the LEED silver standard), with *LEED Rating System Committees*, *supra* note 110 (discussing how LEED standards are set by the USGBC committees).

202. See CONN. GEN. STAT. ANN. § 16a-38k(a).

203. The LEED committees update and revise the LEED standards on a regular basis and there are a variety of different standards that have been promulgated as the LEED system has developed. See *LEED for Existing Buildings*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=221> (last visited Mar. 1, 2011); *LEED for New Construction*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=220> (last visited Mar. 1, 2011); *LEED for Schools*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1586> (last visited Mar. 1, 2011).

204. See CONN. GEN. STAT. ANN. § 16a-38k(a).

205. Compare *id.* (requiring new construction to conform to the LEED silver standard or its equivalent), with *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281, 286-87 (1908) (upholding a legislative delegation to a private organization to “designate . . . the standard height of draw bars for freight cars” subject to certification by the Interstate Commerce Commission).

206. See CONN. GEN. STAT. ANN. § 16a-38k(b).

upon those set forth by the USGBC.²⁰⁷ This could have been an attempt by the legislature to reclaim the lost authority in the near future.

This unconstitutional statute causes a lapse in democratic accountability to the people of Connecticut.²⁰⁸ The USGBC is clearly not an agency of the Connecticut government, nor is it under the control of the state's executive. Instead, the USGBC is a nonprofit corporation that has the exclusive power to make its own independent policy determinations as to what should be included in the LEED standards.²⁰⁹ The LEED silver standard can change at the whim of the LEED committees that are empowered to alter the standards for any specific building application that is under examination.²¹⁰ This statute exemplifies a subversion of democratic accountability that the nondelegation doctrine was designed to check.²¹¹

Similarly, in New York, the legislature incorporated the LEED rating system into its tax law, allowing buildings to receive green building tax credits for compliance with LEED-inspired standards.²¹² While the statute does not mandate conformity with the LEED rating system, the potential tax incentives of these LEED-inspired standards will likely prompt adherence from developers.²¹³ This statute may have been innocuous enough by itself, but New York's green building policies became more problematic from a constitutional standpoint when former Governor George Pataki reinforced the policy of encouraging the adoption of LEED standards in an executive order.²¹⁴ This executive order requires state buildings to comply both with the aforementioned provisions of the New York Tax Law and with LEED standards

207. *See id.* (ordering various state agencies to "adopt state building construction standards that are consistent with or exceed the silver building rating of the [LEED's] rating system").

208. *See* Sunstein, *supra* note 16, at 335-36 (describing democratic accountability as a primary value behind the nondelegation doctrine).

209. *See About USGBC*, *supra* note 69.

210. *See* U.S. GREEN BLDG. COUNCIL BD. OF DIRS., FOUNDATIONS OF LEED app. 3 (2009), <http://www.usgbc.org/ShowFile.aspx?DocumentID=6103> (stating that "[s]ubstantive changes" to LEED content "will go into effect immediately").

211. *See* Theuerkauf, *supra* note 16, at 873-74 (describing political accountability in decisionmaking as a key value behind the nondelegation doctrine).

212. *See* N.Y. TAX LAW §§ 19(a)(1)(A), (a)(2)-(7), (e)(3)(A) (McKinney 2005).

213. *See* Circo, *supra* note 124, at 71-72 ("Tax benefits, reimbursements and grants for green building costs are the incentives that have the greatest potential to revolutionize industry practices and [encourage] investment in green building design and construction practices . . .").

214. *See* N.Y. Exec. Order No. 111 (2001), <http://www.nyserda.org/programs/pdfs/exorder111.pdf> ("In the design, construction, operation and maintenance of new buildings, State agencies and other affected entities shall, to the maximum extent practicable, follow guidelines for the construction of 'Green Buildings,' including guidelines set forth in Tax Law § 19 . . . and the [USGBC's] LEED rating system.").

generally to the “maximum extent practicable,”²¹⁵ thereby delegating to the USGBC the ability to set green building policy through the design of the LEED standards. The power granted to the USGBC by the New York statute,²¹⁶ when looked at in relation to the former governor’s executive order, should be recognized as a violation of the nondelegation doctrine due to the fact that the USGBC has not been provided with any standards of guidance in defining LEED criteria.²¹⁷

