

**THE EXTRA-WTO PRECAUTIONARY PRINCIPLE:
ONE EUROPEAN “FASHION” EXPORT
THE UNITED STATES CAN DO WITHOUT**

by LAWRENCE A. KOGAN*

I. INTRODUCTION

A. Europe Endeavors to Become the New U.S. and Global Regulator—Meet the Extra-WTO Precautionary Principle

In 2002, a *Wall Street Journal* columnist prepared a prescient but largely unnoticed article that unfortunately was a negative harbinger of things to come.¹ It described how the European Union (EU) had largely become *the de facto global legislator and regulator* of all kinds of rules concerning the environment, human health, and safety² that would eventually touch and materially impact practically every industry sector within the United States and, by extension, the world.³

As the columnist then noted,

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1. Brandon Mitchener, *Standard Bearers: Increasingly, Rules of Global Economy Are Set in Brussels—to Farmers and Manufacturers, Satisfying EU Regulators Becomes a Crucial Concern—from Corn to SUV “Bull Bars,”* WALL ST. J., Apr. 23, 2002, at A1.

2.

European Union (EU) policy documents reflect that the products covered by EU environmental, health, and safety regulations, directives, and standards represent a large proportion of [all] products placed on the market. It is estimated that, as of 2003, the trade of products covered only by the major [agricultural and industrial] sectors regulated . . . largely exceeds the volume of 1500 billion euro (1.5 trillion euro) [(or approximately \$2.25 trillion)] per year.

LAWRENCE A. KOGAN, PRECAUTIONARY PREFERENCE: HOW EUROPE’S REGULATORY PROTECTIONISM IMPERILS AMERICAN FREE ENTERPRISE 6 (2005) [hereinafter PRECAUTIONARY PREFERENCE] (quoting COMM’N OF THE EUROPEAN CMTYS., ENHANCING THE IMPLEMENTATION OF THE NEW APPROACH DIRECTIVES 3 (2003), available at <http://www.itssd.org/White%20Papers/PrecautionaryPreference-EURegProtectionism-FULLVERSION.pdf>).

3. Mitchener, *supra* note 1.

Because of differing histories and attitudes toward government, the EU . . . with . . . the world's second-largest economy, regulates more frequently and more rigorously than the U.S., especially when it comes to consumer protection. So, even though the American market is bigger, the EU, as the jurisdiction with tougher rules, tends to call the shots for the world's farmers and manufacturers. . . . EU rules often cause particular friction in the high-tech fields, such as software, electronic commerce and biotechnology.⁴

In effect, this Article implied that America would, over time, lose its sovereign ability to determine its own economic fate and destiny, first outside, and then within its own borders, if it did not act quickly and resolutely enough to slow down and reverse Europe's regulatory juggernaut.

Now, more than four years later, this has become abundantly clear.

Sometimes voluntarily, sometimes through gritted teeth and sometimes without knowing, countries around the world are importing the EU's rules. It is a trend that has sparked concerns among foreign business leaders and that irritates US policymakers. But whether they like it or not, rice farmers in India, mobile phone users in Bahrain, makers of cigarette lighters in China, chemicals producers in the US, accountants in Japan and software companies in California have all found that their commercial lives are shaped by decisions taken in the EU capital.

. . . .

The EU's emergence as a global rulemaker has been driven by a number of factors, but none more important than the sheer size and regulatory sophistication of the Union's home market. . . . At the same time, the drive to create a borderless pan-European market for goods, services, capital and labour has triggered a hugely ambitious programme of regulatory and legislative convergence among national regimes.

This exercise has left the Union with a body of law running to almost 95,000 pages—a set of rules and regulations that covers virtually all aspects of economic life Compared with other jurisdictions, the EU's rules tend to be stricter, especially where product safety, consumer protection and environmental and health requirements are concerned. Companies that produce their goods to the EU's standards can therefore assume that their products can be marketed everywhere else as well.

As . . . two US-based academics[] point out in a recent paper that examines the global impact of three recent EU laws on chemicals, electronic waste and hazardous substances: "The EU is increasingly replacing the United States as the defacto setter of

4. *Id.*

global product standards and the centre of much global regulatory standard setting is shifting from Washington DC to Brussels.”⁵

Indeed, Europe had long targeted the U.S. regulatory and free enterprise systems for fundamental restructuring. Its aim has all along been to achieve *supranational* legal and economic governance over the affairs of global (mainly U.S.) industry through an environment-centric *negative* paradigm of “sustainable development.”⁶ There is, in fact, significant documentary evidence showing how the European Community and a number of EU member state governments have, for many years, tried to persuade/compel American-based international businesses and their domestic and foreign suppliers, as well as U.S. federal, state, and local legislators, to adopt similar rules.⁷ In so many words, Europe has been engaged in a legalistic and economic war with the United States in an effort to reshape the post-World War II paradigm in the European image.⁸ And it has employed “soft” regulatory rather than “hard” military power to achieve this.⁹ The unfortunate reality is that Europe is now well on its way to governing the American way of life; that is, re-colonizing America and the world, unless Americans find a way to reverse this trend.

Brussels is becoming the world’s regulatory capital. The European Union’s drive to set standards has many causes—and a protectionist impulse within some governments (e.g., France’s) may be one. But though the EU is a big market, with almost half a billion consumers, neither size, nor zeal, nor sneaky protectionism explains why it is usurping America’s role as a source of global standards. A better answer lies in transatlantic philosophical differences.

The American model turns on cost-benefit analysis, with regulators weighing the effects of new rules on jobs and growth, as well as testing the significance of any risks. Companies enjoy a presumption of innocence for their products: should this prove mistaken, punishment is provided by the market (and a barrage of lawsuits). *The European model rests more on the “precautionary principle,” which underpins most environmental and health directives.* This calls for pre-emptive action if scientists spot a credible hazard, even before the level of risk can be measured. Such

5. Tobias Buck, *Standard Bearer: How the European Union Exports Its Laws*, FIN. TIMES, July 10, 2007, at 9.

6. For a discussion of this concept see ITSSD, Issues, <http://www.itssd.org/issues.htm> (last visited Mar. 15, 2008), exploring the issues surrounding application of the negative paradigm of sustainable development.

7. See Lawrence A. Kogan, *Exporting Europe’s Protectionism*, 77 NAT’L INTEREST 91, 94 (Fall 2004) [hereinafter *Exporting Europe’s Protectionism*], available at <http://www.itssd.org/Publications/Kogan%20TNI%2077FINAL.pdf> (noting that an EU Commission moratorium on genetically engineered products “halted approximately \$300 million in U.S. corn shipments per year”).

8. See *id.* at 92-93 (noting that the institutionalization of the precautionary principle would transform the current international trade rules and impose a new model of risk evaluation).

9. *Id.* at 98-99.

a principle sparks many transatlantic disputes: over genetically modified organisms or climate change, for example.

In Europe corporate innocence is not assumed. Indeed, a vast slab of EU laws evaluating the safety of tens of thousands of chemicals, known as REACH, reverses the burden of proof, asking industry to demonstrate that substances are harmless. *Some Eurocrats suggest that the philosophical gap reflects the American constitutional tradition that everything is allowed unless it is forbidden, against the Napoleonic tradition codifying what the state allows and banning everything else.*

....

One American official says flatly that the EU is “winning” the regulatory race, adding: “And there is a sense that that is their precise intent.” He cites a speech by the trade commissioner, Peter Mandelson, claiming that the export of “our rules and standards around the world” was one source of European power. Noting that EU regulations are often written with the help of European incumbents, the official also claims that precaution can cloak “plain old-fashioned protectionism in disguise.”¹⁰

In other words, continental Europe, led by France and Germany and now assisted by Great Britain, has been waging a silent underground campaign to export to the United States and throughout the world *the* most precious of its *civil law* legal precepts—the one that will permit *it*, and by extension, the United Nations (UN), which it strongly supports, to regulate most U.S. industrial and technology-based activities on environmental, health, and safety grounds. It is known within European and UN circles as the extra-WTO (World Trade Organization) *Precautionary Principle*.

B. What Is the Extra-WTO Precautionary Principle?—“I Fear, Therefore I Shall Ban”—(Chicken Little Syndrome)

Europe’s formalized *extra-WTO* Precautionary Principle is a non-scientific “better safe than sorry” regulatory philosophy employed to achieve *political* goals in public environment, health, and safety regulation.¹¹ It favors banning or severely restricting broad classes of substances, products, and activities if it is merely *possible* that they or the processes used for their manufacture, formulation, or assembly might, in the uncertain distant future, pose potentially serious but unknown health or environmental harm.¹²

10. *Brussels Rules OK; How the European Union Is Becoming the World’s Chief Regulator*, ECONOMIST, Sept. 20, 2007, at 68 (emphasis added), available at http://www.economist.com/world/europe/displaystory.cfm?story_id=9832900.

11. Lawrence A. Kogan, *The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk*, 1 SETON HALL J. DIPL. & INT’L REL. 77, 78 (Winter/Spring 2004) [hereinafter *The Precautionary Principle and WTO Law*], available at <http://diplomacy.shu.edu/journal/new/pdf/VolVNo1/6%20-%20Kogan.pdf>.

12. LAWRENCE A. KOGAN, NAT’L FOREIGN TRADE COUNCIL, INC., LOOKING BEHIND THE CURTAIN: THE GROWTH OF TRADE BARRIERS THAT IGNORE SOUND SCIENCE 6 (2003),

Rather than focus on the probable occurrence of *actual risks* under real life circumstances (i.e., with reference to *causation*, use and exposure), the Precautionary Principle dwells on *hypothetical hazards* conceived of in a laboratory setting that may or may not arise sometime in the uncertain distant future from unknown potential uses of products and/or processes characterized a priori as unacceptably and inherently dangerous.¹³ Precautionary Principle advocates refuse to accept that a certain amount of risk is unavoidable in everyday life and that such risk can be intelligently and rationally managed with informed, balanced, and cost-effective policies.¹⁴ Instead, they endeavor to establish an environment-centric, risk-free utopian world without even considering how the resulting economic and opportunity costs will impact industry and society-at-large.¹⁵

Europe's almost fanatical promotion of, and blind adherence to, the extra-WTO Precautionary Principle has caused countless numbers of developing countries' citizens to unnecessarily suffer what economists have characterized as a "risk-risk scenario."¹⁶ This means that, in their reflexive zeal to eliminate unknown potential environmental or health hazards, extra-WTO Precautionary Principle oriented policymakers continue to inadvertently trigger new and even greater public risks that cannot be readily assessed and/or managed.

If the Precautionary Principle were adopted worldwide, such an unscientific standard would permit nations to severely restrict *any* inter- and intra-state trade, finance, and technological innovation based on putative evidence of merely a *correlation* between a suspect product, substance, or activity and some observable or anticipated change in the environment. Ordinary scientists, engineers, and business people the world over know quite well that there is a marked difference between *causation* and *correlation*, and that they can make rationally-based decisions in their daily lives guided only by the "knowables" in life rather than the "unknowables." If this is so, then one must ask, what do the Europeans hope to gain?¹⁷

http://www.wto.org/English/forums_e/ngo_e/posp47_nftc_looking_behind_e.pdf [hereinafter LOOKING BEHIND THE CURTAIN].

13. *The Precautionary Principle and WTO Law*, *supra* note 11, at 78.

14. *See id.* at 78-79 (referring to the EU's approach as "better safe than sorry" and stating that this culture of risk averseness "imposes on industry (foreign as well as domestic) a considerable legal and commercial burden of demonstrating that a product or substance is safe or harmless, which is tantamount to the imposition of a negative burden of proof or a zero risk threshold").

15. *See id.* at 103 ("EU regulators argue that their aversion to risk is necessary to ensure a high level of health and environmental protection, even if it imposes a considerable legal, economic, and social burden on industry (foreign as well as domestic) and developing country governments.").

16. LAWRENCE A. KOGAN, NAT'L FOREIGN TRADE COUNCIL, INC., 'ENLIGHTENED' ENVIRONMENTALISM OR DISGUISED PROTECTIONISM?: ASSESSING THE IMPACT OF EU PRECAUTION-BASED STANDARDS ON DEVELOPING COUNTRIES 1, 39 (2004) [hereinafter 'ENLIGHTENED' ENVIRONMENTALISM OR DISGUISED PROTECTIONISM?], available at http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_enlightened_e.pdf.

17. For example, the international debate over climate change "concerns the extent to which certain human activities can actually be *shown to cause* measurable global warming or to merely *correlate with* a barely observable rise in global temperatures that may or may not prove cyclical in nature." LAWRENCE A. KOGAN, ITSSD, EUROPE'S WARNINGS ON CLIMATE CHANGE BELIE MORE NUANCED

There is now evidence that the EU's imposition of the *extra*-WTO Precautionary Principle through its bilateral trade agreements with developing countries and UN aid programs (e.g., the UN facilitated "Roll-Back Malaria" Field Program) has resulted in serious but preventable human tragedies.¹⁸ For example, it has denied sub-Saharan African country citizens 1) the use of DDT for the "indoor residual spraying" of their homes to control the deadly malaria epidemic transmitted by mosquitoes,¹⁹ as well as 2) the use of agricultural biotechnology to address their endemic food shortages and avert mass starvation.²⁰ In addition, it has denied India and certain East Asian developing economies the ability to develop key technologies that may be used to efficiently and safely recycle electronic wastes exported by developed countries, as well as the ability to undertake ship-breaking, a potentially lucrative economic activity.²¹ Unfortunately, the EU and the activist groups it financially supports have defined for developing countries what is unacceptable in terms of hazards and risks without obtaining their consent or constructive input.²² This, in turn, has denied such nations' citizens the ability to achieve a higher standard and quality of life and a more secure future.²³

When invoked, the *extra*-WTO Precautionary Principle arguably shortcuts the scientific process. Regulators need only identify a product or substance's inherently dangerous characteristics or intrinsically harmful qualities (largely a *political* decision), without examining their actual use, application and/or impact based on *scientific* and *empirical* data. As a matter of EU law, the *extra*-WTO Precautionary Principle becomes operative vis-à-vis an administratively created presumption of possible harm, as applied against industry products, substances, processes, and activities.²⁴ It thus imposes an impossible burden upon global industry to prove a negative—the absence of potential health or environmental harm or complete safety—in every future instance and, thereby, threatens to derail U.S. technological and industrial innovation and to seriously impair the global economic competitiveness of U.S. companies.

C. Misguided U.S. Politicians Are Helping Europe to Export the Extra-WTO Precautionary Principle to America

A growing number of U.S. "multilateralist" politicians have assisted the EU in exporting the *extra*-WTO Precautionary Principle to America.²⁵ These "Europhile-

CONCERNS 2 (2007), http://www.itssd.org/White%20Papers/Europe_sWarningsonClimateChangeBelieMoreNuancedConcerns.pdf [hereinafter EUROPE'S WARNINGS].

18. 'ENLIGHTENED' ENVIRONMENTALISM OR DISGUISED PROTECTIONISM?, *supra* note 16, at 32-33.

19. *Id.* at 20-21.

20. LOOKING BEHIND THE CURTAIN, *supra* note 12, at 7.

21. 'ENLIGHTENED' ENVIRONMENTALISM OR DISGUISED PROTECTIONISM?, *supra* note 16, at 45-64.

22. *Id.* at 9-10.

23. LOOKING BEHIND THE CURTAIN, *supra* note 12, at 50-62.

24. *The Precautionary Principle and WTO Law*, *supra* note 11, at 78-79.

25. See LAWRENCE A. KOGAN, ITSSD, EXPORTING PRECAUTION: HOW EUROPE'S RISK-FREE REGULATORY AGENDA THREATENS AMERICAN FREE ENTERPRISE 65 (2005), <http://www.itssd.org/White%20Papers/KoganMonograph.pdf> [hereinafter EXPORTING PRECAUTION] (noting state ordinances that incorporate the precautionary principle into municipal law).

multilateralists” have already helped to incorporate the Precautionary Principle into the municipal laws of two important U.S. cities, and it is now being seriously considered by many others. San Francisco, California, and Portland, Oregon, have adopted the Precautionary Principle outright in their municipal codes.²⁶ The Precautionary Principle now guides every commercial and government activity within these two jurisdictions that could conceivably have an impact on human health and the environment.²⁷ These activities include government procurement policy, energy conservation and efficiency requirements in private and public office buildings, consumer goods waste recycling and disposal activities, chemicals management policies, consumer product safety, and zoning and land use.²⁸

In addition, several U.S. states have indirectly incorporated the extra-WTO Precautionary Principle into state law by adopting wholesale (completely and expressly) certain EU regional regulations or directives that are based on the Precautionary Principle. California, for example has adopted: (1) the EU WEEE and RoHS directives that ban brominated flame retardants and any products incorporating them and impose on product manufacturers and distributors the obligation to “take back” and pay for the collection, disposal and/or recycling of all of their products upon their obsolescence;²⁹ (2) the EU Cosmetics Directive, by banning the use of any cosmetics containing phthalates that are also banned in the EU by such directive;³⁰ and (3) EU carbon dioxide emissions caps on all modes of public and private transportation and energy generation, EU renewable energy portfolio preferences and mandates, and energy conservation and efficiency objectives.³¹

Furthermore, California is now seriously considering adopting as state law the EU’s onerous and expensive EU REACH chemicals management regulations that went into effect throughout the European Community on June 1, 2007,³² as well as

26. See *infra* text accompanying notes 534-556 (discussing San Francisco, California, and Portland, Oregon municipal laws incorporating the Precautionary Principle).

27. EXPORTING PRECAUTION, *supra* note 25, at 65 (“[T]he Precautionary Principle Ordinance . . . is intended as a ‘guiding principle of environmental policy.’”).

28. *Id.*

29. See *infra* text accompanying notes 338-342 (outlining California’s consideration of waste disposal and chemical management legislation modeled after EU directives).

30. See *infra* text accompanying notes 343-345 (noting the similarity between the California Safe Cosmetics bill and the EU Directive on Cosmetics).

31. See *infra* text accompanying notes 452-455 (detailing California’s efforts at creating environmental and energy legislation in accordance with EU goals and directives).

32. REACH is a complex, three-level system for regulation.

It requires companies to register virtually all chemicals based on the volume produced or imported; to evaluate those “substances which give rise to particular concern”; and to seek positive authorization for those deemed “substances of high concern.” Only in this third case does the REACH system take the potential for exposure into consideration. And that, as a leading chemical industry trade group reasonably complains, “does not occur until after registration and up-front toxicity and environmental testing.” Until then, REACH simply presumes that such chemicals are potentially harmful to human health and the environment—though the commission has not performed a science-based risk assessment on any specific substance or product and thus lacks empirical evidence to substantiate its presumption. A risk-based approach would take into account exposure data as early as

the EU's anti-biotech suite of pre-market authorization, traceability, and labeling regulations, which came into force in April 2004.³³ Each are problematic because they dispense with the need to conduct scientific risk assessments to identify actual or probable environmental or health harms and the need to weigh the economic costs against the promised environmental and health benefits. However, these activities are not restricted to California, which is touted as the sixth or seventh largest economy in the world and as a "nation-state" in its own right.³⁴ A number of other U.S. states have already adopted and/or are considering the adoption of such legislation, individually and collectively.³⁵

European multilateralists, such as German Chancellor Angela Merkel,³⁶ former British Prime Minister Tony Blair, and now French President Nicolas Sarkozy,³⁷ as

possible and would use that information primarily to determine the extent of risk and how best to manage it. It would not make industry jump through needless hoops.

Exporting Europe's Protectionism, *supra* note 7, at 95. See also Communiqués de Presse, New European Chemicals Agency Starts Operations as REACH Enters into Force (June 1, 2007), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/745&format=HTML&aged=1&language=EN&guiLanguage=fr>.

33. See text accompanying notes 338-345 (outlining California's consideration of anti-biotech legislation modeled after EU directives); EurActiv.com, Genetically Modified Organisms (Aug. 17, 2004), <http://www.euractiv.com/en/biotech/genetically-modified-organisms/article-117498>.

34. Karen Breslau, *We Are a "Nation-State"; Interview: The "Governator" Walks Where Washington Fears to Tread When It Comes to Global Warming*, NEWSWEEK, Apr. 16, 2007, at 60.

35. See generally EXPORTING PRECAUTION, *supra* note 25, at 43-53 (discussing various Precautionary Principle-based state and local regulations proposed in the United States).

36.

Chancellor Merkel has used the G8 Presidency to promote the idea of deeper economic integration across the Atlantic, the core strategy for improving transatlantic relations, in Washington, Brussels, and European capitals. Merkel's efforts have yielded results. Her initiative for regulatory harmonization has been endorsed by both European and American political leadership. It was a featured topic of the agenda for the EU-U.S. summit in late April. Both parties are currently reviewing the actual implications of deeper integration and considering an agenda for negotiations.

Fredrik Erixon & Andreas Freytag, *Freihandel für Fortgeschrittene*, INTERNATIONALE POLITIK, June 2007, at 3, available at http://www.ecipe.org/files/2007-05-25_IP.pdf (translation).

[Angela] Merkel took the opportunity of her keynote speech at the World Economic Forum in Davos—an annual meeting of top political and business leaders, intellectuals and non-governmental organizations—to call for closer trans-Atlantic cooperation. . . .

. . . "History shows that close trans-Atlantic economic integration is always the impetus for boosting economic growth."

. . . .

She went on to say that the potential for cooperation is far from being exhausted. "I see the need and possibilities for negotiations about non-tariff barriers, like for example technical standards, rules for financial markets, energy, environmental questions and intellectual property," she said. "The different approaches to regulation on the two sides of the Atlantic create unnecessary transaction costs. We can reduce these costs. Our goal should be the creation of structures similar to those of an internal market."

Merkel Calls for Closer EU-US Cooperation, SPIEGEL ONLINE INT'L, Jan. 25, 2007, <http://www.spiegel.de/international/0,1518,462160,00.html> (emphasis added).

37. From a speech given by President Sarkozy:

POLICY OF TRUTH/PRECAUTIONARY PRINCIPLE/ACCOUNTABILITY

well as American Europhiles, have endeavored to promote U.S. adoption of the extra-WTO Precautionary Principle through the “back-door,” via transatlantic efforts to address climate change as the logical fulfillment of the longstanding, but less than successful, New Transatlantic Agenda³⁸ and Transatlantic Economic

We want a policy of truth. Wangari Maathai and former Vice-President Gore have had the courage to proclaim the truth that our growth model is doomed; worse still, that world peace is doomed, if we do nothing.

Our fellow citizens must not imagine that climate change means nothing more than snow melting on the ski slopes. Climate change signifies hundreds of millions of climate refugees. Climate change means an acceleration of major disasters—droughts, floods and hurricanes. In a sense, climate change points to Darfur, where millions of poor people have been driven by hunger and thirst to other regions where they come into conflict with populations that have lived there for centuries. Climate change means new epidemics. It means heightened conflicts over water and food.

We must therefore have the courage to say that the price of oil will remain high from now on. We must have the courage to say that oil will run out before the end of the century. We must have the courage to recognize that we do not know all the long-term effects of the 100,000 chemicals now being sold. We must have the courage to recognize that our behaviour has not always been exemplary.

The French have the right to know. They have the right to know the truth about present and future threats. They have the right to form their own opinions. This is one of the main things the Grenelle is calling for. We will therefore create a right to total transparency of environmental information and expertise. All the data, without exception, including nuclear and GMO data, can from now on be disclosed. The only limits will be protection of privacy—much needs to be done here—, national security and industrial secrets.

This policy of truth is a policy of responsibility. No one must be able to say, henceforth, that he or she did not know. We are all accountable for our actions. And this brings me back to the precautionary principle. To suggest that it should be abolished because it hampers action demonstrates, in my view, a major misapprehension. The precautionary principle is not a principle based on inaction. It is a principle based on action. It is a principle based on action and expertise aimed at reducing uncertainty. It is a principle based on vigilance and transparency. It must therefore be interpreted as a principle based on responsibility. Responsibility is one of the values on which I focused during the election campaign.

Nicolas Sarkozy, President of the French Republic, Speech at the Concluding Session of the Grenelle de L'Environnement 5-6 (Oct. 25, 2007), available at <http://www.legrenelle-environnement.fr/grenelle-environnement/spip.php?article596>.

38.

The New Transatlantic Agenda was signed in December 1995 by President Bill Clinton, the then Spanish Prime Minister Felipe Gonzalez and European Commission President Jacques Santer.

The New Transatlantic Agenda has moved the transatlantic relationship from one of consultation, as foreseen by the 1990 Transatlantic Declaration, to one of joint action. . . .

The NTA is comprised of four “chapters”: first, the promotion of peace, stability and democracy and development around the world; second, global challenges (e.g., combatting [sic] pollution, drug-trafficking, organized international crime); *third, the promotion of economic relations and expansion of world trade (including the consolidation of the World Trade Organization)*; and building bridges among our business, civic and academic communities on both sides of the Atlantic. In this latter chapter, both sides pledge to support and encourage the development of the TransAtlantic Business Dialogue, launched in November 1995, and to take its recommendations into consideration in the creation of the New TransAtlantic Marketplace.

Partnership.³⁹ The original purpose of these initiatives was to prevent proliferation of disguised regulatory (extra-territorial technical non-tariff) trade barriers (protectionism) that could trigger substantial economic trade distortions and technology disruptions.⁴⁰ Both the EU and the United States have long appreciated

European Union, Delegation of the European Commission to the USA, EU-US Summit, The New Transatlantic Agenda, <http://www.eurunion.org/partner/summit/summit9712/nta.htm> (last visited June 10, 2008) (emphasis added).

39.

In the New Transatlantic Agenda, the US and EU committed ourselves, as part of efforts to create a New Transatlantic Marketplace, to strengthen regulatory cooperation. . . . Regulatory issues are becoming ever more prominent in US-EU relations as public interest in consumer protection issues has increased and trade in regulated products has expanded. The US and EU welcome the active and on-going technical dialogue that regulatory authorities already have in the development, harmonization and enforcement of regulations protecting health, safety, the environment and the consumer. To further that effort, the US and EU have agreed to enhance, whenever possible, their cooperation in the areas of: [1] consultation in the early stages of drafting regulations; [2] greater reliance on each other's technical resources and expertise; and [3] harmonization of regulatory requirements or mutual recognition.

. . . We will also discuss how to extend our cooperation to other trade partners and work together in international standard-setting bodies to advance these goals.

European Union, Delegation of the European Commission to the USA, EU/US Summit, Regulatory Cooperation: Promoting Trade While Facilitating Consumer Protection (Dec. 5, 1997), <http://www.eurunion.org/partner/summit/Summit9712/regulst.htm>.

40. European Union, Delegation of the European Commission to the USA, EU/US Summit, The Transatlantic Economic Partnership (May 18, 1998), <http://www.eurunion.org/partner/summit/Summit9805/econpart.htm>. The text states:

7. In keeping with our leading role in the world trade system, we reaffirm our determination to maintain open markets, resist protectionism and sustain the momentum of liberalisation. The most effective means of maintaining open markets and promoting the expansion of trade is the continued development and strengthening of the multilateral system

8. As part of our effort to strengthen further the multilateral system and seek wider trade liberalisation, our shared objectives are . . .

. . . .

f. The adoption of common positions on the respect for and further improvement of the intellectual property rights identified in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);

g. The development of common approaches in appropriate multilateral fora on investment, competition, public procurement and trade and the environment [as concerns bilateral actions]

. . . .

9. The EU and the US will intensify their efforts to reduce or eliminate barriers to trade and investment between them. . . . We will maintain high standards of safety and protection for health, consumers and the environment. Our partnership will not create new barriers to third countries.

10. We will focus on those barriers that really matter to transatlantic trade and investment and to this end we will aim in particular at the removal of those regulatory barriers that hinder market opportunities, both for goods and for services. We will concentrate specifically on the following:

a. technical barriers to trade in goods, reinforcing our efforts for the elimination or substantial lowering of the remaining barriers, while further pursuing our commitment to high health, safety and environmental standards;

the importance of ironing out their differences, particularly in the areas of the environment and health, in order to ensure the smooth functioning and international credibility of the WTO dispute settlement mechanism,⁴¹ which is now under threat from the spillover of transatlantic disputes into third world (developing) countries.⁴² Fortunately, at least for the time being, efforts to incorporate adoption of the extra-WTO Precautionary Principle within the broader transatlantic regulatory agenda are likely to falter to the extent they are unable to facilitate greater transatlantic trade and investment integration and economic growth.⁴³ Indeed, some U.S. government officials have recognized that there is a practical limit to how far even financial regulatory harmonization can go given profound regional differences in regulations and regulatory models.⁴⁴ This especially pertains to substantive differences in due process and procedural rights and even extends to federally-regulated public corporate voting rights.⁴⁵

....

c. agriculture, with the objective of strengthening our regulatory cooperation in the field of human, plant and animal health issues, including biotechnology, while recognising the importance of continuing to improve our respective regulatory processes and of improving our scientific cooperation.

....

e. intellectual property as identified in the Agreement on TRIPS in order to improve the protection of rightholders and to reduce costs.

Id.

41. See European Union, Delegation of the European Commission to the USA, EU/US Summit, New Transatlantic Agenda, Senior Level Group, Report to the US-EU Summit (Dec. 5, 1997), <http://www.eurunion.org/partner/summit/Summit9712/nta9712.htm> (stating that “the smooth functioning of the WTO dispute settlement mechanism” is a major priority).

42. See Bob Bennet, U.S. Senator, Remarks at the 2007 Brussels Forum, Deepening the Transatlantic Marketplace: From Rhetoric to Reality (Apr. 29, 2007), <http://www.gmfus.org/brusselsforum/doc/TransatlanticMarketplaceTranscript.doc> (“We don’t have to fight over labor and environmental standards in some third world country. We just have to do the logical thing with respect to regulatory reform all across the board and we will see the benefit for the economies everywhere.”).

43.

Together the EU and U.S. represent 40 percent of the world’s gross domestic product in terms of purchasing power parity. By removing thousands of inhibitors to investment—differing financial accounting systems, divergent technical standards across all sectors, uneven protection of intellectual property, competition policy hurdles—the economic benefits can be huge.

Claudio Murri, Letter to the Editor, *Transatlantic Marketplace Must Deliver Results*, FIN. TIMES, Jan. 8, 2007, at 12.

44. Press Release, 2007 Brussels Forum, Cox: U.S. and EU Should Accept Limits to Regulatory Harmonization (Apr. 29, 2007), http://www.gmfus.org/brusselsforum/template/press_release_detail.cfm?press_release_id=16.

45. See, e.g., Letter from Steven J. Milloy & Thomas J. Borelli, Managing Partners, Action Fund Management, to Nancy Morris, Secretary, U.S. Securities & Exchange Commission (Aug. 30, 2006), available at <http://www.sec.gov/rules/petitions/2006/petn4-525.pdf> (petitioning to address the problem of unequal voting rights between the foreign and U.S. shareholders of foreign corporate issuers affecting U.S. public environmental policy debates). According to the petition,

Foreign corporate issuers are increasingly participating in significant ways in political and public policy debates in the U.S., including lobbying the federal and state governments, supporting issue advocacy groups, conducting public relations campaigns and making

Europe's true purposes, plainly and simply, are neo-colonialism via international regulation and trade protectionism to impose unilaterally on U.S. individuals and businesses, and other of Europe's trading partners, the same higher regulatory and innovation costs and burdens on private property rights that European industries and citizens must bear as the result of European societal preferences. This, Europe believes, will have the effect of "leveling the global economic playing field" for its "over-regulated," R&D deficient, technologically inadequate, and otherwise inefficient industries. Europe also endeavors to secure global economic regulatory dominance by promoting changes in international and U.S. law that can only be brought about by U.S. engagement in UN multilateral environmental treaties. Additionally, Europe has dispatched emissaries to the United States to assist U.S. multilateralist politicians and environmental activists to change U.S. domestic law from within.⁴⁶ These parties, for example, have launched U.S. campaigns at the state and local levels to adopt Precautionary Principle-based environment and health rules, in some cases citing European regulations and directives by name.⁴⁷ Lastly, Europe has enlisted the aid of European-based companies listed in U.S. stock exchanges and U.S. environment-centric institutional investors to help push sustainable development-based producer supply chain initiatives, citing the financial and legal risks of loss of market access ("toxic lock-outs"), competitiveness, and European and California regulatory liability and common law tort liability.⁴⁸ Furthermore, these organizations have

political contributions. Foreign corporate issuers are also increasingly having significant economic, environmental and social impacts on the public.

....

Other foreign corporate issuers participate in various European Union regulatory processes with an eye toward "exporting" burdensome EU regulations to the U.S. that hamper the competitiveness of U.S. businesses.

Id. at 2-3. One of the recommended regulatory changes "would subject the foreign issuers of the securities underlying ADRs to the proxy rules under certain circumstances, thereby enabling ADR owners to exercise voting rights in the election of directors and to submit shareowner proposals." *Id.* at 5. The other recommended change would:

(1) . . . establish that depositaries have the same duties with respect to ADR holders as banks and registered broker-dealers that hold securities in "street name" for their clients—i.e., to forward, within five business days, certain corporate communications, including proxies to the beneficial owners of the shares; and (2) . . . permit ADR owners to exercise the rights that pertain to the securities underlying their ADRs by directing the depositary to vote the underlying shares and to submit shareowner proposals in the manner prescribed by the ADR owner.

Id. at 6; *see also* PRECAUTIONARY PREFERENCE, *supra* note 2, at 81-87 (discussing various attempts by the EU to promote regulations which incorporate the precautionary principle in the United States).

46. PRECAUTIONARY PREFERENCE, *supra* note 2.

47. *Id.* at 44 ("[P]recautionary principle advocates are now aggressively taking direct action by introducing legislation and initiating legal challenges at the local, state and federal levels, 'challenging the very way America does business.'").

48. *See* Letter from Steven J. Milloy & Thomas J. Borelli, *supra* note 45, at 2 ("Foreign corporations also make significant political contributions to U.S. politicians. British defense company BAE, for example, is the 18th biggest corporate donor in the current U.S. election cycle. GlaxoSmithKline, HSBC, Rolls Royce, UBS, Daimler-Chrysler and BP are other examples of foreign corporations that make significant U.S. political contributions.").

publicly pressured U.S. listed companies and their private suppliers to follow “first-mover,” “green companies” in adopting similar European “voluntary” sustainable development and corporate social responsibility guidelines.⁴⁹ These guidelines are intended to influence U.S. corporate financial *and* non-financial reporting practices.⁵⁰ If the United States succumbs to these pressures to restructure its economy and its legal system, it will most certainly suffer the same fate as Europe—a stagnant slow-growth regional economy, reduced investments in high-tech research and development, and a net outflow of critical skills jobs to lower

49. *Id.* at 3.

50.

In July 2005, the Wall Street Journal began a four part series of front page articles, “Toxic Traces: New Questions About Old Chemicals,” highlighting potential hazards to human health from relatively small amounts of chemicals in every day products. USA Today published a related story, “Are Our Products Our Enemy?” These reflect growing scientific and public concern that has led to a series of chemical phase-outs in various sectors from electronics and semiconductors to household durables and personal care products.

Over time producers will be forced to innovate. However the economics and logistics of re-design, reformulation and mobilization for compliance may be costly and, in some cases, the failure to adapt leaves room for liability or, in some instances, loss of market share.

There is no avoiding the fact that most modern conveniences are attributable in some way to the use of chemicals in production. That stated, investor groups have become interested in how this matter will create winners and losers in various sectors. The Investor Environmental Health Network currently represents \$22 billion in assets under management but may grow over time. Its older cousin, the Carbon Disclosure Project CDP (now in its fourth year) has reached \$31 trillion.

.....
A weakening of the conventional pesticide market may impact sales for several companies in the chemicals sector. Markets are shifting from synthetic to bio pesticides, driven by biotech advancements that reduce the need for extensive spraying. Citigroup cites a \$2 billion reduction in pesticide demand since 1995, a reduction mainly attributed to bioscience. The bio-pesticide industry is projected to increase by 20% per year in the US. Conversely, *the synthetic pesticide market* is expected to decrease by 3.14%, with bio-pesticides replacing 4.25% of that. Companies potentially affected may include: *Potash, Agrium, Chemtura, Syngenta*. Additionally we project that the *agrosiences division of Dow* will also face growing pressure amidst this trend.

.....
 Substances most likely to be targets for substitution include many inputs relevant to the above mentioned product categories such as: plasticizers, *pesticides*, flame retardants, and solvents.

Producers may not want to rely too heavily on cost estimates based on current formulations. They may begin to build out new models based on the eventuality that certain key intermediates will be taken out of the supply chain.

Theoretically downstream companies that already have the *appropriate precautionary measures* in place are likely to be more equipped than producers who do not.

[The] Precautionary principle . . . states that when an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically.

HEATHER LANGSNER & NORAN EID, CROSS CUTTING EFFECTS OF CHEMICAL LIABILITY FROM PRODUCTS 4-5, 9 (2007) (emphasis added), <http://www.sehn.org/tccpdf/liability%20from%20chemicals%20in%20products.pdf>.

cost and more “market-friendly” jurisdictions. Thus, the extra-WTO Precautionary Principle cannot be permitted to take hold in America.

D. The Purpose of This Article Is To Ensure Informed, Common Sense-Based Lawmaking and Regulatory Action

Legislation and regulation premised on the *extra*-WTO Precautionary Principle is rapidly being introduced throughout the United States within state and local legislatures and executive rule-making agencies.⁵¹ It is being justified to American citizens as absolutely necessary to avoid a possible “eco-Armageddon,” if not to achieve the “highest level” of public health and safety possible.⁵² It bears mentioning that extra-WTO Precautionary Principle-based rules are being promoted notwithstanding the much higher economic, technological, and social costs that such an open-ended and risk-averse public policy is known to engender. Precautionary Principle advocates are thus conveying a *false* message to the American public: that American laws, regulations, and process and production standards are no longer safe enough to protect American citizens from possible current and future health and environmental harms.

U.S. industry, as a result, is increasingly subject to the unreasonable demands of Precautionary Principle advocates, ranging from populist, multilateralist American politicians to unaccountable American-based environment and health activist groups. Additionally, U.S. federal, state, and local legislators and administrative agency heads are increasingly placed in the hopelessly defensive position of considering overly restrictive legislation and regulation merely to address the baseless public claims made by these very same groups.

Consequently, the legislators and regulators are being compelled to “act” reflexively any time there is scientific uncertainty surrounding the absolute safety of industry products, processes, and activities that have not otherwise been proven “unsafe” or shown to be in violation of U.S. law.⁵³ In effect, legislators and

51. PRECAUTIONARY PREFERENCE, *supra* note 2, at 44 (“[P]recautionary principle advocates are aggressively taking direct action by introducing legislation and initiating legal challenges at the local, state and federal levels.”).

52.

European regulators are indeed focusing less on objective scientific evidence when evaluating public risks and more on subjective nonscientific criteria based on abstract notions of “morality,” “social justice” and “quality of life” rooted in unfounded perceptions of risk. These perceptions are generated by politically active and ideologically motivated environmental and consumer groups and like-minded politicians, who demand that regulators eliminate from society all health and environmental risks. The ideological “concerns” of these influential non-governmental organizations (“NGOs”) are raised to the level of “public” consciousness via misinformation and fear campaigns that so exaggerate the presence of hypothetical hazards that perceived risks have become more important than actual risks in the public’s mind. Indeed, some leading activists have referred to the precautionary principle in the media as “the most radical idea for rethinking humanity’s relationship to the natural world since the 18th-century European Enlightenment,” and as presaging a “great shift from a risk-taking age to a risk-prevention era.”

Id. at 8-9.

53.

regulators have begun to second-guess their own decision-making abilities. Potentially crippling risk-averse legislation and regulation, corporate social responsibility mandates, and extra-financial analysis used to complement traditional financial risk analyses are now seriously beginning to proliferate and affect the economic and social fabric of our states and nation.⁵⁴

II. EUROPE'S INTERNATIONAL PROMOTION OF THE PRECAUTIONARY PRINCIPLE

"The origins of the formalized Precautionary Principle can be traced back to the German *vorsorgeprinzip*, which means literally 'forecaring principle' or simply 'care.'"⁵⁵ "It is one of five fundamental principles recognized in German law as constituting the basis for environmental policy."⁵⁶ American Precautionary Principle advocates have argued that it can also be traced back to the hazard-based U.S. environmental and health policies of the 1970s which have, since 1980, become more scientific in risk assessment and factually based.⁵⁷ Although Precautionary Principle proponents are loathe to admit it, this controversial concept

The precautionary principle implicitly recognizes that decisions (to act or not [act]) made in the face of scientific uncertainty or ignorance *are policy decisions not scientific ones—that questions of causality given scientific uncertainty are ultimately policy decisions with ethical and economic considerations*. As such, advocates say, it is essential that the decision-making process be transparent and inclusive of all stakeholders.

Brian McKenna & Ted Sylvester, "An Ounce of Prevention": A Precautionary Principle Primer, FROM THE GROUND UP, Oct./Nov. 2004, at 8, available at <http://www.ecocenter.org/newsletter/newsletters/200410/200410prevention.php> (emphasis added).

54. See EXPORTING PRECAUTION, *supra* note 25, at 44-65 (discussing various sector-based initiatives at the state and local levels to introduce legislation incorporation precautionary principles).

55. *The Precautionary Principle and WTO Law*, *supra* note 11, at 91.

56. *Id.*

57.

This issue of how much science is needed before governments regulate has recently come to the forefront in international debates about environmental health policy as a result of increasing emphasis in Europe and in the United States on the "precautionary principle." Over the last two decades, [now almost three decades] quantitative risk assessment has emerged as the dominant paradigm in the United States for including science in regulatory decisionmaking as the best way to manage threats to public health and the environment. Risk assessment is a way to organize scientific information in a form that is meant to provide useful input—both qualitative and quantitative—to risk management decisionmaking.

.....

[T]he United States has had a long history of applying the precautionary principle in regulation but has moved gradually away from doing so as we learn more about risk assessment and its underlying scientific basis. To a great extent and on a more global scale, the re-emergence of the precautionary principle is a reaction against the U.S. legal tradition that requires extensive proceedings to establish a factual basis for regulation as a precondition to government action.

Gail Charnley & E. Donald Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, 32 ENVTL. L. REP. 10363, 10363-64 (2002), available at <http://www.healthriskstrategies.com/pdfs/rvp.pdf>.

traces back even further to the late 19th and early 20th centuries,⁵⁸ including to the German social philosopher, Martin Heidegger, who is known to have had a “dubious and complicated association with Nazism.”⁵⁹ Yet, this has not stopped some within the deep ecological and ideological environmental movement within the U.S. from considering the lessons learned from the Bolivian (Morales) and Venezuelan (Chavez) populist revolutions, which were aimed at “build[ing] a unified Latin counter-power to US hegemony” for the purpose of inspiring an anti-capitalist, Precautionary Principle movement in the U.S.⁶⁰

When the Precautionary Principle saw its first international adoption at the UN General Assembly in 1982,⁶¹ public policymakers could only guess at the rapidity with which it would spread throughout the legislative process. Since then, state, federal, and international legislators have been asked to evaluate public risks based

58. See generally Gordon Hull, Normative Aspects of a “Substantive” Precautionary Principle, (Sept. 7, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013357 (follow “Social Science Research Network” hyperlink); Peter Staudenmaier, *Anthroposophy and Ecofascism*, COMMUNALISM, Dec. 2007, available at <http://www.communalism.net/Archive/13/ae.print.php>; Michael E. Zimmerman, *Deep Ecology, Ecoactivism, and Human Evolution*, 18 REVISION 1 (1998), available at <http://www.bpf.org/tsangha/tsj/zimmerman.pdf>; Alan AtKisson, *Introduction to Deep Ecology: An Interview with Michael E. Zimmerman*, 22 IN CONTEXT 2 (Summer 1989), available at <http://www.context.org/ICLIB/IC22/Zimrman.htm>.