Although the New York Tax Law exemplifies a less direct delegation of legislative authority, the statute clearly refers to the USGBC, stating “[f]or purposes of this clause, ‘LEED rating system’ means the leadership in energy and environmental design green building rating system criteria being developed by the United States green building council.”²¹⁸ This statute, when combined with Governor Pataki’s executive order, represents a codification of the USGBC’s—and not the people of New York’s—LEED standards.²¹⁹ This combination of providing tax incentives for compliance with LEED-inspired standards and mandating compliance with LEED standards via executive order must be called into question by the nondelegation doctrine because a nongovernmental agency comprised of interested developers is setting the standards that could allow them to qualify for tax incentives.²²⁰

Connecticut and New York are not the only states that have unconstitutionally delegated lawmaking authority; the California Executive, Governor Arnold Schwarzenegger, has also delegated legislative authority to the USGBC through his plan to implement a green building policy that incorporates LEED standards as a mandatory requirement for state buildings.²²¹ Executives in other states have taken similar actions.²²² These state level executive orders, which set green

215. *Id.*

216. *See* N.Y. TAX LAW § 19(e)(3)(A) (requiring New York agencies to adopt building regulations “informed by the LEED rating system”).

217. *See id.* (providing no guidelines as to what LEED standards should be applied); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (stating that “standards of legal obligation” must be established for any legislative delegation to be proper).

218. N.Y. TAX LAW § 19(e)(3)(A).

219. *See id.*; N.Y. Exec. Order No. 111, *supra* note 214.

220. *See Schechter*, 295 U.S. at 537 (questioning the validity of a statutory scheme that would allow industries to act as their own regulators).

221. *See* Cal. Exec. Order No. S-20-04 (2004), http://www.energy.ca.gov/greenbuilding/documents/executive_order_s-20-04.html (mandating that government agencies engage in energy-saving methods such as “[d]esigning, constructing and operating all new and renovated state-owned facilities paid for with state funds as ‘LEED Silver’ or higher certified buildings”).

222. *See, e.g.,* Ariz. Exec. Order No. 2005-05 (2005), http://www.governor.state.az.us/eo/2005_05.pdf (“All state-funded buildings constructed after the date of this Executive Order shall meet at least the ‘silver’ [LEED] standard.”); Fla. Exec. Order No. 07-126 (2007), <http://www.flclimatechange.us/ewebeditpro/items/O12F15073.pdf> (“The Department of

building policies,²²³ surrender a significant portion of the critical decisions to the USGBC and its committees—who make all of the decisions regarding the content of the LEED standards²²⁴—by the legal adoption of the LEED rating system.

Another example of the USGBC of the unconstitutionally delegated authority to make law, exhibited on a more local level, is New York City’s mandate that certain construction projects satisfy LEED standards.²²⁵ Mayor Michael Bloomberg signed off on an amendment to the New York City Charter in 2005, which directs that buildings costing the city \$2 million or more comply with at least the LEED silver standard.²²⁶ It cannot be said enough that the LEED silver standard provides no principle for the USGBC to follow when setting the criteria by which a building must comply to attain the desired rating.²²⁷ Furthermore, delegations of legislative control to a nonprofit such as the USGBC, even at the more local levels of government—as in New York City—are forbidden, not only by the nondelegation doctrine, but also by the concordant “‘reserved rights’” doctrine.²²⁸

Additionally, the Scottsdale, Arizona resolution passed by the city council requires that all new city buildings achieve the LEED gold rating.²²⁹ City buildings must strive for the LEED platinum rating, except when costs prohibit the attainment of LEED’s highest standard.²³⁰ The city council retains the ability to grant exceptions to strict

Management Services shall adopt the [USGBC’s] [LEED] for New Construction (LEED-NC) standards for all new buildings. The Department is directed to strive for Platinum Level certification, the highest possible certification . . .”).