59. Steven F. Hayward, *The Fate of the Earth in the Balance: The Metaphysics of Climate Change*, 5 ENVTL. POL’Y OUTLOOK 1, 4 (2006); see also JANET BIEHL & PETER STAUDENMAIER, *ECOFASCISM: LESSONS FROM THE GERMAN EXPERIENCE* (1995); The Historical and Philosophical Antecedents to the Current Wave of Anti-Americanism, <http://www.itssd.org/Issues/TheHistoricalAntecedentstotheCurrentWaveofAnti-Americanism.pdf> (last visited May 16, 2008); Green Web Bulletin #68, David Orton, *Ecofascism: What Is It? A Left Biocentric Analysis*, (2000), <http://home.ca.inter.net/~greenweb/Ecofascism.html>.

60.

The Bolivarian revolution seems to be framing its vision of grassroots democracy in a way that can evade capitalistic fear and criticism. Venezuela’s President Chavez is redistributing wealth and promoting collectivization, while preserving private property per se—the untouchable holy grail of modern capitalist economics. Given Venezuela’s oil wealth and the popularity of Chavez’s program, it’s hard to imagine a major shift in Venezuela, short of a major military (covert or otherwise) intervention by the United States. Chavez is very openly working to build a unified Latin counter-power to US hegemony. Venezuela’s oil wealth, Bolivia’s natural gas, and Chile’s copper are all being presented as key engines to drive this process and create a well-funded ascendant left across the continent. Chavez is also trying to deepen people-to-people connections around the world, including with the US (heating oil program etc.) Could more movements in the US be inspired by this work? Could the great illusion of US as a democracy begin to fade, leading local communities to demand greater autonomy? What does the PP [Precautionary Principle] have to offer a local community that is working to practice self-rule and exercise their sovereignty? How is the PP applied in the context of Latin America and in Latino populations in the US? The PP could become a plank in a broader platform for re-asserting local rights.

See SMARTMEME, *THE FUTURE OF FORESIGHT: LONG TERM STRATEGIC CONSIDERATIONS FOR PROMOTING THE PRECAUTIONARY PRINCIPLE 27-28* (2006) [hereinafter *THE FUTURE OF FORESIGHT*], available at <http://www.sehn.org/pdf/smartMeme.2020.Strategy.pdf>.

61. Scott Lafranchi, *Surveying the Precautionary Principle’s Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool*, 32 B.C. ENVTL. AFF. L. REV. 679, 682 (2005).

on political, ethical, and/or social science concerns, rather than upon common-sense or hard, empirical, sound science.⁶² The Precautionary Principle has created an impossible demand to prove the absence of harm in environmental, health, and public safety policymaking.

The EU formally instituted the Precautionary Principle as the bedrock of its regional environmental policy in 1992 and has since taken active steps to give it greater emphasis in regional and international health policy as well—both within and outside of its borders.⁶³ France has even incorporated the Precautionary Principle within its national constitution⁶⁴ as an expression of its commitment to European “solidarity”—i.e., to the European Community’s hazard-based “science and technology” (trade protectionist) policies. As a result, EU Precautionary Principle-based regulatory regimes covering the greenhouse gas emissions of power generators, motor vehicles, and manufacturing plants; the product design, stewardship/life cycle management, and waste disposal of autos; electrical appliances and electronics; the authorization, traceability, and labeling of biotech food, feed, and seed; and the manufacture and use of high volume toxic chemicals in toys, brominated flame retardants in fire extinguishers, furniture, home furnishings, motor, air, rail, water transport vehicles, and cosmetics have increasingly found their way across the Atlantic.⁶⁵

In fact, these regimes correspond closely to a number of UN environmental treaties that the EU has promoted, signed, ratified, and implemented beginning in the mid-to-late 1980s. Because each of these international treaties reference and/or incorporate some iteration of the Precautionary Principle, it is evident that the EU is using the UN treaty system as a platform to establish its preferred regional definition of the Precautionary Principle as an absolute global regulatory standard and norm of international law.

The international regulatory treaties that reference and/or incorporate the Precautionary Principle require their signatories to adopt and implement it as national law, consistent with the 1996 Hague Declaration on Principles of Environmental Law.⁶⁶ These treaties arguably include, among others, the UN

62. See generally LOOKING BEHIND THE CURTAIN, *supra* note 12 and accompanying text.

63. See *The Precautionary Principle and WTO Law*, *supra* note 11, at 92 (“The precautionary principle, for example, has received European endorsement in various treaties, including the Maastricht Treaty forming the EU and the 1992 United Nations Economic Commission on Europe Helsinki Convention on the protection and use of transboundary watercourses and international lakes.”).

64. FR. CONST., Environmental Charter art. 5 (“In particular, the Charter introduces *the precautionary principle* into the constitutional texts. This principle ‘is designed to take action in the case of scientific uncertainty about the consequences of dangers to the environment.’”) (emphasis added).

65. See generally *infra* notes 345-360 and accompanying text.

66.

The precautionary principle was incorporated into an international action plan at the 1996 international conference “Codifying Rio Principles in National Legislation.” At the conference, a formal declaration was crafted—known as “The Hague Declaration on Principles of Environmental Law”—which included the precautionary principle as one of the Rio Declaration principles that needed to be incorporated into national and international legal systems.

Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Cartagena Protocol on Biosafety to the UN Convention on Biological Diversity, the UN Stockholm Convention on Persistent Organic Pollutants, the Rotterdam Convention on Prior Informed Consent Procedure, the Ban Amendment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, and the Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention for the Protection of the Ozone Layer.⁶⁷

III. WHY IS THE EXTRA-WTO PRECAUTIONARY PRINCIPLE PROBLEMATIC?

A. *Promotes Trade Protectionism*

Europe's penchant for over-regulation based on the Precautionary Principle, along with higher taxes and more onerous labor and environmental standards, has effectively rendered European industry less globally competitive. This has been confirmed once again in two recent European media articles, one appearing in the *Financial Times* and the other in the *EU Observer*:

Europe is damaging its competitiveness by moving faster than the rest of the world to tackle climate change, the European Union's industry commissioner has warned. In a letter seen by the *Financial Times*, Günter Verheugen says: "We have to recognise that . . . our environmental leadership could significantly undermine the international competitiveness of part of Europe's energy-intensive industries and worsen global environmental performance by redirecting production to parts of the world with lower environmental standards."⁶⁸

The German Economy Ministry has attacked EU proposals to tackle climate change as "pointless" if other major contributors to greenhouse gas emissions are not also committed to significant reductions. If climate polluters such as China, India and the United States are not also on board, the EU's climate package would end up

The Precautionary Principle and WTO, *supra* note 11, at 93. According to Paragraph 2 of the Chairman's conclusions:

Reflecting the variety of legal systems, incorporation of the Rio principles should be done in accordance with the legal culture and tradition of each state. This can be accomplished through explicit codification of principles, the elaboration of the principles into legislation and regulations, administrative policy, negotiated and/or voluntary agreements as well as case law.

Id. at 119 n.127 (citing International Environmental Conference on Codifying Rio Principles in National Legislation (May 22, 1996), http://www.eel.nl/documents/den_haag.pdf).

67. See *The Precautionary Principle and WTO Law*, *supra* note 11, at 93-95 (listing a number of international regulatory treaties incorporating precautionary principles); see also 'ENLIGHTENED' ENVIRONMENTALISM OR DISGUISED PROTECTIONISM?, *supra* note 16, at 19-25, 40-45 (discussing the Stockholm Convention on Persistent Organic Pollutants and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal).

68. Andrew Bounds, *Green Laws "May Harm EU Economy,"* FIN. TIMES, Nov. 23, 2006.

harming German businesses The ministry statement said that a reduction by 21 percent on 2005 levels in the amount of emissions trading permits—the key mechanism within the ETS that enables emissions reductions would hurt jobs and growth in the EU’s largest economy. Furthermore, the other key element in the ETS—the commission proposal to begin auctioning pollution permits rather than giving them away—would undermine corporations’ investment plans. Auctioning could even cause the German paper and glass industries to go bankrupt⁶⁹

And, it was pointed out in a recently released book authored by the principal economic adviser to former Democratic President Bill Clinton’s 1992 campaign.

The basic quandary for European reformers over the next decade is that globalization depresses the productivity gains and competitiveness of those who don’t adapt well to it, which in turn slowly and surely reduces people’s living standards. As European living standards stall or slowly erode, peoples’ attachment will only intensify to the distinctive guarantees against firing or being reassigned, the generous unemployment benefits, and the high minimum wages that make Europe Europe. And across the vast service economies of Germany, France, Britain and Italy, the lumbering domestic market leaders will cling just as tightly to their own subsidies and regulatory protections.

The European Union is supposed to ease some of this quandary by creating a single market as large and stable as America’s, within which everything can pass without tariffs or quotas, capital can flow without regulation, and any person can move without restriction. The EU’s dilemma is that its member states don’t want such a free market union.

. . . For all of the EU’s pronouncements, its core countries seem to prefer a strategy closer to Fortress Europe—an EU that resists global pressures—than one open to the global economy. So Germany has called on the EU’s ten new members to *raise* their taxes to German levels “in the name of fairness”; and Brussels actually ordered Poland’s government to raise more taxes. In the same vein, Sweden was ordered to increase its farm subsidies, and the Czech Republic has had to adopt stricter labor market regulations. And recently, Germany and France stopped moves to lower barriers to sales of services from companies in one EU country to another, out of their well-grounded fears that low-cost European businesses would overwhelm their own, well-protected and inefficient service companies.⁷⁰

69. See Leigh Phillips, *EU Climate Proposals Hurt Industry, Says Germany*, EU OBSERVER (July 16, 2008), available at <http://euobserver.com/19/26496>.

70. See ROBERT J. SHAPIRO, *FUTURECAST: HOW SUPERPOWERS, POPULATIONS, AND GLOBALIZATION WILL CHANGE THE WAY YOU LIVE AND WORK* 191-92 (2008).

As a result, a growing competitiveness and technology gap has arisen between Europe and America-Japan in a number of important advanced and high technology industry sectors.⁷¹

Concerned that it has become less globally competitive, European industries have actively lobbied the European Commission, which is responsible for Europe's external trade strategy,⁷² to restore (for them) a "level global economic playing field."⁷³ Their efforts have resulted in a unique collaboration between European

71. See DrugResearcher.com, Kirsty Barnes, EU Commission Accused of Anti-Industry "Green Policies," (Oct. 4, 2006), <http://www.drugresearcher.com/news/ng.asp?n=70840&m=1DRGO04&c=hmsgzavfngsbrbp> (reporting on accusations that the European Commission is "pushing 'green policies' that are stifling progress and global competitiveness"); see also EXPORTING PRECAUTION, *supra* note 25, at 101.

At the global level, Europe's vision of a utopian society also has a pragmatic dark side—Europe's need to maintain its global economic competitiveness by avoiding what some academics have referred to as a "prisoner's dilemma." Europe's penchant for over-regulation and its embrace of "enhanced welfare state" economics have arguably rendered it unable to close its economic growth gap with North America and Asia, and likely explains why Europe has fallen behind in its public quest to surpass U.S. economic competitiveness by 2010.

Id.

For example, in 2000, the members adopted the "Lisbon Strategy" to make the EU "the most competitive and dynamic, knowledge-based economy in the world." Seven years later, almost none of the recommendations have gone anywhere. The strategy called for more R & D outside the four industries that have claimed two-thirds of its in Europe, and nothing has changed. It urged patent reforms to bring down these costs, and nothing has happened. It called for full privatization of Europe's telecom and electricity state companies, and that mostly hasn't happened. It urged member countries to encourage new business creation by ending subsidies for monolithic "European champions," and here, too, little of substance has changed. Finally Lisbon called for lower taxes; and while corporate taxes have come down in many countries, the overall tax burden hasn't declined at all. . . . Most recent forecasts suggest that at a minimum, being part of the EU won't help Europe's major economies over the next decade. According to the OECD, France should expect to grow by about 1.5 percent a year from 2010 to 2020—a miserable rate—and Germany's outlook is no better. One of Germany's leading think tanks, the Institut für Weltwirtschaft, is even more pessimistic, forecasting gains of just about 1 percent a year. The experts at Deutsche Bank take a rosier view and figure that with decent doses of reform, Germany and France could grow, respectively, by 1.9 percent and 2.3 percent annually. But, the bank's experts also warn that without reform and strong immigration, this growth path could fall to as little as one-half of 1 percent a year for a decade . . .

ROBERT J. SHAPIRO, FUTURECAST, *supra* note 70, at 191-93.

72. See Lawrence A. Kogan, *Unscientific "Precaution": Europe's Campaign to Erect New Foreign Trade Barriers* 27-33 (Wash. Legal Found., Working Paper No. 118, 2003), <http://www.itssd.org/White%20Papers/WLFKoganArticle2.pdf> (discussing the three-dimensional trade strategy devised by the EU).

73. See, e.g., Lawrence A. Kogan, Opinion, *Trade Protectionism: Ducking the Truth About Europe's GMO Policy*, INT'L HERALD TRIB., Nov. 27, 2004, available at http://www.iht.com/articles/2004/11/27/edkogan_cd3_.php (reporting that, in the EU agricultural sector, industry is lobbying for overly strict rules for genetically modified crops because they are already at a comparative disadvantage with other non-EU countries); see also 'ENLIGHTENED' ENVIRONMENTALISM OR DISGUISED PROTECTIONISM?, *supra* note 16, at 7 (discussing how the EU's attempt to increase the uptake of the Precautionary Principle was motivated by the need to protect "ailing or lagging EU

industries, regional and global environmental and social activists, grant-seeking academicians, and risk-averse politicians to export the systemically higher European costs of doing business throughout the world.⁷⁴

B. Facilitates Unaccountable Global Governance

Europe is promoting and legitimizing the *extra*-WTO Precautionary Principle at the UN's Environment Program (UNEP) as the linchpin of a new global legal order based on risk aversion rather than risk management.⁷⁵ In other words, national governments should assess possible unknowable environmental and health hazards rather than actual knowable risks, consistent with European notions of sustainable development.⁷⁶ The Precautionary Principle is intended to serve as a primary platform ("staging point") for *supranational global regulatory governance* centered at the UN.⁷⁷ This objective was recently restated in an April 2008 speech delivered by UK Prime Minister Gordon Brown at the JFK Memorial Library in Boston.⁷⁸ However, it is hard to see how such an institution, weighed down as it is

industries by imposing on foreign industries the same high cost of regulation to which EU industries are subject regionally").

74.

Europe's exportation of the precautionary principle is not motivated solely by its desire to preserve a European cultural preference for natural foods, a healthy body, a clean environment and the avoidance of risk. There is a growing global awareness that the EU has intentionally employed the precautionary principle for international economic gain in the sphere of international trade under the guise of pursuing sustainable development. It has systematically targeted the precautionary principle against the competing high tech and more economically efficient industrially processed exports of the U.S. and the low-cost commodity-driven agricultural and natural resource-related exports of developing countries. In other words, Europe has employed precaution as a protectionist device to "level the economic playing field" for its ailing, lagging or underdeveloped industries that suffer from a "comparative economic disadvantage."

EXPORTING PRECAUTION, *supra* note 25, at 102.

75. *Id.* at 6-7 (discussing the precautionary principle's emphasis on risk-prevention rather than risk-taking).

76. See *Exporting Europe's Protectionism*, *supra* note 7, at 92 ("Sustainable development, as the EU sees it, is rooted in the belief that industrialization, globalization and technological advancement pose potentially terrible but unknown threats to human health and the earth's ecosystem. National governments should accordingly engage in proactive environmental risk management to extinguish such threats.").

77. Indeed, the United Nations recently issued a report on collective global threats that cited the need to achieve sustainable development to ensure global collective security within the *first* of the report's many sections identifying and discussing collective global threats. As the report reveals, however, the attainment of sustainable development and economic growth are two distinct goals. UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 25-27 (2004), available at <http://www.un.org/secureworld/report2.pdf>.

78.

[N]ew global challenges that our growing interdependence brings . . . all point in one direction—to the urgent necessity for global cooperation. For none of them—from economy to environment—can be solved without us finding new ways of working more closely together.

with preconceived anti-market and anti-private property ideology, plagued by bureaucratic waste, inefficiency, and corruption, and shrouded in closed, nontransparent and non-representative procedures and processes could be anything but confused, unaccountable, and ineffective. This is largely attributable to the recognized grant of absolute sovereign immunity under which the UN and its agencies, instrumentalities, executive officers, officials, and staff continue to operate.⁷⁹

To recognize this is important. But simply to acknowledge that there are no “Britain-only” or “Europe-only” or “America-only” solutions to the global threats and challenges we face—or to say we are all internationalists now—will change nothing in itself.

Instead, we must go much further: acknowledging that our common self-interest as nation states can be realised only by practical cooperation; that “responsible sovereignty” means the acceptance of clear obligations as well as the assertion of rights.

And my argument today is simple:

global problems require global solutions;

the greatest of global challenges demands of us the boldest of global reforms;

the most urgent of tests demand the broadest of global cooperation;

and to address the worst evils of terrorism, poverty, environmental decay, disease and instability, we urgently need to step out of the mindset of competing interests and instead find common interests—summoning up the best instincts and efforts of humanity in a cooperative endeavour to build new international rules and institutions for the new global era.

Gordon Brown, Prime Minister, United Kingdom, Address at the Kennedy Library (April 18, 2008), available at <http://www.jfklibrary.org/NR/rdonlyres/CA8884F7-58D7-426C-8E6B-387A4CAA3329/41531/TextofGordonBrownSpeech2.pdf>.

79. The key UN sovereign immunity case is *De Luca v. United Nations Organization*, 841 F. Supp. 531 (S.D.N.Y. 1994), *aff'd*, 41 F.3d 1502 (2d Cir. 1994). This decision involved “a claim for reimbursement of income taxes, to which staff subject to United States income taxation [were] entitled.” Peter Neumann, Immunity from International Organizations & Alternative Remedies Against the United Nations (2006), at 8 (unpublished student paper, Vienna University), available at http://intl.law.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/neumann.pdf. The U.S. District Court for the Southern District of New York “considered the varying exceptions to immunity” under the U.S. International Organizations Immunities Act of 1945 (IOIA) and the 1976 U.S. Foreign Sovereign Immunities Act (FSIA). *Id.* Although the U.S. government had argued that the FSIA and the IOIA required only “restricted” immunity—“the same immunity from suit and every form of judicial process as is enjoyed by foreign governments”—the court proceeded to rule against it. *Id.* at 7. The Court in *DeLuca* held:

We need not consider the application of these exceptions to the instant case, for the UN Convention, which contains no exceptions, provide sufficient grounds for finding the UN immune from the plaintiff’s claims” and with this reasoning eventually recognized [that] the United Nations enjoyed immunity under the CPIUN.

Id. at 8. See also Joseph A. Bongiorno, *Sovereign Immunity and International Organization: The Case of DeLuca v. the United Nations*, 10 INT’L J. POL., CULTURE, & SOC’Y 317 (1996) (showing that the *De Luca* Court did not consider the application of exceptions to the case). The official position of the United Nations Legal Affairs Office continues to be that

the restrictive theory of State immunity does not apply to the United Nations, inter alia because the United Nations derives its immunity from international obligations based on treaties to which the United States is a party, i.e., the United Nations Charter and the Convention on Privileges and Immunities of the United Nations, which do not recognize any difference between non-commercial and commercial acts.

Neumann, *supra*, at 9.

The proposed new international legal framework grounded on the Precautionary Principle, however, is inconsistent with WTO law. Absent adherence to relevant international standards or equivalent or comparable national standards, WTO jurisprudence requires WTO member governments to provide scientific and economic justification *before* they regulate to block or severely restrict the market access and/or use of new foreign products, processes, and/or activities.⁸⁰ A number of WTO and lesser disputes have arisen as a result of the European Union's unilateral application of the Precautionary Principle to U.S. food-based exports,⁸¹ including biotech food and seed.⁸²

The potential for continued WTO litigation has given rise to recent calls from the United Nations and academicians for clarification of the relationship between the Precautionary Principle and WTO law and the harmonization of national regulatory systems.⁸³ Nevertheless, despite efforts made by the United States and other governments to persuade the European Commission to bring its regulations (e.g., REACH) into WTO compliance,⁸⁴ the EU continues to flout WTO rules.⁸⁵ This arguably weakens the international legal order (rule of law) which has served as the engine of the U.S. national economy and the source of America's comparative advantage in international trade since the end of World War II.

80. *The Precautionary Principle and WTO Law*, *supra* note 11, at 95-97 (discussing the SPS and TBT Agreements, which "were specifically designed to prevent countries from enacting technical regulations and/or standards that constitute unnecessary obstacles to trade").

81. *Id.*

82. Lawrence A. Kogan, *WTO Ruling on Biotech Foods Addresses "Precautionary Principle,"* LEGAL BACKGROUNDER, Dec. 8, 2006, at 2, available at <http://www.wlf.org/upload/120806kogan.pdf>; Lawrence A. Kogan, *World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes*, 2 GLOBAL TRADE & CUSTOMS J. 149 (2007).

83. See SABRINA SHAW & RISA SCHWARTZ, UNITED NATIONS UNIVERSITY-INSTITUTE OF ADVANCED STUDIES, TRADING PRECAUTION: THE PRECAUTIONARY PRINCIPLE AND THE WTO 7-8 (2005), available at <http://www.ias.unu.edu/binaries2/Precautionary%20Principle%20and%20WTO.pdf> (discussing cases that address the relationship between the precautionary principle and WTO law); Press Release, United Nations Univ., Define "Precautionary Principle" to Avoid Clashes Over Biotechnology Under World Trade Rules (Sept. 14, 2006), http://www.eurekalert.org/pub_releases/2006-09/unu-dp091206.php ("Says UN Under Secretary-General Hans van Ginkel, Rector of UNU: 'There is an important need now to take stock, reassess basic positions, principles and areas of agreement about the precautionary approach before countries initiate a new wave of disputes about biotechnology and the precautionary approach.'"); Environmental News Network, Alister Doyle, World Needs Clearer Rules To Avert Trade Rows (Sept. 15, 2006), <http://www.enn.com/business/article/5061> (discussing a UN study that "urged governments to work out a common threshold of acceptable risk or at least 'a common practice of risk assessment' to help tackle disputes").

84. See Boyden Gray, U.S. Ambassador to the EU, Discussion of EU's REACH Chemicals Proposal (June 8, 2006), http://useu.usmission.gov/About_The_Ambassador/Gray/Jun0806_Gray_REACH.asp (expressing concerns about REACH).

85. See Tobias Buck, *Industry Setback over EU Chemicals Law*, FIN. TIMES, Oct. 10, 2006, available at <http://www.ft.com/cms/s/7a3ab9ae-585d-11db-b70f-0000779e2340.html> ("Parliament's environment committee voted overwhelmingly in favour of a provision that will force companies to substitute especially risky chemicals with less harmful substances. Crucially, this principle will apply even if companies are able to show that the chemical can be handled safely.").

C. *Adulterates Industry Supply-Chain Relationships*

Although the EU Commission has lost each of these WTO disputes, it has continued in its efforts to bind U.S. manufacturers, processors, distributors, retailers, and exporters to the Precautionary Principle. For example, it has continued to promote the development of technical standards incorporating the Precautionary Principle within international standards bodies,⁸⁶ as well as the negotiation and implementation of new Precautionary Principle-based international “voluntary” initiatives (i.e., precursors to future environmental treaties) such as the evolving UN Environment Program’s Strategic Approach to International Chemicals Management (SAICM),⁸⁷ which was adopted in February 2006.⁸⁸ In addition, the EU Commission has financed and encouraged European-based—but globally networked—environment and health activist groups to develop corporate social responsibility and environmental governance standards premised on the Precautionary Principle and then impose them upon U.S. companies operating along global industry supply-chains.⁸⁹ Non-governmental pressure groups impose such standards upon large public corporations (many of which are American) to influence their relationships with local, state, and federal governments (domestic as well as foreign) and with their U.S. and foreign suppliers and their suppliers’ suppliers—i.e., their global supply chains.⁹⁰

D. *Binds American Industry to European Civil Law, Practice, and Cultural Mores*

The EU Commission realizes that in order to establish the Precautionary Principle as both an international treaty norm and as an absolute norm of customary

86. See UNSCIENTIFIC “PRECAUTION,” *supra* note 72, at 36-46 (showing that the EU has continued to develop technical standards that incorporate the Precautionary Principle); EXPORTING PRECAUTION, *supra* note 25, at 8-9 (explaining that the EU continues to promote international standards).

87. SAICM is a policy framework for international action on chemical hazards. SAICM Development, http://www.chem.unep.ch/saicm/saicm_development.htm (last visited May 16, 2008); see also REPORT OF THE SECOND SESSION OF THE PREPARATORY COMMITTEE FOR THE DEVELOPMENT OF A STRATEGIC APPROACH TO INTERNATIONAL CHEMICALS MANAGEMENT 1 (2004), available at http://www.chem.unep.ch/saicm/meeting/prepcom2/meeting_report/SAICM2report.pdf (showing the negotiation and implementation of new Precautionary Principle-based international environmental treaties); REPORT OF THE THIRD SESSION OF THE PREPARATORY COMMITTEE FOR THE DEVELOPMENT OF A STRATEGIC APPROACH TO INTERNATIONAL CHEMICALS MANAGEMENT (2005), available at <http://www.chem.unep.ch/saicm/meeting/prepcom3/en/3-5%20Report%20E.pdf> (reporting on the development of the strategic approach of international chemical management).

88. See United Nations Environment Programme, Strategic Approach to International Chemicals Management, <http://www.chem.unep.ch/saicm/> (last visited May 16, 2008) (stating that SAICM was adopted by the International Conference on Chemicals Management (ICCM) on Feb. 6, 2006 in Dubai, United Arab Emirates).

89. See, e.g., Buck, *supra* note 85 (explaining that EU is imposing harsh provisions in order to obtain safer conditions regarding chemical use).

90. See generally Lawrence A. Kogan, *Precautionary Preference: How Europe Employs Disguised Regulatory Protectionism to Weaken American Free Enterprise*, 7 INT’L J. OF ECON. DEV. 245-54 (2005) [hereinafter *Precautionary Preference II*], available at <http://www.itssd.org/White%20Papers/ijed-7-2-3-kogan.pdf> (explaining the pressure Europe is trying to exert on the United States and that, because Europe regulates more than any other region, it will be costly if the United States adopts their system).

international law (both legal “terms of art”) the United States must be bound by it as a matter of domestic *and* international law. This requires that the U.S. government, which has refused to ratify all Precautionary Principle-based multilateral environmental treaties (other than the Montreal Protocol and the UN Migratory Fish Stocks Agreement⁹¹), be politically and economically compelled (tied down) to adopt and then implement the Precautionary Principle at the federal, state, and local levels.

European politicians hope that this will occur initially through the United State’s accession to a number of Precautionary Principle-based UN Environment Program treaties now in force, upon which a future Democratic U.S. administration, assisted by a democratically-controlled Congress, is likely to agree. Alternatively, or perhaps simultaneously, this result can occur through the more laborious and uneven process of individual and/or regional state and local government enactment of EU-style Precautionary Principle-based legislation and/or regulations. Arguably, this would satisfy the *opinio juris* (legal obligation) and *state practice* (national practice) elements of customary international law.⁹²

In order to achieve these outcomes, the EU Commission and several EU member state governments have waged an all-out ground and media campaign, with the help of misguided American “multilateralist” politicians,⁹³ ideological American environmental activists and academicians,⁹⁴ and opportunistic

91. See UN ENVT. PROGRAMME, THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER 1 (2000), available at <http://www.unep.org/OZONE/pdfs/Montreal-Protocol2000.pdf>; see also Agreement for the Implementation of the LOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Art. 5(c), 6, Annex II (2001), available at http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm.

92. See UNSCIENTIFIC “PRECAUTION,” *supra* note 72, at 61-65 (showing that such a result would satisfy the *opinio juris* and state practice of customary international law).

93. See EXPORTING PRECAUTION, *supra* note 25, at 43, 96-113 (showing that the EU commission and member states have combined with American politicians to incorporate the Precautionary Principle in domestic U.S. law); see also Press Release, ITSSD, Britain Leads EU Charge to Undermine U.S. Climate Change Policy (July 17, 2006), <http://www.itssd.org/Press%20Release/BritainUndermines.pdf> (discussing the undercover campaign the EU has been waging against the United States).

94.

Some American and European academics have concluded that the different approaches employed by Europe and the U.S. to address food safety (and arguably environmental) risks (a hazard assessment ex-ante regulatory approach vs. a risk assessment ex-post market legal approach) are attributable to fundamental underlying constitutional differences between these two regions. These constitutional differences, in turn, reflect different notions concerning the rights of individuals versus those of society, of the role of government in balancing between those rights and of the relative functions served by the different institutions of government.

EXPORTING PRECAUTION, *supra* note 25, at 96-97 (comparing differences between EU and U.S. regulation as reflecting a similar contrast between the individual-based U.S. constitutional system and the polity-based British Parliamentary system).

In this impressive review of the history of air pollution control law, Noga Morag-Levine . . . a political science professor at the University of Michigan . . . traces the roots of current tensions between common law and precautionary approaches to regulation. [She] argues that U.S. air pollution control efforts have been hampered by the continued influence of common law principles despite the enactment of the Clean Air Act, which was designed to overcome the common law’s inadequacies. She explores why common law notions have

entrepreneurs to win the hearts and minds of the American public so that they may ultimately, for profit, incorporate the European culture-based *extra*-WTO Precautionary Principle within U.S. domestic law. In this way, it is hoped that American science and technology policy and business practice can be restructured, reshaped, and changed from its *common law* heritage into Europe's *civil law* image, consistent with Europe's drastically different notion of private property rights, which provides European officials with much greater latitude for taxation and regulation without adequate representation.

Indeed, the efforts of American Precautionary proponents such as the Science and Environmental Health Network (SEHN) have become far more sophisticated and nuanced over time,⁹⁵ as reflected in several 2006 SEHN reports.⁹⁶ And, another 2006 SEHN report includes futuristic "normative" planning scenarios that are being shaped to tap a host of emotional, ethical, religious, and pseudo-spiritual "hot buttons" within the public consciousness and subconscious, which SEHN may then exploit for "Precautionary Principle (PP) organizing" purposes. "As the PP connects with multiple movements and influences different sectors of the culture

proven so durable in the U.S. legal system even after the enactment of comprehensive federal regulatory statutes. *Comparing U.S. experience with that of Europe, Morag-Levine argues in favor of a more precautionary approach to regulation akin to that employed in civil law countries that place greater emphasis on technology-based regulation . . .*

Robert V. Percival, Book Review, 14 L. & POL. BOOK REV. 1 (2004) (reviewing NOGA MORAG-LEVINE, CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE (2003)) (emphasis added), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Morag-Levine104.htm>. See also the discussion in the conclusion regarding the differences between Anglo-American "negative" property rights and Continental "positive" property rights.

95. See, e.g., NANCY J. MYERS & CAROLYN RAFFENSPERGER, PRECAUTIONARY TOOLS FOR RESHAPING ENVIRONMENTAL POLICY (2005).

96. SEHN goals include:

Widening circles of influence: SEHN seeks to move the Precautionary Principle beyond the environmental-health community.

Averting/redirecting opposition: Opposition to the Precautionary Principle is escalating because of the success activists and governments have had in using the principle to find new ways of protecting public health and the environment.

Environmentalism beyond regulation: The Precautionary Principle must be carried into the courts and other institutions in a way that influences the law as well as policy. But beyond that, this cutting edge science must continue to reveal the patterns of complex natural systems and our effects on them.

Mainstreaming the PP: The Precautionary Principle must go mainstream if it is to influence the larger national political agenda. This inevitably means "rebranding" the PP, and creating a culture around the Precautionary Principle as a policy piece as well as a way of doing things.

New ways of doing business: Business is embracing the Precautionary Principle. This can happen. SEHN wants to find and articulate the common purpose that will put business on the same trajectory as those working for justice and sustainability.

New institutions: We need new governance models and institutions that are more harmonious with the patterns of the real (natural and social) world.

See SMARTMEME, MAPPING 2020: CHARTING A PRECAUTIONARY FUTURE: EXPLORING SCENARIOS FOR THE UNFOLDING PRECAUTIONARY MOVEMENT 4 (2006), available at <http://www.sehn.org/pdf/smartMeme.2020.Scenario.pdf>.

there will be an ongoing need for new ways of communicating core concepts.”⁹⁷ If this were not insidious sounding enough, the latter SEHN report also seemingly endeavors, through means of neo-normative indoctrination, to cast doubt upon and undermine longstanding enlightenment era notions of secular western rationalism, including its reliance on objective empirical science. “As the PP starts to be mainstreamed in mass culture perhaps the (artificial) dichotomy between sacredness and scientific rationalism will be transcended.”⁹⁸

E. Imposes a Broad Legal Duty of Care, Triggers Risk Aversion, Dictates Product Design, Chills Innovation, and Disregards Economic Cost-Benefit Analysis

Risk aversion (luddism and psychobabble)⁹⁹ is the foundation underlying the Precautionary Principle, which “asks how much harm can be avoided rather than how much is acceptable.”¹⁰⁰ In essence, the Precautionary Principle requires that industry demonstrate to government and civil society’s satisfaction that a product, substance, or activity deemed inherently hazardous (harmful) is “safe” or “harmless” (risk-free) before it can be authorized for sale, distribution, or marketing.¹⁰¹ This is equivalent to imposing on industry a negative burden of proof or a zero-risk threshold, which will severely curtail economic growth, technological innovation, societal well being, and quality of life.

The Precautionary Principle would impose upon U.S. industry a broad affirmative legal duty of care “to do no harm”—i.e., not to undertake *any* activities that could possibly trigger unascertainable but serious risks of environmental or health harm in the distant future. Companies would not be considered to have satisfied this duty of care *even if* they followed “best practice and appropriate regulatory rules.” Consequently, the Precautionary Principle would usher in a new era of strict liability,¹⁰² without the burden on the government to show causation. It

97. THE FUTURE OF FORESIGHT, *supra* note 60, at 42. “Mapping 2020 is a traditional scenario document—a series of short narratives that highlight key strategic pathways over the next fifteen years to promote the precautionary principle.” *Id.* at 7.

A full scenario planning process would involve identifying the specific drivers for the PP. We saw that undertaking as beyond the resources and needs of this project and so, after surveying a number of driver sets used in well researched government scenario planning processes, we selected a driver set that we think works. It includes 6 overarching drivers: Demographics, Environmental Change, Economics, Science and Technology, National and International Governance, and a somewhat catch-all Culture category of Perceptions, Beliefs, Attitudes & Values.

Id. at 42.

98. *Id.* at 34.

99. See Lawrence Kogan & Robert Stein, *Precautionus Principilitis: A Psychosocial Disorder That Causes Luddite Psychobabble*, ITSSD J. ON PATHOLOGICAL COMMUNALISM (Jan. 20, 2008, 08:24 EST) <http://itssdpathologicalcommunalism.blogspot.com/2008/01/precautionus-principilitis-psychosocial.html> (explaining that the philosophy embraces a “better safe than sorry” way of living).

100. *The Precautionary Principle: Protecting Public Health and the Environment*, THE COLLABORATIVE ON HEALTH AND THE ENVIRONMENT (2002), available at <http://www.protectingourhealth.org/corethemes/precaution/2002-1125schettlerprecautionary.htm>.

101. *Id.*

102. Timothy O’Riordan, *The Precaution Principle in Environmental Management*, in SUSTAINABLE DEVELOPMENT IN INDUSTRIAL ECONOMIES (1992), available at <http://www.uea.ac.uk/env/cserge/pub/>

would shift the regulatory burden of proof, consisting of both the burden of producing evidence and the burden of persuasion, from the government (concerned about the possible occurrence of serious future harm) to the manufacturer or operator whose activity might potentially give rise to it. Such a reversal would, in effect, translate into a lower standard of proof as well, with negative consequences for tort defendants.¹⁰³ “Precaution in effect then means guilty, until proven innocent, when tampering with the environment in [potentially] risky ways.”¹⁰⁴ Trans-Atlantic environmental activist groups admittedly view the likelihood of more frequent tort litigation and higher jury verdicts in favor of “health victims” as the triggering event for system-wide tort reform that will ultimately give rise to a public outcry for a Precautionary Principle-based legal framework and as a source of continuous funding to support ongoing self-reinforcing Precautionary Principle political and educational campaigns.¹⁰⁵

Companies’ *fear of legal prosecution* for being unable to meet such a standard, and *fear of lost profitability* due to their inability to absorb the higher manufacturing, processing, and distribution costs that would result from such rules, will have a profoundly negative impact on company product design, manufacture, and distribution capabilities. In addition to likely greater tort, insurance, director and officer liability, and public financial as well as non-financial disclosure costs and obligations, adoption of the Precautionary Principle as U.S. law would most certainly trigger another type of risk aversion—*fear of experimentation and innovation*.

Companies will thus have *less* economic incentive to undertake breakthrough research and development and invest in financially risky innovations. A review of European industries’ adverse experience with the broad legal obligation “to do no

wp/gec/gec_1992_03.pdf (explaining that, pursuant to this concept, “any agent altering environmental conditions in the future would be liable to compensation for any affected parties or natural systems even if best practice and appropriate regulatory rules were being followed”); *see also* EXPORTING PRECAUTION, *supra* note 25, at 20-37 (providing an explanation of the overall implications of the “do no harm” regulations).

103. *See* EXPORTING PRECAUTION, *supra* note 25, at 20-25.

104. O’Riordan, *supra* note 102, at 10.

105.

There are various ways that litigation could move the PP forward, but there’s always the immortal “next tobacco” line. As the science crystallizes, public concern builds, and perhaps strong health/justice movements evolve to direct the rage of the “sick herd”—enter the trial lawyers. One obvious form would be class action suits against chemical companies. This could create an economic base for large public education work (like the Truth ads that came out of the tobacco settlements) to sway public opinion. Lots of money will change hands but more politicized demands may evolve—such as companies adopting the PP etc. One key factor that PP activists have already been involved in is the danger of tort reform to threaten the PP’s efforts to reverse the burden of proof. Likewise if Big Chemical is really going to fall, we may see government intervention such as in the asbestos cases. Whether because people sue companies, or corporations attempt to use the courts to block local municipalities implementing precautionary laws, the courts are going to be a relevant venue for the PP. However, even if the courts create the stage (soap box) for the conflict, of the PP movement must have a larger political strategy in order to not to get marginalized as a mere technical legal debate.

THE FUTURE OF FORESIGHT, *supra* note 60, at 27.

harm” reveals how such regulations have already had a “chilling effect” upon European research and development, capital investment, and scientific and technological innovation.¹⁰⁶ This has made European companies less globally competitive, and it is a consequence American companies can expect to face should the Precautionary Principle ever become U.S. law.¹⁰⁷

The Precautionary Principle would dampen scientific and technological innovation precisely because it would permit governments to dictate how companies design their products and processes before evidence of actual health or environmental harm has been adduced. First, it would require companies to utilize best available techniques to design and develop their products and processes from the outset, no matter the economic and opportunity costs involved.¹⁰⁸ Second, it would require companies to develop substitutes to replace well-known products already on the market that have been arbitrarily categorized as inherently hazardous to human health or the environment.

For example, the EU Commission and the State of California have adopted rules that ban and require substitutes for brominated flame retardants, lead solder in electronic and computer equipment, and phthalate-containing cosmetics and plastics, including toys.¹⁰⁹ Furthermore, they have done so even though they have lacked empirical proof that such products have actually been harmful—i.e., that they have triggered (*caused*) medical reactions and/or leaked into underground aquifers.¹¹⁰ The resulting quest for substitutes to the use of lead solder in electronics and electrical appliances, for example, has led industry on an expensive, never-ending quixotic journey that has thus far yielded less viable alternatives that may actually be more harmful to the environment and to equipment users than the lead solder itself.¹¹¹

106. See Carl F. Cranor, *Some Legal Implications of the Precautionary Principle: Improving Information-Generation and Legal Protections*, 2 EUR. J. ONCOL. LIBR. 31 (Mar. 1, 2003), available at http://www.rachel.org/files/document/Some_legal_implications_of_the_Precutionary_P.pdf (exploring certain, adverse implications of the Precautionary Principle).

107. See EXPORTING PRECAUTION, *supra* note 25, at 37-43 (explaining that the profitability of certain European enterprises is seriously at risk).

108.

Although European industry had, for a time, persuaded regulators in many Community member states to allow a strategy of “best available techniques *not entailing excessive costs*” (BATNEEC) . . . [this] cost justification element [has] steadily [been] restricted. If the technology is available, or can be developed in a reasonable time, [the current prevailing view is that] it should be deployed.

The Precautionary Principle and WTO Law, *supra* note 11, at 89 (internal citations omitted).

109. See MICHAEL P. WILSON, DANIEL A. CHIA & BRYAN C. EHLERS, GREEN CHEMISTRY IN CALIFORNIA: A FRAMEWORK FOR LEADERSHIP IN CHEMICALS POLICY AND INNOVATION 21-23 (2006), available at <http://coeh.berkeley.edu/FINALgreenchemistryrpt.pdf> (explaining the repercussions of California’s legislation); Press Release, State of Cal. Res. Agency, Officials from California and Sweden Agree to Work Together on Biomethane and Renewable Fuels (June 29, 2006), http://resources.ca.gov/press_documents/CaliforniaSwedenBioenergyMOURelease_06_29_06.pdf (reporting that California has been researching the specifics of EU regulations).

110. See LOOKING BEHIND THE CURTAIN, *supra* note 12, at 69-71, 84, 109-10 (explaining that some regulations require no scientific proof that something actually is harmful).

111. See LEADFREE Archives (Oct. 2006), <http://listserv.ipc.org/scripts/wa.exe?A1=ind0610&L=leadfree> (compiling a collection of emails discussing the ramifications of various regulations).