223. See *Ariz. Exec. Order No. 2005-05*, *supra* note 222; *Cal. Exec. Order No. S-20-04*, *supra* note 221; *Fla. Exec. Order No. 07-126*, *supra* note 222; *N.Y. Exec. Order No. 111*, *supra* note 214.

224. See *LEED Rating System Committees*, *supra* note 110.

225. See *Erpenbeck & Schiman*, *supra* note 4, at 35 (“New York City also has passed a law for city buildings and projects funded by the city treasury that apply to new construction, building additions, and substantial reconstructions. These requirements include meeting LEED certification standards and vary depending on the cost of the project.”).

226. See *N.Y.C. LOCAL LAW No. 86, § 2 (2005)*, http://www.nyc.gov/html/dob/downloads/pdf/l1_86of2005.pdf.

227. This is because the USGBC and its committees control the content of the LEED standards. See *LEED Rating System Committees*, *supra* note 110.

228. Under this doctrine, a local government cannot “bargain away” regulatory power on matters of public health and safety. *Stone v. Mississippi*, 101 U.S. 814, 819 (1879); see also Judith Welch Wegner, *Utopian Visions: Cooperation Without Conflicts in Public/Private Ventures*, 31 SANTA CLARA L. REV. 313, 337 (1991) (“Under [the reserved rights] doctrine, a local government cannot ‘contract away’ its police power, but must retain the right to modify regulatory requirements as needed to respond to important public health and safety concerns.”).

229. See *SCOTTSDALE, ARIZ. RES. NO. 6644, § 2 (2005)*, <http://www.scottsdaleaz.gov/Assets/Public+Website/greenbuilding/Resolution+6644.pdf>; *Erpenbeck & Schiman*, *supra* note 4, at 34; Press Release, Anthony Floyd, *supra* note 122.

230. See *SCOTTSDALE, ARIZ. RES. NO. 6644, § 2*.

compliance under the law, but this legislative check is secondary to the mandated compliance with the LEED rating system.²³¹ As noted many times before,²³² the adoption of LEED standards provides no “intelligible principle” guiding the LEED committees in setting LEED standards, which makes this type of delegation unconstitutional as a violation of the nondelegation doctrine.²³³

Unconstitutional delegations of legislative control to the USGBC through the statutory adoption of the LEED standards have occurred more frequently on a local level than in the statewide arena.²³⁴ The localization of the delegation problem has likely occurred because of the way in which control over land use is exercised at the local level.²³⁵ However, the level of government at which the delegations occur is irrelevant; codification of LEED standards into law at any level of government is an unconstitutional delegation of power to a nongovernmental organization—the USGBC—over which the government and public at large can exercise no direct control.²³⁶

All of the aforementioned delegations of legislative power are unconstitutional because of their violation of the nondelegation doctrine. The laws incorporating the LEED standards fail to provide reasonable safeguards against an abuse of the granted authority by the USGBC in setting the LEED criteria.²³⁷ The lack of safeguards is not due solely to the lack of an “intelligible principle,”²³⁸ but is also directly linked to the

231. *See id.* § 4 (stating that when city buildings are designed with added features and costs of becoming a LEED gold building and the recovering of those costs will not be paid for in five years, buildings may deviate from the standards, but must still incorporate LEED standards into their design as much as possible); *id.* § 5 (“The city council may grant exceptions to this Policy when it deems appropriate.”).

232. *See supra* notes 197, 205, 217, 227 and accompanying text (criticizing various delegations for their lack of standards).

233. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

234. *See Parlow, supra* note 36, at 519-20 (discussing the statutory adoption of LEED standards by state and local governments).

235. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (holding that municipalities have the power to impose controls and restrictions on local land use); Circo, *supra* note 124, at 61 (stating that municipalities use police power to implement green building policies); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 727-37 (2008) (discussing the history of municipal use of zoning regulations and judicial deference to said regulations).

236. According to the USGBC bylaws, it is the responsibility of its Board of Directors, not any governmental body, “[t]o oversee, control and direct affairs of the [USGBC], its committees and publications.” *See USGBC BYLAWS, supra* note 75, at art. VI, § 2(E).

237. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935) (“In creating . . . an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.” (quoting *Wichita R.R. & Light Co. v. Pub. Util. Comm’n*, 260 U.S. 48, 59 (1922))).

238. *J. W. Hampton*, 276 U.S. at 409.

absence of control the government has over the nongovernmental USGBC and LEED rating system.²³⁹

The USGBC is clearly not an agent of the government, but is instead controlled by its membership.²⁴⁰ Since the USGBC is a nonprofit corporation and lawmaking bodies have no direct control over it, the group provides no avenue for democratic dialogue.²⁴¹ The only way that legislatures—and thereby the people—are able to exercise any degree of direct influence over the LEED rating system is by becoming a member of the organization.²⁴² Even then, new members' influence is likely to be negligible.²⁴³ Because of the lack of legislative control and accountability the USGBC has to the citizens of this country, the LEED standards that have been incorporated into statutes are an unconstitutional delegation of legislative power.

As this Part has just shown, the nondelegation doctrine is applicable to the above laws incorporating the LEED rating system and should be called upon by the courts to correct the unconstitutional delegation of legislative power to the USGBC. The next Part will provide suggestions to remedy the unconstitutional delegations, while allowing for the success of the green building movement.

239. See *supra* note 236.

240. See *About USGBC*, *supra* note 69.

241. See *id.*; *supra* note 236 and accompanying text (explaining the lack of governmental control over the USGBC); see also Sunstein, *supra* note 16, at 336 (describing the “accountability” that results from democratic dialogue as a key value behind the nondelegation doctrine).

242. Under the USGBC bylaws, federal, state, and local governments may become members of the USGBC and its board of directors. See USGBC BYLAWS, *supra* note 75, at art. III, § 1; *id.* art. VI, § 1.

243. For example, government actors occupy a miniscule percentage of positions on the USGBC's board of directors. Only one directorship out of fifteen is currently occupied by a government actor, and none of the six executive committee spots are occupied by a government actor. See *Board of Directors*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2382&> (last visited Mar. 1, 2011).

IV. WORTHWHILE MOVEMENTS FACE SETBACKS: SUGGESTIONS AND SOLUTIONS TO KEEP THE GREEN BUILDING MOVEMENT ALIVE

Environmentally-conscious legislation pertaining to green buildings should continue to flourish, but who should be responsible for implementing green building standards? The privatization²⁴⁴ of government functions has occurred in many instances and does not always raise a constitutional question.²⁴⁵ This Part sheds light on some of the benefits of having the USGBC involved in determining green building standards and ways in which the organization's expertise can best be put to use. This Part also looks at ways the USGBC can remain influential in the green building movement through pathways that other legislative bodies have taken to avoid constitutional conflicts.

There are limited benefits to having a private entity, such as the USGBC, developing strategies for creating a more environmentally-sound built environment. One such benefit of the USGBC providing the criteria to guide green building standards is that the organization will bear the cost of research and development of environmentally-conscience building techniques.²⁴⁶ This is certainly an advantage rather than having the cost shifted to the public sector by way of tax increases to fund research for green building technologies.²⁴⁷

Other benefits of the USGBC setting green building standards stem from its well-developed expertise in green building design and the organization's ability to attract individuals who are responsive to the environmental issues that are intrinsic in our built environment's design and construction.²⁴⁸ In reality, governmental bodies may find it simply easier and cheaper to adopt the USGBC's LEED standards rather than

244. Celeste Pagano, *Proceed With Caution: Avoiding Hazards in Toll Road Privatizations*, 83 ST. JOHN'S L. REV. 351, 361 (2009) ("Privatization refers to any of variety of processes that transfer government functions and responsibilities in whole or in part to the private sector."); see Savas, *supra* note 21, at 889 ("Privatization' means increased governmental reliance on the private sector, rather than on government agencies, to satisfy the needs of society.").

245. See Mays, *supra* note 20, at 44.

246. LEED committees use green building experts to assess the implementation of green technology in the LEED rating system. See *LEED Technical Committee*, *supra* note 21; see also Savas, *supra* note 21, at 894-95 (discussing studies which show government officials prefer contracting out services because of high capital costs, and that such contracted services are generally found to be cheaper).