The Precautionary Principle, in other words, dispenses with economic cost-benefit analysis,¹¹² while cost-benefit analysis serves a vital role in U.S. federal administrative decision-making.¹¹³ Risk managers employ economic cost-benefit analysis as a safeguard to ensure that important societal interests, including those of industry and property owners, are considered and equitably balanced *before* federal environmental or health regulations having a potentially significant economic or “takings” impact are enacted.¹¹⁴ Within Europe, there exists a bureaucratic reticence to account in an economic sense for one’s regulatory promulgations and, consequently, there is currently *no* provision within European Community law requiring regulators to evaluate the economic impact or costs of assessing and managing public risks in a systematic manner. According to the EU Commission’s legal adviser, “cost benefit analysis and other influences can lead to undue delays in precautionary action and further losses.”¹¹⁵

Lastly, there is also the *fear of lost business reputation and shareholder value* that follows from the public disparagement campaigns systematically launched against public companies by EU Commission and UN-financed Precautionary Principle proponents—health, environmental, and animal rights zealots—should the companies refuse to abide by their demands. Sadly, the Chief of the UN Treaty Section, the Director of the UN Environment Program, the Executive Head of the UN Global Compact Office, and the UN Secretary General himself, have applauded the use of public disparagement “name and shame” campaigns to keep

112. EXPORTING PRECAUTION, *supra* note 25, at 37 (“[I]f the technology is available, or can be developed in a reasonable time, . . . it should be deployed’ *whatever the cost.*” (citation omitted)); see Andrew Jordan and Timothy O’Riordan, *The Precautionary Principle in Contemporary Environmental Policy and Politics* (Jan. 25, 1998), <http://www.johnsonfdn.org/conferences/precautionary/jord.html> (discussing the cost-benefit analysis in relation to the Precautionary Principle).

113. *The Precautionary Principle and WTO Law*, *supra* note 11, at 79-80.

114. Section 3(b) of Presidential Executive Order 12630 provides:

[R]egulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988), *available at* http://www.blm.gov/nhp/news/regulatory/EOS/eo_12630.pdf. E.O. 12630 also sets forth a standard to determine whether environmental, health, and safety (EHS) regulations so affect the value and/or beneficial use of private property as to be deemed a “taking” for public use that is also entitled to just compensation. *Id.* These guidelines were subsequently updated to reflect more recent case law following a 2003 review by the General Accounting Office, which found that federal agencies had conducted few takings implications assessments, pursuant to Executive Order 12630. U.S. GEN. ACCOUNTING OFFICE, *REGULATORY TAKINGS: IMPLEMENTATION OF EXECUTIVE ORDER ON GOVERNMENT ACTIONS AFFECTING PRIVATE PROPERTY USE* (2003) (explaining that the executive order has changed since 1988).

115. Theofanis Christoforou, *The Precautionary Principle in European Community Law and Science*, in *PRECAUTION: ENVIRONMENTAL SCIENCE AND PREVENTIVE PUBLIC POLICY* 249 (Joel A. Tickner, ed., 2002) (“[C]onsiderations of the level of economic impact or cost from adopting a future precautionary action *do not play a decisive role* in the determination whether to adopt a measure, but only in the actual choice or design of the measure to be taken and the acceptable level of risk.”).

companies, especially U.S. businesses and their global suppliers, in line with “international” (European/UN) expectations.¹¹⁶

IV. CONSTITUTIONAL ISSUES TRIGGERED

Europe’s global objective of substituting precautionary action for risk-based decision-making as a matter of international law is fundamentally at odds with U.S. legal culture, especially its recognition and protection of *individual* rights by means requiring the establishment of a factual record showing significant, substantial, and unreasonable risk *before* regulation is pursued.

The precautionary principle is based on the idea that it is better to be safe than sorry; that is, precaution reflects the need to take action in the face of potentially serious risks without awaiting the results of scientific research that establishes cause-and-effect relationships with full scientific certainty. In contrast, U.S. law reflects a traditional suspicion of government regulation, requiring extensive factual records proving “significant risks” to justify regulation aimed at protecting public health from environmental contaminants. This fundamental norm of the U.S. legal culture, sometimes called the “principal of legality,” makes precautionary environmental health regulation difficult because government must assemble a factual record to support its actions.¹¹⁷

American commentators have openly acknowledged that Europe’s efforts in this regard “can be viewed as an objection to the U.S. legal tradition of extensive administrative law requirements and court review of the factual basis of government decisions about environmental risks.”¹¹⁸

When Europeans today call for decisions based on “the precautionary principle” in international forums, they are challenging a core premise of the American legal culture that requires an extensive factual record to justify government regulatory action. U.S. tradition holds the deep belief that the risks of arbitrary government action are so great that it is better to pay the costs of procedural delay and elaborate legality than to run the risk of unjustified government actions. That is not the case in Europe or in most industrialized nations, including Canada, where governmental regulatory decisions are not subject to judicial challenges to nearly the same degree as they are in the United States. As a consequence, outside the United States, the necessary procedures for marshaling

116. See PRECAUTIONARY PREFERENCE, *supra* note 2, at 81-91 (explaining throughout the paper what the various authorities have done to bring EU regulations to the United States).

117. Charnley & Elliot, *supra* note 57, at 10363 (internal citations omitted).

118. PRECAUTIONARY PREFERENCE, *supra* note 2, at 2.

and analyzing scientific evidence before a decision can be made are nowhere near as great.¹¹⁹

In other words, these commentators indirectly admit that the societal philosophy and regulatory thinking underlying Europe's *extra*-WTO Precautionary Principle directly challenge the core U.S. constitutional principles upon which our nation was founded.

By dividing the business of government among three independent branches, the Constitutional framers ensured that the principle powers of government—legislative, executive, and judicial—were not monopolized by any single branch. Allocating government authority among three separate branches also prevented the formation of too strong a national government capable of overpowering individual state governments. . . .

. . . .

The Founders also determined that power must be divided among the different levels of government: national and state. . . .

. . . .

Under the U.S. Constitution, confederation was to give way to federation—a system in which power would be shared between one national and several state governments. The national government was to be supreme in certain areas, but the states were not to become mere administrative units of the central government. States' rights were protected [by] . . . the 10th Amendment . . . [and] by their representation inside the U.S. Senate . . .¹²⁰

Arguably, a number of U.S. constitutional issues are triggered as the result of legislative and regulatory activities being undertaken at the state and local levels. These activities may involve constitutional violations of the Interstate and Foreign Commerce Clauses, the Compact Clause, the President's and Congress' plenary authority to conduct foreign affairs, the Supremacy Clause, and the Tenth, Fourteenth, and Fifth Amendments to the Bill of Rights. In addition, it may even be argued in certain instances that analogous state constitutional guarantees have been breached.

A. Interstate and Foreign Commerce Clause

While many state initiatives appear to be proposed and/or adopted by individual states, they may nevertheless be part of a larger coordinated regional undertaking between adjacent and/or contiguous states and, perhaps, even foreign nations, provinces, and/or cities. To the extent that commerce crossing individual

119. *Id.* at 2-3 (“For example, in Europe, standards limiting exposure to chemicals in the workplace are routinely set based on a consensus of expert judgment. In contrast, U.S. courts have held that the expert consensus approach is not a sufficient factual basis for regulation.”).

120. Greg Russell, *Constitutionalism: America & Beyond*, DEMOCRACY PAPERS (Melvin I. Urofsky, ed., 2001), available at <http://usinfo.state.gov/products/pubs/democracy/dmpaper2.htm>.

state and/or national lines is adversely affected by the imposition of regulations that are arguably *not* the least trade restrictive rules available to achieve a state's legitimate public policy goal, there may be cause to challenge such rules under Article I, Section 8, Clause 3 (the Interstate and Foreign Commerce Clause) of the U.S. Constitution. This provision reserves to the Congress the "Power . . . [t]o regulate Commerce with foreign Nations, and among the several States."¹²¹

One interesting litigation avoidance strategy employed by states participating in what are effectively "uniform" regional pacts is that of jointly promulgating proposed "Model Rules" or "Model Acts" for consideration and adoption at the state level that may reasonably be expected to have an impact on interstate commerce. Both state Attorneys General and the private lawyers counseling them are well informed about the "gray" area between *uniform* and *model* rules from which it is often difficult to discern actual intent and economic effect. According to the National Conference of Commissioners on Uniform State Laws (NCCUSL),

[A]n act will be designated as a "Uniform" act when (1) there is a substantial reason to anticipate enactment in a large number of jurisdictions *and* (2) uniformity of the provisions of the proposed enactment among the various jurisdictions is a *principal objective*. An act will be designated as a "Model" act if either (a) uniformity is a desirable objective but is *not* a *principal objective*, or (b) the act *could promote uniformity and minimize diversity* even though a significant number of jurisdictions might not adopt the act in its entirety, or (c) *the purposes of the act can be substantially achieved* even though it is not adopted in its entirety by every state.¹²²

During November 2007, Regional Greenhouse Gas Initiative, Inc. (RGGI), "a nonprofit corporation formed to provide technical and scientific advisory services" to all participating RGGI states "in the development and implementation of the CO₂ Budget Trading Program,"¹²³ announced that the nation's first auction of carbon offset credits and allowances "for a mandatory emissions reduction program will take place on September 10, 2008 The states participating in RGGI have agreed to participate in quarterly *uniform* regional auctions for the allowances that

121. U.S. CONST. art. I, § 8, cl. 3; *see also Precautionary Preference II, supra* note 90, at 352-55 nn.421-23 (discussing the Commerce Clause).

122. NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS, at Sec. 2(f)(i) and (ii) (2001) (emphasis added), *available at* <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42>.

123. "RGGI, Inc. was created in September 2007, to provide technical support to the states participating in RGGI, in order to facilitate the administration of the regional RGGI cap-and-trade program. RGGI, Inc. is a 501(c) 3 nonprofit organization." Press Release, RGGI, Date Announced for the Nation's First Auction of Greenhouse Gas Emissions Allowances (Mar. 17, 2008), http://www.rggi.org/docs/20080317news_release.pdf [hereinafter Press Release, RGGI]; *see also* RGGI, Bylaws of Regional Greenhouse Gas Initiative, Inc. (Dec. 12, 2007), *available at* http://www.rggi.org/docs/rggi_bylaws_12_12_07.pdf. RGGI, Inc. was incorporated in the State of Delaware. Certificate of Incorporation of Regional Greenhouse Gas Initiative, Inc. (July 13, 2007), *available at* http://www.rggi.org/docs/cert_of_inc.pdf.

each state will be offering for sale.”¹²⁴ Similarly, the RGGI’s “Goals and Guiding Principles” clearly states that the “program will emphasize *uniformity* to facilitate interstate trading in GHG allowances.”¹²⁵ Considering that the Model Rule mandates that a certain minimum percentage of credits not be auctioned off and be retained for consumer benefit, and that it is reasonably expected that most states will comply, potential litigants are left to wonder whether the RGGI is actually a uniform rule masquerading as a model rule that will undoubtedly affect interstate commerce.¹²⁶ The CO₂ auction has also been scheduled three months before the RGGI enters into force during 2009.¹²⁷

This characterization is also relevant to the extent that RGGI state requirements, imposed on “load serving entities” (LSEs) to curtail carbon leakage—procurement of carbon energy sources not subject to RGGI rules, directly or indirectly affect the commerce of non-RGGI state energy suppliers. For example, can RGGI states legally impose a carbon procurement adder, carbon procurement emissions rate, and/or an emissions portfolio standard on a RGGI LSE¹²⁸ that indirectly impairs the competitiveness of non-RGGI energy providers? Is it not arguable that interstate commerce could be adversely affected, especially

124. Press Release, RGGI, *supra* note 123.

125. RGGI, Goals and Guiding Principles, <http://www.rggi.org/goals.htm> (last visited May 5, 2008).

126.

A feature of this architecture, found in the original RGGI memorandum of understanding (MOU), specified that all states *should* allocate at least 25% of the emission allowances created by a cap-and-trade program to consumer benefit and strategic energy initiatives. . . .

. . . *The RGGI Model Rule specifies that each state must* allocate at least 25% of its budgeted allowances to a consumer benefit or strategic energy purpose account. These “consumer benefit” allowances are to be sold or otherwise distributed to promote energy efficiency, to directly mitigate electricity ratepayer impacts, or to promote lower-carbon-emitting energy technologies. Some RGGI states have stated that they intend to auction 100% of their budgeted allowances. In July 2006, the authors of this report participated in workshop convened on behalf of stakeholders and state officials in RGGI to provide technical assistance on how to design an auction.

HOLT ET AL., AUCTION DESIGN FOR SELLING CO₂ EMISSION ALLOWANCES UNDER THE REGIONAL GREENHOUSE GAS INITIATIVE 10 (2007) (emphasis added), *available at* http://www.coopercenter.org/econ/sitefiles/documents/pdf/rggi_final_report.pdf.

127.

In 2009, the 10 northeastern states that comprise the Regional Greenhouse Gas Initiative (RGGI) will launch the first cap-and-trade program for greenhouse gas emissions within the United States. This innovative program, which covers carbon dioxide (CO₂) emissions from electricity generators within the region, is the result of a *multi-year cooperative effort among states from Maryland to Maine*. CO₂ emissions will be capped at levels comparable to emissions levels at the beginning of this decade and then ramped down to 10% below initial cap levels by 2019. Participants in the RGGI planning process have developed architecture for a successful cap-and-trade program that can serve as a model for a national program.

Id. at 5 (emphasis added).

128. For more information about these and other anti-leakage mechanisms, see RGGI, POTENTIAL EMISSIONS LEAKAGE AND THE REGIONAL GREENHOUSE GAS INITIATIVE (RGGI): FINAL REPORT OF THE RGGI EMISSIONS LEAKAGE MULTI-STATE STAFF WORKING GROUP TO THE RGGI AGENCY HEADS 14 (2008) [hereinafter RGGI: FINAL REPORT], *available at* <http://www.rggi.org/docs/20080331leakage.pdf>.

considering the RGGI program's tacit admission that "[t]he program will not unduly interfere with other national, state or regional emissions trading programs and initiatives . . . ?"¹²⁹

B. Compact Clause

"No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State"¹³⁰ This provision contains the only limitation on state authority within the U.S. Constitution that may be waived by Congress. Arguably, therefore, the failure to comply with its terms *may* potentially give rise to a cause of action. Otherwise known as the Compact Clause, it "is designed to prevent the states from usurping the power of the federal government."¹³¹

The determination of whether an interstate compact violates the Compact Clause entails a three-part inquiry. First, does the interstate cooperation at issue encroach upon or interfere "with the just supremacy of the United States," such that it "enhances state power *quoad* the National Government"?¹³² Second, has Congress consented to the interstate agreement, or a modification of it, either "by authorizing joint state action in advance or by giving expressed or implied approval"¹³³ to an agreement the States have already joined"¹³⁴ Third, have the

129. RGGI, Goals and Guiding Principles, *supra* note 125.

130. U.S. CONST. art. I, § 10, cl. 3.

131. See William M. Quin, II, *Whose False Federalism?: The Constitutionality of State Attorneys General Civil Law Enforcement and Corporate Wrongdoers' Longing for Lochner*, MISS. C. L. REV. ON-LINE FORUM (2007), at 5, [http://mclawreview.org/MC_Law_Review_-_Federalism_Paper_\(L0027650\).DOC](http://mclawreview.org/MC_Law_Review_-_Federalism_Paper_(L0027650).DOC) (citing James Madison's question during the Constitutional Convention regarding the status of Article I, section 10: "Will it prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified, among ourselves, as well as in every other confederated republic ancient and Modern.").

132. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978). This case involved [an interstate] compact result[ing] from model legislation adopted by the legislatures of the participating states, which created [a] Multistate Tax Commission (MTC) composed of the tax administrators from all the member states. The MTC was authorized to study local and state tax systems, develop recommendations for greater uniformity in state tax laws, and conduct audits of businesses for member states.

. . . The Court acknowledged that the MTC and its creation of a multi-state administrative authority increas[ing] the power of member states over corporations subject to their respective taxing jurisdictions . . . did not impermissibly enhance state power because it did not "purport to authorize the member States to exercise any powers they could not exercise in its absence," there was no "delegation of sovereign power to the Commission[,] each State retained complete freedom to adopt or reject the rules and regulations of the Commission," and each state could "withdraw at any time."

William M. Quin, II, *supra* note 131, at 6.

133. "The Constitution makes no provision with regard to the time when the consent of Congress shall be given or the mode or form by which it shall be signified." FindLaw, U.S. Constitution, Article I, Annotations p. 58, <http://caselaw.lp.findlaw.com/data/constitution/article01/58.html> (citing *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 85 (1823)). "While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed." *Id.* (citing *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893)). "The required consent is not necessarily an expressed consent; it may be inferred from

states “engaged in activities in areas in which they are expressly excluded”?¹³⁵ In this regard, noted constitutional law scholar Laurence Tribe has opined that “Congress cannot authorize a state to violate a constitutional command designed to protect private rights against government action (such as the commands of one of the Fourteenth Amendment)” or “license state violation of a constitutional norm too basic to the very nature and structure of the Union for it to be subject to compromise.”¹³⁶

At least one commentator has opined:

The Compact Clause is not all-encompassing, however. Compacts are in essence treaties between sovereign States, and their use predates the Constitution. . . . Because the attributes of State sovereignty not surrendered through the ratification of the U.S. Constitution survive to this day, not every interstate agreement requires congressional consent, *but those that are properly approved by Congress become federal law.* . . . [Furthermore,] . . . [w]hether approved by Congress or not, interstate compacts are not merely legislative acts, they are in very important respects contracts binding on the signatories.¹³⁷

As noted above, one possible byproduct of congressional approval of an interstate compact is the implied creation of “federal agency” or “quasi-federal agency” status. “The courts . . . have been quite willing to inquire as to whether a particular compact agency is so endowed with a ‘federal interest’ that it should be

circumstances.” *Id.* (citing *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 60 (1871)). “It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.” *Id.* (citing *Wharton v. Wise*, 153 U.S. 155, 173 (1894)). “The consent of Congress may be granted conditionally ‘upon terms appropriate to the subject and transgressing no constitutional limitations.’” *Id.* (quoting *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); citing *Arizona v. California*, 292 U.S. 341, 345 (1934); *De Veau v. Braisted*, 363 U.S. 144, 145 (1960)). “Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.” *Id.* (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1856)).

134. William M. Quin, II, *supra* note 131, at 6-7 (quoting *Cuyler v. Adams*, 449 U.S. 433, 441 (1981)). The Court in *Cuyler* further stated:

Where an agreement is not “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,” it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.

Cuyler, 449 U.S. at 440 (citations omitted). “Congress may also condition its approval on acceptance by the states of a modified compact or agreement.” William M. Quin, II, *supra* note 131, at 7 (quoting *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 275 (1959)).

135. William M. Quin, II, *supra* note 131, at 7.

136. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1238 (3d ed. 1999).

137. William S. Morrow, Jr., *The Case for an Interstate Compact APA*, ABA SEC. OF ADMIN. LAW AND REG. PRAC. (emphasis added), available at http://www.abanet.org/adminlaw/interstate/ICAPAPaper_Morrow.pdf (last visited May 12, 2008).

considered a ‘quasi-federal agency.’”¹³⁸ Such a determination may, in turn, engender the exercise of federal jurisdiction over interstate compact activities to ensure compact state compliance, if it is not otherwise elected, with the federal Administrative Procedures Act.¹³⁹ This result, however, is not always assured.¹⁴⁰

Since both the RGGI Model Rule and RGGI, Inc. are intended to serve as a model for national legislation on climate change and for U.S. international reengagement with the parties of the UN Kyoto Protocol,¹⁴¹ could it be effectively argued that the RGGI arrangement constitutes a compact or agreement that is subject to congressional approval? After all, RGGI, Inc.’s announcement of the nation’s first CO₂ offset credit auction specifically quotes RGGI, Inc.’s Chair (and New York State representative) as stating, “Absent federal leadership, the Northeast and Mid-Atlantic states of RGGI are taking action to cut greenhouse gas emissions and reduce their impact on the environment. Our CO₂ auction will be the first in the nation and it is one that should be replicated at the federal level.”¹⁴²

Whether or not congressional approval is required, can it be argued that RGGI, Inc. constitutes a compact agency that is so endowed with a “federal interest” that it should be considered a “quasi-federal agency” subject to the federal APA? Could it also be effectively argued that such a result would better protect the economic interests of businesses operating within RGGI states from excessive harm or deprivation or restriction of their due process rights?

While the answers to these questions may not be determined with absolute certainty, what is certain is that the Supreme Court’s view on this subject has changed over time. And, not surprisingly, at least one commentator has argued that the “RGGI should not be considered a compact or agreement under the Compact Clause.”¹⁴³ “While it may be ‘pure fantasy,’ as Justice White said with regard to

138. *Id.* at 5.

139. *Id.* at 6-7. According to this commentator, “some compacts [elect to adopt the federal APA] . . . approach with respect to rulemaking.” *Id.* at 8 (citing the Interstate Insurance Receivership Compact, art. VII, § 2, 45 ILL. COMP. STAT. 160/5 (2003); Interstate Compact for Adult Offender Supervision, art. VIII, § b, 45 ILL. COMP. STAT. 170/5 (2003); Northeast Interstate Dairy Compact, S.J. Res. 28, 104th Cong., 1st Sess. §§ 5, 12 (1995)).

140. “Congressional consent transforms a compact into federal law but does not in and of itself transform a compact agency into an authority of the government of the United States within the meaning of the federal APA. The result is that courts are often left looking for administrative law to apply.” *Id.* at 8.

141.

The Office of the Assistant Legal Adviser for Treaty Affairs . . . advise U.S. states and foreign governments of potential implications of the Compact Clause of the United States Constitution. In particular, Article 1, section 10, clause 1 of the Constitution provides that “[n]o State shall enter into any Treaty, Alliance or Confederation.” Article 1, section 10, clause 3 further provides that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .”

U.S. Department of State, Compact Clause: Does the Office of Treaty Affairs Review Arrangements Between U.S. States and Foreign Counterparts?, <http://www.state.gov/s/l/treaty/faqs/70120.htm> (last visited May 12, 2008).

142. Press Release, RGGI, *supra* note 123 (quoting Pete Grannis, Chair of RGGI, Inc. and Commissioner of the New York State Department of Environmental Conservation).

143. See Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958 (2007).

the MTC [Multistate Tax Commission], to imagine that the nine RGGI states would have come up with nearly identical rules acting on their own, what RGGI amounts to in the end is similar policy enacted in multiple states.”¹⁴⁴ Thus, it is up to future litigants to plead their case with both the facts “on the ground” and the current (national and international) policy environment “in mind.”

C. Executive Plenary Authority of the Executive to Conduct Foreign Affairs, Subject to Constitutional Treaty Constraints, Versus the Tenth Amendment

In some cases, individual states and/or regional groups of states have entered into or otherwise participated in international initiatives with foreign national provincial and/or municipal governments.¹⁴⁵ To the extent that such activities conflict with federal policy and influence, substantially affect, or otherwise undermine U.S. foreign relations, including foreign commerce, with such nations, it is arguable that such state initiatives intrude upon the plenary authority of the President, subject to the Treaty Power of the Congress, to conduct foreign affairs on behalf of the nation, not to mention the authority of Congress to regulate commerce with foreign nations.¹⁴⁶ In that case, such initiatives may be susceptible

144. *Id.* at 1979.

The RGGI MOU is the only “agreement” between the member states, but the MOU on its own has no power to force action. If no state adopted the Model Rule, the MOU would be meaningless, but once states adopt the Model Rule as state law, it operates independently of the MOU. Consequently, it is not clear what holding the MOU invalid would accomplish. Perhaps a court could instead attempt to prohibit the states from doing what they agreed to do in the MOU—most significantly, implementing the Model Rule. But if the statute or regulation would otherwise be valid, that is, if the only impediment to the state enacting that very statute or regulation again would be a “fruit of the poisonous tree” logic, then there is no ascertainable line between what is permissible and what is not.

Id. at 1978.

145. *See, e.g., Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-88 (2000) (holding that, even though Massachusetts chose to enter into its own law regarding another country, the federal law preempts that state-specific law).

146. One of the more recent cases in this area is *Crosby*. In *Crosby*, the State of Massachusetts adopted a law barring state entities from buying goods or services from any legal person identified on a restricted purchase list of those doing business with the country of Burma (Myanmar). *Id.* at 366-67. Three months following the enactment of the Massachusetts statute, Congress passed a federal law imposing a set of mandatory and conditional restrictions on Burma. *Id.* at 368. The National Foreign Trade Council (NFTC) subsequently brought suit in federal district court against Massachusetts on behalf of thirty-four of its members that were blacklisted by the statute. *Id.* at 370-71. The district court granted the injunctive relief sought against Massachusetts and held that the statute unconstitutionally infringed on the federal government’s exclusive authority to regulate foreign affairs. *Id.* at 371. On appeal, the First Circuit affirmed the lower court ruling and held the statute unconstitutional on three independent grounds: (1) it interfered with the foreign affairs power of the federal government, (2) it violated the dormant foreign commerce clause, and (3) it was preempted by the federal law. *Crosby*, 530 U.S. at 371. Massachusetts was subsequently granted certiorari to bring the case before the U.S. Supreme Court. *Id.* The Court decided the case on what appeared to be narrower grounds than the circuit court. *Id.* It held that the “Burma law posed an obstacle to the accomplishment of Congress’ full objectives under the federal Act.” *Id.* at 373. The inconsistency of the sanctions imposed by the Massachusetts law undermined “congressional calibration of the force” of the sanctions. *Id.* at 380. The Massachusetts statute was also at odds with Congress’ express grant of power to the President, via the Act, of the authority “to speak for the [U.S.] among the world’s nations in developing a ‘comprehensive

to challenge under Sections 8 and 10 of Article I, and Clauses 1 and 2 in Section 2 of Article II of the U.S. Constitution.¹⁴⁷

The states, however, have taken the legal position that they have the constitutional right to enter into executive agreements with foreign nations, provinces, and/or cities because they have always done so pursuant to the powers reserved to the states by the Tenth Amendment of the Constitution's Bill of Rights.¹⁴⁸ In addition, they have argued that, in any event, their activities affect neither U.S. foreign relations with those nation-states nor U.S. foreign policy, including foreign commerce, generally conducted by the President and/or Congress through executive agreements and/or formal treaties.¹⁴⁹

D. Supremacy Clause—Preemption Doctrine Versus the Tenth Amendment

Most states have taken the legal position that they have the constitutional right to regulate in these areas because they have always done so pursuant to the powers reserved to the states by the Tenth Amendment of the Constitution's Bill of Rights.¹⁵⁰ In making this argument, the states have also pointed to the federal government's decision not to, or its failure to, "*occupy the specific field*"¹⁵¹ of regulation in these areas.¹⁵² They have utilized this strategy to employ the Tenth Amendment to promote strict EU-type environmental legislation based on Europe's Precautionary Principle throughout the United States at the state and local levels.¹⁵³ Nevertheless, it is arguable that existing federal laws and regulations, U.S. executive decisions not to enter into or ratify international environmental treaties, and congressional decisions *not* to legislate as aggressively in the environmental and health areas as occurs in Europe, reflect Congress' and the President's clear preference for voluntary over mandatory measures for risk over hazard-based health and environmental assessments and for economic cost-benefit analysis.¹⁵⁴ As a result, it is arguable that these rules can be challenged under Section 2 of Article VI of the U.S. Constitution—the Supremacy Clause.¹⁵⁵

multilateral strategy to bring democracy and improve human rights practices.'" *Id.* This explicit delegation of power over economic sanctions to the President vested him with the maximum authority of the national government. *Crosby*, 530 U.S. at 380-81.

147. See PRECAUTIONARY PREFERENCE, *supra* note 2, at 355-59 (arguing that state initiatives are susceptible to challenge by the Constitution).

148. See, e.g., *Crosby*, 530 U.S. at 364 (arguing that the states have the constitutional right to enter into executive agreements with foreign nations).

149. See, e.g., *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998) (arguing that Massachusetts state law did not have an effect on U.S. foreign relations).

150. See, e.g., S. 227, 92d Leg., Reg. Sess. (Mich. 2003) (codifying criminal categories for the intentional release, importation, or possession of GM organisms, especially GM fish, plants, and aquatic organisms).

151. *West v. Northwest Airlines, Inc.*, 923 F.2d 657, 661 (9th Cir. 1990) (emphasis added) (add subsequent history).

152. See, e.g., S. 227, 92d Leg., Reg. Sess. (Mich. 2003).

153. *Id.*

154. PRECAUTIONARY PREFERENCE, *supra* note 2, at 350-52.

155. See, e.g., Eric Lasker, *Federal Preemption and State Anti-"GM" Food Laws*, LEGAL BACKGROUNDER, Dec. 2, 2005, at 4, available at <http://www.wlf.org/upload/120205LBLasker.pdf>

Perhaps a preferred way to view states' rights and Tenth Amendment questions is through the lens of *the individual*. The philosophical justification for the Bill of Rights, which limits the ability of (federal and state) government to trespass upon certain individual liberties that collectively compose the textural fabric of a free society, is that it places those civil liberties beyond the grasp of political majorities which could deprive citizens of their fundamental rights. These protected rights may derive directly from natural rights or indirectly through arrangements (social contracts) reached via political consensus within society and reduced to common law precedent, civil law statutes, and constitutions. Thus, the logical conclusion would be that states' rights *are based on* the individual rights of the governed. In the words of U.S. constitutional law scholar Laurence Tribe, "that *all lawful power derives from the people* and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism."¹⁵⁶ For this reason, former U.S. Supreme Court Justice Sandra Day O'Connor, in *New York v. United States*,¹⁵⁷ held that "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments . . . [but instead,] for the protection of individuals."¹⁵⁸

E. Fifth Amendment Takings and Due Process Clauses Extended by the Fourteenth Amendment to Citizens via the States

The promulgation of onerous, costly, and overly restrictive Precautionary Principle-based environmental and health regulations, especially those being considered and adopted by U.S. state legislatures and administrative agencies *without* scientific or economic justification, substantially diminish the value of private property such as plants, equipment, land, fixtures, etc. It is arguable, based on U.S. Supreme Court jurisprudence, that such rules violate the Fifth Amendment of the Constitution's Bill of Rights because they constitute an "indirect" regulatory taking of private property for an ostensible public policy use (police carve-outs which may actually be a private use), without payment of just compensation.¹⁵⁹

After careful deliberation, the federal government has squarely rejected arguments that GM foods are unsafe or that labeling of GM foods should be required or is appropriate. States that enact statutes that single out GM products or producers for adverse treatment—burdening their operations through labels or liability rules or barring their operations altogether—may find these laws to be unenforceable as contrary to federal law.

156. TRIBE, *supra* note 136, 6-7 (emphasis added).

157. 505 U.S. 144 (1992).

158. *Id.* at 181

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

159. LAWRENCE A. KOGAN, TERMINATING GLOBAL WARMING, ENERGY DEPENDENCE OR PRIVATE PROPERTY RIGHTS? 4, <http://www.itssd.org/Publications/Terminating-Global-Warming.pdf> (last visited Feb. 24, 2008) ("[T]he mere assertion of a public health and safety purpose is insufficient to avoid [having the regulation deemed] a taking . . . Actions . . . asserted to be for the protection of public health

Indeed, the U.S. Supreme Court has recognized how “a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.”¹⁶⁰

In addition, each of the EU-style Precautionary Principle-based regulations discussed in this paper require, to varying degrees, that companies submit to regulators as a condition to obtaining market access for their products, information dossiers containing proprietary formulae, and otherwise undisclosed information and testing data which may qualify as “trade secrets” under state law.¹⁶¹ However, it is common knowledge that these regulations do not provide adequate intellectual

and safety, therefore, should be undertaken *only in response to real and substantial threats* to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.” (emphasis in original) (alteration in original) (quoting Exec. Order No. 12,630, 53 Fed. Reg. 8859 (March 15, 1988)); see also Exec. Order No. 12,630, 53 Fed. Reg. 8859 (March 15, 1988) (“Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings.”).

160. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). *The Federalist* papers also clearly reflect that private property rights have long been among the most fundamental, inalienable, and liberating of all *natural* rights guaranteed to U.S. citizens by the U.S. Constitution and its accompanying Bill of Rights. See, e.g., THE FEDERALIST NO. 10 (James Madison) (Jacob E. Cooke ed., 1961) (noting, in his discussion of the advantage of federal government in controlling factions, the importance of protecting property rights). Founding father James Madison wrote in *Federalist No. 10* that the protection of “the faculties of men, from which the rights of property originate . . . is the first object of Government.” *Id.* at 58 (emphasis added). In addition, in *Federalist No. 54*, Madison wrote that “[g]overnment is instituted no less for protection of the property, than of the persons of individuals. The one as well as the other; therefore may be considered as represented by those who are charged with the government.” THE FEDERALIST NO. 54 (James Madison), *supra*, at 370 (emphasis added). Several years later, in an article published in the *National Gazette*, Madison wrote what is arguably his most articulate exposé on private property rights. Property means

“that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”

. . . [I]t embraces everything to which a man may attach a value and have a right; and which leaves to every one else the like advantage.

In the former sense, a man’s land, or merchandize, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

. . . .

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

James Madison, *Property*, NAT’L GAZETTE, Mar. 29, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266-68 (R. Rutland et al. eds., 1983), available at <http://www.vem.duke.edu/POI/madison.pdf> (emphasis added).

161. See, e.g., Jeroen H. J. den Hartog & Mark G. Paulson, *Europe’s “REACH” Initiative Will Impact Trade Secrets*, LEGAL BACKGROUNDER, June 16, 2006, at 1, 4, available at <http://www.wlf.org/upload/061606dehartog.pdf> (arguing that EU-style Precautionary Principle-based regulations demand, as a condition to obtaining market access for their products, that companies submit information dossiers containing proprietary formulae and otherwise undisclosed information and testing data which may qualify as “trade secrets” under state law).

property protection for such information.¹⁶² Consequently, just like European regulators, U.S. state regulators may have the ability, means, and inclination to pass such information directly or indirectly to third party “domestic” competitors without ensuring that the government or a third party pays the original owner of that information or data “just compensation.” Thus, such regulations may be susceptible to challenge as facilitating an illegal, “indirect” “taking” (i.e., a deemed compulsory license) of private property for public use without payment of just compensation in violation of the substantive right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

F. State Constitution—Due Process Clause

In several instances, U.S. governors have sought to avoid the public debate that would likely ensue if their state legislatures were to expressly adopt Precautionary Principle-based laws that negatively impacted the asset values of local businesses, the value of private property held by homeowners, and the general cost of living within the state. For this reason, they have frequently chosen to pursue a relatively insular, closed, and arcane regulatory rule-making approach to lawmaking that shuns the transparency of the legislative process and denies the public the ability to debate the merits of such rules. There is considerable leeway here for state residents to argue that such conduct violates their procedural due process rights to adequate and timely notice and a full and impartial hearing under both the Fourteenth Amendment to the U.S. Constitution and similar provisions within many state constitutions.¹⁶³

V. SEVERAL TYPES OF EUROPEAN EXTRA-WTO PRECAUTIONARY PRINCIPLE-BASES RULES ARE BEING INTRODUCED WITHIN U.S. STATE AND LOCAL LEGISLATURES AND ADMINISTRATIVE AGENCIES

As noted above, Brussels and EU Member State parliamentarians and regulators have been working within the United States at the regional, state, and local levels to promote adoption of Precautionary Principle-based environmental, health, and safety legislation and regulations.¹⁶⁴

162.

REACH requires a substantial amount of trade secret information to be disclosed, which will be or may be shared with other registrants, users, or potential registrants. Still much is to be defined in further rules. The mandatory character of data sharing leads to *de facto* compulsory licensing of know how, obtained in valuable investments by companies with very little remuneration.

Id.

163. See LAWRENCE A. KOGAN, U.S. PRIVATE PROPERTY RIGHTS UNDER INTERNATIONAL ASSAULT 20 (2006), available at <http://www.itssd.org/pdf/LAK-PrivatePropertyRightsUnderInternationalAssault.pdf> (arguing that such conduct violates state residents' procedural due process rights to adequate and timely notice and a full and impartial hearing).

164. See LAWRENCE A. KOGAN & SLAVI PACHOVSKI, RGGI IS EUROPE'S "BACK-DOOR-MAN": HOW EUROPE RELIES ON THE NORTHEAST GREENHOUSE GAS INITIATIVE TO INFLUENCE U.S. CLIMATE CHANGE POLICY 9-10 (2005), http://www.itssd.org/White%20Papers/RGGI_Europe_White%20Paper.pdf (showing that EU Member States have been working within the United States to promote adoption

During the past three years, they have been focusing on three broad subject matter areas: (1) biotech-related foods, feed, and seed; (2) hazardous substances such as high volume toxic chemicals, cosmetics, brominated flame retardants and the products containing them, metals found in appliances and electronics, and the collection, recycling, and disposal of such e-waste; and (3) carbon dioxide emissions, mandatory renewable energy standards, and energy efficiency mandates related to climate change and energy.¹⁶⁵ Additionally, each subject area closely corresponds to onerous and expensive EU regional regulations or directives known by the following acronyms—GMOs, RoHS, WEEE, Cosmetics, and REACH.¹⁶⁶

The following discussion identifies precisely where the several types of Precautionary Principle-based initiatives have been studied, introduced, proposed, adopted, carried over, defeated, or outright rejected since 2003. In addition, several counties and municipalities have already adopted or endeavored to adopt the Precautionary Principle outright as a governing legal principle pursuant to which all local government business activities, including commercial procurement, must be conducted. Indeed, the volume and frequency of activity undertaken since 2003 to establish the Precautionary Principle as U.S. law at the state and local levels has been quite astounding.

A. *Categories of Anti-Biotech and Pro-Biotech Legislation*

Most states have promoted the science of biotechnology from a research and development perspective. However, a number of U.S. states since 2003 have introduced and/or adopted legislation that, like the EU pre-market authorization, traceability, and labeling rules imposed on biotech food, feed, and related products and processes, strictly regulates the market access of such products. In addition, numerous states and municipalities have proposed seed liability legislation that holds manufacturers and farmers responsible in the event of accidental cross-

of Precautionary Principle-based legislation and regulations); Env'tl. Law Section, State Bar of Cal., Environmental Law Conference at Yosemite, Schedule of Events and Speakers, at 9 (2006), available at http://www.calbar.ca.gov/calbar/pdfs/sections/enviro/2006-10-19_yosemite.pdf [hereinafter Environmental Law Conference] (offering a session entitled "The 'Precautionary Principle' and the Future of Risk Regulation" including panelist Robert Donkers, an environment counselor from the delegation of the European Commission to the United States in Washington, D.C.); see also Press Release, Inst. for Trade, Standards & Sustainable Dev., Britain Leads EU Charge to Undermine U.S. Climate Change Policy: News Article Confirms that Europe, Through Britain, Seeks to Influence U.S. Climate Change Policy Through the Back-Door of State & Local Policymaking (Jul. 17, 2006), <http://www.itssd.org/Press%20Release/BritainUndermines.pdf> (reporting that Britain was seeking to influence U.S. climate change policy through state and local policymaking); LAWRENCE A. KOGAN, BEWARE OF THE FLYING DUTCHMAN WHEN TRAVELING TO BRUSSELS 3, available at <http://www.itssd.org/Publications/Beware-Flying-DutchmanIII.pdf> (noting that the European Commission has dispatched its first environment-health ambassador to the United States, whose "goal is to ensure, through any means, the harmonization of EU and US regulatory laws and business practices, consistent with European standards").

165. See *supra* note 164 (providing examples of three documents dealing with these areas).

166. See LOOKING BEHIND THE CURTAIN, *supra* note 12, at 5-7 (showing that each subject matter area closely corresponds to onerous and expensive EU regional regulations or directives); see also EXPORTING PRECAUTION, *supra* note 25, at 11-17 (showing that each subject matter area closely corresponds to onerous and expensive EU regional regulations or directives).

pollination. And, other states have proposed outright moratoria on the planting of genetically modified (GM) crops and use of biotechnology on animals within their jurisdictions. This has prompted a backlash of sorts among biotech advocates who have promoted preemption legislation in numerous states to prevent the enactment of moratoria and other restrictions on biotech crops. In fourteen states, even anti-crop destruction (private property protection) legislation was adopted.

As noted above, the GM legislation breaks down into the following categories:

Anti-GM Regulatory Approaches:

- *Regulatory Restrictions on GM Food, Feed, and Seed*: this category of legislation for the most part would regulate GM organisms under the traditional regulatory state.
- *Labeling of GM Products and/or Seeds*: this category seeks to place warning labels on products that have GM ingredients in order to “educate” the consumer.
- *Liability and Farmer-Seed Manufacturer (“Ag”) Contracts*: this category would place liability for any “injury” related to GM or biotechnology on the backs of farmers and seed manufacturers.
- *Study and Task Force*: this category is designed to slow the introduction of GM and biotechnology into the marketplace by requiring unnecessary, lengthy, and costly government studies prior to introduction.
- *GM Crop Moratoria*: this category looks to outlaw the use of any GM crop in a given jurisdiction.

Pro-GM Regulatory Approaches:

- *Legislative Preemption*: this category looks to protect consumer choice by preempting legislative restrictions on GM organisms.
- *Supporting Biotechnology*: this category supports the use of biotechnology by creating tax or other incentives for those who employ such technology.
- *Anti-Crop Destruction*: this category aims to protect farmers who raise GM crops by creating legal penalties if their crops are destroyed by activists.

1. State Anti-GM Regulatory Approaches (2003-2005)

(i) Regulatory Restrictions on GM Food, Feed, and Seed

A typical form of GM regulation involves restrictions on GM foods, feeds, and seeds that stop short of complete bans on all GM organisms. Typical of this type of legislation is Michigan Senate Bill 211, which was adopted in 2005.¹⁶⁷ This bill was styled to “protect the environment and the natural resources” of Michigan by prohibiting introduction of certain plants, fish, and insects.¹⁶⁸ Included in the lengthy list of prohibited species are any “genetically engineered variant” of the prohibited species.¹⁶⁹ But, S.B. 211 was just the latest in a series of regulatory

167. S. 211, 93d Leg., Reg. Sess. (Mich. 2005).

168. *Id.*

169. *Id.*

restrictions on GM products in Michigan. In 2003, the state adopted four bills that limited which GM plants and animals could be introduced in the state.¹⁷⁰ Forerunners to Senate Bill 211, the 2003 quartet criminalized introduction of non-native and GM variant fish and aquatic plants in Michigan.¹⁷¹ Additionally, Senate Bill 228 more broadly restricts the introduction of certain non-indigenous and GM animals and plants that the state veterinarian under the state Department of Agriculture identifies in order to “protect the human food chain and the livestock and aquaculture industries of the state.”¹⁷² Arkansas also adopted a measure regulating the use of GM organisms, creating, in 2003, a biological agents registry under the State Department of Health.¹⁷³ The bill defines biological agents to include GM micro-organisms that have been shown to produce or include factors associated with disease or coded for toxins outlined in federal regulations.¹⁷⁴

Michigan and Arkansas have been the only success stories for GM plant and animal regulation. In 2003, nine states rejected measures that would have subjected GM organisms to state regulation. A California Senate proposal to prohibit the importation of live GM aquatic animals until such time as the U.S. Food and Drug Administration (FDA) authorizes such animals for human consumption, the State Department of Health and Human Services completes an environmental impact report, and the State Fish and Game Commission promulgates regulations for their use, with exceptions for approved research, was not enacted.¹⁷⁵ The Kansas Senate killed a bill in committee that would have required state certification for the growing of GM crops, while empowering the State Secretary of Agriculture to adopt rules for the regulation of GM crops and the certification of growers.¹⁷⁶ The Minnesota Senate in 2003 declined to enact a pair of bills that would have ended the State Department of Agriculture’s authority to issue permits for GM organisms.¹⁷⁷ The Montana legislature killed two bills that year; one bill would have created a biological agent registry similar to Arkansas’, while the other would have created certification process and registry for growers of

170. See S. 227, 92d Leg., Reg. Sess. (Mich. 2003) (codifying criminal categories for the intentional release, importation, or possession of GM organisms, especially GM fish, plants, and aquatic organisms); S. 226, 92d Leg., Reg. Sess. (Mich. 2003) (amending the state Natural Resources and Environmental Protection Act to prohibit the release of GM or nonnative organisms, including game fish, into the state without a permit); S. 228, 92d Leg., Reg. Sess. (Mich. 2003) (prohibiting the importation of GM variants of species under quarantine or GM variants which have the potential to spread disease or harm to livestock or wildlife unless expressly permitted by an order of the director); S. 229, 92d Leg., Reg. Sess. (Mich. 2003) (prohibiting introduction or transportation of GM variants of aquaculture species, including research organisms, unless they are specifically identified on a list of approved aquaculture species or in subsequent rules).

171. See *supra* note 170 (citing Michigan legislation that preceded S. 211).

172. S. 228, 92d Leg., Reg. Sess. (Mich. 2003).

173. S. 2615, 84th Leg., Reg. Sess. (Ark. 2003).

174. *Id.*; see also 42 C.F.R. § 72 (2006) (restricting, on the federal level, toxins referenced in S. 2615).

175. S. 53, 2003 Leg., Reg. Sess. (Cal. 2003).

176. S. 236, 2003-04 Leg., Reg. Sess. (Kan. 2003). The bill would additionally make manufacturers liable for contamination of non-GM crop populations unless the grower failed to follow the manufacturer’s safe handling instructions. *Id.*

177. S. 246, 2003 Leg., Reg. Sess. (Minn. 2003); S. 1523, 2003 Leg., Reg. Sess. (Minn. 2003).

GM wheat.¹⁷⁸ Similarly, the North and South Dakota Senates defeated proposed GM wheat certification regimes.¹⁷⁹ The Vermont Senate ended its 2003 session without enacting a proposed requirement that GM seed be registered before sale.¹⁸⁰ A proposed biological agent registry, which would include natural or bioengineered organisms, was killed in committee during the 2003 West Virginia legislative session.¹⁸¹ The Hawaiian Senate introduced two bills in 2003 that would force biotechnology companies that operate as crop producers to disclose the location and nature of their genetic testing operations.¹⁸² The Senate adjourned that year without acting on those proposals, and subsequent efforts in 2004,¹⁸³ 2005,¹⁸⁴ and 2006¹⁸⁵ all failed to gain legislative approval.

In 2004, three other states considered and rejected additional regulation of GM organisms. The Michigan Senate considered without action two bills that would have imposed additional restrictions on the use of GM fish and other aquatic species.¹⁸⁶ The New York legislature adjourned in 2004 without enacting proposed measures that would have required sellers of GM seeds to register with the state for a fee before sale and prohibited the sale or possession of GM aquatic animals unless authorized by the state for zoological, educational, scientific, or preservation purposes.¹⁸⁷ The latter proposals further authorized the state to inspect pet stores at least annually to ensure compliance.¹⁸⁸ The Kansas House of Representatives rejected a bill that would require state approval for sale of wheat that contained transgenic material.¹⁸⁹ A similar proposal in 2005 failed to gain the legislature's approval,¹⁹⁰ as did an effort in 2006.¹⁹¹

Again 2005 saw no state adopt legislation regulating GM organisms. The Hawaiian legislature considered a quartet of bills that would have required

178. See H.R. 200, 2003 Leg., Reg. Sess. (Mont. 2003) (creating a biological agents registry under the State Department of Justice); H.R. 409, 2003 Leg., Reg. Sess. (Mont. 2003) (Montana Wheat Protection and Promotion Act).

179. See S. 2408, 2003 Leg., Reg. Sess. (N.D. 2003) (requiring sellers of GM wheat to be certified or be liable for a Class B felony); S. 214, 2003 Leg., Reg. Sess. (S.D. 2003) (tasking the State Department of Agriculture to promulgate rules for the regulation of GM wheat and requiring those seeking to plant GM wheat to receive departmental approval).

180. S. 165, 2003 Leg., Reg. Sess. (Vt. 2003).

181. S. 175, 2003 Leg., Reg. Sess. (W. Va. 2003) (West Virginia Bioterrorism Threat Reduction Act).

182. S. 1436, 22d Leg., Reg. Sess. (Haw. 2003); S. 1640, 22d Leg., Reg. Sess. (Haw. 2003).

183. S. 2122, 22d Leg., Reg. Sess. (Haw. 2004).

184. H.R. 1024, 22d Leg., Reg. Sess. (Haw. 2005); S. 1857, 22d Leg., Reg. Sess. (Haw. 2005).

185. H.R. Res. 99, 23d Leg., Reg. Sess. (Haw. 2006); H.R. Con. Res. 134, 23d Leg., Reg. Sess. (Haw. 2006); H.R. 3218, 23d Leg., Reg. Sess. (Haw. 2006); S. 2752, 23d Leg., Reg. Sess. (Haw. 2006).

186. See S. 1422, 2004 Leg., Reg. Sess. (Mich. 2004) (making minor amendments to 2003 Mich. Pub. Acts 270); S. 1423, 2004 Leg., Reg. Sess. (Mich. 2004) (requiring the State Department of Natural Resources to disclose all information and penalties about prohibited GM fish and other aquatic species).

187. See Assem. 10094, 2004 Leg., Reg. Sess. (N.Y. 2004) (defining GM seed registry); S. 6537, 2004 Leg., Reg. Sess. (N.Y. 2004) (providing prohibition on GM aquatic animals); Assem. 10315, 2004 Leg., Reg. Sess. (N.Y. 2004) (providing prohibition on GM aquatic animals).

188. Assem. 10315, 2004 Leg., Reg. Sess. (N.Y. 2004); S. 6537, 2004 Leg., Reg. Sess. (N.Y. 2004).

189. H.R. 2865, 2003-04 Leg., Reg. Sess. (Kan. 2004).

190. H.R. 2239, 2005-06 Leg., Reg. Sess. (Kan. 2005).

191. H.R. 2717, 2005-06 Leg., Reg. Sess. (Kan. 2006).

coordination between state and county agencies when managing GM organisms.¹⁹² Another quartet would have created a licensing system for the use of GM organisms, along with labeling and liability standards.¹⁹³ Most ominously, one bill would have explicitly adopted the Precautionary Principle as a binding approach for the State Department of Agriculture when dealing with GM organisms.¹⁹⁴ None of these bills were adopted at the close of the 2005 session. The Massachusetts Senate passed on enacting a biological agent registry similar to Arkansas', taking no action on the bill after it was introduced.¹⁹⁵ A second attempt in New York to require registration of GM seed before sale also failed to get out of committee,¹⁹⁶ as did a broader proposal to create a GM organism registry with the State Department of Agriculture.¹⁹⁷ Additionally, the Vermont House of Representatives defeated a bill that would have required all seeds labeled as organic to be registered with the state Secretary of Agriculture to ensure that such seeds are free of GM materials.¹⁹⁸

(ii) Labeling of GM Products and/or Seeds

Requiring labeling on all products containing any GM material is another popular legislative approach, comprising roughly eight percent of all GM legislation. From 2003 to 2005, four states—Alaska, Maine, Minnesota, and Vermont—passed bills that force conspicuous labeling of products containing any GM materials.¹⁹⁹ While three of the laws are focused on specific use of GM organisms in the sale of fish, milk, and seed, the Maine law has a more general effect. It changes the criminal code to include failure to properly label farm products and other foods as GM.²⁰⁰ Over that same period, seven states—Connecticut, Hawaii, Massachusetts, Michigan, New Mexico, New York, and North Dakota—rejected bills which would require labeling of GM products.²⁰¹

192. S. Res. 121, 22d Leg., Reg. Sess. (Haw. 2005); H.R. Res. 220, 22d Leg., Reg. Sess. (Haw. 2005); S. Con. Res. 213, 22d Leg., Reg. Sess. (Haw. 2005); H.R. Con. Res. 295, 22d Leg., Reg. Sess. (Haw. 2005).

193. S. 1763, 22d Leg., Reg. Sess. (Haw. 2005); S. 1764, 22d Leg., Reg. Sess. (Haw. 2005); H.R. 1780, 22d Leg., Reg. Sess. (Haw. 2005); H.R. 1781, 22d Leg., Reg. Sess. (Haw. 2005).

194. S. 646, 22d Leg., Reg. Sess. (Haw. 2005).

195. S. 1239, 2005 Leg., Reg. Sess. (Mass. 2005).

196. Assem. 115, 2005 Leg., Reg. Sess. (N.Y. 2005).

197. Assem. 8309, 2005 Leg., Reg. Sess. (N.Y. 2005).

198. H.R. 490, 2005 Leg., Reg. Sess. (Vt. 2005).

199. See 2005 Alaska Sess. Laws 26 (requiring that GM fish not be sold for human consumption unless it is conspicuously labeled); S. 2843, 2003-04 Leg., 83d Sess. (Minn. 2004) (providing for *voluntary* labeling of dairy products produced from cows *not* treated with rBGH (rBST) and *mandatory* labeling of dairy products derived from cows that have been treated with rBGH); 2004 Vt. Acts & Resolves 97 (requiring all GM seed to be labeled with information describing the trait and manufacturer; containing requirements for safe handling, storage, transport, and use; and requiring that all GM seed manufacturers report to the secretary their quantities sold annually); 2003 Me. Legis. Serv. 452 (West) (designating as a civil violation any false labeling of a product, such as commercial feed, that is made with GE or bioengineering, whether by a manufacturer, distributor, processor, wholesaler, or retailer).

200. 2003 Me. Legis. Serv. 452.

201. See S. 6625, 2006 Leg., Reg. Sess. (N.Y. 2006) (requiring specific handling and usage instructions on products containing GM material); S. 647, 22d Leg., Reg. Sess. (Haw. 2005) (prohibiting the sale of seeds labeled as GM-free if the seller should reasonably know that the product contains GM

Alaska and Vermont both considered and rejected earlier versions of the labeling bills that they eventually passed.²⁰² New York has been particularly active in considering labeling legislation, rejecting five bills that would have imposed varying levels of labeling requirements since 2003.²⁰³ Two of the New York proposals in 2005 would have required GM seeds to carry a label stating: “These are GE seeds.”²⁰⁴ Such labeling exceeds the requirements of the Federal Seed Act.²⁰⁵ While those proposals were defeated in 2005, the New York Senate in 2006 introduced a bill that would have imposed labeling requirements on all GM seeds, including the identity and relevant traits and characteristics of a particular seed, safe handling, storage, transport, and use instructions, as well as contact information of the manufacturer, distributor, or supplier of the seed.²⁰⁶ That bill died in committee without being enacted.

(iii) Liability and Ag Contracts

State legislatures have also moved to impose seed liability that would hold manufacturers and farmers responsible in the event of accidental cross-pollination of GM seed with non-GM crop populations. This category comprised nearly twenty percent of the legislation introduced during 2005. As of yet, only Hawaii and Illinois have adopted measures that address the issue of cross-pollination.²⁰⁷

material); H.R. 2667, 2005 Leg., Reg. Sess. (Mass. 2005) (requiring labeling of food and food products, including seed and hormones, that contain GM material); H.R. 1353, 2005 Leg., Reg. Sess. (N.D. 2005) (requiring that organic seed be labeled with information specifying its transgenic content); S. 906, 2005 Leg., Reg. Sess. (N.M. 2005) (requiring food that has been genetically engineered to be labeled); S. 1637, 2005 Leg., Reg. Sess. (N.Y. 2005) (requiring labeling of products containing GM material); Assem. 3165, 2005 Leg., Reg. Sess. (N.Y. 2005) (same); Assem. 8344, 2005 Leg., Reg. Sess. (N.Y. 2005) (same); S. 1045, 2003 Leg., Reg. Sess. (Conn. 2003) (requiring manufacturers to label products containing GM organisms); H.R. 5155, 2003 Leg., Reg. Sess. (Mich. 2003) (requiring disclosure of any GM product that may have a GM ingredient or was fed a GM product); S. 176, S. 1834, 2003 Leg., Reg. Sess. (N.Y. 2003) (establishing labeling standards for GM and non-GM products); *see generally* Pew Initiative on Food & Biotechnology, Legislative Tracker, Feb. 2007, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Food_and_Biotechnology/PIFB_Legislative_Tracker.pdf (tracking agricultural biotechnology legislation).

202. *See* H.R. 89, 2005 Leg., Reg. Sess. (Alaska 2005) (requiring the labeling of GM fish and fish products); S. 281, 2004 Leg., Reg. Sess. (Alaska 2004) (requiring GM fish, and any products or spawn thereof, to be labeled as GM); S. 163, 2003 Leg., Reg. Sess. (Vt. 2003) (requiring natural or processed products containing GM products to carry a label); H.R. 351, 2003 Leg., Reg. Sess. (Vt. 2003) (requiring any natural or processed product containing GM to carry a label).

203. S. 6625, 2006 Leg., Reg. Sess. (N.Y. 2006); S. 1637, 2005 Leg., Reg. Sess. (N.Y. 2005); Assem. 3165, 2005 Leg., Reg. Sess. (N.Y. 2005); Assem. 8344, 2005 Leg., Reg. Sess. (N.Y. 2005); S. 176, 2003 Leg., Reg. Sess. (N.Y. 2003); S. 1834, 2003 Leg., Reg. Sess. (N.Y. 2003).

204. *See* Assem. 3165, 2005 Leg., Reg. Sess. (N.Y. 2005) (requiring labeling of products containing GM material); Assem. 8344, 2005 Leg., Reg. Sess. (N.Y. 2005) (same); *Legislative Committee Report, THE SEEDSMAN*, Aug. 2006, at 7, available at http://www.atlanticseed.org/Pages/Seedman/august_2006.pdf (requiring a label stating, “These are genetically engineered seeds”).

205. Federal Seed Act, 7 U.S.C. §§ 1551-1611 (2006).

206. S. 6625, 2006 Leg., Reg. Sess. (N.Y. 2006).

207. *See* S. Res. 115, 22d Leg., Reg. Sess. (Haw. 2005) (urging support for coexistence among different agricultural sectors); H.R. Res. 194, 22d Leg., Reg. Sess. (Haw. 2005) (requiring support for coexistence among different agricultural sectors); S. Con. Res. 208, 22d Leg., Reg. Sess. (Haw. 2005)

The Hawaiian legislature in 2005 adopted three resolutions urging coexistence of the whole scope of agricultural practices in the state, from organic to GM.²⁰⁸ During that session, it rejected four other bills that would have retained liability for injuries allegedly stemming from GM products.²⁰⁹ But 2005 could be considered a veritable success for Hawaiian proponents of GM plants and organisms following the 2004 legislative session where eight bills that would have imposed strict liability on manufacturers of GM plants or organisms,²¹⁰ as well as imposed strict disclosure requirements which would incur additional liability if not followed died.²¹¹ 2004 merely continued the pattern of indifference to liability measures on the part of the Hawaiian legislature, as the body allowed a trio of bills to die without action in 2003 that would have created a disclosure, labeling, and liability regime to insulate “conventional” farmers from the perceived dangers of cross-pollination.²¹² Illinois, on the other hand, passed in 2003 more targeted legislation that required contracts between seed suppliers and growers to disclose any GM content in a separate document.²¹³ However, an effort in 2005 to limit liability for farmers who wish to retain harvested GM seed by registering such seed with the State Department of Agriculture died after introduction.²¹⁴

While only two states adopted seed liability legislation during this period, ten states, in addition to Hawaii and Illinois, have rejected measures that would impose legal liability for injuries caused by GM plants.²¹⁵ Most of these states have considered multiple bills over multiple sessions without enacting any legislation that would impose liability on manufacturers or farmers. Most of the proposals

(urging support for coexistence among different agricultural sectors so that biotech, conventional, and organic crops can grow in the same region); 2003 Ill. Legis. Serv. 522 (West) (outlining requirements for contracts between producers and purchasers of grain, including requirements for designating GMO content in an accompanying materials sheet).

208. Haw. S. Res. 115; Haw. H.R. Res. 194; Haw. S. Con. Res. 208.

209. *See* S. 645, 22d Leg., Reg. Sess. (Haw. 2005) (requiring disclosure of possible risks from the use of GM organisms without waiving liability); H.R. 1022, 22d Leg., Reg. Sess. (Haw. 2005) (assigning liability for injuries caused by GM plants and organisms); S. 1036, 22d Leg., Reg. Sess. (Haw. 2005) (same); S. 1037, 22d Leg., Reg. Sess. (Haw. 2005) (same). The Hawaiian legislature also rejected another resolution similar to the three it adopted that year. H.R. Con. Res. 263, 22d Leg., Reg. Sess. (Haw. 2005).

210. *See* H.R. 2054, 22d Leg., Reg. Sess. (Haw. 2004) (holding manufacturers of GM plants and organisms strictly liable); H.R. 2176, 22d Leg., Reg. Sess. (Haw. 2004) (same); S. 2271, 22d Leg., Reg. Sess. (Haw. 2004); S. 2492, 22d Leg., Reg. Sess. (Haw. 2004) (same).

211. *See* H.R. 2175, 22d Leg., Reg. Sess. (Haw. 2004) (imposing strict disclosure requirements and mandating instructions for minimizing cross-pollination); S. 2272, 22d Leg., Reg. Sess. (Haw. 2004) (same); S. 2491, 22d Leg., Reg. Sess. (Haw. 2004) (same); S. 2270, 22d Leg., Reg. Sess. (Haw. 2004) (creating “GMO-Free” labeling criteria which would impose liability on any manufacturer for cross-pollination with GM plants).

212. S. 601, 22d Leg., Reg. Sess. (Haw. 2003); H.R. 1033, 22d Leg., Reg. Sess. (Haw. 2003); H.R. 1281, 22d Leg., Reg. Sess. (Haw. 2003).

213. 2003 Ill. Legis. Serv. 522 (West).

214. H.R. 3786, 2005 Leg., Reg. Sess. (Ill. 2005).

215. Assem. 984, 2005 Leg., Reg. Sess. (Cal. 2005); S. 218, 2005 Leg., Reg. Sess. (Mont. 2005); H.R. 547, 2005 Leg., Reg. Sess. (Mont. 2005); H.R. 405, 2005 Leg., Reg. Sess. (Mont. 2005); S. 2235, 2005 Leg., Reg. Sess. (N.D. 2005); S. 18, 2005 Leg., Reg. Sess. (Vt. 2005); H.R. 309, 2005 Leg., Reg. Sess. (Vt. 2005).

imposed labeling requirements on manufacturers with liability resting on farmers for failure to follow such instructions.²¹⁶ California, however, rejected a far more onerous bill which would have imposed liability on the *manufacturer* of the GM organism, not the farmer, for any contamination by their product of the non-GM agricultural industry.²¹⁷ In 2005, Montana allowed three separate measures that would have added significant hurdles to the use of GM wheat in the state to die before enactment. Two bills would have required usage instructions and exhaustive planting, growing, and harvesting instructions on all genetically engineered wheat seed for all GM wheat sold in the state.²¹⁸ All three bills would have provided some exemptions from liability for farmers who followed planting instructions, though the third bill would have imposed liability for any injury caused by GM wheat.²¹⁹ The Montana legislature pulled a similar feat in 2003 when it let three more restrictive bills meet similar fates.²²⁰ Also in 2005, the Vermont legislature considered the “Farmer Protection Act” which would have imposed liability for GM seeds and plants on the manufacturer.²²¹ While the Senate bill was adopted by the legislature, it was ultimately vetoed.²²² Like Montana, Vermont had, earlier in 2003, failed to pass multiple bills that would have imposed liability for failure to disclose GM materials in agricultural products.²²³ North Dakota rejected a bill in 2005 that would have made the introducer of GM wheat into the state liable for any injury stemming from its introduction.²²⁴ That decision was preceded in 2003 by the defeat of bills imposing liability for damages caused

216. See H.R. 547, 2005 Leg., Reg. Sess. (Mont. 2005) (requiring usage instructions and exhaustive planting, growing, and harvesting instructions on all genetically engineered wheat seed for all GM wheat sold in the state); H.R. 405, 2005 Leg., Reg. Sess. (Mont. 2005) (requiring usage instructions and exhaustive planting, growing, and harvesting instructions on all genetically engineered wheat seed for all GM wheat sold in the state, while providing some exemptions from liability for farmers who follow planting instructions).

217. Assem. 984, 2005 Leg., Reg. Sess. (Cal. 2005).

218. H.R. 547, 2005 Leg., Reg. Sess. (Mont. 2005); H.R. 405, 2005 Leg., Reg. Sess. (Mont. 2005).

219. H.R. 547, 2005 Leg., Reg. Sess. (Mont. 2005); H.R. 405, 2005 Leg., Reg. Sess. (Mont. 2005); S. 218, 2005 Leg., Reg. Sess. (Mont. 2005).

220. See S. 266, 2003 Leg., Reg. Sess. (Mont. 2003) (mandating that manufacturers wishing to begin commercial production of GM wheat in the state post a \$10 million bond beforehand); S. 440, 2003 Leg., Reg. Sess. (Mont. 2003) (requiring exhaustive safe planting, growing, and harvesting instructions on GM wheat seed, while limiting the liability of farmers who follow said instructions; requiring manufacturers to pay a departmental fee for enforcement); H.R. 522, 2003 Leg., Reg. Sess. (Mont. 2003) (imposing liability for injuries caused by GM wheat on the patent holder).

221. S. 18, 2005 Leg., Reg. Sess. (Vt. 2005); H.R. 309, 2005 Leg., Reg. Sess. (Vt. 2005).

222. Paul J. Heald, *The Problem of Social Cost in a Genetically Modified Age*, 58 HASTINGS L.J. 87, 139 (2006).

223. See S. 164, 2003 Leg., Reg. Sess. (Vt. 2003) (“A seed contract shall provide that the manufacturer shall indemnify and defend the purchaser for all claims, damages, losses, and expenses, including attorney fees, caused by the use of the seeds or plant parts according to the label and directions for use.”); H.R. 350, 2003 Leg., Reg. Sess. (Vt. 2003) (extending liability for persons who omit material information regarding genetic characteristics of GM products); S. 182, 2003 Leg., Reg. Sess. (Vt. 2003) (mandating that characteristics and traits be included with usage instructions on GM seeds).

224. S. 2235, 2005 Leg., Reg. Sess. (N.D. 2005).

by cross-pollination with any GM crop and prohibiting sellers from charging additional contract or technology fees for GM seeds.²²⁵

Also in 2005, New York defeated two bills in committee that would have addressed the relationship between GM manufacturers and farmers.²²⁶ The bills would have required GM plant and seed sellers to provide safe use instructions as well as grant farmers who use GM organisms an affirmative defense if such organisms were used without knowledge or intent to cause harm.²²⁷ Those bills met the same fate as similar bills proposed in 2003.²²⁸ The Massachusetts legislature defeated a 2005 bill in committee that would have imposed liability on the *manufacturer* of any GM organism that caused injury in the state, but would have limited liability if such injury resulted from use violating contractually agreed-upon safety precautions.²²⁹ The legislature similarly allowed a 2003 bill imposing liability on manufacturers to die in the state Senate.²³⁰ Missouri, in both 2003 and 2005, allowed identical bills creating a state seed registry for farmers who wish to retain harvested GM seed for future planting to die in committee.²³¹

Three of the ten states to consider liability and agricultural contract legislation have not considered the issue since 2003. That year, the Iowa legislature killed three bills in committee that targeted the GM seed industry.²³² One bill would have imposed multiple layers of disclosure for GM seeds, from labeling to invoices, while also outlining liability.²³³ The other two bills would have restricted the ability of GM seed manufacturers to prevent farmers from saving seed for future planting and to charge farmers additional non-uniform technology charges.²³⁴ The Minnesota Senate passed a measure in 2003 identical to the Missouri seed registry, but it did not pass the full legislature and was not revisited.²³⁵ Kansas rejected a larger GM plant regulatory bill that would have made manufacturers liable for

225. See S. 2304, 2003 Leg., Reg. Sess. (N.D. 2003) (imposing liability on the manufacturers of GM seeds for damages resulting from cross-pollination with GM crops); S. 2356, 2003 Leg., Reg. Sess. (N.D. 2003) (prohibiting sellers from charging contract or technology fees for the sale of GM seeds).

226. Assem. 1468, 2005 Leg., Reg. Sess. (N.Y. 2005) (establishing an affirmative defense for unauthorized use of GM seeds or organisms if the unauthorized use was not engaged in knowingly and with the intent to cause harm); Assem. 1969, 2005 Leg., Reg. Sess. (N.Y. 2005) (requiring sellers of GM plants or seeds to provide instructions for their use).

227. *Id.*

228. See Assem. 1911, 2003 Leg., Reg. Sess. (N.Y. 2003) (allowing farmers to sue manufacturers if their products become contaminated with GM material and protecting farmers from liability if they can show that such introduction of GM material was not intentional); Assem. 2761, 2003 Leg., Reg. Sess. (N.Y. 2003) (mandating that distributors of GM plants, stock, or seed that may cross-pollinate include written usage instructions).

229. S. 267, 2005 Leg., Reg. Sess. (Mass. 2005) (emphasis added).

230. See S. 1912, 2003 Leg., Reg. Sess. (Mass. 2003) (imposing liability on seed manufacturers unless such damages resulted from the failure of another party to comply with safety precautions).

231. H.R. 317, 2005 Leg., Reg. Sess. (Mo. 2005); H.R. 457, 2003 Leg., Reg. Sess. (Mo. 2003).

232. H.R. 512, 2003 Leg., Reg. Sess. (Iowa 2003); H.R. 518, 2003 Leg., Reg. Sess. (Iowa 2003); H.R. 521, 2003 Leg., Reg. Sess. (Iowa 2003).

233. H.R. 512, 2003 Leg., Reg. Sess. (Iowa 2003).

234. H.R. 518, 2003 Leg., Reg. Sess. (Iowa 2003); H.R. 521, 2003 Leg., Reg. Sess. (Iowa 2003).

235. S. 1356, 2003 Leg., Reg. Sess. (Minn. 2003).

contamination of non-GM crop populations unless the grower failed to follow the manufacturer's safe handling instructions.²³⁶

(iv) Study and Task Force

Several states have passed or proposed legislation commissioning studies or task forces to investigate GM organisms and their usage. These bills would authorize studies to examine the impact that agro-biotech has on the economy, food safety, and the environment. This category comprised fewer than ten percent of all bills introduced during 2005, and nearly ten percent of all bills adopted. Hawaii is, again, at the forefront of this legislative category. In 2005, the state legislature adopted resolutions requesting a study into "bio-prospecting," the practice of looking to native natural resources for new components for pharmaceutical and other products.²³⁷ These resolutions passed after earlier attempts in 2003 and 2004 to create several state bureaucracies to study GM plants and animals were defeated.²³⁸ In 2003, the Hawaiian legislature seriously considered several proposals which would have commissioned studies on bio-prospecting, biological diversity, and possible regulatory frameworks for GM organisms.²³⁹ While most of these proposals died in committee, the bio-prospecting bill actually passed the Hawaiian House of Representatives before dying in the state Senate. In 2004, the Hawaiian House again passed a bio-prospecting bill, only to see it die again in the

236. S. 236, 2003-04 Leg., Reg. Sess. (Kan. 2003).

237. H.R. Rep. 108, 22d Leg., Reg. Sess. (Haw. 2005), H. Comm. Rep. 146, 22d Leg., Reg. Sess. (Haw. 2005). The Hawaiian Senate also passed a resolution supporting the Hawaii Biotech Policy Forum's efforts to promote dialogue on GM crops. S. Res. 129, 22d Leg., Reg. Sess. (Haw. 2005). Another version of that resolution was defeated that same year, as were other bills that would have created a temporary bio-prospecting advisory commission. See S. Con. Res. 224, 22d Leg., Reg. Sess. (Haw. 2005) (supporting the Hawaii Biotech Policy Forum); S. 484, 22d Leg., Reg. Sess. (Haw. 2005) (prohibiting the sale of publicly-held biological resources as well as establishing a temporary bio-prospecting advisory committee); S. 1692, 22d Leg., Reg. Sess. (Haw. 2005) (creating a temporary commission to address bio-prospecting).

238. H.R. 2034, 22d Leg., Reg. Sess. (Haw. 2004); H. Comm. Rep. 270, 22d Leg., Reg. Sess. (Haw. 2004); S. 3161, 22d Leg., Reg. Sess. (Haw. 2004); S. 643, 22d Leg., Reg. Sess. (Haw. 2003); S. Res. 35, 22d Leg., Reg. Sess. (Haw. 2003); S. Comm. Rep. 55, 22d Leg., Reg. Sess. (Haw. 2003); H. Comm. Rep. 196, 22d Leg., Reg. Sess. (Haw. 2003); S. Con. Res. 140, 22d Leg., Reg. Sess. (Haw. 2003); H. Comm. Rep. 144, 22d Leg., Reg. Sess. (Haw. 2003); H.R. 541, 22d Leg., Reg. Sess. (Haw. 2003); S. 837, 22d Leg., Reg. Sess. (Haw. 2003); S. 600, 22d Leg., Reg. Sess. (Haw. 2003); H.R. 1280, 22d Leg., Reg. Sess. (Haw. 2003).

239. See S. 643, 22d Leg., Reg. Sess. (Haw. 2003) (commissioning study of bio-prospecting); Haw. S. Res. 35 (requesting the establishment of a Bioprospecting Advisory Commission to develop a plan for the preservation and use of biological resources of trust lands); S. Con. Res. 55, 22d Leg., Reg. Sess. (Haw. 2003) (same); H.R. Con. Res. 196, 22d Leg., Reg. Sess. (Haw. 2003) (commissioning study of biological diversity); Haw. S. Con. Res. 140 (requesting the convening of a task force to study GM organisms); H. Con. Res. 144, 22d Leg., Reg. Sess. (Haw. 2003) (commissioning study of regulatory approach to GM organisms and biodiversity). The state also allowed bills that would establish broader commissions on strategic workplace development to die. See H.R. 541, 22d Leg., Reg. Sess. (Haw. 2003) (allowing for the creation of the Workplace Development Strategic Planning Committee); S. 837, 22d Leg., Reg. Sess. (Haw. 2003) (allowing for the creation of the Workplace Development Strategic Planning Committee).

state Senate.²⁴⁰ That same year, two additional proposals were offered to create a state advisory board on GM organisms and to commission an assessment of the environmental and economic implications of the introduction of GM papaya.²⁴¹ Additional efforts in 2003 and 2005 to appropriate funding for the University of Hawaii to research the long-term impact of GM organisms in the state also failed.²⁴² Most recently, the state legislature rejected two bills in 2006 that would have mandated the State Department of Agriculture to aggregate data on GM crop research projects within the state, as well as to disclose their locations.²⁴³

In 2003, three other states—Illinois, Montana, and New Mexico—passed resolutions commissioning studies of GM products and organisms.²⁴⁴ Illinois established a Private Equity Task Force to examine allocation of state resources and programs targeting the development of the state's technology sector, including pharmaceuticals and biotech.²⁴⁵ Montana's legislature passed a joint resolution that cautioned against the introduction of GM wheat and barley in the state without further research into methods to reduce cross-pollination between GM and non-GM populations, despite the acknowledgement within the resolution that Montana is dependent on foreign sources of wheat and barley.²⁴⁶ The legislature, however, let a related bill die that would have established a committee to research GM wheat and barley, from introduction to marketing, after it was reported out of committee.²⁴⁷ New Mexico passed a resolution requesting a feasibility study and impact analysis on the labeling of GM food, with additional language asking the FDA to issue final rules on labeling.²⁴⁸

Only four states have adopted proposed legislation commissioning further study of GM plants, animals, and food. In 2003 alone, Florida, Massachusetts, Maine, New York, North Dakota, and Pennsylvania rejected outright or let bills and resolutions that would have commissioned additional study into GM organisms expire.²⁴⁹ Florida's Senate introduced a bill creating a state Marine Biotechnology Consortium to aid in the development of marine biotechnology and the disclosure

240. H.R. 2034, 22d Leg., Reg. Sess. (Haw. 2004).

241. *See* H. Comm. Rep. 270, 22d Leg., Reg. Sess. (Haw. 2004) (creating a state advisory board for GM organisms); S. 3161, 22d Leg., Reg. Sess. (Haw. 2004) (reporting on the introduction of GM papaya).

242. S. 1762, 22d Leg., Reg. Sess. (Haw. 2005); H.R. 1683, 22d Leg., Reg. Sess. (Haw. 2005); S. 600, 22d Leg., Reg. Sess. (Haw. 2003); H.R. 1280, 22d Leg., Reg. Sess. (Haw. 2003).

243. H.R. Rep. 81, 23d Leg., Reg. Sess. (Haw. 2006); H. Con. Res. 110, 23d Leg., Reg. Sess. (Haw. 2006).

244. S. Rep. 89, 2003 Leg., Reg. Sess. (Ill. 2003); S.J. Res. 8, 2003 Leg., Reg. Sess. (Mont. 2003); S. Misc. Rep. 62, 2003 Leg., Reg. Sess. (N.M. 2003).

245. S. Rep. 89, 2003 Leg., Reg. Sess. (Ill. 2003).

246. S.J. 8, 2003 Leg., Reg. Sess. (Mont. 2003).

247. S.J. 30, 2003 Leg., Reg. Sess. (Mont. 2003).

248. S. Misc. Rep. 62, 2003 Leg., Reg. Sess. (N.M. 2003).

249. H.R. 4536, 2004 Leg., Reg. Sess. (Mass. 2004); S.B. 2376, 2003 Leg., Reg. Sess. (Fla. 2003); S. 1913, 2003 Leg., Reg. Sess. (Mass. 2003); H.R. 3564, 2003 Leg., Reg. Sess. (Mass. 2003); H.R. 3565, 2003 Leg., Reg. Sess. (Mass. 2003); H.P. 893, 2003 Leg., Reg. Sess. (Me. 2003); H.R. 1026, 2003 Leg., Reg. Sess. (N.D. 2003); Assem. 1809, 2003 Leg., Reg. Sess. (N.Y. 2003); Assem. 3188, 2003 Leg., Reg. Sess. (N.Y. 2003); Assem. 5631, 2003 Leg., Reg. Sess. (N.Y. 2003); H.R. 815, 2003 Leg., Reg. Sess. (Pa. 2003).

of marine biotech activities and practices; it died in committee.²⁵⁰ A trio of bills introduced that same year by the Massachusetts legislature met the same fate. A proposed Senate bill would have created a Commission on Law, Ethics, Science and Technology to advise the governor of issues of science and technology and their ethical ramifications.²⁵¹ The other bills, both introduced in the House, would have created an advisory panel at the University of Massachusetts to conduct research and educate the public on GM organisms as well as a state task force with advisory powers on state regulation of GM products.²⁵² The two House bills were repackaged into a single bill in 2004, but again failed to get out of committee.²⁵³ The Maine House of Representatives and Senate agreed to an amended bill in 2003 that would have created a working group on agriculture and biotechnology, but it was not sent to the governor.²⁵⁴ Three bills directing the State Department of Agriculture to study the use of GM crops and seed were introduced in New York in 2003, but none left committee.²⁵⁵ The North Dakota Senate voted down a proposal to create a state Transgenic Wheat Board to evaluate the introduction, production, and marketing of GM wheat at the state, national, and international levels.²⁵⁶ Finally, in 2003, a Pennsylvania House of Representatives bill to create a state Family Farm and Food Protection Commission to study biotechnology and Pennsylvania's farming community failed to leave committee.²⁵⁷

Since 2003, efforts outside of Hawaii to commission increased study of the impact of GM organisms have slowed. In 2004, only two additional states—Michigan and Virginia—introduced legislation to commission additional bureaucratic oversight for the biotechnology sector, and neither state enacted such legislation.²⁵⁸ In 2005, the New York House let a bill die in committee that would have directed the State Department of Agriculture to study more broadly the use and effects of GM plants and organisms.²⁵⁹ Also, in 2006, Massachusetts defeated

250. S. 2376, 2003 Leg., Reg. Sess. (Fla. 2003).

251. S. 1913, 2003 Leg., Reg. Sess. (Mass. 2003).

252. *See* H.R. 3564, 2003 Leg., Reg. Sess. (Mass. 2003) (proposing the creation of an advisory committee on biotechnology at the University of Massachusetts); H.R. 3565, 2003 Leg., Reg. Sess. (Mass. 2003) (proposing the creation of a state biotechnology task force).

253. H.R. 4536, 2004 Leg., Reg. Sess. (Mass. 2004).

254. H.P. 893, 2003 Leg., Reg. Sess. (Me. 2003).

255. *See* Assem. 1809, 2003 Leg., Reg. Sess. (N.Y. 2003) (directing State Departments of Agriculture, Health and Environmental Conservation to study GM crops and develop regulatory standards); Assem. 3188, 2003 Leg., Reg. Sess. (N.Y. 2003) (directing a study of the risks and benefits of engineered sterile seeds); Assem. 5631, 2003 Leg., Reg. Sess. (N.Y. 2003) (directing the state Commissioner of Agriculture to study sterile seed technology).

256. H.R. 1026, 2003 Leg., Reg. Sess. (N.D. 2003).

257. H.R. 815, 2003 Leg., Reg. Sess. (Pa. 2003).

258. *See* S. 1424, 2004 Leg., Reg. Sess. (Mich. 2004) (establishing the framework for the nonnative species advisory council); S. 1425, 2004 Leg., Reg. Sess. (Mich. 2004) (creating the nonnative species Advisory Council, with the power to outlaw the use of GM species and the objective of eradicating illegally introduced GM species); 2004 Exec. Order No. 76 (Va. 2004) (creating Governor's Commission on Biotechnology).

259. H.R. 870, 2005 Leg., Reg. Sess. (N.Y. 2005).

a proposal to authorize the legislature's Committee on Public Health to investigate certain House of Representatives documents on GM organisms.²⁶⁰

(v) GM Crop Moratoria

While comprising approximately ten percent of all legislation introduced in 2005, no state legislature adopted a moratorium on the use of GM crops. In 2003, California did enact a measure making it illegal to spawn, cultivate, or incubate any transgenic fish within state waters of the Pacific Ocean.²⁶¹ Since then, only Maryland, in 2006, passed legislation that bans the use of GM organisms in that state.²⁶² During that same period, eleven states, including California itself, rejected bills that would have imposed a moratorium on the possession or use of GM plants or animals.²⁶³

In 2003, the same year California banned GM fish in its Pacific waters, Hawaii, Iowa, Massachusetts, New York, Texas, and Vermont all failed to enact proposed measures that would prohibit the sale or planting of GM plants.²⁶⁴ Iowa and New York both declined to enact moratoria on the sale of "terminator technology"²⁶⁵ seed.²⁶⁶ The proposed New York ban would have extended to the transportation and planting of terminator technology plants as well.²⁶⁷ The New York Senate also allowed a proposed five-year moratorium on the planting of GM crops to expire without action.²⁶⁸ Vermont's Senate allowed a bill to die that would

260. H.R. 4733, 2006 Leg., Reg. Sess. (Mass. 2006).

261. 2003 Cal. Legis. Serv. 871 (West).

262. *See* 2006 Md. Laws 560 (extending termination date for law prohibiting issuance of a state aquaculture permit for the raising of GM species).

263. *See, e.g.*, S. 318, 2005 Leg., Reg. Sess. (Ark. 2005) (prohibiting the growing of GM rice for pharmaceutical purposes, with additional provisions for state licensing of GM plants); Assem. 1428, 2005 Leg., Reg. Sess. (Cal. 2005), (proposing moratorium on GM plants and animals); H.R. 1382, 2005 Leg., Reg. Sess. (Minn. 2005) (prohibiting the sale, planting, or harvesting of GM wild rice); S. 1566, 2005 Leg., Reg. Sess. (Minn. 2005) (prohibiting the sale, planting, or harvesting of GM wild rice); S. 570, 2005 Leg., Reg. Sess. (Or. 2005) (banning the planting of certain GM plants); S. 1421, 2004 Leg., Reg. Sess. (Mich. 2004) (expanding earlier restrictions on GM fish that would have more broadly prevented the use of such fish in state waters); H.R. 99, 22d Leg., Reg. Sess. (Haw. 2003) (banning the planting of GM kona coffee until the state concocted a licensing system for planters); H.R. 515, 2003 Leg., Reg. Sess. (Iowa 2003) (banning the sale of "terminator" technology seed); H.R. 3012, 2003 Leg., Reg. Sess. (Mass. 2003) (banning open-air planting of GM pharma-crops); Assem. 998, 2003 Leg., Reg. Sess. (N.Y. 2003) (banning open-air planting of GM pharma-crops and "terminator" technology plants); S. 1397, 2003 Leg., Reg. Sess. (N.Y. 2003) (proposing a five-year moratorium on the planting of GM crops); H.R. 3387, 2003 Leg., Reg. Sess. (Tex. 2003) (prohibiting the use of GM plants or animals in the production of drugs, chemicals or non-food materials); S. 162, 2003 Leg., Reg. Sess. (Vt. 2003) (imposing a moratorium on the planting of GM crops until 2006).

264. H.R. 99, 22d Leg., Reg. Sess. (Haw. 2003); H.R. 515, 2003 Leg., Reg. Sess. (Iowa 2003); H.R. 3012, 2003 Leg., Reg. Sess. (Mass. 2003); Assem. 998, 2003 Leg., Reg. Sess. (N.Y. 2003); S. 1397, 2003 Leg., Reg. Sess. (N.Y. 2003); H.R. 3387, 2003 Leg., Reg. Sess. (Tex. 2003); S. 162, 2003 Leg., Reg. Sess. (Vt. 2003).