247. See, e.g., Sussman, *supra* note 12, at 20 (describing use of energy service companies to develop energy-efficiency projects, which do not impose upfront costs upon the municipality).

248. See *supra* Part II.B (describing USGBC's expertise in and influence on green building standards); see also Pagano, *supra* note 244, at 364 ("By privatizing a service, government can take advantage of efficiency gains that come with private business, such as management structures, specialized expertise, and innovation." (emphasis added)).

spending the time, money, and effort to develop their own green building criteria.²⁴⁹

However, the benefits of the privatization of green building standards must be contrasted with the substantial drawbacks of such legislative action.²⁵⁰ As has cleverly been stated, “[c]onsigning the provision of [government] functions to private organizations is akin to asking the wolf to guard the henhouse.”²⁵¹ Private organizations, including the USGBC, are not accountable to the people and only seek to advance their own interests.²⁵² When a private organization sets green building standards, a veil is placed over a lawmaking process that should have encompassed public discourse and debate.²⁵³ Further, private entities generally lack concern for the community at large.²⁵⁴ The privatization of environmental regulations, and specifically green building standards, leaves the general public without an avenue to address its specific environmental concerns.²⁵⁵

It is evident that state governments have a substantial amount of leeway in regulating the way buildings are constructed.²⁵⁶ States should be able to determine for themselves what green building standards entail for the specific concerns and needs of their citizenry.²⁵⁷ State and local lawmaking bodies can use their police powers²⁵⁸ to promulgate their own green regulations that are based on the LEED rating system. This approach would not violate the principles of the nondelegation doctrine.²⁵⁹ A prime example of an attempt at this approach is Portland, Oregon, which created its own LEED rating system in conjunction with the USGBC.²⁶⁰ Such a combined effort puts the USGBC’s green

249. See Sussman, *supra* note 12, at 10 (“It is considerably easier for a community to adopt an established green building rating system than to develop its own and provide its own mechanisms and staff to certify compliance.”).

250. See Mays, *supra* note 20, at 68 (“[S]ince the purposes of a public and private corporation are vastly different, the consequences of permitting private entities to perform public functions will be perverse . . .”).

251. *Id.* at 69.

252. See *id.* at 68-69.

253. See Pagano, *supra* note 244, at 368.

254. See Mays, *supra* note 20, at 69.

255. See *id.* at 68.

256. Circo, *supra* note 25, at 749.

257. See *id.* at 774-78 (arguing for state and local implementation of green building standards).

258. James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 319 (1997-98) (“[S]tates maintain control over those matters which are reasonably related to the promotion and maintenance of the health, safety, morals, and general welfare of the public, through what are traditionally known as ‘police powers.’” (footnote omitted)).

259. See Circo, *supra* note 25, at 746 (“Given the current police power jurisprudence . . . few authorities would question the legal justification for regulations that promote green buildings.”).

260. See BUREAU OF PLANNING & SUSTAINABILITY, EXHIBIT A: CITY OF PORTLAND GREEN BUILDING POLICY 2 (2001) [hereinafter GREEN BUILDING POLICY], <http://www.portlandonline.com/>

building expertise to public use, while allowing elected lawmakers to directly shape the law and policy of green building standards implemented in their jurisdiction.²⁶¹

State and local lawmaking bodies could also give deference to the LEED rating system, but provide an independent assessment and interpretation of what it means to be a green building. Boulder, Colorado is an example of such an approach.²⁶² Boulder gives deference to compliance with the LEED rating system by exempting buildings that fulfill the requirements for the LEED silver standard from the city's own green building criteria, the "Green Points" system.²⁶³ This approach allows for the legislature to reap the benefits of the USGBC's superior knowledge and expertise in developing standards for green building, but still allows the legislature to have the final say in the green standards applied to buildings in Boulder.²⁶⁴

Over the past few decades, states have implemented environmentally-friendly legislation by encouraging the use of solar panels.²⁶⁵ There is no reason that the same type of specific guidelines as legislatures have instituted for solar panels cannot be set out for green buildings. These and other corrective measures would allow for democratic control and accountability in green building legislation while providing an avenue for the development of an increasingly green society. As this Part has detailed, there are paths to explore that would allow the USGBC to remain at the forefront of designing green building standards while retaining lawmaking power within legislative bodies and the bounds of constitutionality.

bps/index.cfm?&a=211352&c=50447. Unfortunately, this policy was superseded by a later policy, which took the more direct (and constitutionally problematic) approach of simply mandating compliance with LEED standards. See BUREAU OF PLANNING & SUSTAINABILITY, GREEN BUILDING RESOLUTION 2-4 (2009), <http://www.portlandonline.com/bps/index.cfm?c=50447&a=243213>.