265. Terminator technology refers to seeds that have been modified to produce plants that cannot reproduce.

266. H.R. 515, 2003 Leg., Reg. Sess. (Iowa 2003); Assem. 998, 2003 Leg., Reg. Sess. (N.Y. 2003).

267. Assem. 998, 2003 Leg., Reg. Sess. (N.Y. 2003).

268. S. 1397, 2003 Leg., Reg. Sess. (N.Y. 2003).

have imposed a moratorium on the planting of GM crops until 2006.²⁶⁹ In Texas, a much broader bill was introduced that would have prohibited the use of GM plants or animals in the production of drugs, chemicals, or non-food materials.²⁷⁰ The Massachusetts House of Representatives declined to act in 2003 on a proposed ban on the open-air planting of GM crops for pharmaceutical use (so-called “pharma-crops”);²⁷¹ that bill was repackaged with two other study and task force bills discussed *supra* in 2004, but was not enacted that year either.²⁷² Hawaii carried over into its 2004 session a 2003 bill that would have banned the planting of GM kona coffee until the state concocted a licensing system for planters, but did not enact the bill.²⁷³

In 2004, Michigan and Hawaii introduced, but failed to enact, bills that would have imposed limits on the use of GM plants and animals.²⁷⁴ The Hawaii legislature introduced two bills that session. One was similar to the 2003 Texas proposal barring the use of GM plants and animals in the production of drugs or other non-food products.²⁷⁵ The other was similar to the carried-over Massachusetts proposal banning the open-air planting of GM crops for pharmaceutical use.²⁷⁶ Neither bill got out of committee and both died at the end of the 2004 legislative session. The Michigan Senate failed to enact an expansion of earlier restrictions on GM fish that would have more broadly prevented the use of such fish in state waters.²⁷⁷

In 2005, some of the aforementioned states reintroduced bills that would have enacted bans that had previously failed. The Hawaiian legislature defeated three bills targeting pharmaceutical crops.²⁷⁸ One bill would have totally banned the growth of GM plants for pharmaceutical purposes.²⁷⁹ The other two would have only banned such planting in open-air fields, allowing growing of GM plants in controlled conditions that would prevent the release of pollen.²⁸⁰ Likewise, Massachusetts again defeated a bill that would have prevented the growth of GM plants for pharmaceutical purposes in open-air plots, this time until the state had promulgated protections from cross-pollination with non-GM crop populations.²⁸¹

269. S. 162, 2003 Leg., Reg. Sess. (Vt. 2003).

270. H.R. 3387, 2003 Leg., Reg. Sess. (Tex. 2003).

271. H.R. 3012, 2003 Leg., Reg. Sess. (Mass. 2003).

272. H.R. 4536, 2004 Leg., Reg. Sess. (Mass. 2004).

273. H.R. 99, 22d Leg., Reg. Sess. (Haw. 2003).

274. H.R. 2053, 22d Leg., Reg. Sess. (Haw. 2004), S. 2331, 22d Leg., Reg. Sess. (Haw. 2004); H.R. 2055, 22d Leg., Reg. Sess. (Haw. 2004), S. 2132, 22d Leg., Reg. Sess. (Haw. 2004); S. 1421, 2004 Leg., Reg. Sess. (Mich. 2004).

275. H.R. 2053, 22d Leg., Reg. Sess. (Haw. 2004); S. 2331, 22d Leg., Reg. Sess. (Haw. 2004).

276. H.R. 2055, 22d Leg., Reg. Sess. (Haw. 2004); S. 2132, 22d Leg., Reg. Sess. (Haw. 2004).

277. S. 1421, 2004 Leg., Reg. Sess. (Mich. 2004).

278. *See* S. 644, 22d Leg., Reg. Sess. (Haw. 2005) (imposing a complete ban on GM pharma-crops); S. 649, 22d Leg., Reg. Sess. (Haw. 2005) (prohibiting the planting of genetically engineered seed or plant part in an open field); H.R. 975, 22d Leg., Reg. Sess. (Haw. 2005) (banning open-air planting of GM plants for pharmaceutical use, but allowing the growing of GM crops for such purpose in controlled conditions that would prevent the release of pollen).

279. S. 644, 22d Leg., Reg. Sess. (Haw. 2005).

280. S. 649, 22d Leg., Reg. Sess. (Haw. 2005), H.R. 975, 22d Leg., Reg. Sess. (Haw. 2005).

281. H.R. 4598, 2005 Leg., Reg. Sess. (Mass. 2005).

Texas defeated a bill similar to the 2003 proposal banning the use of GM plants and animals in the production of drugs, chemicals, or other non-food materials.²⁸² The New York legislature again considered and rejected a five-year moratorium on the planting of GM crops within the state.²⁸³ Additionally, a proposal to ban GM pharma-crops, with civil penalties upwards to a million dollars, was defeated in committee.²⁸⁴ The New York legislature also defeated two bills that would have prohibited the sale of transgenic aquatic animals, except for zoological, educational, and scientific purposes.²⁸⁵

These states were joined in 2005 by Arkansas, California, Minnesota, and Oregon in rejecting moratoria on GM plants and animals. The California Assembly killed a bill in committee that would have banned the commercial sale of cloned or GM pets.²⁸⁶ Minnesota defeated two bills in committee that would have prohibited the sale, planting, or harvest of GM wild rice.²⁸⁷ The Oregon Senate adjourned at the end of the 2005 session without enacting a bill that would ban the planting of certain GM plants.²⁸⁸ While it did not enact the bill, the Arkansas Senate recommended for further study a measure to prohibit the growing of GM rice for pharmaceutical purposes, with additional provisions for state licensing of GM plants.²⁸⁹

While Maryland was extending its aquaculture restrictions in 2006, Hawaii and Minnesota once again rejected bills that would place limits on specific crops within those states. In Hawaii, multiple proposals to impose a ten-year moratorium on the testing, propagating, cultivating, growing, and raising of GM coffee and taro

282. H.R. 876, 2005 Leg., Reg. Sess. (Tex. 2005).

283. *See* A. 1715, 2005 Leg., Reg. Sess. (N.Y. 2005) (imposing a moratorium on planting and growing of GM crops).

284. *See* H.R. 8675, 2005 Leg., Reg. Sess. (N.Y. 2005) (imposing a moratorium on planting and growing pharmaceutical and industrial crops).

285. *See* A. 4469, Leg., Reg. Sess. (N.Y. 2005) (prohibiting the sale of transgenic aquatic animals); S. 4345, 2005 Leg., Reg. Sess. (N.Y. 2005) (prohibiting the sale of transgenic aquatic animals); Pew Initiative on Food and Biotechnology, State Legislative Activity Related to Agricultural Biotechnology in 2005-2006, Feb. 2007, at 9, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Food_and_Biotechnology/PIFB_State_Legislature_2005-2006Session.pdf.

286. *See* A. 1428, 2005 Leg., Reg. Sess. (Cal. 2005) (prohibiting the commercial sale and transfer of cloned or GM pet animals).

287. *See* H.R. 1382, 84th Leg., Reg. Sess. (Minn. 2005) (prohibiting the release, planting, cultivation, harvest, and sale of genetically engineered wild rice); S.R. 1566, 84th Leg., Reg. Sess. (Minn. 2005) (prohibiting the release, planting, cultivation, harvest, and sale of GM rice).

288. *See* S. 570, 2005 Leg., Reg. Sess. (Or. 2005) (prohibiting growing, raising, or cultivating certain genetically engineered plants, while imposing civil penalties for violations).

289. *See* S. 318, 2005 Leg., Reg. Sess. (Ark. 2005) (prohibiting the planting, growth, cultivation, and harvest of genetically engineered wild rice).

were all defeated.²⁹⁰ Minnesota likewise rejected a proposal to enact a two-year moratorium on GM wild rice.²⁹¹

2. State Pro-GM Regulatory Approaches (2003-2006)

(i) Preemption Bills

Preemption bills generally *prevent regulation* of advertising, labeling, distribution, sale, transportation, storage, or use of GM crops, seeds, and animals. Preemption bills roughly equal the number of GM regulatory bills previously noted. In 2004, South Dakota passed a bill allowing the patent holder of a GM organism to use that organism within the state.²⁹² Pennsylvania joined South Dakota that year in passing preemption legislation.²⁹³ In 2005, nine states—Georgia, Idaho, Indiana, Iowa, Kansas, Michigan, North Dakota, Oklahoma, and West Virginia—passed preemption bills.²⁹⁴ In Iowa, two other measures seeking to preempt regulatory action against GM organisms were withdrawn²⁹⁵ and left to die without legislative action.²⁹⁶ Three states—California, Missouri, and North Carolina—defeated preemption bills in 2005.²⁹⁷

290. See S. 2749, 23d Leg., Reg. Sess. (Haw. 2006) (proposing limits on the growth of GM taro); S. 2750, 23d Leg., Reg. Sess. (Haw. 2006) (proposing limits on the growth of GM coffee); S. 2751, 23d Leg., Reg. Sess. (Haw. 2006) (proposing a ten-year moratorium on the testing, propagating, cultivating, raising and growing of GM coffee and taro); H.R. 3219, 23d Leg., Reg. Sess. (Haw. 2006) (proposing a ten-year moratorium on the testing, propagating, cultivating, raising and growing of GM coffee and taro).

291. See S. 3575, 23d Leg., Reg. Sess. (Minn. 2006) (proposing a two year moratorium on GM wild rice); H.R. 3915, 23d Leg., Reg. Sess. (Minn. 2006) (same).

292. See S.D. Sess. Laws 257 (S.D. 2004) (allowing the use of certain federal permits relating to organisms and products produced through genetic engineering); H.R. 1237, 2004 Leg., Reg. Sess. (S.D. 2004) (allowing the use of certain federal permits relating to organisms and products produced through genetic engineering).

293. See H.R. 2387, 2004 Leg., Reg. Sess. (Pa. 2004) (creating a licensing requirement for all seed distributors).

294. See 2005 Ga. Laws 329 (preempting local ordinances relating to seeds); 2005 Ind. Legis. Serv. 40 (West) (preempting local ordinances relating to seeds); 2005 Iowa Legis. Serv. 21 (West) (preempting local ordinances relating to seeds); 2005 Kan. Sess. Laws 105 (preempting local ordinances relating to fertilizer); 2005 N.D. Laws 61 (preempting local ordinances relating to seeds); 2005 W.Va. Acts 9 (preempting local ordinances relating to seeds); H.R. 401, 2005 Leg., Reg. Sess. (Idaho 2005) (preempting local ordinances relating to seeds); S. 777, 2005 Leg., Reg. Sess. (Mich. 2005) (preempting local ordinances relating to seeds); H.R. 1471, 2005 Leg., Reg. Sess. (Okla. 2005) (preempting local ordinances relating to seeds). Idaho also passed another version of a preemption bill that was vetoed. H.R. 38, 2005 Leg., Reg. Sess. (Idaho 2005) (preempting local ordinances relating to seeds).

295. See S. 259, 2005 Leg., Reg. Sess. (Iowa 2005) (preempting local ordinances relating to seeds).

296. See H.R. 202, 2005 Leg., Reg. Sess. (Iowa 2005) (preempting local ordinances relating to seeds).

297. See S. 1009, 2006 Leg., Reg. Sess. (Mo. 2006) (preempting local ordinances relating to seeds); H.R. 1842, 2006 Leg., Reg. Sess. (Mo. 2006) (preempting local ordinances relating to seeds); S. 1056, 2005 Leg., Reg. Sess. (Cal. 2005) (preempting local ordinances relating to nursery stock); H.R. 671, 2005 Leg., Reg. Sess. (N.C. 2005) (preempting local ordinances relating to GM plants).

(ii) Supporting Biotechnology

These initiatives address agro-biotech as part of a greater class of biotech bills. They include tax and other financial incentives or grants to support investment in and development of the biotech sector. Legislation in this area also includes the formation of taskforces or advisory groups created for the express purpose of furthering biotechnology, as opposed to the studies and task forces section discussed above, which looked at the dangers of biotechnology. This category has been the most successful for biotech advocates, as eighteen states and the District of Columbia have adopted legislation since 2003 that express some support for the biotech industry.²⁹⁸ These bills typically grant tax credits and exemptions to biotech companies or give direct government grants to existing biotech firms and biotech research centers at state institutions.²⁹⁹ Most recently, in 2005, seven

298. *See, e.g.*, 2003 Ark. Legis. Serv. 182 (West) (providing tax credits for the creation of jobs, including jobs within the biotech sector); 2003 Colo. Legis. Serv. 333 (West); 2003 Conn. Pub. Acts 3-225 § 10 (confirming that corporations engaging in biotechnology research and development will be allowed to carry over the twenty percent tax credit every year); 2003 Iowa Legis. Serv. 125 (West) (creating tax incentives for biotech firms); 2003 Iowa Legis. Serv. 150 (West) (offering tax credits to agricultural biotech firms); 2003 Iowa Legis. Serv. 178 (West) (appropriating funds for biotech research); 2003 Iowa Legis. Serv. 1st Ex. Sess. 1 (West) (discussing the taxation and regulatory requirements affecting businesses, including biotech firms); 2003 La. Acts 47 (allocating government funds to lure biotech firms to Louisiana); 2005 Md. Laws 445 (authorizing the creation of a state debt for the financing of grants, including one for biotech research); 2003 Mass. Legis. Serv. 141 (West) (creating an Emerging Technology Fund to promote new technologies in Massachusetts); 2003 Me. Legis. Serv. Ch. 50 (West) (allocating funds for biomedical and biotech research and development); 2004 Mich. Pub. Acts 244-245 (granting tax credits and exemptions for biotech companies); 2003 Minn. Sess. Law Serv. 1st Spec. Sess. 1 (West) (granting tax breaks for biotech firms); 2003 Miss. Legis. Serv. 522 (West) (providing funds to state universities and agencies for biotech research); 2003 N.J. Sess. Law Serv. 166 (West) (extending the state Business Employment Incentive Program to the biotech industry); 2003 N.M. Legis. Serv. 367 (West) (creating incentives for state colleges and universities to undertake advanced technology research); 2005 Va. Legis. Serv. 788 (West) (creating a biotech commercialization loan fund and a panel to make decisions in support of the state's biotech investments); 2005 Wash. Sess. Laws 178 (creating biotechnology product and medical device manufacturing tax incentives); B16-504 (D.C. 2006) (establishing a Technology Opportunity Development Task Force to identify biotechnology); H.R. 75, 2005 Leg., Reg. Sess. (Pa. 2005) (raising the cap on tax credit for biotechnology research); H. Con. Res. 185, 22d Leg., Reg. Sess. (Haw. 2003) (creating a resolution to promote technical education focusing on biotechnology); H. Con. Res. 3031, 2003 Leg., Reg. Sess. (N.D. 2003) (urging North Dakota State University to host the center for genetic research and to become a leader in biotechnology); Exec. Order No. 05-13 (Mo. 2005) (establishing the governor's advisory council for plant biotechnology).

299. *See, e.g.*, 2003 Ark. Legis. Serv. 182 (West) (providing tax credits for the creation of jobs, including jobs within the biotech sector); 2003 Ark. Legis. Serv. 860 (West) (including biotech companies as potential recipients of state Capital Development Company loans); 2003 Colo. Legis. Serv. 333 (providing funds from a committee on advanced technology for the development of biotechnology); 2003 La. Acts 47 (allocating government funds to lure biotech firms to Louisiana); 2003 Mass. Legis. Serv. 141 (West) (creating an Emerging Technology Fund to promote new technologies in Massachusetts); 2003 Me. Legis. Serv. Ch. 50 (West) (allocating funds for biomedical and biotech research and development); 2004 Mich. Pub. Acts 244-45 (granting tax credits and exemptions for biotech companies); 2003 Minn. Sess. Law Serv. 1st Spec. Sess. 1 (West) (granting tax breaks for biotech firms); 2003 Miss. Legis. Serv. 522 (providing funds to state universities and agencies for biotech research); 2003 N.J. Sess. Law Serv. 166 (West) (extending the state Business Employment

states—Hawaii, Maine, Maryland, Pennsylvania, Virginia, Washington, and West Virginia—and the District of Columbia adopted measures benefiting biotech research and development, ranging from state loans and tax incentives³⁰⁰ to creation of a biotech research center at the University of Maryland.³⁰¹ Pennsylvania adopted a more general directive to include biotech enterprises in the state's Industrial Development Act.³⁰² The Governor of Missouri, Matt Blunt, also issued an executive order creating a Governor's Advisory Council for Plant Biotechnology.³⁰³ Maine adopted a bill to provide funding for the International Northeast Biotechnology Corridor, a regional agreement between New England governors and Eastern Canada premiers to foster growth in their biotech sectors.³⁰⁴ The District of Columbia passed a measure establishing a Technology Opportunity Development Task Force to identify emerging technology fields that could provide economic development.³⁰⁵ West Virginia passed a bill urging the creation of a regional biotechnology compact with Iowa, Illinois, Michigan, and Minnesota in order to pool resources for attracting biotechnology development.³⁰⁶

While states, for the most part, have been receptive to proposals that would bolster development of biotechnology, not every bill offered has been enacted. In 2003, eleven states rejected proposals ranging from tax cuts to loans to research centers at state-funded universities aimed at biotechnology development.³⁰⁷ Some of these states, including Hawaii, Iowa, Maine, and Massachusetts, also passed

Incentive Program to the biotech industry); 2003 N.M. Legis. Serv. 367 (creating incentives for state colleges and universities to undertake advanced technology research).

300. See 2005 Haw. Sess. Laws 216 (appropriating funds to help expand the market for a GM Hawaiian rainbow papaya in Japan, China and Europe); 2005 Va. Legis. Serv. 788 (creating a biotech commercialization loan fund and a panel to make decisions in support of the state's biotech investments); 2005 Wash. Sess. Laws 178 (creating biotechnology product and medical device manufacturing tax incentives). Virginia also created a Biotechnology Commercialization Loan Fund to finance commercialization of biotech inventions. S. 646, 2004 Leg., Reg. Sess. (Va. 2004).

301. See 2005 Md. Laws 445 (authorizing the creation of a state debt for the financing of grants, including one for biotech research).

302. See H.R. 75, 2005 Leg., Reg. Sess. (Pa. 2005) (incorporating biotechnology into the Pennsylvania Industrial Development Act).

303. Exec. Order No. 05-13 (Mo. 2005); see also Governor's Communications Office, *Blunt Announces Advisory Council for Plant Biotechnology; Recognizes Life Sciences as Economic Cornerstone for Missouri's Future*, Apr. 18, 2005, http://www.gov.mo.gov/press/Biotechnology_041805.htm (announcing the creation of the Governor's Advisory Counsel for Plant Biotechnology).

304. 2005 Me. Laws 55.

305. B16-504 (D.C. 2005).

306. 2005 W.Va. Acts 9.

307. See, e.g., Assem. 122, 2003 Leg., Reg. Sess. (Cal. 2003) (proposing an extension of various tax credits for biotech companies); H.R. 563, 2003 Leg., Reg. Sess. (Ga. 2003) (proposing an extension of tax exemptions and credits to biotech businesses); H.R. 567, 2003 Leg., Reg. Sess. (Ga. 2003) (proposing an extension of tax exemptions and credits to biotech businesses); S. 943, 2003 Leg., Reg. Sess. (N.C. 2003) (offering funding for bio-manufacturing training center at the University of North Carolina); H.R. 642, 2003 Leg., Reg. Sess. (Pa. 2003) (proposing amendment of the state Industrial Development Authority Act to specifically include agricultural biotech firms for development loans); S. 5531, 2003 Leg., Reg. Sess. (Wash. 2003) (proposing an extension of the expiration date for high tech research and development tax deferral).

legislation supporting the biotech industry in 2003.³⁰⁸ Louisiana, Minnesota, and Mississippi also rejected alternate versions of measures that they ultimately adopted.³⁰⁹ Hawaii and Iowa were particularly active in considering these types of bills. While Hawaii passed a resolution urging technical education promoting areas like biotechnology in 2003,³¹⁰ it also rejected eleven additional measures that would have funded several biotech research facilities,³¹¹ and devoted funds to job training and industry development.³¹² Iowa likewise rejected four bills targeting biotechnology development³¹³ while enacting four others.³¹⁴ In 2004, only five

308. *See, e.g.*, H.R. 2927, 2003 Leg., Reg. Sess. (Mass. 2003) (proposing the creation of a new training program to address labor shortages in industries like biotech); H.R. 4245, 2003 Leg., Reg. Sess. (Mass. 2003) (proposing the creation of a tax rebate for biotech companies and the creation of a research center at the University of Massachusetts); S. 174, 2003 Leg., Reg. Sess. (Me. 2003) (authorizing funding for a research laboratory for marine biotechnology in partnership with the state biotech industry); H.R. 769, 2003 Leg., Reg. Sess. (Me. 2003) (providing funding for the establishment of technology centers).

309. *Compare* S. 1000, 2003 Leg., Reg. Sess. (La. 2003) (proposing amendment of the Louisiana Quality Jobs Program Act, which provides rebates to include biotech and other agricultural and forestry firms), *with* 2003 La. Acts 47 (providing that out-of-state employees relocating to Louisiana qualify as “new direct jobs” under the Louisiana Quality Jobs Program Act); *compare* S. 1067, 2003 Leg., Reg. Sess. (Minn. 2003) (proposing the creation of biotechnology zones with incentives such as tax breaks to promote job creation and facility expansion), *and* H.R. 1597, 2003 Leg., Reg. Sess. (Minn. 2003) (proposing the creation of biotechnology zones with incentives such as tax credits to promote job creation and facility expansion), *with* 2003 Minn. Sess. Law Serv. 1st Spec. Sess. 1 (West) (granting tax credits to biotech firms); *compare* H.R. 1594, 2003 Leg., Reg. Sess. (Miss. 2003) (proposing funds to construct biotech building at Mississippi State University), *with* 2003 Miss. Legis. Serv. 522 (West) (authorizing funds for a biotech building at Mississippi State University).

310. H. Con. Res. 185, 22d Leg., Reg. Sess. (Haw. 2003).

311. *See, e.g.*, H.R. 154, 22d Leg., Reg. Sess. (Haw. 2003) (proposing an appropriation of funds for a Tropical Agriculture and Human Resources center at the University of Hawaii, Manoa); S. 534, 22d Leg., Reg. Sess. (Haw. 2003) (proposing an appropriation of funds for a Tropical Agriculture and Human Resources center at the University of Hawaii, Manoa); S. 663, 22d Leg., Reg. Sess. (Haw. 2003) (offering funding for expansion of the Oceanic Institute’s Center for Applied Aquaculture and Marine Biotechnology).

312. *See, e.g.*, S. 521, 22d Leg., Reg. Sess. (Haw. 2003) (proposing the establishment of a Washington, D.C., office to pursue federal funding for biotech and other high tech industry development); H.R. 1392, 22d Leg., Reg. Sess. (Haw. 2003) (proposing the inclusion of agricultural biotech in the state enterprise zone plan); S. 1433, 22d Leg., Reg. Sess. (Haw. 2003) (appropriating funding for career and technical training in development areas like biotech); S. 1648, 22d Leg., Reg. Sess. (Haw. 2003) (appropriating funds to the state Strategic Development Corporation to attract agriculture and biotech firms).

313. *See* H.R. Study B. 286, 2003 Leg., Reg. Sess. (Iowa 2003) (proposing an extension of eligibility for value added agriculture tax credits to biotech companies); S. 223, 2003 Leg., Reg. Sess. (Iowa 2003) (proposing the removal of the restriction on biotech firms that own agricultural land in the state from receiving state industry financing); H.R. 358, 2003 Leg., Reg. Sess. (Iowa 2003) (proposing the removal of the restriction on biotech firms that own agricultural land in the state from receiving state industry financing); H.R. 471, 2003 Leg., Reg. Sess. (Iowa 2003) (proposing amendment of the state Agricultural Development Act to include agricultural biotech firms); H.R. 611, 2003 Leg., Reg. Sess. (Iowa 2003) (proposing the creation of a state financial assistance program to promote the use of GM crops).

314. *See* 2003 Iowa Legis. Serv. 125 (creating tax incentives for biotech firms); 2003 Iowa Legis. Serv. 150 (offering tax credits to agricultural biotech firms); 2003 Iowa Legis. Serv. 178 (appropriating funds for biotech research); 2003 Iowa Legis. Serv. 1st Ex. Sess. 1 (discussing the taxation and regulatory requirements affecting businesses, including biotech firms).

states tackle legislation aimed at supporting local biotech interests.³¹⁵ Only Michigan adopted its proposals,³¹⁶ while the Georgia Senate buried a quartet of bills providing tax credits to the biotech industry in committee.³¹⁷ In 2005, ten states considered but did not pass bills that would have offered support to local biotech firms, mostly in the form of tax benefits.³¹⁸ That number includes three states—Maryland, Virginia, and Washington—that also passed legislation in 2005.³¹⁹ Virginia also carried over a bill into 2007 that would provide tax benefits for biotechnology investment.³²⁰

(iii) Anti-Crop Destruction

This category of legislation establishes the act of crop destruction as a civil and/or criminal offense against *private property* and/or establishes task forces to prevent such activities.³²¹ Fourteen states adopted bills in 2004 criminalizing crop destruction.³²² Nine states—Arizona, Hawaii, Idaho, Kansas, Mississippi,

315. See, e.g., S. 1257, 2004 Leg., Reg. Sess. (Ariz. 2004) (offering tax incentives to private investors to spur development of the state biotech sector); H.R. 2647, 2004 Leg., Reg. Sess. (Kan. 2004) (proposing the creation of several state agencies to facilitate the identification, funding, and development of state bioscience research and industries); H. Con. Res. 30, 2004 Leg., Reg. Sess. (Mo. 2004) (urging cooperation between federal and state government and the EU and other countries on regulation and technology access).

316. See 2004 Mich. Pub. Acts 244-245 (granting tax credits and exemptions for biotech companies).

317. S. 556, 2004 Leg., Reg. Sess. (Ga. 2004); S. 557, 2004 Leg., Reg. Sess. (Ga. 2004); S. 558, 2004 Leg., Reg. Sess. (Ga. 2004); S. 559, 2004 Leg., Reg. Sess. (Ga. 2004).

318. See, e.g., H.R. 6725, 2005 Leg., Reg. Sess. (Conn. 2005) (authorizing funding for research laboratories to attract biotech firms); H.R. 6503, 2005 Leg., Reg. Sess. (Conn. 2005) (proposing enterprise zone benefits to biotech companies located in distressed locales within the state); H.R. 1683, 2005 Leg., Reg. Sess. (Fla. 2005) (proposing the creation of a Research Improvement District to promote development and practical application of advanced biotechnology); S. 1365, 2005 Leg., Reg. Sess. (Ill. 2005) (allocating funds for the development of a corporate biotechnology park); H.R. 2688, 2005 Leg., Reg. Sess. (Ill. 2005) (same); S. 287, 2005 Leg., Reg. Sess. (La. 2005) (providing various tax incentives for biotech firms); H.R. 500, 2005 Leg., Reg. Sess. (La. 2005) (same); H.R. 872, 2005 Leg., Reg. Sess. (La. 2005) (extending various tax incentives for biotech firms); H.R. 1484, 2005 Leg., Reg. Sess. (Mass. 2005) (providing tax benefits for biotech firms); H.R. 1485, 2005 Leg., Reg. Sess. (Mass. 2005) (same); S. 1054, 2005 Leg., Reg. Sess. (N.C. 2005) (providing \$1 million to establish a Center for Translational Biotechnology at Winston-Salem State University); Assem. 606, 2005 Leg., Reg. Sess. (Wis. 2005) (providing tax benefits for biotech firms); S. 435, 2005 Leg., Reg. Sess. (Wis. 2005) (same); S. J. Res. 52, 2005 Leg., Reg. Sess. (Wis. 2005) (supporting the creation of a compact with the states of Iowa, Illinois, Michigan, and Minnesota for the purpose of pooling resources to attract biotechnology research).

319. See S. 620, 2005 Leg., Reg. Sess. (Md. 2005) (providing tax credits for investments in biotech firms); H.R. 329, 2005 Leg., Reg. Sess. (Va. 2005) (creating a state fund to give grants and attract biotech firms); H.R. 1870, 2005 Leg., Reg. Sess. (Wash. 2005) (providing tax incentives to biotech firms); S. 6462, 2005 Leg., Reg. Sess. (Wash. 2005) (same).

320. H.R. 159, 2005 Leg., Reg. Sess. (Va. 2005).

321. Lawrence A. Kogan, *Economic Sabotage a Form of Free Speech?*, June 28, 2005, http://www.itssd.org/Publications/Rural%20News%20-%20Rural%20News_co_nz.pdf; Lawrence A. Kogan, *In the UK "Economic Sabotage" is Still a Form of Free Speech*, June 15, 2005, http://www.agbioworld.org/newsletter_wm/index.php?caseid=archive&newsid=2380.

322. E.g., H.R. 2481, 2004 Leg., Reg. Sess. (Ariz. 2004) (creating criminal penalties for crop destruction); S. 640, 22d Leg., Reg. Sess. (Haw. 2004) (same); H.R. 169, 2004 Leg., Reg. Sess. (Idaho

Missouri, North Carolina, North Dakota, and South Dakota—approved legislation imposing double liability for crop destruction.³²³ Iowa went a step further by imposing liability valued at three times of the actual and consequential losses.³²⁴ Georgia, Montana, and Oregon were content to criminalize crop destruction with actual liability.³²⁵ Oregon, in fact, adopted three bills targeting interference with animal and agricultural research, livestock production, and tree spiking for criminal liability.³²⁶ Since 2003, only Hawaii and Massachusetts have rejected proposed bills that would impose criminal or civil liability for crop destruction.³²⁷

3. Local Ordinances (2003-2005)

California has seen several local measures aimed at the biotech industry. During December 2005, Sonoma County voters soundly defeated an anti-GM moratorium measure.³²⁸ Several California counties and municipalities passed ordinances during 2004 that placed limitations on GM crops. They include Marin, Mendocino, and Trinity Counties.³²⁹ However, other anti-GM ordinances in Butte and San Luis Obispo Counties failed.³³⁰ More ordinances were proposed in Lake and Tehama Counties.

2004) (same); S. 502, 2004 Leg., Reg. Sess. (Iowa 2004) (same); S. 36, 2004 Leg., Reg. Sess. (Kan. 2004) (same); S. 302, 2004 Leg., Reg. Sess. (Mo. 2004) (same); S. 462, 2004 Leg., Reg. Sess. (Mo. 2004) (same); S. 2790, 2004 Leg., Reg. Sess. (Miss. 2004) (same); H.R. 387, 2004 Leg., Reg. Sess. (Mont. 2004) (same); H.R. 2344, 2004 Leg., Reg. Sess. (Or. 2004) (same); H.R. 2385, 2004 Leg., Reg. Sess. (Or. 2004) (same); H.R. 2947, 2004 Leg., Reg. Sess. (Or. 2004) (same); H.R. 218, 2004 Leg., Reg. Sess. (N.C. 2004) (same); S. 2280, 2004 Leg., Reg. Sess. (N.D. 2004) (same); H.R. 1169, 2004 Leg., Reg. Sess. (S.D. 2004) (same).

323. See Ariz. H.R. 2481 (imposing double liability valued at twice the market value of the crop); Haw. S. 640 (same); Idaho H.R. 169 (same); Kan. S. 36 (same); Mo. S. 302 (same); Miss. S. 2790 (same); N.C. H.R. 218 (imposing double liability valued at twice the value of the commodities or production system); N.D. S. 2280 (imposing double liability valued at twice the costs for the destruction of any crop, livestock, or commodity produced for personal, commercial, testing, or research purposes); S.D. H.R. 1169 (imposing double liability valued at twice the crop, animal, or organism value for the destruction of any field crop, animal, or organism grown for personal, commercial, testing, or research purposes).

324. S. 502, 2004 Leg., Reg. Sess. (Iowa 2004).

325. See H.R. 270, 2004 Leg., Reg. Sess. (Ga. 2004) (criminalizing the acquisition or control of a crop facility, crop, or other property from a crop facility with the intent to deprive the owner and to disrupt or damage the enterprise conducted at the crop facility); Mont. H.R. 387 (imposing actual and consequential damages and court costs on any person who purposely or knowingly intends to damage a crop research facility).

326. Or. H.R. 2344 (defining tree spiking and interference with animal research or livestock production as criminal racketeering); Or. H.R. 2385 (designating interference with agricultural research as a crime and holding the perpetrator liable for damages); Or. H.R. 2947 (defining penalties for interference with livestock production).

327. See H.R. 1082, 22d Leg., Reg. Sess. (Haw. 2005) (establishing an interagency agricultural crime abatement taskforce); H.R. 1774, 2005 Leg., Reg. Sess. (Mass. 2005) (enacting measures to protect against crop destruction).

328. James M. Taylor, *California County Rejects Biotech Ban*, ENV'T NEWS, Dec. 1, 2005, available at <http://www.heartland.org/Article.cfm?artId=18119>.

329. *Id.*

330. See EXPORTING PRECAUTION, *supra* note 25, at 52-53 (explaining the success of family farmers in defeating anti-biotech initiatives).

B. Categories of Hazardous Substances, Products, and E-Waste Disposal Initiatives

A number of U.S. states have considered or adopted legislation that mirrors or otherwise references EU chemicals and substances regulations and directives, and the EU Commission is apparently crowing about it.³³¹ One such regime is the EU “RoHS” Directive—Restriction of Hazardous Substances. Its stated aim is to reduce and eventually eliminate the amount of chemical pollutants that could potentially leak out of certain products disposed of in landfills.³³² The restriction applies to certain levels of Lead (Pb), Mercury (HG), Hexavalent Chromium (CRVI), Cadmium (Cd), and several fire retardant chemicals, including Polybrominated Biphenyls (PBBs) and Polybrominated diphenyl ethers (PBDEs).³³³ Manufacturers incorporate fire retardants into many different products. The RoHS covers ten categories of electrical products sold or produced³³⁴ and requires producers and sellers to provide substitutes for these substances even if they do not currently exist.³³⁵

Similarly, a number of U.S. states have considered and/or adopted waste disposal, “take-back,” and recycling legislation that mirrors the EU regional Directive on Waste from Electrical and Electronic Equipment (“WEEE”).³³⁶ The WEEE requires manufacturers of these and other products to arrange and pay for the collection, recycling, and reuse of their products.³³⁷

California has unabashedly taken the lead in promoting chemicals management among the states. More than half of the U.S. state legislatures have already considered Euro-style proposals to mandate some type of brominated flame retardant and/or e-waste recycling.

Furthermore, during 2004, the California legislature commissioned the University of California Berkeley to conduct a study and make recommendations

331. See Euractiv, *US States in Push for EU-Style Chemicals Law*, May 9, 2007, <http://www.euractiv.com/en/environment/us-states-push-eu-style-chemicals-law/article-155099> (comparing EU reform of stricter chemical laws with those of the United States).

332. See The European Commission, “RoHS Compliance in the EU,” <http://www.rohs.eu/english/index.html> (last visited Feb. 15, 2008) (requiring member states of the European Union to ensure that products do not contain any of the six recently banned chemicals).

333. *Id.*

334. Such products include: (1) large household appliances, (2) small household appliances, (3) computer and telephone equipment, (4) consumer electronics, (5) light bulbs, (6) tools, (7) electronic entertainment items (e.g., video and electronic games, electronic stop watches, train sets), (8) medical equipment, (9) thermostats and other control instrumentation, and (10) automatic food dispensers.

335. See LOOKING BEHIND THE CURTAIN, *supra* note 12, at 68-73 (explaining the mandate that companies find substitutes for the banned chemicals and have the banned chemicals completely phased out of production by July 1, 2006).

336. See Kenneth S. Rivlin, Jean-Phillippe Brisson, & Felise Cooper, WEEE and RoHS Legal Implications for High-Tech Industry, <http://www.aeanet.org/Events/xwbrqSsKlAjIRsmrQYMeXHTWIvevDbB.PPT#257,1> (last visited June 20, 2008) (providing an overview of the directives as well as guidance for compliance).

337. See The European Commission, Waste Electrical and Electronic Equipment, http://ec.europa.eu/environment/waste/weee/index_en.htm (last visited June 20, 2008) (detailing the need for, and availability of, recycling options for defunct electrical equipment).

on overall chemicals management policy options for the state.³³⁸ The University was asked to consider the feasibility of adopting not only statutes that resemble the EU RoHS and WEEE directives, but also REACH (Registration, Evaluation and Authorization of Chemicals) directives, Europe's grand new paradigm for the regulation of chemicals.³³⁹ The study, which was first released during March 2006,³⁴⁰ was the subject of a recent October 24, 2006 symposium that took place in California's capital of Sacramento.³⁴¹ The study "outlines a comprehensive state-level chemicals policy—one with similarities to Europe's REACH proposal."³⁴²

Moreover, during October 2005, California became the nation's first state to enact a law regarding chemicals in cosmetics—the California Safe Cosmetics Act³⁴³—which is very similar, if not identical to, the EU Directive on Cosmetics.³⁴⁴ Companies will now have to notify the state when they use chemicals linked to cancer and birth defects.³⁴⁵

In addition, a bill was introduced within the Massachusetts Senate during 2005, "An Act for a Healthy Massachusetts: Safer Alternatives to Toxic Chemicals," that lists ten toxic substances targeted for elimination and is intended to expand the "reach" of (i.e., complement) the Massachusetts Toxics Use Reduction Act (TURA). The bill specifically references European Union chemicals laws in its preamble:

That the European Union and other countries have already adopted more restrictive policies regarding the use of toxic chemicals and

338. See MICHAEL P. WILSON, DANIEL A. CHIA & BRYAN C. EHLERS, GREEN CHEMISTRY IN CALIFORNIA: A FRAMEWORK FOR LEADERSHIP IN CHEMICALS POLICY AND INNOVATION, at iii (2006), available at <http://coeh.berkeley.edu/FINALgreenchemistryrpt.pdf> [hereinafter GREEN CHEMISTRY IN CALIFORNIA] (addressing "public and environmental health concerns while also building long-term capacity in the design, production, and use of chemicals that are safer for humans and the environment").

339. What is REACH?, http://ec.europa.eu/environment/chemicals/reach/reach_intro.htm (last visited June 20, 2008) (detailing the purpose of REACH and the increased responsibility REACH gives to the industry to manage risks from chemicals).

340. GREEN CHEMISTRY IN CALIFORNIA, *supra* note 338.

341. Cal. Env'tl. Prot. Agency & Dep't of Toxic Substances Control, Green Chemistry Symposium Brochure, http://www.dtsc.ca.gov/PollutionPrevention/upload/GreenChem_brochure.pdf.

342. See DARYL DITZ, CLOUDY SKIES, CHANCE OF SUN: A FORECAST FOR U.S. REFORM OF CHEMICALS POLICY 4 (2006), http://assets.panda.org/downloads/ciel_cloudy_skies_050906.pdf (providing past legislative context of U.S. policy regarding chemicals regulation while explaining the development of current policy suggestions).

343. CAL. HEALTH & SAFETY CODE § 111791 (West 2006); S. 484th Leg., Reg. Sess. (Cal. 2005).

344. See EXPORTING PRECAUTION, *supra* note 25, at 12 (banning the use of phthalates in cosmetic products despite scientific evidence suggesting exposure poses a health risk to humans); LOOKING BEHIND THE CURTAIN, *supra* note 12, at 106-11 (describing the EU's effort to make REACH guidelines the global standard for chemicals regulation).

345. Press Release, The Campaign for Safe Cosmetics, Governor Signs Safe Cosmetics Bill: New Law Heightens Scrutiny of Industry Safety, (Oct. 8, 2005), <http://www.safecosmetics.org/newsroom/press.cfm?pressReleaseID=13>. "This bill faced tough opposition from major cosmetics companies including Mary Kay, Avon, Estee Lauder, L'Oreal, Neutrogena, Proctor and Gamble, and Johnson and Johnson." The Campaign for Safe Cosmetics, State Level Efforts for Smarter Laws, <http://www.safecosmetics.org/about/policies.cfm> (last visited June 20, 2008).

more health protective requirements for products and are currently considering far reaching revisions of chemicals regulations and over 37% of Massachusetts trade is with the European Union's Member States, and

That there are safer alternatives available for many of the toxic substances in use today that will allow businesses to be more competitive by reducing costs associated with health care costs, worker illnesses and turnover, materials handling and tracking, and by opening their products to local, national and international markets, and

That investing in Massachusetts businesses to assist them to develop and institute safer alternatives will make Massachusetts a global leader in sustaining an innovation economy based on research, development and production of new materials, products and processes that strengthen our economy while protecting our health and environment.³⁴⁶

Lastly, several states have proposed bills to more stringently regulate agricultural pesticides.

The legislative proposals and executive rulemaking initiatives can be broken down into the following subject matter areas:

- *PBDEs*: this category of legislation seeks to ban the use of brominated flame retardants.
- *Metals in Electrical and Electronic Products ("E-Waste")*: this category looks to address perceived problems in the safe disposal of electronic products and components.
- *Cosmetics*: this category would outlaw the use of cosmetics containing phthalates.³⁴⁷

1. PBDEs (Brominated Flame Retardants) (2003-2006)

Overall, ten states have banned penta-PBDE and octa-PBDE and/or articles containing them: California, Hawaii, Illinois, Maine, Maryland, Michigan, New York, Oregon, Rhode Island, and Washington. California was the earliest, prohibiting the manufacture, processing, or distribution of products containing penta-PBDEs and octa-PBDEs in 2003.³⁴⁸ Hawaii, Maine, and New York followed suit in 2004.³⁴⁹ In 2005, five more states—Illinois, Maryland, Michigan, Oregon,

346. S. 553, 184th Leg., Reg. Sess. (Mass. 2005), available at <http://www.mass.gov/legis/bills/senate/st00/st00553.htm>.

347. Phthalates are a family of compounds made from alcohols and phthalic anhydride often used to make vinyl flexible and soft. Phthalates Information Center, <http://phthalates.org> (last visited June 20, 2008).

348. 2003 Cal. Legis. Serv. Ch. 205 (Cal. 2003). In 2004, California subsequently expedited the date for total phase-out for penta- and octa-BDE from January 1, 2008 to January 1, 2006. 2004 Cal. Legis. Serv. Ch. 205 (Cal. 2004).

349. See 2004 Haw. Sess. Laws 146 (prohibiting the manufacture, processing, or distribution of products containing penta-BDE, octa-BDE, or other similar chemical formulation); 2004 Me. Legis.

and Washington—adopted measures aimed at reducing PBDE use in those states.³⁵⁰ While four of those states adopted bans on penta- and octa-BDEs similar to California's 2003 ban, Washington merely allotted money in the state budget for the development of a chemical action plan to reduce PBDEs.³⁵¹ Rhode Island adopted its ban in 2006.³⁵² Additionally, several resolutions and other measures have been adopted to further the anti-PBDE agenda in these states. In 2004, then-Governor of Washington, Gary Locke, issued an executive order directing the State Departments of Ecology and Health to phase out the use of PBDEs.³⁵³ Following his lead, in 2006, the governors of Illinois and Maine engaged their states to take additional steps to address the perceived threat of PBDEs. Governor John Baldacci of Maine issued an executive order establishing a task force to identify and promote safer alternatives to PBTs, neurotoxins, and other chemicals discovered through biological monitoring.³⁵⁴ In March 2006, Illinois Governor Rod Blagojevich issued a letter to the Illinois Environmental Protection Agency directing the agency to undertake further study of the risks posed by deca-PBDEs.³⁵⁵ Lastly, the Hawaiian

Serv. 629 (prohibiting sale and distribution of penta-PBE and octa-PBEs); 2004 N.Y. Sess. Laws Ch. 387 (prohibiting the manufacture, process, or distribution of brominated flame retardants penta-PBE and octa-BDE and authorizing regulations on maintaining records/registration of substances presently or potentially hazardous to the environment).

350. See 2005 Ill. Legis. Serv. 100 (prohibiting the manufacture, processing, and distribution of PBDEs in products or as components in brominated flame retardants); 2005 Md. Laws Ch. 522 (prohibiting the manufacture, processing, sale, or distribution of any product or flame retardant containing PBDEs); 2005 Mich. Pub. Acts 562 (prohibiting manufacture, process, or distribution of products containing penta-BDE or octa-BDE); 2005 Or. Laws Ch. 496 (prohibiting the sale of products containing PBDEs); 2005 Wash. Legis. Serv. Ch. 518 (including \$83,000 in the state budget for an agency-developed chemical action plan to reduce PBDEs).

351. 2005 Wash. Legis. Serv. Ch. 518. *But see* 2005 Mich. Pub. Acts 526 (creating a PBDE advisory committee in addition to its BDE ban in 2005).

352. H.R. 7917, 2006 Leg., Reg. Sess. (R.I. 2006) (banning penta- and octa-PBDE and studying deca-PBDE).

353. Exec. Order No. 04-01 (Wash. 2004); *see also* Press Release, Office of Governor Gary Locke, Governor Locke Signs Executive Order to Protect the Public from Toxic Chemicals (Jan. 28, 2008), *available at* <http://www.digitalarchives.wa.gov/GovernorLocke/press/press-view.asp?pressRelease=1520&newsType=1> (announcing the signing of protective executive order).

354. Exec. Order No. 12 FY (Me. 2006-07).

355. See Letter from Rod Blagojevich, Governor of Illinois, to Doug Scott, Director, Illinois Environmental Protection Agency (Mar. 3, 2006), *in* ILL. ENVTL. PROT. AGENCY, REPORT ON ALTERNATIVES TO THE FLAME RETARDANT DECBDE: EVALUATION OF TOXICITY, AVAILABILITY, AFFORDABILITY, AND FIRE SAFETY ISSUES 15 (2007), *available at* <http://www.epa.state.il.us/reports/decabde-study/decabde-alternatives.pdf>.

In keeping with the General Assembly's support for state adoption of a "precautionary approach" regarding brominated fire retardants, I am instructing Illinois EPA to conduct a follow-up study to answer critical questions that remain about the environmental and health effects of DecaBDE. We must determine whether safer alternatives are available so that manufacturers can reduce their reliance on toxic flame retardant chemicals while still ensuring their products meet fire safety standards.

Id.

legislature passed resolutions in 2006 requesting that the State Department of Health look into alternative flame retardants for household appliances.³⁵⁶

Only three states have rejected measures aimed at limiting the use of PBDEs. In 2005, the Montana legislature rejected a proposed joint resolution that would have urged the abandonment of PBDEs and furthered development of alternatives.³⁵⁷ A year later, Hawaii and Washington both voted down measures that would have banned the sale of PBDEs.³⁵⁸ The proposed Hawaii bill would have banned deca-PDBEs, while the Washington proposal would have banned all PBDEs.³⁵⁹

These actions are merely the tip of the proverbial iceberg of legislation targeting PBDEs. During the 2006 legislative session, six states considered, but did not enact, legislation addressing PBDEs. Connecticut, Illinois, and Michigan contemplated measures that would have banned the use of deca-PBDEs.³⁶⁰ The Minnesota House of Representatives proposed a tax credit for mattresses manufactured in the state that met flame retardant standards without using PBDEs.³⁶¹ Vermont's Senate introduced a bill that would have required manufacturers to submit, as part of their product take-back and recycling obligations, an annual report covering electronic devices sold during the previous calendar year and an estimated baseline of mercury, cadmium, lead, hexavalent chromium, and polybrominated biphenyls used.³⁶² The California legislature carried over a 2005 bill into the 2006 session that would have granted rulemaking authority to the State Department of Toxic Substances Control to administer and enforce the 2003 ban on PBDEs.³⁶³ Washington's Department of Ecology also issued its proposed Final PBDE Chemical Action Plan in 2006.³⁶⁴ These proposals

356. H.R. 102, 23d Leg., Reg. Sess. (Haw. 2006); H.R. Con. Res. 139, 23d Leg., Reg. Sess. (Haw. 2006), (requesting that the State Department of Health conduct a study to determine if safer, technically feasible alternatives to deca-BDEs exist as a fire retardant in household electrical appliances).

357. S.J. Res. 15, 2005 Leg., Reg. Sess. (Mont. 2005) (supporting phase-out of PBDEs harmful to humans, supporting testing of people and the environment for PBDEs, and encouraging availability of alternatives to PBDEs).

358. *See* H.R. 2819, 23d Leg., Reg. Sess. (Haw. 2006) (prohibiting manufacture, sale, and distribution of televisions, computers, furniture, mattresses, and mattress pads containing commercial deca-BDEs); S. 3193, 23d Leg., Reg. Sess. (Haw. 2006) (same); H.R. 1488, 2006 Leg., Reg. Sess. (Wash. 2006) (prohibiting the sale of all products containing PBDEs); S. 5515, 2006 Leg., Reg. Sess. (Wash. 2006) (same).

359. *See supra* text accompanying note 358.

360. *See* S. 657, 2006 Leg., Reg. Sess. (Conn. 2006) (banning use of penta-BDEs, octa-BDEs, and specific uses for deca-BDEs, with very few limited exceptions, and requiring manufacturers of electronic and textile products that contain alternatives to PBDE to provide safety data on those alternatives); H.R. 4783, 2006 Leg., Reg. Sess. (Ill. 2006) (amending the Brominated Fire Retardant Prevention Act to prohibit manufacturing, processing, and distribution in commerce of products or flame-retarded parts of products containing deca-BDEs); H.R. 5573, 2006 Leg., Reg. Sess. (Mich. 2006) (prohibiting manufacture, processing, and distribution of deca-BDEs with exemptions for original equipment manufacturer replacement parts and processing of recyclables containing deca-BDEs).

361. H.R. 3816, 2005-06 Leg., Reg. Sess. (Minn. 2006).

362. S. 270, 2006 Leg., Reg. Sess. (Vt. 2006).

363. Assem. 263, 2005 Leg., Reg. Sess. (Cal. 2005).

364. WASH. STATE DEP'T OF ECOLOGY, WASHINGTON STATE POLYBROMINATED DIPHENYL ETHER (PBDE) CHEMICAL ACTION PLAN: FINAL PLAN (2006), <http://www.ecy.wa.gov/pubs/0507048.pdf>.

followed several other measures that were offered in 2005, but not enacted.³⁶⁵ Massachusetts, in fact, had carried over two proposed bills from two consecutive legislative sessions that would have required the state to conduct an assessment to ascertain the feasibility of adopting chemical and/or technological alternatives for a list of toxic or hazardous substances including penta-PBDE.³⁶⁶ Additionally, the Massachusetts proposals would have required all companies to gradually substitute ten identified toxic chemicals with safer ones.³⁶⁷ These bills have essentially remained unchanged since they were introduced in 2003, despite opposition from electrical manufacturers.³⁶⁸

2. Metals in Electrical and Electronic Products—"E-Waste" (2003-2007)

In February 2005, the Council of State Governments/Eastern Regional Conference (CSG/ERC) and the Northeast Recycling Council (NERC) launched a collaborative project to develop a coordinated regional legislative approach to end-of-life electronics management in the Northeast.³⁶⁹ Participants include legislators

365. See S. 785, 2005 Leg., Reg. Sess. (Conn. 2005) (proposing to ban PBDEs); H.R. 234, 22d Leg., Reg. Sess. (Haw. 2005) (amending the state's 2003 ban on PBDEs and granting rulemaking authority to the State Department of Health to regulate PBDEs); S. 471, 22d Leg., Reg. Sess. (Haw. 2005) (same); H.R. 2572, 2005 Leg., Reg. Sess. (Ill. 2005) (proposing to ban the manufacture, processing, and distribution in commerce of PBDEs in products or as components in brominated flame retardants); S. 424, 2005 Leg., Reg. Sess. (Ill. 2005) (same); H.R. 1299, 2005 Leg., Reg. Sess. (Minn. 2005) (proposing to ban the manufacture, processing, sale, or distribution of any product or flame retardant containing PBDEs); S. 962, 2005 Leg., Reg. Sess. (Or. 2005) (prohibiting the sale of products containing PBDEs); H.R. 1488, 2005 Leg., Reg. Sess. (Wash. 2005) (same); S. 5515, 2005 Leg., Reg. Sess. (Wash. 2005) (same); S.B. 367, 2005 Leg., Reg. Sess. (Wis. 2005) (prohibiting the sale of covered electronics containing lead, mercury, cadmium, beryllium, hexavalent chromium, brominated flame retardants, polyvinyl chloride, or other substances specified by the DNR; televisions; monitors; color video display devices; other video display devices at least eight inches measured diagonally; computers weighing over six pounds (including laptops); digital audio storage devices; printers; and faxes).

366. H.R. 1298, 2005 Leg., Reg. Sess. (Mass. 2005); S. 2275, 2005 Leg., Reg. Sess. (Mass. 2005). See also *Alliance for a Healthy Tomorrow Enters New Legislative Session with Strong Support*, ALLIANCE FOR A HEALTHY TOMORROW NEWSL. (Alliance for a Healthy Tomorrow, Boston, Mass.), Winter 2005, <http://www.healthytomorrow.org/legislative.htm> (referring to *An Act for a Healthy Massachusetts: Safer Alternatives to Toxic Chemicals*, discussing the Alliance's legislative priority of protecting Massachusetts from toxic chemicals by requiring the use of safer alternatives).

367. H.R. 1298, 2005 Leg., Reg. Sess. (Mass. 2005); S. 2275, 2005 Leg., Reg. Sess. (Mass. 2005); Press Release, The Campaign for Safe Cosmetics, Governor Signs Safe Cosmetics Bill: New Law Heightens Scrutiny of Industry Safety (Oct. 8, 2005), http://www.securedcontent.net/nutritionfile/NewsUpdates2.0/pdf/California_Safe.pdf.

368. The National Electrical Manufacturer's Association (NEMA) opposed this bill. See Letter from Ric Erdheim, NEMA Senior Manager, to Pamela P. Resor, Mass. Sen., & William G. Greene, Jr., Mass. State Rep. (Sept. 29, 2003), available at <http://www.nema.org/gov/ehs/positions/upload/NEMA-testimony-2003-09-29.pdf> (setting forth reasons why NEMA opposes the bill, including increased costs of business); cf. Clean Water Action, Alliance for a Healthy Tomorrow, S-1268 & H-2275 The Act for a Healthy Massachusetts: Safer Alternatives to Toxic Chemicals, <http://www.cleanwateraction.org/ma/aht/healthyMA.html> (last visited Feb. 15, 2008) (describing the problem of toxic chemicals contributing to an epidemic of chronic illnesses and suggesting replacement of toxic chemicals with safer alternatives as a solution).

369. MODEL ELEC. RECYCLING LEGISLATION: AN ACT PROVIDING FOR THE RECOVERY AND RECYCLING OF USED ELEC. DEVICES (Council of State Gov'ts./E. Reg'l Conference & Ne. Recycling

and state environmental agency solid waste management staff from the U.S. Virgin Islands, Puerto Rico, Quebec, and ten different states: Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.³⁷⁰ In addition, administrative agency representatives from Illinois, Iowa, Michigan, and Minnesota (representing state Environmental Protection Agencies (EPAs), Departments of Natural Resources, Pollution Control, and Environmental Quality) have collaborated in a similar Mid-Western regional initiative. Their objective is to develop a consistent and unified approach for managing waste electronics that imposes numerous responsibilities on manufacturers.³⁷¹

All told, eleven states have adopted legislation targeting electronic end-of-life management.³⁷² While all of the measures adopted are focused on addressing disposal of e-waste, several different approaches are on display. In a majority of states, manufacturers or retailers have been made responsible for the safe disposal of e-waste through required take-back programs or similar measures.³⁷³ Arkansas,

Council, Inc. 2006), http://www.nerc.org/documents/electronic_recycling_legislation/RegionalDraft4-06FINAL.pdf; *see* Northeast Regional Electronics Management Project, <http://www.csgeast.org/content.asp?pageID=68> (last visited Mar. 23, 2008) (outlining the development of a coordinated regional approach to end-of-life electronics management).

370. *See* DISCUSSION DOCUMENT FOR MODEL ELECTRONIC RECYCLING LEGISLATION: AN ACT PROVIDING FOR THE RECOVERY AND RECYCLING OF USED ELECTRONIC DEVICES 1-4 (2006), <http://www.csgeast.org/pdfs/RegionalDraftDiscussionDocument4-06FINAL.pdf> (discussing electronic recycling plans in the Northeastern United States).

371. *See* Minnesota Pollution Control Agency, Midwest Regional Electronic Waste Recycling Policy Initiative (Apr. 2006), <http://www.pca.state.mn.us/oea/stewardship/electronicmidwest.cfm> (outlining policies to hold manufacturers responsible for electronic waste).

372. 2005 Ark. Acts 970; 2004 Cal. Legis. Serv. Ch. 891; 2003 Cal. Legis. Serv. Ch. 526; 2005 Md. Laws Ch. 384; H.R. 1960, 2003 Leg., Reg. Sess. (Mass. 2003); Legis. Doc. 1840, 122d Leg., Reg. Sess. (Me. 2006); Legis. Doc. 1892, 2004 Leg., Reg. Sess. (Me. 2004); Minn. Stat. § 115A.1310 (2003); 2006 Wash. Legis. Serv. Ch. 183; 2004 Wash. Legis. Serv. Ch. 194; H.R. 854, 2007 Leg., Reg. Sess. (Minn. 2007); S. 235, 2007 Leg., Reg. Sess. (Minn. 2007); H.R. 1455, 2006 Leg., Reg. Sess. (N.H. 2006); H.R. 7789, 2006 Leg., Reg. Sess. (R.I. 2006); H.R. 2662, 2006 Leg., Reg. Sess. (Wash. 2006); H.R. 455, 22d Leg., Reg. Sess. (Haw. 2005); S. 1077, 22d Leg., Reg. Sess. (Haw. 2005); S. 1861, 2005 Leg., Reg. Sess. (N.J. 2005); Assem. B. 3057, 2005 Leg., Reg. Sess. (N.J. 2005); H.B. 1861, 2005 Leg., Reg. Sess. (N.J. 2005); H.R. 882, 2005 Leg., Reg. Sess. (Minn. 2005); H.R. 882, 2003 Leg., Reg. Sess. (Minn. 2003).

373. *See* 2004 Cal. Legis. Serv. Ch. 891 (requiring in-state cell phone retailers to offer a no-cost way for consumers to properly dispose of their old phones); 2003 Cal. Legis. Serv. Ch. 526 (reducing the amount of hazardous substances used in certain electronic products sold, requiring collection of an electronic waste recycling fee at point of sale, establishing environment-friendly purchasing criteria for state agencies' purchases of certain electronic equipment, and covering cathode ray tubes (CRTs), flat panel (FP) displays in automobiles, medical devices, heavy industrial equipment, PDAs, hand-held video game units, microwaves, after-market in-dash GPS monitors, and printers); 2005 Md. Laws Ch. 384 (requiring producers to pay to register each year with the state's recycling fund once they have instituted a computer take-back program and establishing that counties pay for collection, transportation, and recycling but can apply to the state recycling fund for grants to offset some costs); 2004 Wash. Legis. Serv. Ch. 194 (requiring the department of ecology to conduct research and develop recommendations for implementing and financing an electronic product collection, recycling, and reuse program); H.R. 854, 2007 Leg., Reg. Sess. (Minn. 2007) (requiring manufacturers to permanently label video displays and register with the appropriate state agency and holding manufacturers responsible for the recycling of an amount of video display products equal to a specified proportion of its video display

Hawaii, Massachusetts, Minnesota, and New Hampshire have banned the disposal of certain or all e-waste in state landfills.³⁷⁴ Hawaii and Washington have directed state agencies to further develop e-waste disposal and recycling programs.³⁷⁵ California, in 2003, had been the only state thus far to enact legislation specifically targeting the contents of consumer electronic and electrical products.³⁷⁶

sales during the previous year); S. 235, 2007 Leg., Reg. Sess. (Minn. 2007) (requiring manufacturers to permanently label video displays and register with the appropriate state agency and holding manufacturers responsible for the recycling of an amount of video display products equal to a specified proportion of its video display sales during the previous year); Legis. Doc. 1840, 2006 Leg., Reg. Sess. (Me. 2006) (requiring cell phone retailers to put a "take-back" system in place for reuse, recycling, or proper disposal, at no cost to the consumer); H.R. 2662, 2006 Leg., Reg. Sess. (Wash. 2006) (establishing a statewide electronic product recycling program that holds manufacturers responsible for the final disposal costs of the covered electronic products they sell); H.R. 1960, 2005 Leg., Reg. Sess. (Mass. 2005) (requiring producers to take full financial and physical responsibility for collecting and recycling CRTs, prohibiting the approval of any plan that includes a fee imposed at collection points, and prohibiting any cost from being imposed on a city, town, county, or regional entity unless the cost is agreed to by that entity); S. 1861, 2005 Leg., Reg. Sess. (N.J. 2005) (holding manufacturer responsible for electronic waste management); Assem. B. 3057, 2005 Leg., Reg. Sess. (N.J. 2005) (same); Legis. Doc. 1892, 2004 Leg., Reg. Sess. (Me. 2004) (proposing mandatory e-waste "take-back" and recycling for businesses modeled after Europe and requiring manufacturers to develop plans for collection and recycling or reuse of computer monitors and televisions); H.R. 882, 2003 Leg., Reg. Sess. (Minn. 2003) (requiring manufacturers to submit plans on collection and recycling of products such as televisions, computer monitors, laptops, computers, printers, scanners, and other peripherals, and prohibiting disposal of such products in landfills).

374. See 2005 Ark. Acts 970 (banning disposal of computer and consumer electronics waste in landfills); Minn. Stat. § 115A.1310 (2003) (prohibiting disposal of e-waste containing cathode-ray tubes in landfills); H.R. 1455, 2006 Leg., Reg. Sess. (N.H. 2006) (prohibiting the disposal of video display devices in solid waste landfills or incinerators); S. 1077, 22d Leg., Reg. Sess. (Haw. 2005) (directing the department of health to adopt rules to establish a cathode ray tube recycling program and prohibiting placing cathode ray tubes in landfills); H.R. 1960, 2005 Leg., Reg. Sess. (Mass. 2005) (requiring producers to take full financial and physical responsibility for collecting and recycling CRTs, prohibiting approval of any plan that includes a fee imposed at collection points, and prohibiting any cost from being imposed on a city, town, county, or regional entity unless the cost is agreed to by that entity); H.R. 882, 2005 Leg., Reg. Sess. (Minn. 2005) (prohibiting disposal of e-waste in landfills; a portion of this bill was adopted in 2003); H.R. 882, 2003 Leg., Reg. Sess. (Minn. 2003) (requiring a manufacturer to submit plans on collection and recycling of products such as televisions, computer monitors, laptops, computers, printers, scanners, and other peripherals, and prohibiting disposal of such products in landfills).

375. See 2004 Wash. Legis. Serv. Ch. 194 (requiring the State Department of Ecology to submit recommendations to the legislature for implementing and financing statewide recycling of obsolete computers and TVs); H.R. 455, 22d Leg., Reg. Sess. (Haw. 2005) (establishing a task force to prepare a statewide policy and plan for the management of electronic waste); S. 1077, 22d Leg., Reg. Sess. (Haw. 2005) (directing the State Department of Health to adopt rules to establish a cathode-ray tube recycling program). In 2006, Washington adopted a statewide electronic product recycling program that holds manufacturers responsible for the final disposal costs of the covered electronic products they sell. 2006 Wash. Legis. Serv. Ch. 183; H.R. 2662, 2006 Leg., Reg. Sess. (Wash. 2006).

376. See 2003 Cal. Legis. Serv. Ch. 526 (reducing the amount of hazardous substances used in certain electronic products sold, requiring collection of an electronic waste recycling fee at point of sale, establishing environment-friendly purchasing criteria for state agencies' purchases of certain electronic equipment, and covering cathode-ray tubes (CRTs), flat panel (FP) displays in autos, medical devices, heavy industrial equipment, PDAs, hand-held video game units, microwaves, after-market in-dash GPS monitors, and printers).

Much of the proposed legislation in 2005 and 2006 neatly fits the approaches outlined above. Nebraska, New York, and Vermont all proposed measures that would impose on manufacturers or producers the responsibility to dispose of e-wastes; none were enacted by the close of 2006.³⁷⁷ Wisconsin introduced a similar bill that was defeated.³⁷⁸ Massachusetts considered without action another bill holding manufacturers responsible, with additional language that would bar those manufacturers who fail to comply from selling covered electronic products in the state.³⁷⁹ New Jersey carried over a pair of bills to its 2007 session that would strengthen the computer “take-back” program it passed in 2005 by allowing retailers to collect advance fees to cover disposal.³⁸⁰ Tennessee, following Hawaii and Washington, buried in committee a proposed state recycling program for the disposal of e-wastes while also proposing mandatory disclosure by manufacturers of the material content of electronic products sold in the state.³⁸¹ Rhode Island enacted more aggressive legislation, patterned after California’s 2003 measure, which requires manufacturers to phase out the use of specified materials in the production of electronics.³⁸² The New Jersey legislature carried a similar bill over

377. *See* Legis. B. 1031, 2006 Leg., Reg. Sess. (Neb. 2006) (placing responsibility on the manufacturers: (a) for ensuring proper handling, recycling, and disposal of discarded covered electronic devices; (b) to absorb costs associated with the consolidation, handling, and recycling of covered electronic devices before the point of purchase; (c) to reduce, and to the extent feasible, ultimately phase out the use of hazardous materials in covered electronic devices); S. 270, 2006 Leg., Reg. Sess. (Vt. 2006) (proposing requirement for manufacturers to pay a fee on sale of each covered device into state administered fund for recycling, with fee visible to consumer at purchase); H.R. 700, 2006 Leg., Reg. Sess. (Vt. 2006) (same); Assem. Order 3200, 2005 Leg., Reg. Sess. (N.Y. 2005) (requiring manufacturers of electronic equipment to register with and report to the Department of Environmental Conservation, prohibiting the sale of any electronic equipment from a manufacturer which is not registered, and establishing that an electronic equipment manufacturer is responsible for the collection, transportation, and recycling of certain electronic equipment based on their market share of this equipment).

378. *See* S. 367, 2005 Leg., Reg. Sess. (Wis. 2005) (holding producer responsible for financing the collection and disposition of its own covered electronic equipment sold in-state and for historic and orphan covered waste based on producer market share; prohibiting sale in-state of covered electronic equipment containing certain substances—lead, mercury, cadmium, beryllium, hexavalent chromium, brominated flame retardants, and polyvinyl chloride).

379. S. 3228, 2005 Leg., Reg. Sess. (Mass. 2005).

380. *See* Assem. 2498, 2005 Leg., Reg. Sess. (N.J. 2005); S. 554, 2005 Leg., Reg. Sess. (N.J. 2005) (holding manufacturers responsible for computer take-back, providing for retailer advance collection of recovery fees for televisions, and covering items including CPUs, CRT devices, flat panel displays, and video displays). This proposal was carried over from the 2005 legislative session into the 2006 session.

381. *See* S. 673, 2005 Leg., Reg. Sess. (Tenn. 2005) (establishing a state recycling framework for electronic waste, such that manufacturers who sell covered electronic devices must report total estimated amounts of lead, mercury, hexavalent chromium, cadmium, and PBBs in products sold within the state).

382. *See* H.R. 7789, 2006 Leg., Reg. Sess. (R.I. 2006) (requiring all covered electronic products (“CEPs”) to either be recycled or disposed of as hazardous waste; requiring manufacturers to phase-out the use of lead, mercury, cadmium, hexavalent chromium, beryllium, brominated flame retardants, and polyvinyl chloride in electronic equipment within two years of the effective date of the legislation in favor of less harmful alternatives; and covering electronic devices such as computers, monitors, and televisions that contain lead, mercury, cadmium, hexavalent chromium, beryllium, brominated flame retardants, and polyvinyl chloride).

into 2007,³⁸³ while a comparable version in Minnesota languished in committee.³⁸⁴ California, meanwhile, proposed but did not enact a measure that would have adopted an EU prohibition on electronic devices with video displays greater than four inches, due to the presence of certain heavy metals covered in Annex IA to the WEEE Directive.³⁸⁵ Lastly, the Illinois State Computer Equipment Disposal and Recycling Commission issued its Report and Recommendations addressing the problem of computer and electronic equipment e-waste disposal and recycling to Governor Blagojevich in May 2006.³⁸⁶ Citing, among other things, the *UN Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* and the lack of federal legislation in this area, it recommended that Illinois enact “take-back” and recycling legislation consistent with and supportive of a Midwestern Regional Electronic Waste Recycling Policy Initiative (MREWRPI).³⁸⁷ Any proposed legislation should impose a “shared responsibility” model under which producers would pay a fee based on qualifying sales or share of returned equipment for recycling in the state, and retailers would provide sales data.³⁸⁸ The Commission believed that this approach would lead to a well-funded system and would provide the necessary incentive for manufacturers to spend less on recycling by “Designing for Environment,” that is, using less hazardous material and products that are easier to recycle.³⁸⁹ Manufacturers may opt out of the standard plan and choose to operate their own “take-back” program to collect, dispose, and recycle computer equipment falling within the definition of “covered electronic devices” (CEDs).³⁹⁰ Most importantly, the Commission stressed that “[u]pon the effective date of this initiative, manufacturers of CEDs must be in

383. Assem. 1663, 2006 Leg., Reg. Sess. (N.J. 2006); S. 554, 2006 Leg., Reg. Sess. (N.J. 2006) (requiring that, within twelve months, every producer must phase-out the use of lead, mercury, cadmium, hexavalent chromium, brominated flame-retardants, and polyvinyl chloride; proposing to shift financial responsibility for collection and recycling of discarded electronics to producers of electronic equipment; requiring every producer of electronic equipment sold, offered, or promoted in New Jersey to prepare and submit an electronic waste management plan covering orphan and historic waste; and covering many electronic products, including, but not limited to: computer equipment; display monitors and displays; telecommunication equipment, including fax machines, answering machines, small electronic devices and appliances; video and stereo equipment; televisions; toys; games; educational devices; and major household appliances).

384. S. 1595, 2005 Leg., Reg. Sess. (Minn. 2005) (requiring producers selling electronic equipment in Minnesota to phase out the use of BFRs, lead, mercury, cadmium, hexavalent chromium, and polyvinyl chloride in favor of products that contain less harmful alternatives; also includes product take-back and recycling provisions).

385. Assem. 2202, 2006 Leg., Reg. Sess. (Cal. 2006).

386. See generally COMPUTER EQUIP. DISPOSAL & RECYCLING COMM’N, ILL. DEP’T OF COMMERCE & ECON. OPPORTUNITY, A REPORT ON ELECTRONICS EQUIPMENT DISPOSAL AND RECYCLING (2006), available at <http://www.commerce.state.il.us/NR/rdonlyres/2F3529DD-8126-41AF-9AB5-9620D83AE191/0/ElectronicsCommissionReport052406.pdf>.

387. *Id.* at 25.

388. *Id.* at 7.

389. *Id.* at 20.

390. *Id.* at 23 (“(CED), for the purposes of this initiative includes, but are not limited to, desktop/personal computers, computer monitors, portable computers, desktop printers, other peripherals, CRT-based televisions, non-CRT-based televisions, VCRs and DVD players, fax machines, cellular telephones, MP3 players, and PDAs.”).

compliance with the European Union's Restrictions on Hazardous Substances (RoHS) Directive."³⁹¹

3. Cosmetics (2003-2008)

While legislation directed at PBDEs and e-waste has been relatively popular among state legislators, regulation of the chemical content of cosmetics has been slow to gain popularity. During the 2003-05 legislative terms, only California directly³⁹² and Massachusetts indirectly considered measures addressing the toxic chemicals used in the manufacture of cosmetics.³⁹³ While Massachusetts has carried over its proposed bills targeting the content of cosmetics for two different legislative sessions, as discussed later,³⁹⁴ the California Senate adopted a bill in

391. *Id.* at 25-26 (emphasis added).

392. *See, e.g.*, S. 484, 2005 Leg., Reg. Sess. (Cal. 2005) (requiring manufacturers of cosmetic products sold in the state to provide the Division of Environmental and Occupational Disease Control with a list of those products which contain carcinogens or toxins).

393. Alliance for a Healthy Tomorrow, *supra* note 368 (discussing how Massachusetts House Bill 2275 and Massachusetts Senate Bill 1268 will reduce human exposure to toxic chemicals (citing H. 2275, 2003-04 Leg. Sess. (Mass. 2004) and S. 1268, 2003-04 Leg., Reg. Sess. (Mass. 2004)).

394. *See supra* text accompanying note 393 (discussing Massachusetts Senate Bill 1268 and Massachusetts House Bill 2275); *see also The Campaign for Safe Cosmetics Update: Three Leading Manufacturers of Personal Care Products Change Ingredients in U.S. Market to Meet New European Safety Standards*, ALLIANCE FOR A HEALTHY TOMORROW NEWSL. (Winter 2005), http://www.healthytomorrow.org/safe_cos.html.

Both L'Oreal and Revlon said they are now in compliance with the European Union's new safety standards for cosmetics and personal care products. In addition, over 50 companies have now signed the Compact for Safe Cosmetics pledge to immediately remove all EU-banned chemicals from their products and develop a plan to replace all other chemicals of concern.

Id. Jody Feinberg, Security Guards: Cosmetic Safety is Goal of Quincy Health Group, *The Patriot Ledger*, Nov. 15, 2005, available at <http://ledger.southofboston.com/articles/2005/11/15/life/life01.txt>.

Since the campaign started, more than 200 companies have signed the Compact for Safe Cosmetics, indicating a commitment to remove from products the chemicals banned in Europe as well as others, Roll said. But nearly all the companies are small, often organic, and have a tiny share of the market compared to products created by major corporations.

Id.

The European Union (EU) has a new law that requires cosmetics companies to remove chemicals linked to cancer and birth defects from personal care products by September 2004. When they reformulate their products in the EU, these companies could make these safer products available to their other customers around the world as well. That's why the Campaign for Safe Cosmetics is calling on all cosmetics and personal care companies to protect our health by phasing out the use of chemicals linked to cancer, birth defects and other health concerns in every market they serve. . . . One of every 100 products on the market contains ingredients certified by government authorities as known or probable human carcinogens, including shampoos, lotions, make-up foundations, and lip balms manufactured by Almay, Neutrogena, Grecian Formula, and others. An astonishing one-third of all products contain one or more ingredients classified as possible human carcinogens. . . . Seventy-one hair dye products contain ingredients derived from carcinogenic coal tar. . . .

Massachusetts Breast Cancer Coalition, Campaign for Safe Cosmetics, <http://www.mbcc.org/content.php?id=8> (last visited May 5, 2008).

October 2005.³⁹⁵ The law requires cosmetics manufacturers to disclose to the state any product ingredient that is on state or federal lists of chemicals that cause cancer or birth defects, even though “[t]here is little direct evidence linking cancer and cosmetics.”³⁹⁶ Health advocacy groups such as Alliance for a Healthy Tomorrow, women’s advocacy networks such as the Campaign for Safe Cosmetics,³⁹⁷ and even sustainability investor groups hailed the California law as a model for the nation. Not unsurprisingly, other states, including Washington, Oregon, Maryland, New York, and Massachusetts, have since introduced similar bills.

In 2005, the European Union passed Directive 76/768/EEC banning over 1,000 chemicals for use in cosmetics. The same year, California Governor Arnold Schwarzenegger signed the California Safe Cosmetics Act of 2005 which requires companies to report to the state the ingredients found in their products. There is legislation pending on cosmetics in at least five other states. The Washington Safe Cosmetics Act of 2007³⁹⁸ is modeled after the California bill and Oregon will introduce two bills this year. In 2006, Maryland, New York, and Massachusetts all had bills concerning these issues.³⁹⁹

Furthermore the Minnesota Senate Health, Housing and Family Security Committee recently voted in favor of a Safe Cosmetics Bill, requiring cosmetics companies “to disclose fragrance ingredients on product bottles and on their website.”⁴⁰⁰

395. S. 484 (Cal. 2005), *supra* note 392 (establishing the California Safe Cosmetics Act); *see also* Simon Pitman, *California Cosmetics Bill Becomes Law*, COSMETICSDESIGN.COM, Oct. 12, 2005, <http://cosmeticsdesign.com/news/ng.asp?id=63150-ewg-cosmetic-bill>.

396. Cynthia Washam, *Safe Cosmetics Act Aims to Lessen Cancer Risk*, 98 J. OF THE NAT’L CANCER INST. 1441, 1441 (2006) (emphasis added), *available at* <http://jnci.oxfordjournals.org/cgi/reprint/98/20/1441.pdf>.

397. *See* Press Release, The Campaign for Safe Cosmetics, Governor Signs Safe Cosmetics Bill: New Law Heightens Scrutiny of Industry Safety (Oct. 8, 2005), *available at* <http://www.safecosmetics.org/newsroom/press.cfm?pressReleaseID=13>. It should be noted that, “The Campaign for Safe Cosmetics was founded by *Alliance for a Healthy Tomorrow*, the Breast Cancer Fund, Commonweal, Environmental Working Group, Friends of the Earth, National Black Environmental Justice Network, National Environmental Trust, and Women’s Voices for the Earth.” Anne Moore Odell, *Toxic Cosmetics Getting under the Skin of Concerned Investors*, SUSTAINABILITY INVESTMENT NEWS, Mar. 1, 2007, <http://www.socialfunds.com/news/article.cgi/2240.html>

398. The Washington Safe Cosmetics Act, H. 2166, was reintroduced January 14, 2008. Washington State Legislature, HB 216—2007-08, <http://apps.leg.wa.gov/billinfo/summary.aspx?year=2007&bill=2166>. “‘Cancer-causing petrochemicals have been found in dozens of children’s bath products and adult personal-care products, in some cases at levels twice the U.S. Food and Drug Administration’s lenient recommended limit,’ said Rep. Maralyn Chase (D-Shoreline), the primary sponsor of the proposed law (House Bill 2166).” *Witnesses Call for Passage of Chase’s Washington Safe Cosmetics Act* (Feb. 20, 2007), http://housedemocrats.wa.gov/members/chase/20070220_chase_cosmetics.asp.

399. Odell, *supra* note 397.

400. News Release, State Senator Ellen R. Anderson, Committee Passes Safe Cosmetics Bill: Legislation to Help Consumers Know What Ingredients Are in Cosmetics (Feb. 26, 2008), *available at* http://www.senate.leg.state.mn.us/members/member_pr_display.php?ls=&id=1459.

4. Pesticides (2006-2007)

In January 2006, the City of San Francisco approved a resolution revising the Reduced Risk Pesticides List for the City's Integrated Pest Management Program.⁴⁰¹ During October 2006, the U.S. EPA settled a lawsuit commenced by the nonprofit Center for Biological Diversity, agreeing to protect the threatened California red-legged frog from sixty-six pesticides.⁴⁰² Pursuant to the settlement, the use of these pesticides are prohibited "in and adjacent to core red-legged frog habitats throughout California until the EPA completes formal consultations with the U.S. Fish and Wildlife Service to ensure the chemicals are not jeopardizing or contributing to the decline of the species."⁴⁰³ During May 2007, California's Department of Pesticide Regulation (DPR) released draft regulations on smog-forming pesticide emissions intended to protect public health from the dangers of ozone pollution or "smog."⁴⁰⁴ The State of California had been under pressure in April from a court order to adopt, implement, and submit to the EPA regulations that would reduce smog-forming emissions from pesticides by twenty percent from 1991 levels in the Sacramento, San Joaquin Valley, Ventura, Southeast Desert, and South Coast air basins.⁴⁰⁵

The State of Oregon recently enacted legislation aimed at identifying and reducing discharges of a class of "persistent bioaccumulative toxins" (PBTs) to State waters, including "legacy" pesticides.⁴⁰⁶

The new law, known as Senate Bill 737—Reducing Toxic Pollutants in Oregon's Waterways—was signed into law on June 28, 2007, and will amend Oregon's water quality statute, ORS Chapter 468B. It requires the Oregon Department of Environmental Quality ("ODEQ") to prepare a priority list of the PBTs that accumulate in sediment, fish and human tissue, and, using current water quality monitoring data, produce a report for the legislature identifying the

401. S.F., Cal., Res. 003-06-COE (Jan. 24, 2006). See Resolution Adopting Revised Reduced-Risk Pesticides List for 2006, Jan. 24, 2006, <http://web.sfgov.org/site/uploadedfiles/sfenvironment/meetings/coe/supporting/2006/Res003-06-COERevisedReducedRiskPesticidesList2006.pdf> (providing text of resolution); 2006 San Francisco Reduced-Risk Pesticide List for City Operations, Jan. 2005, <http://sfgov.org/site/uploadedfiles/sfenvironment/meetings/coe/supporting/2006/2006ReducedRiskPesticideList.pdf> [hereinafter San Francisco Pesticide List] (providing text of 2006 San Francisco Reduced-Risk Pesticide List).

402. Press Release, Ctr. for Biological Diversity, Settlement Agreement Will Protect California Red-Legged Frogs from 66 Toxic Pesticides (Oct. 20, 2006), <http://www.watoxics.org/pressroom/press-releases/pr-2006-10-20>.

403. *California Frog Granted Protection from Pesticides*, ENVTL. NEWS SERV. (Oct. 20, 2006), <http://www.ens-newswire.com/ens/oct2006/2006-10-20-09.asp#anchor1>.

404. Press Release, Californians for Pesticide Reform, Long Overdue State Regulations on Smog-Forming Pesticides Released Today: Compliance with Federal Standards Must Target Pesticide Use Reduction (May 18, 2007), <http://www.pesticidereform.org/article.php?id=298>.

405. *Id.*

406. S. 737, 74th Or. Legis. Assem., 2007 Reg. Sess. (Or. 2007).

sources of PBTs, the levels entering the environment, and steps that should be taken to prevent, reduce or eliminate these toxics.”⁴⁰⁷

During 2007, Governor John Baldacci of Maine issued an executive order establishing a task force to identify and promote less toxic alternatives to PBTs, neurotoxins, and other chemicals, including pesticides, discovered in the home through biological monitoring.⁴⁰⁸ Several provisions within Maine’s pesticide control laws were amended effective March and April 2007.⁴⁰⁹ Effective September 2006, the State of Arizona enacted pesticide control laws that establish a structural pest control commission, provide for integrated pest management (IPM), and give notification of pesticides application to public schools and child care facilities.⁴¹⁰

North Carolina passed the School Children’s Health Act in 2006, which requires the use of IPM in all public schools in the state.⁴¹¹ According to one commentator, “[t]he success of this legislation and wide support reflected in its unanimous passage by both houses of the N.C. General Assembly was not accidental,” but rather a reflection of a collaborative effort that included grassroots and environmentalist organizations, medical and public health professionals, environmentalists, educators, industry members, and key state politicians.⁴¹²

The Wisconsin Natural Resources Board recently passed stricter limits on allowable groundwater levels of alachlor-ESA, the breakdown product of the herbicide alachlor, cutting the standard in half to twenty parts per billion (ppb),⁴¹³ even though Wisconsin farmers have complained that the standard is too strict, sets a bad precedent for regulating other herbicides, and places them at a competitive disadvantage with other less restrictive states.⁴¹⁴

407. Oregon Legislature Enacts Toxics Reduction Law, Martin Law Group (Aug. 8, 2007), <http://www.martenlaw.com/news/?20070808-toxics-reduction-law>; see also Oregon Department of Agriculture, Pesticides Division, PBT Active Ingredients Banned in Oregon: Summary of Action, <http://www.oregon.gov/ODA/PEST/pbt.shtml> (last visited Feb. 26, 2008) (listing active ingredients that are designated as PBTs and are not allowed for use in Oregon).

408. Exec. Order Feb. 22, 2006 (Me.), available at http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=21193&v=Article (“The Integrated Pest Management (IPM) Council Coordinators from the Department of Agriculture and University of Maine Cooperative Extension will continue to distribute an informational brochure to promote the use of existing web resources for educating homeowners about *less toxic alternatives to pesticides* commonly employed in and around Maine homes.”) (emphasis added).

409. See Maine Board of Pesticide Control, Laws & Regulations: Recently Amended Rules, <http://www.maine.gov/agriculture/pesticides/laws/rulemaking.htm#proposed> (last visited Jan. 30, 2008) (listing the pesticide statutes that were amended in March and April of 2007).

410. ARIZ. REV. STAT. ANN. §§ 32-2301-32-2329 (West, Westlaw current through end of the 48th Leg., 1st Reg. Sess. (2007)).

411. 2006 N.C. Sess. Laws 143.

412. Fawn Pattison & Katherine M. Shea, *A Collaborative Model for Children’s Environmental Health Policy: The North Carolina School Children’s Health Act of 2006*, 17 DUKE ENVTL. L. & POL’Y F. 233, 246-47 (2007).

413. Wis. Ag Connection, Natural Resources Board Approves Herbicide Limits (Aug. 17, 2007), <http://www.wisconsinagconnection.com/story-state.php?Id=985&yr=2007>.

414. Meeting Minutes, Natural Resources Board, Sept., 28, 2005, at 2, <http://dnr.wi.gov/org/nrboard/minutes/M05/0905%20minutes.pdf>.

There are “33 state laws and over 400 school districts that are known to have policies or programs regarding integrated pest management, pesticide bans, and right-to-know.”⁴¹⁵ For example, during 2002, the Los Angeles Unified School District (LAUSD) passed one of the nation’s most stringent plans for phasing out pesticides, incorporating the Precautionary Principle and parents’ right-to-know.⁴¹⁶ During September 2007, it was reported that the Duval County School Board in Florida was “prepared to join other school districts that have changed their pest-control tactics by making pesticides a last resort, rather than routinely spraying baseboards,” and would vote before the end of the month “on a \$195,000 annual contract with Terminix for a program called integrated pest management.”⁴¹⁷

[I]n recent years, schools have faced calls to reduce their use of pesticides, particularly in light of environmental reports that say small children are vulnerable with the poisonous ingredients that kill bugs.

....

Thirty-three states currently require schools to use integrated pest management. Florida isn’t among those states, leaving the decision to districts.⁴¹⁸

C. GHG Emissions, Renewable Energy and Energy Efficiency Legislation, and Executive Rule-Making Initiatives

Those states and municipalities which have remained true to the Precautionary Principle-based orthodoxy of the United Nations’ Kyoto Protocol have proposed and adopted a veritable “witches-brew” of initiatives without providing scientific evidence for their need or economic analyses of their impact on state and municipal economies. Some aim directly at curbing “at-source” greenhouse gas (GHG)—

415. Beyond Pesticides, State and Local School Pesticide Policies, <http://www.beyondpesticides.org/schools/schoolpolicies/index.htm> (last visited Feb. 22, 2008); see also BEYOND PESTICIDES, LOCAL IPM/PESTICIDE REDUCTION POLICIES, July 2007, http://www.beyondpesticides.org/stateipm/policy/localpolicy_overview.pdf (noting that approximately thirty-five states are known to have some form of state and/or local IPM pesticide reduction policies).

416. SCHOOL PESTICIDE REFORM COALITION AND BEYOND PESTICIDES, SAFER SCHOOLS: ACHIEVING A HEALTHY LEARNING ENVIRONMENT THROUGH INTEGRATED PEST MANAGEMENT 16 (2003), <http://www.beyondpesticides.org/schools/publications/IPMSuccessStories.pdf>.