261. See GREEN BUILDING POLICY, *supra* note 260. The same might have been said of similar provisions of the Connecticut and New York statutes, if they were not secondary to the mandating of LEED standards in their respective states. See *supra* notes 198-220 and accompanying text (discussing the adoption of Connecticut and New York LEED standards).

262. See BOULDER REV. CODE. § 10-7.5-2 (2008), http://www.bouldercolorado.gov/files/PDS/green_points/902.pdf (explaining the scope and administration of Boulder, Colorado's green building regulations).

263. See *id.* § 10-7.5-2(d) (allowing an exemption from the city's "Green Points" program for buildings which are certified LEED silver or certified by a comparable green building rating system).

264. See *id.* § 10-7.5-2(c) (mandating compliance with all sections of the statute, and requiring city managers to sign off on all applications).

265. See Bronin, *supra* note 28, at 268.

V. CONCLUSION

The green movement has come a great distance since its inception in the 1960s and the trend is likely to continue well into the future.²⁶⁶ However, the unconstitutional delegations of legislative authority to control green building standards to the USGBC stands in direct opposition to the principles of our democratic society.²⁶⁷ Although the premise of a more environmentally-receptive built environment is critical to our society's long-term sustainability,²⁶⁸ we cannot depart from the constitutional restrictions placed on our legislative bodies as they have been interpreted by the Supreme Court and high courts of the several states. The nondelegation doctrine imposes limitations on the ability of legislatures to delegate their lawmaking power in order to prevent the unconstitutional dispersal of legislative policy control to other actors.²⁶⁹ As this Note has shown, the delegation of lawmaking authority through the incorporation of LEED standards in certain laws violates the nondelegation doctrine.²⁷⁰

There are, however, alternatives to the unconstitutional delegations of legislative authority when legislatures are setting green building policy. Our legislatures, in order to promote democratic input and accountability, must adequately explore such alternative paths, as Portland and Boulder have done, rather than delegating their authority to the USGBC to avoid making tough policy decisions implicit in determining green building criteria.²⁷¹ Our government cannot dictate that the green building standards imposed on our building industry originate in a closed-off and interest-based nonprofit that has been unconstitutionally delegated authority to determine, on a nationwide scale, green building policy.²⁷²

The green building movement will continue to gain momentum as the concerns about global climate change become more imminent and the substantial environmental benefits of green building become more widely recognized and accepted.²⁷³ The unconstitutional delegations

266. See *supra* notes 7-8 and accompanying text.

267. See *supra* Part III.B.

268. See Sussman, *supra* note 12, at 8 (“The large use of energy and other resources by buildings demonstrates the compelling need to use green building practices to foster sustainability.”).

269. See *supra* Part III.A.

270. See *supra* Part III.B.

271. See *supra* Part IV.

272. See *supra* Part III.B.

273. See Sussman, *supra* note 12, at 8-9 (arguing that “[g]lobal warming requires action at all levels of society” and that green building could have a significant and beneficial impact on “climate change mitigation”).

examined above²⁷⁴ should encourage our governmental bodies to foster public discourse in dealing with what seems like an insurmountable issue with pressing implications for our nation as well as around the globe.²⁷⁵ As our laws continue to reflect the trend towards a greener society, we must not, at the expense of the democratic principles our nation's founders enshrined in our most sacred document, allow the fervor of the green building movement to overcome the reasoned decisionmaking embodied in our democratic process.

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274. *See supra* Part III.B.

275. *See supra* notes 42-47 and accompanying text (explaining the significant environmental impacts of traditional construction techniques).

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