The “Precautionary Principle” is the long-term objective of the District. The principle recognizes that: a) no pesticide product is free from risk or threat to human health, and b) industrial producers should be required to prove that their pesticide products demonstrate an absence of the risks enumerated in paragraph two (2) rather than requiring that the government or the public prove that human health is being harmed. This policy realizes that full implementation of the Precautionary Principle is not possible at this time and may not be for decades. But the District commits itself to full implementation as soon as verifiable scientific data enabling this becomes available.

L.A. UNIFIED SCH. DIST., INTEGRATED PEST MANAGEMENT POLICY 1 (2002), available at <http://www.laschools.org/employee/mo/ipm/docs/ipmpolicyretype.pdf>.

417. David Bauerlein, *Schools Refining Control of Pests*, TIMES-UNION (Jacksonville, Fla.), Sept. 3, 2007, available at http://www.jacksonville.com/tu-online/stories/090307/met_196514751.shtml.

418. *Id.*

mostly carbon dioxide—emissions believed to be harmful to both human health and the environment, as well as a primary cause of global warming. Others impose mandatory “fuel-switching” to preferred alternative energy sources (favored renewable portfolio standards) and/or strict energy efficiency and energy conservation requirements. These regulations can be broken down into four different forms:

- State Bills and Legislation
- Governor-Executive Orders, Agreements, and Rulemakings
- Multi-State Initiatives and Policy Resolutions
- Local and Municipal Ordinances

1. State Bills and Legislation 2005-2007

Between the 2005 and 2006 legislative sessions, seventeen states have adopted bills that address emissions or alternative energy in some form. California, Hawaii, Louisiana, Missouri, Montana, Rhode Island, Texas, Vermont, and Wisconsin have enacted legislation that impose some duty on energy producers to develop and utilize alternative energy sources.⁴¹⁹ Some of these measures, like one approved by the California Senate in 2006, are general requirements for energy producers to produce a specified percentage from “renewable sources,” like wind and solar power, by a set date.⁴²⁰ Others are more targeted. Louisiana and Missouri both adopted bills in 2006 mandating that fuel, including diesel, sold in-state must

419. *See, e.g.*, 2006 Cal. Stat. Ch. 464 (requiring that the California Public Utilities Commission adopt a renewable energy procurement plan); 2006 La. Acts 313 (requiring that ethanol produced from domestically grown feedstock or other biomass material account for two percent of the total gasoline sold in the state and that two percent of the total diesel sold in the state be biodiesel); 2005 Mont. Laws Ch. 457 (establishing a renewable energy standard for public utilities); 2005 Tex. Sess. Law Serv. 1st Called Sess. Ch. 1 (requiring utilities to construct transmission facilities for the purpose of meeting the goal for generating capacity from renewable energy technologies); 2005 Vt. Acts & Resolves 61 (requiring electricity providers to own sufficient energy from renewable resources to meet the state’s renewable energy goals); 2006 Wis. Legis. Serv. 141 (stating renewable energy requirements for utilities); S. 2957, 23d Leg., Reg. Sess. (Haw. 2006); S. 3185, 23d Leg., Reg. Sess. (Haw. 2006) (allowing the public utilities commission to redirect funds collected through a management surcharge by the state’s electric utilities into a public benefits fund); H. 1270, 93d Gen. Assem., Reg. Sess. (Mo. 2006) (requiring that, subject to certain exceptions, all gasoline sold in the state be an ethanol blend); S. 2903, 2006 Gen. Assem., Jan. Sess. (R.I. 2006); H. 8025, 2006 Gen. Assem., Jan. Sess. (R.I. 2006) (establishing a public corporation to assist electric and natural gas distribution companies in the development and implementation of comprehensive plans to achieve cost effective energy conservation programs).

420. 2006 Cal. Legis. Serv. Ch. 464; *see also* 2005 Mont. Laws Ch. 457 (requiring that 10% of the electricity sold in Montana come from renewable sources by 2010 and 15% by 2015, and calling for a renewable energy credit tracking system); 2005 Vt. Acts & Resolves 61 (requiring utilities’ renewable generation to equal incremental load growth or be subject to state-determined RPS based on state-experienced load growth, where renewable energy includes wind, solar, small hydropower methane from landfill gas, anaerobic digesters, and sewage-treatment facilities); 2006 Wis. Legis. Serv. 141 (increasing renewable portfolio standard by requiring utilities to produce ten percent of their electricity from renewable energy sources in order to directly support energy efficiency programs, and requiring the state agencies to purchase twenty percent of their energy from renewable sources and to create specific energy standards for state building projects).

include a specified percentage of ethanol or biomass fuel additive.⁴²¹ Hawaii, Rhode Island, and Texas each took different approaches. On June 26, 2006, Hawaii passed legislation that required state agencies to install renewable energy devices, like solar water heaters, in state offices, as well as required state officials to drive “energy efficient vehicles” powered by biodiesel, ethanol, hybrid electric/gasoline, or hydrogen fuel cells as part of a wider initiative to adopt and promote green building practices in Hawaiian state government.⁴²² Rhode Island, also in 2006, adopted more focused measures that established new criteria for the erection of new wind power facilities while also creating a \$7 million fund to bolster investment in renewable energy.⁴²³ Texas, in 2005, expanded earlier legislation enacted in 1999⁴²⁴ by increasing the installed cumulative megawatt capacity for several alternative energy sources, including wind, solar, landfill gas, and micro-hydroelectric.⁴²⁵

While the majority of states focused on developing and utilizing alternative energy, several states also focused on setting emissions or energy efficiency standards or at least getting agency action on standards started. Alaska, California, Connecticut, Florida, Hawaii, Maryland, New York, Rhode Island, and Washington all passed legislation in 2005 and 2006 that set emissions or efficiency standards or called for agency action to set such standards.⁴²⁶

421. 2006 La. Acts 313 (requiring that ethanol produced from domestically grown feedstock or other biomass material account for two percent of the total gasoline sold in the state and that two percent of the total diesel sold in the state be biodiesel); 2006 Mo. Legis. Serv. 1270 (requiring all but premium grade gasoline sold in Missouri to contain ten percent ethanol).

422. See S. 2957, 23d Leg., Reg. Sess. (Haw. 2006) (providing a framework for including renewable energy); H.R. 2175, 23d Leg., Reg. Sess. (Haw. 2006) (requiring energy efficiency in state facilities, vehicles, equipment, and public schools); S. 3185, 23d Leg., Reg. Sess. (Haw. 2006) (improving existing requirements for energy efficiency), available at http://www.capitol.hawaii.gov/session2006/bills/SB3185_cd1_.htm; see generally Pew Center on Global Climate Change, *Hawaii's New Energy Laws to Boost Efficiency, Renewable Energy*, <http://www.pewclimate.org/node/4833> (last visited May 14, 2008).

423. S. 2903, 2006 Gen. Assem., Jan. Sess. (R.I. 2006); H.R. 8025, 2006 Gen. Assem., Jan. Sess. (R.I. 2006). These bills also required the state Public Utility Commission to set new standards for procuring energy from alternative and renewable sources.

424. See Barry G. Rabe, Univ. of Mich., *Race to the Top: The Expanding Role of U.S. State Renewable Portfolio Standards 11* (2006), available at <http://www.pewclimate.org/docUploads/RPSReportFinal.pdf> (last visited Feb. 22, 2008) (reporting that the 1999 Texas legislation had “established a clear and effective ‘renewable energy credit’ program, a transparent market transaction process, and an ‘alternative compliance mechanism’ that provide[d] options, [but] costly ones, for electricity suppliers unable to meet standard requirements”).

425. S. 20, 2005 Leg., Reg. Sess. 79(1) (Tex. 2005) (endorsing a major extension and expansion of 1999 legislation setting forth a renewable portfolio standard that provided for wind, solar, and landfill gas and micro-hydroelectric by increasing the cumulative installed renewable megawatt capacity, and setting forth voluntary megawatt targets for sources other than wind power).

426. See, e.g., 2006 Cal. Legis. Serv. Ch. 488 (requiring the State Air Resources Board to adopt regulations to require the reporting and verification of statewide greenhouse gas emissions and to monitor and enforce compliance with the program); 2006 Cal. Legis. Serv. Ch. 598 (requiring the Public Utilities Commission to establish a greenhouse gases emission performance standard for all baseload generation of load-serving entities); 2006 Md. Laws Ch. 23 (prohibiting affected facilities collectively from emitting more than specified amounts per year of oxides of nitrogen, sulfur dioxide, and mercury on or after specified dates); 2005 N.Y. Sess. Ch. 431 (establishing new appliance energy efficiency

Rhode Island has been extremely active in this particular area. In 2005, the state passed a bill entitled The Energy and Consumer Savings Act, setting minimum efficiency standards for fourteen electrical appliances.⁴²⁷ When the legislature reconvened in 2006, it passed a comprehensive energy bill comprised of several more measures, discussed previously, that, among other things, tasked the state Public Utilities Commission to set both new standards for procuring energy from alternative and renewable sources and new efficiency standards for seven residential appliances.⁴²⁸

California has been most aggressive in utilizing state legislation to cap GHG emissions. In 2006, the legislature approved two bills that severely restrict GHG emissions by capping emissions at 1990 levels by 2020, directing the state Energy Commission to set GHG standards for public utilities, and directing the state Air Resources Board to create reporting and compliance standards.⁴²⁹ One of the bills

standards); 2005 Wash. Sess. Laws Ch. 12 (requiring that state-owned buildings and schools be improved with green building features); S. 2957, 23d Leg., Reg. Sess. (Haw. 2006) (allowing consumers to claim renewable energy tax credits); S. 3185, 23d Leg., Reg. Sess. (Haw. 2006) (allowing the Public Utilities Commission to use money in a public benefit fund to support energy efficiency); H.R. 2848, 23d Leg., Reg. Sess. (Haw. 2006) (appropriating funds to reconvene the major energy and policy stakeholders for a forum on implementing the energy goals developed in the previous forum); S. 2903, 2006 Gen. Assem., Jan. Sess. (R.I. 2006) (creating an office of energy resources to effectuate plans with the goal of providing energy resources in the state in a manner that “enhances economic well-being, social equity, and environmental quality”); H.R. 8025, 2006 Gen. Assem., Jan. Sess. (R.I. 2006) (establishing a public corporation to assist electric and natural gas distribution companies in the development and implementation of comprehensive plans to achieve cost effective energy conservation programs); S. 2844, 2006 Gen. Assem., Jan. Sess. (R.I. 2006) (requiring the commission to adopt regulations establishing minimum efficiency standards for a wide variety of products, ranging from automatic ice makers to traffic signal monitors); S. 660, 2006 Gen. Assem., Feb. Sess. (Conn. 2006) (requiring the Commissioner of Revenue Service to adjust the tax on motor vehicles sold with a model year of 2008 or later based on fuel cycle emissions of greenhouse gas); S. 888, 2006 Leg., Reg. Sess. (Fla. 2006) (establishing an “Energy Efficient Week” when tax is not collected on new energy efficient products that cost less than \$1,500); H.C.R. 30, 24th Leg., Reg. Sess. (Alaska 2006); S. 540, 23d Leg., Reg. Sess. (R.I. 2005); H.R. 1397, 2005 Leg., Reg. Sess. (Wash. 2005) (setting new vehicle emission standards); H.R. 1062, 2005 Leg., Reg. Sess. (Wash. 2005) (setting new standards for energy efficiency).

427. S. 540, 2005 Gen. Assem., Jan. Sess. (R.I. 2005). *See also* News Release, RIPIRG, Governor Carcieri Signs Energy Efficiency Bill (July 1, 2005), *available at* <http://ripirg.org/RI.asp?id2=17955&id3=RI>.

428. *See, e.g.*, S. 2903, 2006 Gen. Assem., Jan. Sess. (R.I. 2006); H.R. 8025, 2006 Gen. Assem., Reg. Sess. (R.I. 2006) (requiring, as part of a comprehensive energy bill, that the state’s Public Utilities Commission (PUC) set new standards for procuring energy from diverse sources, including renewable energy systems and distributed energy systems); S. 540, 2005 Leg., Reg. Sess. (R.I. 2005) (requiring the PUC to establish new energy efficiency standards for seven residential appliances). “The legislation (S 2903 and H 8025) was sponsored by Sens. William Walaska of Warwick and Susan Sosnowski of South Kingstown and House Majority Leader Gordon Fox of Providence and Rep. Brian Patrick Kennedy of Hopkinton, respectively.” Press Release, State of Rhode Island, Carcieri Signs Comprehensive Energy Legislation into Law (June 29, 2006), *available at* <http://www.ri.gov/GOVERNOR/view.php?id=2243>.

429. *See, e.g.*, 2006 Cal. Legis. Serv. Ch. 488 (capping the state’s GHG emissions at 1990 levels by 2020, requiring the State Air Resources Board to establish a program for statewide GHG emissions reporting and to monitor and enforce compliance with this program, authorizing the state board to adopt market-based compliance mechanisms including emissions cap-and-trade, and allowing a one-year extension of the targets under extraordinary circumstances); 2006 Cal. Legis. Serv. Ch. 598 (directing

also authorizes the Air Resources Board to adopt market-based compliance mechanisms, including emissions cap-and-trade, and allows a one-year extension of the targets under extraordinary circumstances.⁴³⁰ California's emissions cap would reduce emissions twenty-five percent from current levels and is the first statewide program in the country to mandate an economy-wide emissions cap that includes enforceable penalties.

California is not the only state to take such a radical legislative approach to GHG. Washington, in 2005, enacted multiple measures adopting GHG emission standards, appliance efficiency standards, and the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Silver standards for new public buildings.⁴³¹ In 2006, Maryland passed a bill imposing emission rate limits on coal-fired electric power plants that contribute to ozone, fine particles, regional haze, and acid rain pollution and requiring a comprehensive study of reliability and cost issues relating to pollution controls on power plants.⁴³² Passage of the bill allowed Maryland to become a full participant in the Northeastern and Mid-Atlantic state RGGI by June 30, 2007.⁴³³ In February 2007, the Maryland Senate, following the lead of the state House, approved a bill imposing more stringent emissions requirements than federal limits;⁴³⁴ Governor Martin O'Malley indicated that he would sign the legislation when it reached his desk.⁴³⁵ During November 2007, two nearly identical climate change bills were introduced in the New Jersey Assembly (A4556⁴³⁶ and A4559⁴³⁷) that, if enacted, would enable the state to

the California Energy Commission to set a GHG performance standard for electricity procured by local publicly-owned utilities, whether generated within state borders or imported from plants in other states).

430. 2006 Cal. Legis. Serv. Ch. 488.

431. See H.R. 1397, 2005 Leg., Reg. Sess. (Wash. 2005) (adopting California's motor vehicle emissions standards); H.R. 1062, 2005 Leg., Reg. Sess. (Wash. 2005) (adopting California's vehicle GHG emissions standards, subject to Oregon's adoption of such standard, and adopting appliance efficiency standards similar to those adopted in Maryland, Connecticut, Arizona, New Jersey, and California); 2005 Wash. Legis. Serv. Ch. 12 (mandating that all new public buildings meet green building standards).

432. 2006 Md. Laws Ch. 23.

433. *Id.*

434. S. 103, 2007 Leg., Reg. Sess. (Md. 2007) (cross-filed with H.R. 131, 2007 Leg., Reg. Sess. (Md. 2007)).

435. John Wagner, *Bill to Toughen Vehicle Emission Rules Approved*, WASH. POST, Feb. 27, 2007, at B02; see also *id.* ("Opponents said last night that Maryland would lose some of its sovereignty under the legislation, which pegs emissions standards to those of California. Supporters said that California's standard has been embraced by 10 other states and that it would be impractical for all states to set different standards.").

436. Assem. 4556, 212th Leg., 2d Ann. Sess. (N.J. 2007).

Assembly bill No. 4556, sponsored by Environmental Committee Chairman McKeon, would authorize the Department of Environmental Protection (DEP) to create an emissions trading program. The DEP would auction green house gas emission "allowances." Under RGGI, NJ is allocated about 22.9 million tons of emissions. Each "allowance" would authorize emission of one ton. Auction prices for allowance discussed in RGGI negotiations are in the ballpark of \$3 per ton. So the bill could generate approximately \$65 million that would be used to invest in energy efficiency and renewables and protect consumers.

Bill Wolfe, *Global Warming Showdown in Trenton?*, NEW JERSEY.COM, Nov. 27, 2007, http://blog.nj.com/njv_bill_wolfe/2007/11/global_warming_showdown_in_tre.html.

implement its commitments as a member of the RGGL. On the opposite end, Connecticut and New York were content to pass bills that merely set efficiency standards for commercial appliances and required vehicle GHG standard disclosure, respectively.⁴³⁸ Alaska and Florida would not even go that far, as both created new state agencies in 2006 to assess climate change and energy policy and make recommendations.⁴³⁹ Those two states joined Arizona, California, Montana, North Carolina, New Mexico, Oregon, and Vermont in creating Climate Legislative Commissions and Executive Branch Advisory Groups.⁴⁴⁰

2. Governor-Executive Orders, Agreements, and Rulemakings (2005-2007)

In contrast to the large group of states that have addressed emissions and energy regulation legislatively, comparatively fewer states have used the bully pulpit of the governor's office to direct energy policy. Eight states have seen their governors take an active role in directing and setting emissions and energy policy through executive orders, agreements, and rulemaking in 2005 and 2006. Among those eight, California and Arizona have clearly taken the mantle of leadership, although their approaches differ in form. Arizona Governor Janet Napolitano has focused her executive efforts on implementing state and regional standards for GHG emissions and energy efficiency.⁴⁴¹ Beginning in 2005, Napolitano created a

437. Assem. 4559, 212 Leg., 2d Ann. Sess. (N.J. 2007). Assembly bill No. 4559, which is basically the same as A4556, was referred to the Telecommunications and Utilities Committee, then sponsored and expanded by Chairmen Chivukula and McKeon. It "is a broader bill that would authorize DEP to establish a cap and trade program and leave the details of the program to DEP rules." Wolfe, *supra* note 436.

438. See S. 660, 2006 General Assem., Reg. Sess. (Conn. 2006) (requiring that a label be affixed to vehicles detailing the vehicle's greenhouse gas score, its score as compared to others of the same make and year, and the average score for vehicles within the same class); 2005 N.Y. Sess. Laws Ch. 431 (setting energy efficiency standards for appliances—such as ceiling fan and light kits, commercial washing machines, commercial refrigerators, freezers, icemakers, torchiere lighting fixtures, and other commercial and household items—and seeking development of new energy efficiency standards to reduce the amount of power used by certain products in standby mode).

439. See H.R. Con. Res. 30, 24th Leg., 2d Sess. (Alaska 2006) (creating an Alaska Climate Impact Assessment Commission to assess the impacts and costs of climate change to Alaska, as well as to develop recommendations for preventative measures), available at http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=HCR030E&session=24; S. 888, 2006 Leg., 2006 Sess. (Fla. 2006) (creating the Florida Energy Commission and granting them authority to develop recommendations for legislation, alternative fuel incentives, and long-term energy policy, including recommending steps and a schedule for the development of a state climate action plan through a public-involvement process to reduce GHG emissions).

440. Pew Center on Global Climate Change, States with Active Climate Legislative Commissions and Executive Branch Advisory Groups, http://www.pewclimate.org/what_s_being_done/in_the_states/climatecommissions.cfm (last visited June 20, 2008).

441. See, e.g., Exec. Order No. 2006-13, 12 Ariz. Admin. Reg. 3398 (Sept. 15, 2006) (setting up a timeline for reducing greenhouse gas emissions); Exec. Order No. 2005-02, 11 Ariz. Admin. Reg. 2155 (June 3, 2005) (establishing the Climate Change Advisory Group); Exec. Order 2005-05 11 Ariz. Admin. Reg. 2161 (June 3, 2005) (ordering state agencies to implement new energy standards in their facilities); Press Release, State of Ariz. Executive Office, Governors Napolitano and Richardson Launch Southwest Climate Change Initiative (Feb. 28, 2006), <http://www.governor.state.az.us/press/2006/>

state Climate Change Advisory Group by executive order to study Arizona's GHG emissions and recommend ways to reduce them.⁴⁴² She also mandated that new state buildings use more alternative and renewable energy sources and be compliant with LEED energy standards.⁴⁴³ In 2006, Napolitano implemented recommendations received from the Climate Change Advisory Group by executive order, establishing a six percent statewide reduction of GHG emissions by 2010 and a fifty percent reduction in present day emissions by 2040.⁴⁴⁴ The executive order also directed the State Department of Environmental Quality to develop a reporting regime and to coordinate with the State Department of Transportation to adopt and implement California's vehicle emissions standards.⁴⁴⁵ Napolitano also partnered with New Mexico Governor Bill Richardson in 2006 to create the Arizona-New Mexico Southwest Climate Change Initiative to promote cooperation between the states in reducing GHG emissions and other green policies, like energy efficient technologies and clean energy sources.⁴⁴⁶

While Napolitano has been content thus far to dictate Arizona policy and seek regional solutions to the potential dangers of climate change, California Governor Arnold Schwarzenegger has taken a more global course. In addition to establishing statewide GHG emissions reduction targets by executive order in 2005,⁴⁴⁷ during January 2007, Schwarzenegger signed an executive order directing California agencies to develop the world's first low carbon fuel standard (LCFS).⁴⁴⁸ Previously, the California Governor had executed executive agreements with foreign nations to target GHG emissions.⁴⁴⁹ In 2006, Schwarzenegger signed separate agreements with the United Kingdom and Sweden to foster cooperation in combating climate change and promoting renewable energy. While the Sweden agreement was limited to technology exchanges aimed at promoting biogas and

0602/022806_SouthwestClimateChangeInitiative.pdf (announcing the project initiated by Arizona and New Mexico to protect water supplies and reduce emissions).

442. 11 Ariz. Admin. Reg. 2155.

443. 11 Ariz. Admin. Reg. 2161.

444. 12 Ariz. Admin. Reg. 3398.

445. *Id.*

446. Press Release, State of Ariz. Executive Office, *supra* note 441.

447. Exec. Order No. S-03-05 (Cal., June 1, 2005), *available at* <http://gov.ca.gov/executive-order/1861>.

448. Exec. Order No. S-01-07 (Cal., Jan. 18, 2007), *available at* <http://gov.ca.gov/index.php?/executive-order/5172>.

449. Press Release, State of Cali. Resources Agency, Officials from California and Sweden Agree to Work Together on Biomethane and Renewable Fuels (June 29, 2006), http://resources.ca.gov/press_documents/CaliforniaSwedenBioenergyMOURelease_06_29_06.pdf (fostering an extensive exchange of technologies and ideas between California and Sweden to advance the use of biogas and other renewable fuels); Office of the Governor, Fact Sheet: United Kingdom and California Climate Change and Clean Energy Collaboration, <http://gov.ca.gov/index.php/fact-sheet/united-kingdom-and-california-announcement-on-climate-change-clean-energy-c> (last visited June 20, 2008) (committing both California and the United Kingdom to: enhancing linkages between their respective scientific communities to assess the impacts of climate change at the regional level; sharing information on the economic impacts of climate change and of potential mitigation strategies and adaptation measures; collaborating on technology research, especially for the energy sector; evaluating and implementing market-based mechanisms; and exploring the potential for linkages between such mechanisms in California and the UK).

other renewable fuels,⁴⁵⁰ the United Kingdom agreement borders on a treaty to reduce GHG emissions. The United Kingdom agreement commits both parties to enhanced scientific collaboration in developing new energy technologies, assessing regional climate change impact and the economic effects of climate and mitigation policies, as well as cooperation in implementing “market-based” mechanisms addressing climate change.⁴⁵¹

During March 2007, Governor Schwarzenegger’s aides publicly expressed his intention to

link [California’s] planned emissions trading system to the European Union’s market, boosting efforts to build a global mechanism to fight climate change. . . . “Our governor has asked us to design a market that could be compatible with the ETS, the European trading system,” [said] Linda Adams, secretary of the California Environmental Protection Agency.⁴⁵²

Apparently, a member from Schwarzenegger’s cabinet had been sent to Brussels to meet with officials from the European Commission and European Parliament in order to learn more about the EU emissions trading system.⁴⁵³ This effort recently culminated, during October 2007, in California’s entering into an international agreement with a group of other U.S. states (including the other members of the Western Climate Initiative—discussed later), Canadian provinces, and a coalition of European Union countries to launch the International Carbon Action Partnership (ICAP).⁴⁵⁴ Although the ICAP is billed as more of an educational and cooperative forum where participating governments share best practices and lessons learned in developing compatible and efficient local and regional emissions caps and trade systems to reduce the impacts of global warming,⁴⁵⁵ it is more likely a precursor to establishing a truly international (multilateral) system.

Indiana, Illinois, Iowa, New Jersey, New Mexico, and Wisconsin have made limited use of executive power in addressing climate change and energy policy. As previously discussed, New Mexico Governor Bill Richardson is an equal partner in

450. Press Release, State of Cali. Resources Agency, *supra* note 449.

451. Office of the Governor, *supra* note 449.

452. Jeff Mason, *California Eyes Joining EU Emissions Trading Scheme*, PLANET ARK, Mar. 30, 2007, <http://www.planetark.com/dailynewsstory.cfm/newsid/41166/story.htm>.

453. *Id.*

454. Press Release, Office of the Governor of Cali., Governor Schwarzenegger Issues Statement on International Carbon Action Partnership (Oct. 29, 2007), *available at* <http://gov.ca.gov/press-release/7958>.

455. *Id.*

The ICAP will provide an international forum in which governments adopting enforceable caps on greenhouse gas emissions will share experience and best practice on the design of emissions trading mechanisms. ICAP will help ensure that trading mechanisms are compatible and work to boost demand for low-carbon products and services, promote innovation, and reduce the cost of effective reductions so as to allow swift and ambitious cuts in global warming emissions.

Id.

the Arizona-New Mexico Southwest Climate Change Initiative.⁴⁵⁶ That agreement came on the heels of Richardson's 2005 executive order targeting reduction of current emissions to 2000 levels by 2012, an additional ten percent reduction below 2000 levels by 2020, and an enormous seventy-five percent reduction below 2000 emission levels by 2050.⁴⁵⁷ The executive order also supplemented the state's renewable energy portfolio, created a renewable energy tax credit, and set energy efficiency goals.⁴⁵⁸

Similarly, Illinois Governor Blagojevich issued an executive order in 2006 mandating a six percent cut in the state government's GHG emissions by 2010.⁴⁵⁹ The executive order also created the state Climate Change Advisory Group to consider a full range of policies and strategies and make recommendations to reduce GHG emissions.⁴⁶⁰ Maryland Governor O'Malley likewise issued an executive order, during April 2007, establishing a Climate Change Commission to develop an action plan that addresses "the drivers and causes of climate change, to prepare for the likely consequences and impacts of climate change to Maryland."⁴⁶¹

Meanwhile, New Jersey had been one of the "first-mover" states as concerns climate change. In 2005, New Jersey's acting Governor, Richard Codey, adopted regulations originally proposed during 2004⁴⁶² to amend air pollution control rules to reflect the alleged current "scientific consensus" that carbon dioxide is an "air contaminant."⁴⁶³ This revision not only laid the groundwork for New Jersey to later enter into the RGGI to reduce carbon dioxide emissions,⁴⁶⁴ it also helped create a frame of reference for the litigants in the *Massachusetts v. Environmental Protection Agency* (EPA) decision.⁴⁶⁵ The U.S. Supreme Court majority in this case, led by liberal Justice Stevens, ultimately ruled that, "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."⁴⁶⁶ However, contrary to the claims now being made by

456. See Press Release, State of Ariz. Executive Office, *supra* note 441 ("Arizona Governor Janet Napolitano and New Mexico Governor Bill Richardson today signed an agreement launching the Southwest Climate Change Initiative . . .").

457. Exec. Order No. 05-033 (N.M., June 9, 2005), available at http://www.governor.state.nm.us/orders/2005/EO_2005_033.pdf.

458. *Id.*

459. Exec. Order No. 11 (Ill., Oct. 5, 2006), available at <http://www.illinois.gov/Gov/pdfdocs/execorder2006-11.pdf>.

460. *Id.*

461. Exec. Order No. 01.01.2007.07 (Md., Apr. 20, 2007), available at <http://www.gov.state.md.us/executiveorders/01.07.07ClimateChange.pdf>.

462. N.J. Dep't of Env'tl. Prot., Notice of Rule Proposal, Reclassification of CO₂ as an Air Contaminant, <http://www.state.nj.us/dep/rules/notices/101804b.html> (last visited June 20, 2008) (giving public notice of proposed rulemaking that would amend state law to make reclassification of carbon dioxide as an air contaminant legally valid).

463. Press Release, State of N.J. Office of the Governor, Codey Takes Crucial Step to Combat Global Warming (Oct. 8, 2005) available at http://www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=2779.

464. *Id.*

465. 127 S. Ct. 1438, 1457 (2007); see EXPORTING PRECAUTION, *supra* note 25, at 66-71.

466. *Massachusetts*, 127 S. Ct. at 1462; EXPORTING PRECAUTION, *supra* note 25, at 29-30.

state regulators⁴⁶⁷ and state attorneys general⁴⁶⁸ largely for political effect, the Court did *not* require the EPA to regulate carbon dioxide *unless* it first makes a finding of

467. For example, RGGI state regulators have already misstated the Court's holding when claiming in a recent report, "The court ruled that the Environmental Protection Agency violated the Clean Air Act by improperly declining to regulate greenhouse gas emissions from new-vehicles." RGGI: FINAL REPORT, *supra* note 128, at 14.

468. For example, California's Attorney General has sought to take this form of misrepresentation a bit further by claiming that the EPA has refused to acknowledge and act upon its own endangerment finding which it has not yet officially announced, as has been revealed by a congressional investigation undertaken by none other than the biased and antagonistic Democrat, Henry Waxman, Chairman of House Committee on Oversight and Government Reform.

California Attorney General Edmund G. Brown Jr. went to federal court today to force the U.S. Environmental Protection Agency to release a court-mandated determination that greenhouse gases endanger public health or welfare. Such a determination of endangerment is the first step towards establishing federal controls on greenhouse gas emissions that cause global warming.

....

On April 2, 2007, the Supreme Court ruled in *Massachusetts v. EPA* that the EPA must regulate greenhouse gas emissions after making a formal determination that such pollution threatens public health or welfare. The EPA itself described the Court's mandate as follows: "[T]he EPA must determine . . . whether greenhouse gas emissions from new motor vehicles cause or contribute to air pollution that endangers public health or welfare."

A recent investigation by the House Committee on Oversight and Government Reform revealed that the EPA had already made its endangerment determination—including an extensive scientific review—and sent it to the White House Office of Management and Budget for final approval. Brown called EPA's inaction "a textbook case of unreasonable delay" because the agency already completed its endangerment determination last year and is simply refusing to release it publicly.

"It makes absolutely no sense for the EPA to say it needs a year-long public comment period before it can obey the Supreme Court," Brown said. "The EPA has finished its determination and Johnson should keep his promise by releasing the final version immediately."

Press Release, Office of the Attorney General, State of California, Brown Takes EPA To Court for Ignoring Supreme Court Mandate (April 2, 2008), *available at* <http://ag.ca.gov/newsalerts/release.php?id=1540>.

“endangerment.”⁴⁶⁹ This has even been acknowledged by Environmental Defense Fund, a well-known environmental activist group.⁴⁷⁰

Furthermore, it is arguable that New Jersey Governor Jon Corzine and former New York Governor Eliot Spitzer benefited from this definition when they traveled to Brussels in October 2007 to attend a political summit with European leaders for the specific purpose of executing an *international* carbon emissions trading agreement (the International Carbon Action Partnership (ICAP)) with the European Commission, United Kingdom, Germany, Portugal, France, Netherlands, New Zealand, and Norway.⁴⁷¹

Indiana, Iowa, and Wisconsin have also used executive orders to address energy efficiency in their own states.⁴⁷² These measures have ranged from Iowa

469.

Because greenhouse gases fit well within the Clean Air Act’s capacious definition of “air pollutant,” we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.

....

While the statute does condition the exercise of EPA’s authority on its formation of a “judgment,” 42 U.S.C. § 7521(a)(1), that judgment must relate to whether an air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare

If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles. . . . Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.

Massachusetts, 127 S. Ct. at 1462.

470.

In a landmark decision, the U.S. Supreme Court has ruled that the gases that cause global warming are pollutants under the Clean Air Act. The court also found that the U.S. government has the authority to regulate carbon dioxide (CO₂) and other heat-trapping gases Although the ruling does not require the federal government to act, it puts new pressure on Congress to set a national policy that caps carbon pollution—the best way to solve this problem. “This is ultimately up to Congress,” said Environmental Defense President Fred Krupp.

Court Rules 5-4 in Massachusetts versus EPA: Supreme Court Finds that EPA Can Regulate Heat-Trapping Pollution, Putting Pressure on Congress To Act on Global Warming, Environmental Defense Fund (April 3, 2007), <http://www.edf.org/article.cfm?contentID=5623>.

471.

The ground-breaking international and interregional agreement was *signed today by U.S. and Canadian* members of the Western Climate Initiative, northeastern U.S. members of the Regional Greenhouse Gas Initiative, as well as European members including the United Kingdom, Germany, Portugal, France, the Netherlands, and the European Commission. New Zealand and Norway joined on behalf of their emissions trading programs.

Press Release, State of N.J. Office of the Governor, Nations, States, Provinces, Announce Carbon Markets Partnership to Reduce Global Warming (Oct. 29, 2007), <http://www.state.nj.us/governor/news/news/approved/20071029c.html> (emphasis added).

472. See Exec. Order No. 06-14, Jul.-Dec. 2006 Ind. Reg. (Oct. 25, 2006), <http://www.in.gov/legislative/iac/20061025-IR-GOV060483EOA.xml.pdf> (creating an Interagency Council on Energy to provide energy policy advice to the governor and General Assembly and oversee the implementation of a plan to improve energy efficiency and promote in-state production of clean energy by encouraging use of clean coal and biomass to produce electricity and transportation fuels);

Governor Tom Vilsack's mandating of fifteen percent energy efficiency improvements in state facilities by 2010⁴⁷³ to Indiana Governor Mitch Daniels' creation of a state Interagency Council on Energy to advise and promote clean energy.⁴⁷⁴

3. Multi-State Initiatives and Policy Resolutions (2005-2007)

During February 2007, Governor Schwarzenegger joined with the governors of four Western states (Arizona, New Mexico, Oregon, and Washington) to sign a Memorandum of Understanding (MOU) creating the Western Regional Climate Action Initiative (Western Climate Initiative),⁴⁷⁵ billed as "a joint strategy to fight global warming."⁴⁷⁶ As previously discussed, Arizona and New Mexico had earlier formed the Southwest Climate Change Initiative⁴⁷⁷ and, prior to that, during 2004, California, Oregon, and Washington had entered into the West Coast Governors' Global Warming Initiative.⁴⁷⁸ The latter agreement promoted joint development of policy recommendations that could lead to the adoption of state and regional level GHG emissions reduction goals, vehicle GHG reduction standards, a regional market-based carbon allowance program, and a renewable energy and alternative fuels program.⁴⁷⁹ This initiative led to the Western Governors' Association issuing, in 2006, a policy resolution that called on Western states and cities to take action to reduce GHG emissions while also meeting growing energy demand.⁴⁸⁰ The agreement unanimously recognized that climate change is occurring and that it is influenced by human activities.⁴⁸¹ It also expressed support for regional and national programs to reduce GHG emissions in a cost-effective manner; set clean energy, energy efficiency, and reliable transmission targets; and called for

Exec. Order No. 41, XXVII Iowa Admin. Bull. 1570 (May 25, 2005) (mandating a fifteen percent energy efficiency improvement at state facilities by 2010, mandating state procurement of hybrid or alternative-fuel vehicles for non-law enforcement state vehicles, and directing state agencies to purchase equipment with the lowest life-cycle cost and ten percent of their electricity from renewable sources); Exec. Order 145, 604 Wis. Admin. Reg. 33 (Apr. 30, 2006) (requiring all state buildings, those existing, as well as all future construction, to conform to high environmental and energy efficiency standards).

473. 27 Iowa Admin. Bull. 1570 (Apr. 22, 2005).

474. Exec. Order No. 06-14 (Ind., Aug. 11, 2006).

475. Western Climate Initiative Website, <http://www.westernclimateinitiative.org/>.

476. Press Release, Office of the Governor of Cali., Gov. Schwarzenegger Announces Agreement with Western States to Reduce Greenhouse Gases (Feb. 26, 2007), available at <http://gov.ca.gov/index.php?/press-release/5505>. See also Mark Martin, 5 *Western States Announce Effort to Reduce Emissions*, S.F. CHRONICLE, Feb. 27, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2007/02/27/MNGTCOBH531.DTL&type=politics> (discussing the unveiling of the Western States Initiative at the 2007 meeting of the National Governors Association).

477. See *supra* note 441 and accompanying text (citing documents discussing the Southwest Climate Change Initiative).

478. West Coast Governors' Global Warming Initiative, <http://www.ef.org/westcoastclimate> (last visited Jan. 29, 2008).

479. *Id.*

480. Western Governors' Association Policy Resolution 06-3, June 13, 2006, available at <http://www.westgov.org/wga/policy/06/climate-change.pdf>.

481. *Id.*

advanced vehicle fuel efficiency and alternative fuels.⁴⁸² Collectively, these executive actions were intended to contribute to the development of a Western market that could allow companies to buy and sell carbon emission credits with both the EU's carbon emission trading system and the RGGI.

In 2006, members of the National Caucus of Environmental Legislators from Illinois, Iowa, Michigan, Minnesota, Ohio, and Wisconsin agreed to collaborate in the promotion of renewable energy and energy conservation and to start taking immediate steps to limit GHG emissions (carbon) from proposed new power plants.⁴⁸³ These legislators introduced several related bills that promote energy conservation and renewable energy by limiting carbon emissions, promoting renewable portfolio standards, creating tax credits for Energy Star appliance purchases, setting energy efficiency standards for appliances, creating Climate Change Commissions, creating Renewable Energy Funds, adopting California automobile emissions standards, establishing voluntary greenhouse gas registries, and creating tax credits for carbon sequestration projects, as noted previously.⁴⁸⁴

Several years before these Western state initiatives were conceived, since 2003, a number of Northeastern and Mid-Atlantic states were well on their way towards developing their own regional initiative—the “RGGI.” Notwithstanding the lack of verifiable information at the onset of these efforts, the facts ultimately revealed that the RGGI was being designed specifically to influence U.S. federal *and* international climate change policy (i.e., “serving as a model for a national program to limit greenhouse gas emissions” that also serves U.S. climate change diplomacy goals) and to exploit the international carbon emissions trading market that was evolving in Europe for the benefit of “first-mover” U.S. companies.⁴⁸⁵

Forming what can accurately be described as their own mini-Kyoto Protocol cap-and-trade system, the states of Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont, on December 20, 2005, executed a joint Memorandum of Understanding (“MOU”) pursuant to which each pledged to enact statewide rules for the reduction of GHG emissions from power plants that are substantially similar to and consistent with the RGGI “Model Rule” that was later issued by the original participating states on August 15, 2006.⁴⁸⁶ Massachusetts

482. *Id.*

483. Midwest Legislators Address Climate Change, Sept. 28, 2006, http://www.ncel.net/newsmanager/news_article.cgi?news_id=158.

484. *Id.*

485. EXPORTING PRECAUTION, *supra* note 25, at 58-60; *see* Kogan & Pachovski, *RGGI is Europe's "Back-Door-Man," supra* note 164; Lawrence Kogan & Slavi Pachovski, *A Real Nor'easter*, TCS DAILY, Aug. 30, 2005, <http://www.tcsdaily.com/article.aspx?id=083005D>.

486. *See* RGGI, Multi-State RGGI Agreement, <http://www.rggi.org/agreement.htm>; RGGI, MEMORANDUM OF UNDERSTANDING (2005), *available at* http://www.rggi.org/docs/mou_final_12_20_05.pdf; *see generally* RGGI, <http://www.rggi.org/> (detailing the efforts of Mid-Atlantic and New England states to reduce greenhouse gas emissions). RGGI will administer state compliance with Model Rule and other advisory services related to state enforcement of RGGI requirements. RGGI is described as a “non-profit corporation formed to provide technical and scientific advisory services to participating states in the development and implementation of the CO₂ Budget Trading Program under the Regional Greenhouse Gas Initiative (‘RGGI’).” RGGI, REQUEST FOR SERVICES, AUDITING SERVICES CONTRACT 1 (2008), *available at* www.nescaum.org/documents/audit-rfs-final-round-2-2008-04-07.pdf.

and Rhode Island subsequently joined the initiative in January 2007.⁴⁸⁷ As previously noted, during 2006, Maryland passed a bill imposing emission rate limits on coal-fired electric power plants that effectively made it eligible to become a full participant in the RGGI by June 30, 2007.⁴⁸⁸ Maryland eventually signed the MOU and became the tenth state to join the RGGI on April 20, 2007.⁴⁸⁹ The stated goal of the RGGI is to stabilize carbon dioxide emissions to current levels by 2015, with a ten percent reduction by 2019, through a carbon allowance system.⁴⁹⁰ Whether RGGI's environmental objectives can realistically be achieved is highly uncertain, however. The applicable state-level rules implementing the Model Rule have either already been or are likely to be proposed in each of the participating states for adoption, either legislatively or administratively, to implement the program.⁴⁹¹

4. Local and Municipal Ordinances (2005-2006)

Municipal, county, and state level climate change initiatives that incorporate the Precautionary Principle have been proposed and/or adopted. For example, during September 2006, Seattle adopted a Climate Action Plan.⁴⁹² The city targeted a seven percent reduction in current emissions by 2012 from 1990 levels by implementing the Green Ribbon Commission on Climate Protection's recommendations for reducing carbon dioxide emissions, consistent with the Kyoto Protocol target.⁴⁹³ Similarly, in 2005, the U.S. Conference of Mayors reached a Climate Protection Agreement, committing municipalities to satisfy the Kyoto Protocol's goal of reducing GHG emissions seven percent below 1990 levels by 2012.⁴⁹⁴ Perhaps not coincidentally, Seattle Mayor Greg Nickels led both efforts.⁴⁹⁵

487. Press Release, Commonwealth of Mass. Executive Dep't, Governor Patrick Signs Regional Pact to Reduce Greenhouse Gas Emissions (Jan. 18, 2007) available at http://www.mass.gov/?pageID=pressreleases&agId=Agov3&prModName=gov3pressrelease&prFile=reduce_greenhouse_gas_es011807.xml/; Donald L. Carcieri, Governor, Rhode Island, State of the State Address (Jan. 30, 2007), available at <http://www.governor.ri.gov/documents/statemessage07.pdf/>.

488. Martin, *supra* note 476.

489. See Press Release, Office of the Governor, Governor Martin O'Malley Signs Greenhouse Gas Agreement, Climate Change Executive Order (Apr. 20, 2007), available at <http://www.gov.state.md.us/pressreleases/070420.html>.

490. RGGI, MEMORANDUM OF UNDERSTANDING, *supra* note 486, at 2-3.

491. EXPORTING PRECAUTION, *supra* note 25, at 54-60.

492. CITY OF SEATTLE, A CLIMATE OF CHANGE: MEETING THE KYOTO CHALLENGE (2006), http://www.seattle.gov/climate/docs/SeaCAP_summary.pdf.

493. *Id.* at 1.

494. Debra DeHaney-Howard & Judy Sheahan, *Forty-Five Mayors Discuss Climate Change and the Role of Local Governments at Sundance Summit*, July 25, 2005, http://www.usmayors.org/uscm/us_mayor_newspaper/documents/07_25_05/sundance.asp.

495. Seattle.gov, Office of the Mayor, History & Background, <http://www.seattle.gov/mayor/climate/default.htm#history> ("On March 30, 2005, 9 mayors representing more than 3 million Americans, joined together to invite cities from across the country to take additional actions to significantly reduce global warming pollution."). "To date, 307 mayors representing some 51 million Americans . . . have signed on." Robert McClure, *Mayor Has Plan To Clear the Air*, seattlepi.com, Sept. 27, 2006, http://seattlepi.nwsource.com/local/286629_climate27.html (emphasis added).

5. Environmentalist Lawsuits at the Federal Level and U.S. Politician-Inspired Local Protests Impacting State and Local Projects

On July 23, 2007, the Montana Environmental Information Center, Citizens for Clean Energy, and the Sierra Club filed a lawsuit in the United States District Court for the District of Columbia seeking an injunction to “to stop the federal government from lending billions of dollars to private developers and utilities across the country to build new coal-fired power plants without fully analyzing the global warming impacts of their projects.”⁴⁹⁶ The suit alleges that the funding of such projects by the Rural Utilities Service (RUS), a branch of the U.S. Department of Agriculture (USDA), absent the requirement that the potential global warming impacts of such projects be disclosed in an Environmental Impact Statement, violates the National Environmental Policy Act (NEPA) in four ways.⁴⁹⁷ Furthermore, complainants argue that “the funding of these new projects by the RUS ‘will accelerate climate change and eliminate the market for cleanly generated electricity.’ Plaintiffs allege that ‘RUS has never considered how financing coal plants along with greenhouse gas emitting projects contributes to climate change.’”⁴⁹⁸

Environmentalists have highlighted the symbolic “significance” of this case insofar as it reflects a “growing national trend to require agencies and project developers to analyze GHG emissions as part of an EIS, and . . . the fact that the NEPA nexus is premised on federal financing of the proposed project.”⁴⁹⁹ This case also follows the successes realized as the result of prior lawsuits commenced against the companies of Texas energy provider TXU. These actions endeavored to

496. Michael Lufkin, *NEPA Lawsuit Seeks to Stop Federal Investment in New Coal-Fired Power Plants*, ENVTL. NEWS, Aug. 8, 2007, <http://www.martenlaw.com/news/?20070808-nepa-lawsuit>.

497. *Id.*

498. *Id.*

499. *Id.*; see also Press Release, End Mountaintop Removal Action and Resource Center, Mountaintop Advocates Open New Front in Fight Against Coal—Challenge Billion-Dollar Government Giveaways for not Considering Cost to the Mountains (Mar. 3, 2008), available at <http://www.ilovemountains.org/all/371> (discussing a lawsuit filed by the North Carolina-based Appalachian Voices and Canary Coalition, representing a host of different environmental extremist groups). The lawsuit alleges:

[T]he federal government shouldn't be in the business of subsidizing coal plants without knowing the true environmental costs—including impacts of ultra-destructive mountaintop removal coal mining. The Energy Policy Act of 2005 included \$1.65 billion in tax incentives for new coal plants, \$1 billion of which has been allocated to nine projects around the country.

....

Of the nine experimental coal facilities that have received tax incentives, none have conducted an environmental impact assessment (EIA) looking at the impact of coal on the environment—as required by the National Environmental Policy Act (NEPA). The nine facilities include a Duke Energy projects in Edwardsport, IN and in Rutherford and Cleveland Counties, NC; a Mississippi Power Company project; an E.ON U.S. & Louisville Gas and Electric project in Bedford, KY; a Carson Hydrogen Power project in Carson, CA; a TX Energy project in Longview, TX; a Tampa Electric project in Polk County, FL (that is currently delayed); and two anonymous coal gasification projects.

Id.; see generally About iLoveMountains.org, <http://www.ilovemountains.org/about>.

limit the number of clean coal builds within the State of Texas out of concern for emissions of GHGs as well as nitrous oxide, mercury, and sulfur dioxide.⁵⁰⁰ Perhaps, TXU's comments that "coal-gasification technology is still too unreliable for a massive investment" prompted and even justified environmental group and Texas regulator suspicions about the sincerity of company pledges—"that 100 percent of the regulated pollutants emitted by new plants will be offset by technology upgrades in older facilities."⁵⁰¹ In fact, the *political* furor surrounding the Texas lawsuits, including opposition generated by environmental groups such as the Sierra Club, Public Citizen, Environmental Defense, and the Natural Resources Defense Council and complemented by the opportunistic public statements made by the Democratic mayors of Dallas and Houston,⁵⁰² ultimately compelled TXU to restructure itself as a "green energy company" focusing more on nuclear and other "more preferred" renewable energy sources as a condition to its being purchased by a consortium of well-known U.S. venture capital (buy-out) groups.⁵⁰³

500. Two public interest groups, CleanCOALition and Robertson County: Our Land Our Lives, filed a lawsuit against Texas electricity provider TXU Corp. during December 2006 in the U.S. District Court for the Western District of Texas in Waco, Texas. They sought:

[T]o compel industry and regulators to comply with the standards for emission controls known as Best Available Control Technology (BACT).

....

The lawsuit alleges multiple violations of federal law and cites numerous failures of TXU to apply the BACT to reduce power plant emissions. Among other claims, the lawsuit challenges TXU's decision to use lignite as a fuel source for the Oak Grove plant. It also asserts TXU should have considered using integrated gasification combined cycle (IGCC) technology as a part of its emissions control determination.

TXU's Coal-Fired Oak Grove Plant Targeted in Lawsuit, Pegasus News (Dec. 3, 2006), <http://www.pegasusnews.com/news/2006/dec/03/txus-coal-fired-oak-grove-plant-targeted-lawsuit>. See also Marty Schladen, *Utilities Get Rule Change for Power Plants*, THE DAILY NEWS: GALVESTON COUNTY, Nov. 5, 2006, available at <http://news.galvestondailynews.com/story.lasso?ewcd=791ff6ae47e198f2>; Jaime S. Jordan, *Sierra Club Joins Coal Plant Lawsuit*, DALLAS BUS. J., Dec. 27, 2006, available at <http://dallas.bizjournals.com/dallas/stories/2006/12/25/daily16.html>.

501. Bret Schulte, *A Texas Mess Over Coal: Proposed Plants Have Stirred a Clean-Air Uproar*, U.S. NEWS & WORLD REP., Nov. 26, 2006, available at <http://www.usnews.com/usnews/news/articles/061126/4coal.htm>.

502. See Marc Gunther, *TXU Faces a Texas Coal Rush*, FORTUNE, Feb. 5, 2007, available at http://money.cnn.com/magazines/fortune/fortune_archive/2007/02/19/8400164/index.htm.

A \$10.4-billion-a-year energy company based in Dallas, TXU is staking its future on coal—the dirtiest of all fuels used to generate electricity. Last spring the company announced plans to build 11 new coal-fired power plants in Texas at a cost of nearly \$1 billion apiece. That has set off a firestorm of opposition—lawsuits, pickets, petitions, anti-TXU Web sites, lobbying at the state capitol, even a hunger strike.

Id.

503. See Press Release, Environmental Defense Fund, Pressure, Buyout Halts TXU Coal Buildout in Texas: Texas Pacific Group and Kohlberg Kravis Roberts & Co (KKR) Will Terminate Applications for 8 of 11 Proposed Coal Plants; Environmental Defense Brokers Deal for Safeguards, Climate Action (Feb. 26, 2007), available at <http://www.edf.org/content.cfm?contentID=5984>; see also *TXU: A Green Deal as Big as Texas: Environmental Defense Helps Usher In a New Era of Cleaner Energy*, ENVTL. DEFENSE FUND, Mar. 2, 2007, <http://www.edf.org/article.cfm?contentID=6025>.

Two top private equity firms . . . enlisted our help in a bold bid to acquire TXU Corporation, the state's huge electric utility. . . .

Unfortunately, more “public interest” lawsuits have since been launched by environmental extremist groups against State governments to compel the imposition of GHG regulations and other environmental sanctions consistent with the religious orthodoxy of the *extra*-WTO Precautionary Principle-based UN Kyoto Protocol. For example, Earthjustice and Environmental Integrity Project recently filed a petition with the U.S. EPA on behalf of Environmental Defense and Sierra Club, alleging:

Texas violates the Clean Air Act and its own State Implementation Plan through repeated weak permitting decisions concerning new coal plants and other large polluting facilities. . . . The petitioners request that the EPA use its authority to impose one or more of the following sanctions: prohibit construction of new stationary sources, such as large power plants or refineries; withhold highways funds; or implement reduction of offsets from other pollution sources in the state.⁵⁰⁴

The TXU and other cases appear to have provided environmental extremist organizations and even student groups with “artistic license” to further their cause by engaging in acts of “civil disobedience.” Through the use of protests, public disparagement campaigns, and physical trespass, these actors have endeavored to halt construction of those coal-fired plants that have thus far secured regulatory approvals.⁵⁰⁵ What is most disturbing about these legal and illegal grassroots initiatives, as the Mayor of Missoula, Montana and the Florida Public Service Commission had previously found out, is that they were encouraged overwhelmingly by current and former high-level U.S. politicians of predominantly one political persuasion.⁵⁰⁶ In the case of Montana and Florida, local popular doubts over the wisdom of going forward with new coal plant builds arose *as the result of* strident public opposition voiced (a “warning shot fired”) by U.S. Senate

As part of the landmark deal, the new buyers, Texas Pacific Group and Kohlberg Kravis Roberts & Co., agreed to withdraw applications for eight coal-fired power plants proposed in Texas and adopt an unprecedented set of environmental initiatives, including a pledge to support a mandatory cap on carbon emissions.

Id.

504. Press Release, Sierra Club, Lone Star Chapter, Environmentalists Challenge State’s Weak Adherence to Clean Air Act’s Permitting Program (Jan. 17, 2008), *available at* <http://texas.sierraclub.org/press/newsreleases/20080117.asp>.

505. *See, e.g.*, Liz Veazey, *NC Youth Stop Coal Plant Construction: 8 arrested!*, STUDENT ENVTL. ACTION COALITION, Apr. 1, 2008, *available at* <http://www.seac.org/node/296> (“Shortly after activists locked themselves to construction equipment, police arrived on the scene and used pain compliance holds and tazers to force them to unlock themselves. 8 young people were arrested. We’ve talked to one of them from jail and they seem to be ok.”).

506. *See* Steven Mufson, *Coal Rush Reverses, Power Firms Follow: Plans for New Plants Stalled by Growing Opposition*, WASH. POST (Sept. 4, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/03/AR2007090301119_pf.html.

Democratic Majority Leader Harry Reid⁵⁰⁷ while, in North Carolina, illegal student protests were triggered by statements made by Former Democratic Vice President Al Gore.⁵⁰⁸

D. Oceans Policy

1. State Bills and Legislation (2004-2007)

During October 2004, California Governor Schwarzenegger first announced a statewide Ocean Action Plan⁵⁰⁹ consisting of a series of newly enacted laws.⁵¹⁰ Chief among them, the California Ocean Protection Act (COPA)⁵¹¹ intended to

507.

Recently, proponents of coal-fired power plants acquired a new foe: Senate Majority Leader Harry M. Reid. In late July, Reid (D-Nev.) sent a letter to the chief executives of four power companies in which he vowed to “use every means at my disposal” to stop their plans to build three coal-fired plants in Nevada. Last month, after a speech in Reno, Reid said he was opposed to new coal-fired plants anywhere.

“There’s not a coal-fired plant in America that’s clean. They’re all dirty,” Reid told reporters after speaking at a conference on renewable energy. He said that the United States should turn to wind, solar and geothermal power in an effort to slow climate change. “Unless we do something quickly about global warming, we’re in trouble,” he said.

Reid’s opposition to coal plants is the latest in a series of new obstacles for power companies seeking to use the fuel to generate electricity. A combination of rising construction costs, state mandates for the use of renewable energy and lawsuits by environmental organizations have forced many utilities to drop or postpone coal projects this summer.

Id.

508.

This act follows on Al Gore’s comment in August that young people needed to get out and chain themselves to bulldozers at construction sites. So Al, when are you going to get arrested? We have to stop all new fossil fuel construction to even have a chance at meeting the needed reductions of emissions. We need everyone to step it up!

The act of civil disobedience is one of over 100 protests taking place around the world on what climate activists are calling Fossil Fools Day, a confrontational day of protest targeting companies responsible for runaway carbon dioxide emissions.

Veazey, *supra* note 505 (emphasis added).

509. CALI. RESOURCES AGENCY AND CALI. ENVT’L PROTECTION AGENCY, PROTECTING OUR OCEAN: CALIFORNIA’S ACTION STRATEGY (2004), http://www.resources.ca.gov/ocean/Cal_Ocean_Action_Strategy.pdf [hereinafter PROTECTING OUR OCEAN].

510. See Press Release, Office of the Governor of Cali., Governor Schwarzenegger Announces “Ocean Action Plan” (Oct. 18, 2004), available at <http://gov.ca.gov/press-release/2724/> (citing California legislation involved in the Ocean Action Plan); see, e.g., S. 1459, 2004 Leg., Reg. Sess. (Cal. 2004) (“Regulates and restricts bottom trawling in California’s waters.”); Assem. 471, 2004 Assem., Reg. Sess. (Cal. 2004) (“Prohibits a cruise ship from conducting onboard incineration within three miles of California’s shore.”); Assem. 2529, 2004 Assem., Reg. Sess. (Cal. 2004) (“Gives State Water Resources Control Board funding priority for grants to nonprofits and local governments to address discharges into marine managed areas”); S. 512, 2004 Leg., Reg. Sess. (Cal. 2004) (“Representative on the federal Pacific Fishery Management will be a balanced representation of interested parties including NGOs and marine scientists, not limited as formerly to fishing and industry interests.”).

511. See S. 1319, 2004 Leg., Reg. Sess. (Cal. 2004) (enacting into law the California Ocean Protection Act (COPA), creating the California Ocean Protection Council (OPC) to guide ocean policy

establish a U.S. national standard for the management of ocean and coastal resources. The plan's overall objectives are to: "[i]ncrease the abundance and diversity of California's oceans, bays, estuaries and coastal wetlands[; m]ake water in these bodies cleaner[; p]rovide a marine and estuarine environment that Californians can productively and safely enjoy[; and s]upport ocean dependent economic activities."⁵¹² In addition, "[i]t directs the assessment of the ocean's economic contribution to California and the nation[,] . . . develops a forward looking strategy for research, education, and technical advances and . . . improves the stewardship of ocean resources."⁵¹³ Furthermore, the action plan calls for the cabinet-level California Ocean Protection Council, created by COPA, to monitor California's interests in Precautionary Principle-informed international organizations, such as the International Maritime Organization, and international environmental treaties, such as the UN Law of the Sea Convention (UNCLOS), whose ratification by the U.S. Congress without adequate public review and investigation⁵¹⁴ Governor Schwarzenegger supports.⁵¹⁵ Interestingly, the action

and coastal protection, and creating a state trust fund for future legislative ocean protection appropriations).

512. Press Release, Office of the Governor of Cali., *supra* note 510.

513. *Id.*

514. PROTECTING OUR OCEAN, *supra* note 509, at 12; see Lawrence Kogan, Commentary, *LOST and Found*, WASH. TIMES, Aug. 8, 2007, at A15 (examining trade relationships between the United States and the European Union and the Law of the Sea Treaty (LOST)); Lawrence Kogan, Letter to the Editor, *Vetting LOST*, WASH. TIMES, Aug. 11, 2007, available at <http://www.washingtontimes.com/apps/pbcs.dll/article?AID=/20070811/EDITORIAL/108110016> (responding to a critique of the author's previously published commentary on the Law of the Sea Treaty); see also Lawrence A. Kogan, *U.S. Military Review of the Law of the Sea Treaty Lacking*, ITSSD JOURNAL, Oct. 2007, http://itssd.blogspot.com/2007/10/us-military-review-of-law-of-sea-treaty_04.html; Lawrence A. Kogan, *Myths and Realities Concerning UN Law of the Sea Treaty LOST Does Incorporate Europe's contra-WTO Precautionary Principle!*, ITSSD JOURNAL, Oct. 2007, http://itssd.blogspot.com/2007/10/myths-and-realities-concerning-un-law_06.html (discussing the application of the Precautionary Principle in the Law of the Sea Treaty pending before the U.S. Senate); Lawrence A. Kogan *Myths & Realities #4 Concerning UN Law of the Sea Treaty; LOST, Land-Based Activities & Sources of Marine Pollution, and the Precautionary Principle*, ITSSD JOURNAL, Oct. 17, 2007, http://itssd.blogspot.com/2007/10/myths-realities-4-concerning-un-law-of_5097.html (discussing the potential use of the Law of the Sea Treaty by foreign governments to challenge U.S. regulations related to pollution in marine environments); Lawrence A. Kogan, *Myth & Realities # 2 Concerning UN Law of the Sea Treaty; U.S. Naval Freedom of Navigation and Avoidance of LOST Tribunal Jurisdiction, Despite Europe's Aggressive Use of the Precautionary Principle?*, ITSSD JOURNAL, Oct. 2007, at n.12-17, http://itssd.blogspot.com/2007/10/myth-realities-2-concerning-un-law-of_31.html (discussing the relationship between the Law of the Sea Treaty and Precautionary Principle-based wildlife and nature treaties); Lawrence A. Kogan, *UNCLOS Alchemy*, ITSSD JOURNAL, Nov. 2007, <http://itssd.blogspot.com/2007/11/unclos-alchemy.html> (discussing the economic, legal, and security related costs to the U.S. military in the context of the Law of the Sea Treaty).

515. PROTECTING OUR OCEAN, *supra* 509, at v, 12. Action two under the governance provisions of the California Ocean Action Strategy provides that:

The California Ocean Council will evaluate the comprehensive or "big picture" needs of California ocean and coastal management and create a strategic vision for the future. . . . Some of the major actions of the California Ocean Council will include the following:

. . . .

Monitor California's interests regarding international treaties (such as the Law of the Sea), . . . and its relationships with international organizations such as the International Maritime Organization regarding ocean and coastal management needs. California has

plan expressly references the Precautionary Principle-based environmental and marine laws of the European Union as providing a model of the high level of ocean stewardship to which the State of California aspires.⁵¹⁶

Schwarzenegger followed up this agenda with an announcement, in October 2007, that he had enacted several additional ocean resource protection laws.⁵¹⁷ The laws “will maintain and improve the quality of California’s marine environment,

interests in international treaties and organizations for management issues that directly or indirectly impact the state. The Governor has expressed his support for the ratification of the Law of the Sea Treaty, for example, which would allow the United States to be fully engaged in management and commerce matters at the international level. California has specifically benefited from intervention in international processes just off its coast. California worked with the U.S. Coast Guard, the National Marine Sanctuary Program, and the International Maritime Organization (IMO) to alter the location and configuration of the vessel traffic scheme for ship traffic off the central California coast to increase the safety of these operations. The result is that vessels with the potential to spill oil or other hazardous cargoes are now routed farther off the coast to reduce the risk of groundings, to lessen the chance of spilled oil reaching shore, and to provide more response time for spills that do occur.

Id.

516. *Id.* at 12. The policy of the state of California is expressed in the California Ocean Action Strategy as follows:

California needs to continue working with these and other organizations such as the European Union (EU) to improve the water quality of the ocean by reducing vessel waste. The EU prohibits the dumping of sewage and effluents in the waters of all its member nations and requires all ships to use waste reception facilities in port. All EU member nations have installed waste reception facilities to handle all of the vessels that call upon their ports. In addition, the nations have developed various methods to pay for the construction and operation of their facilities and a disincentive fine process for vessels that do not use the waste reception facilities. The individual countries have an inspection process to verify wastes contained aboard the vessels, vessel’s records of waste disposal, and a facilities records cross-check procedure. California does not have reception facilities capable of handling ship-generated sewage and wastewater; however, it can learn from the EU how to fund construction of reception facilities and vessel inspection programs. The IMO has international sewage regulations that become effective in 2004. These regulations require the mandatory use of port reception facilities if they are available. This and emerging ocean management issues in the Exclusive Economic Zone and along our border with Mexico will necessitate ongoing attention to international issues.

Id. (emphasis added).

517. *See, e.g.*, Assem. 1056, 2007 Assem., Reg. Sess. (Cal. 2007) (“Authorizes the Ocean Protection Council to establish a science advisory team to identify scientific research priorities necessary to protect coastal water and ocean ecosystems.”); Assem. 1280, 2007 Assem., Reg. Sess. (Cal. 2007) (expanding “California Ocean Protection Trust Fund to include the development of fisheries management plans and authorizes fund expenditures for community-based management and allocation strategies that would increase incentives for ecosystem improvement”); Assem. 740, 2007 Assem., Reg. Sess. (Cal. 2007) (“Expands the marine invasive species program by requiring specified in water cleaning and record keeping for vessels that visit a California port or place, and requires State Lands Commission to develop regulations governing the management of hull fouling on vessels.”); Assem. 1396, 2007 Assem., Reg. Sess. (Cal. 2007) (requiring the Department of Transportation, consistent with existing law, to annually identify excess coastal zone property and provide the information to specified agencies, including the State Coastal Conservancy; “[e]xisting law authorizes the Legislature to transfer excess specified coastal zone property to specified agencies, including the State Coastal Conservancy”).

promote ocean and coastal research, further develop fisheries management plans and guard against the threat of aquatic invasive species.”⁵¹⁸

It is more than coincidental that California’s Ocean Action Plan supports and elaborates upon⁵¹⁹ both the U.S. Commission on Ocean Policy’s Preliminary⁵²⁰ and Final Reports⁵²¹ and the President’s subsequently released U.S. Ocean Action Plan,⁵²² each of which call for U.S. accession to the UN Law of the Sea Convention.⁵²³ Significantly, both the preliminary and final commission reports make an effort to distinguish between the Precautionary/Adaptive Ecosystem-based Management Approach and the *extra*-WTO Precautionary Principle and conclude with a recommendation that the President’s “National Ocean Council (NOC)

518. Press Release, Office of the Governor of Cali., Governor Schwarzenegger Signs Bills to Protect California’s Ocean Resources (Oct. 10, 2007), <http://gov.ca.gov/index.php/?/press-release/7665>.

519. See Arnold Schwarzenegger, Comments from the State of California on the Preliminary Report of the U.S. Commission on Ocean Policy (2004), available at http://www.oceancommission.gov/documents/gov_comments/California.pdf (discussing how U.S. leadership in international law can be restored by U.S. ratification of the UNCLOS). “[W]e support the recommendation that the Law of the Sea Convention be ratified by the U.S.” *Id.* at 2.

520. U.S. COMM’N ON OCEAN POLICY, PRELIMINARY REPORT OF THE U.S. COMMISSION ON OCEAN POLICY: GOVERNOR’S DRAFT (2004), available at http://www.oceancommission.gov/documents/prelimreport/00_complete_prelim_report.pdf.

521. U.S. COMM’N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT (2004), available at http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf [hereinafter OCEAN BLUEPRINT]. The Final Report was issued to the President and the Congress on September 20, 2004, triggering the ninety-day (legislatively mandated) response window for the White House. On December 17, 2004, two days before the Commission was scheduled to expire, pursuant to the Oceans Act of 2000 (P.L. 106-256), the White House issued Presidential Executive Order 133663. The Executive Order established a cabinet-level Committee on Ocean Policy (COP), which then released the U.S. Ocean Action Plan (OAP). See generally U.S. Commission on Ocean Policy, About the Commission, <http://www.oceancommission.gov/commission/welcome.html> (last visited May 14, 2008); Press Statement, U.S. Commission on Ocean Policy, Chairman of U.S. Commission on Ocean Policy Commends President Bush on Initial Step toward a National Ocean Policy (Dec. 17, 2004), available at http://www.oceancommission.gov/newsnotices/dec17_04.html.

522. COMM. ON OCEAN POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, U.S. OCEAN ACTION PLAN: THE BUSH ADMINISTRATION’S RESPONSE TO THE U.S. COMMISSION ON OCEAN POLICY, available at <http://ocean.ceq.gov/actionplan.pdf> (last visited May 14, 2008) [hereinafter U.S. OCEAN ACTION PLAN].

523.

There are many compelling reasons for the United States to expeditiously accede to the Convention. International bodies established under the LOS Convention are in the process of making decisions that directly affect important U.S. interests. . . .

The Convention will no doubt continue to evolve. In 2004, the Convention will be open for amendment by its parties for the first time. If the United States is to ensure that its interests as a maritime power and coastal state are protected, it must participate in this process. The best way to do that is to become a party to the Convention, and thereby gain the right to place U.S. representatives on its decision-making bodies. Participation in the Convention would also enhance America’s prestige and credibility as a leader on global ocean issues.

OCEAN BLUEPRINT, *supra* note 521, at 444-45.

As a matter of national security, economic self-interest, and international leadership, the Bush Administration is strongly committed to U.S. accession to the UN Convention on the Law of the Sea. The Administration urges Congress to provide advice and consent to this treaty as early as possible in the 109th Congress.

U.S. OCEAN ACTION PLAN, *supra* note 522, at 5.

should adopt the principle of ecosystem-based management and . . . [a]s part of this effort, the NOC should . . . coordinate the development of procedures for the practical application of *the precautionary approach* and adaptive management.”⁵²⁴

The *precautionary principle* has been proposed by some parties as a touchstone for managers faced with uncertain scientific information. In its strictest formulation, the precautionary principle states that when the potentially adverse effects of a proposed activity are not fully understood, the activity should not be allowed to proceed. While this may appear sensible at first glance, its application could lead to extreme and often undesirable results. Because scientific information can never fully explain and predict all impacts, strict adoption of the precautionary principle would prevent most, if not all, activities from proceeding.

In contrast to the precautionary principle, the Commission recommends adoption of a more balanced *precautionary approach* that weighs the level of scientific uncertainty and the potential risk of damage as part of every management decision. . . . To ensure the sustainability of ecosystems . . . decision makers should follow a balanced precautionary approach, applying judicious and responsible management practices based on the best available science and on proactive, rather than reactive, policies. Where threats of serious or irreversible damage exist, lack of full scientific certainty shall not be used as a justification for postponing action to prevent environmental degradation.⁵²⁵

That the U.S. Commission on Ocean Policy went to the trouble to emphasize this distinction reflects only the *current* political reality in Washington; namely, that the White House has been occupied since 2001 by a Republican presidential administration that spanned the entire term of the U.S. Commission on Ocean Policy. As a forthcoming law review article from this author will reveal, the focus of the two Bush administrations, like that of the Reagan administrations before it, upon the use of scientific risk assessment and economic cost-benefit analysis, as important objective benchmarks that serve to limit the promulgation of unnecessarily burdensome and costly environmental and health legislation and regulation, may be contrasted with the practices of the two Clinton Democratic administrations, which instead relied upon hazard assessment and economic cost-benefit analysis to emphasize the legitimate public benefits that may be expected from enacting stringent environmental and health legislative and regulatory protections, with a lesser regard for the costs and burdens such rules imposed on economic actors.⁵²⁶ It may be argued that these two different conceptions concerning the role of risk versus hazard assessment and costs versus benefits

524. GOVERNOR’S DRAFT, *supra* note 520, at 49 (emphasis altered); OCEAN BLUEPRINT, *supra* note 521, at 80, 481 (emphasis added).

525. GOVERNOR’S DRAFT, *supra* note 520, at 35-36; OCEAN BLUEPRINT, *supra* note 521, at 65.

526. See Lawrence A. Kogan, *Regulate, Tax & Spend: The Law of the Sea Convention Unveiled* (forthcoming 2008).

roughly corresponds to the distinction between the WTO-sanctioned Precautionary Approach and the *extra*-WTO Precautionary Principle.⁵²⁷ Hence, the cost-benefit calculus used to determine the stringency and extent of U.S. environmental legislative and/or regulatory changes that might be necessary to implement the recommendations contained in the final report will likely depend on which political party (Republican or Democrat) wins the White House and/or retains a majority in the Congress.

With this caveat in mind, it is important, furthermore, to emphasize the apparent biased tone of the final Oceans Commission Report, which strongly suggests such a politics-driven outcome. In particular, it is quite striking how, in Chapter 2, the report starkly contrasts the era of international environmental activism and multinational environmental cooperation between 1969 and 1980 with that of the Reagan era, which was marked by policy themes of limited federal government, strengthened national defense, and expanded free enterprise that allegedly “changed the tenor of American ocean policy internationally.” The report then contrasts these periods with that of the 1990s (i.e., the Clinton era) during which time a decade of divided U.S. government prevented a coherent national ocean policy from ever evolving, despite the United Nations Conference on Environment and Development having spawned a number of international environmental agreements.⁵²⁸

Moreover, it is critical to understand the potentially expansive scope of future legislation and regulation related to a new emerging U.S. national oceans policy. Its breadth can be quite considerable given the capacious definition of the term “coastal areas,” which includes “coastal states,” “coastal zone counties,” “coastal watershed counties,” and “the nearshore.”⁵²⁹ These designations are consistent also with the broad definition given to the terms “ecosystem” and “ecosystem management.” According to the report, “Activities that affect the oceans and coasts may take place far inland. For example, *land-based sources of pollution*, such as runoff from farms and city streets, are a significant source of the problems that plague marine ecosystems.”⁵³⁰ Also, notable are the report’s eighty-nine references to the term “climate change.” If this were not convincing enough, discerning readers need only peruse H.R. 21, entitled the Oceans Conservation, Education, and National Strategy for the 21st Century Act, whose purpose is to establish a national policy to protect, maintain, and restore the health of marine ecosystems and to require that federal agencies administer U.S. policies and laws accordingly.⁵³¹ The bill expressly incorporates what appears to be the Precautionary Approach as a

527. See, e.g., Lawrence A. Kogan, *World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes*, 2 GLOBAL TRADE AND CUSTOMS J. 149 (2007), available at http://www.itssd.org/Publications/GTCJ_04-offprints_Kogan%5B2%5D.pdf.

528. See OCEAN BLUEPRINT, *supra* note 521, at 51-54.

529. *Id.* at 34; see also NAT’L OCEANIC AND ATMOSPHERIC ADMIN., NOAA’S LIST OF COASTAL COUNTIES FOR THE BUREAU OF THE CENSUS STATISTICAL ABSTRACT SERIES, available at http://www.census.gov/geo/landview/lv6help/coastal_cty.pdf.

530. OCEAN BLUEPRINT, *supra* note 521, at 63 (emphasis added).

531. H.R. 21, 110th Cong. § 101 (2007).

national standard for addressing circumstances where there is “incomplete or inconclusive information as to the effects of a covered action on United States ocean waters or ocean resources.”⁵³² Indeed, all of these disclosures provide further confirmation that U.S. ratification of the UNCLOS is likely to result in more stringent, costly, and non-science-based federal, state, and local environmental legislation and regulation of coastal, inland water, and adjacent airways here at home.⁵³³

E. Implementation of the Precautionary Principle at the City and State Level

Although the *extra*-WTO Precautionary Principle has not been expressly and directly incorporated within most of the state legislative and executive measures discussed thus far, it has nevertheless been incorporated “in spirit” and indirectly by reference to hazard rather than risk-based assessment principles and through the omission, in most cases, of an economic cost-benefit analysis by administrative agencies prior to adoption of such measures. Some U.S. municipalities, however, have expressly adopted the Precautionary Principle as governing environmental law and a guiding environmental philosophy in connection to government economic activities taking place within their jurisdictions. For example, a March 17, 2006 letter addressed by the senior officer of the United Nations Global Compact Office to the director of the San Francisco City and County Department of Environment reveals that, in exchange for the city’s offer to provide the UN Global Compact Office space for a West Coast branch office in the San Francisco Department of Environment, the UN agreed to help the city implement the Precautionary Principle.⁵³⁴

I wish to also make clear—as quid pro quo for the initial pro-bono space—that I would be delighted to contribute some of my time to support the efforts and programs of your department, as well as assisting the City with implementation related to its commitment to the Global Compact.⁵³⁵

This is significant because following the Precautionary Principle “is one of the Global Compact’s ten principles in the areas of human rights, working conditions, environmental stewardship and anti-corruption.”⁵³⁶ As the discussion of municipal

532. *Id.* §§ 4(23), 101(b)(2)(C).

533. *See, e.g.,* Kogan, *Myths & Realities #4*, *supra* note 514; *see also* Lawrence A. Kogan, *What Goes Around, Comes Around: How UNCLOS Ratification Will Herald the Precautionary Principle as U.S. Law*, 7 SANTA CLARA J. INT’L L. (forthcoming 2008) (discussing the linkages between the environmental requirements of the UNCLOS and their impact on various U.S. federal laws).

534. Letter from Gavin Powers, Senior Officer, United Nations Global Compact Office, to Jared Blumenfeld, Director, S.F. City and County Dep’t of Env’t (Mar. 17, 2006), <http://web.sfgov.org/site/uploadedfiles/sfenvironment/meetings/coe/supporting/2006/UNLetterJaredBlumenfeld.pdf>.

535. *Id.*

536. *Id.*

actions will show, San Francisco is not alone in seeking to explicitly adopt the extra-WTO Precautionary Principle as a governing strategy.

Cities and counties on the West Coast have been the prime movers in adopting the extra-WTO Precautionary Principle. In particular, the jurisdictions in and around San Francisco, Portland, and Seattle have pioneered the enactment of the extra-WTO Precautionary Principle as a governing philosophy. In July 2003, San Francisco amended the city and county municipal code, adding the Precautionary Principle as Chapter 1 of the municipal Environmental Code and requesting that the municipal Planning Commission adopt the extra-WTO Precautionary Principle.⁵³⁷ Since that time, San Francisco has adopted five separate ordinances and resolutions that impose the extra-WTO Precautionary Principle on several areas of municipal governance. In June 2005, the city enacted the Precautionary Purchasing Ordinance, which amended the municipal Environment Code to reflect a preference in municipal product procurement for those products that “reduce the negative impact on human health and the environment.”⁵³⁸ Following enactment of the Precautionary Purchasing Ordinance, the city Department of the Environment promulgated regulations to implement the ordinance.⁵³⁹ These regulations established public participation guidelines for the Precautionary Purchasing Ordinance,⁵⁴⁰ as well as created an Approved Alternates List for: (1) products covered in the Federal Comprehensive Procurement Guidelines other than printing and writing paper products, (2) products not listed in the Federal Comprehensive Procurement Guidelines, (3) batteries, and (4) vehicle fuel.⁵⁴¹ These actions were followed in 2006 by the adoption of two additional resolutions: in January 2006, a resolution revising the Reduced Risk Pesticides List for the city’s Integrated Pest Management Program⁵⁴² and, in March 2006, the addition of several categories to the Precautionary Purchasing Ordinance that was adopted in 2003.⁵⁴³

537. San Francisco, Cal., City and County Municipal Ordinance 171-03 (adopted June 24, 2003), available at <http://sfgov.org/site/uploadedfiles/bdsupvrs/ordinances03/o0171-03.pdf>.

538. San Francisco, Cal., City and County Precautionary Purchasing Ordinance 115-05 (adopted June 17, 2005), available at <http://www.municode.com/content/4201/14134/HTML/ch002.html>.

539. San Francisco, Cal., Regulation Establishing Public Participation Guidelines for Implementation of the Precautionary Purchasing Ordinance, SFE 05-02-PPO (Dep’t of Env’t Sept. 20, 2005), available at <http://www.ci.sf.ca.us/site/uploadedfiles/sfenvironment/meetings/coe/supporting/2005/RegulationSFE2005-02-PPOPublic%20ParticFINAL.doc> [hereinafter San Francisco Reg. #2]; San Francisco, Cal., Regulation Adopting and Approved Alternatives List, SFE-05-01-PPO (Dep’t of Env’t July 18, 2005), available at <http://www.ci.sf.ca.us/site/uploadedfiles/sfenvironment/meetings/coe/supporting/2005/RegulationSFE2005-01-PPOPublic%20ParticFINAL.doc> [hereinafter San Francisco Reg. #1].

540. See San Francisco Reg. #2, *supra* note 539 (providing for meaningful public input in implementation of the Precautionary Purchasing Ordinance).

541.

[The] regulations set forth the scope and requirements pertaining to each product category listed above, and are subject to the requirements of the Ordinance, including the definitions, requirements pertaining to waivers, and enforcement mechanisms set forth in the Ordinance. The regulations do not duplicate the Ordinance, and must be read together with [it].

San Francisco Reg. #1, *supra* note 539, at § C.

542. See San Francisco, Cal., Res. 003-06-COE (Jan. 24, 2006), available at <http://web.sfgov.org/site/uploadedfiles/sfenvironment/meetings/coe/supporting/2006/Res003-06-COE RevisedReducedRiskPesticidesList2006.pdf> (adopting a revised reduced-risk pesticides list); see also

The machinations in San Francisco were not lost on the sympathetic municipalities surrounding the city. Since 2003, the cities of Oakland, Berkeley, and Palo Alto, and Marin and Mendocino Counties, all have adopted or proposed ordinances implementing the extra-WTO Precautionary Principle. The Berkeley City Council resolved in 2003 to develop a Precautionary Principle Ordinance and Environmentally Friendly Purchasing Program within a year.⁵⁴⁴ In August 2004, the city approved a resolution enacting the Environmentally Friendly Purchasing Program based on the Precautionary Principle.⁵⁴⁵ Explicit adoption of the extra-WTO Precautionary Principle into the city's Municipal Code occurred in March 2006.⁵⁴⁶ In 2005, Palo Alto adopted the Draft Zero Waste Strategic Plan Resolution based on the extra-WTO Precautionary Principle.⁵⁴⁷ A year later, Oakland enacted a similar resolution, creating a Zero Waste Goal by 2020 and commissioning the development of a Zero Waste Strategic Plan that is likely to draw heavily on the extra-WTO Precautionary Principle.⁵⁴⁸ Marin County adopted

San Francisco Pesticide List, *supra* note 403 (discussing the list of pesticide products approved for use under San Francisco's Integrated Pest Management Ordinance).

543. San Francisco, Cal., Resolution Adopting the Targeted Product Categories List, 007-07-COE (Mar. 28, 2006); *see also* San Francisco, Cal., Commission on the Environment, Regular Meeting Approved Minutes (Mar. 28, 2006), *available at* http://sfgov.org/site/sfenvironment_page.asp?id=38550 (presenting the minutes of an informational presentation adopting the list of targeted product categories); Targeted Product Categories for Environmentally Preferable Purchasing, 2006-2008, *available at* http://web.sfgov.org/site/uploadedfiles/sfenvironment/meetings/coe/supporting/2006/PPO-TPC_final_summary_COE_version.pdf (identifying the justifications and environmental and health issues for products purchased by the city of San Francisco); Environmental & Health Criteria for Scoring Targeted Product Categories (Mar. 21, 2006), *available at* <http://web.sfgov.org/site/uploadedfiles/sfenvironment/meetings/coe/supporting/2006/EnvHlthCriteriaforScoringProdCategories.pdf> (outlining the health, environmental, and overall desirability criteria of products to be purchased by San Francisco).

544. *See* Berkeley, Cal., Res. 62,259 N.S. (Oct. 14, 2003), *available at* http://www.takingprecaution.org/docs/101403_berkeley_resolution.pdf (adopting by resolution a Precautionary Principle program).

545. *See* Berkeley, Cal., Implementing Council Resolution No. 62,259 N.S. (Oct. 14, 2003), *available at* http://www.besafenet.com/ppc/docs/purchasing/PU_BPP.pdf (supporting the precautionary principle through implementation of a preferable purchasing policy).

546. BERKELEY, CAL., MUN. CODE ch. 12.29 (2006), *available at* <http://www.ci.berkeley.ca.us/bmc/BMC-part1-T1-22--091807.pdf>; Science & Environmental Health Network, Berkeley City Council Passes Precautionary Principle Ordinance, http://www.sehn.org/berkeley_ordinance.html.

547. City Council, City of Palo Alto, Cal., Minutes of Special Meeting 99-411 to -412 (Oct. 17, 2005), <http://www.cityofpaloalto.org/civica/filebank/blobdload.asp?BlobID=2971> (noting the adoption of the Resolution of the Council of the City of Palo Alto Setting Waste Reduction and Zero Waste Goals and Approving the Zero Waste Strategic Plan); *see also* GARY LISS & ASSOCIATES, PALO ALTO ZERO WASTE STRATEGIC PLAN 44, 46 (2005), *available at* <http://www.cityofpaloalto.org/civica/filebank/blobdload.asp?BlobID=7100> (discussing the economic impact of the city's Zero Waste Strategic Plan).

548. Oakland, Cal., Res. 79774 (Mar. 7, 2006), *available at* <http://clerkwebsvr1.oaklandnet.com/attachments/13137.pdf>; *see also* PUBLIC WORKS AGENCY, OAKLAND, CA., REPORT TO THE CITY COUNCIL RECOMMENDING ADOPTION OF THE ZERO WASTE GOAL AND THE CREATION OF A ZERO WASTE STRATEGIC PLAN TO ACHIEVE THE GOAL (2006), <http://clerkwebsvr1.oaklandnet.com/attachments/12914.pdf> (discussing the key issues surrounding and potential impact of adopting a Zero Waste policy).

a resolution in 2004 for a “wide variety of programs.”⁵⁴⁹ The Mendocino County Board of Supervisors followed suit in June 2006.⁵⁵⁰ Lastly, the California State Bar, during its October 2006 Environmental Law Conference, convened a panel discussion on “The ‘Precautionary Principle’ and the Future of Risk Regulation.”⁵⁵¹ No other municipality has considered an explicit adoption of the Precautionary Principle.⁵⁵²

Outside of the San Francisco Bay Area, the Precautionary Principle has been slow to catch on. It began migrating up the Pacific Coast, first to Oregon in 2004, when the Portland City Council and Multnomah County adopted the Precautionary Principle in the development of a new Toxics Reduction Strategy.⁵⁵³ In 2006, the Toxics Reduction Strategy, consistent with the Precautionary Principle, was adopted by the Portland City Council.⁵⁵⁴ Seattle also adopted the Precautionary Principle as a governing environmental strategy in January 2005 as part of the city’s “Comprehensive Plan Towards a Sustainable Seattle.”⁵⁵⁵ Furthermore, during February 2006, the Washington State Public Health Association, the leading advocacy organization for public health in Washington State, adopted a resolution endorsing the Precautionary Principle as a public health tool to prevent harm from

549. See Marin, Cal., Res. 2004-108 (Oct. 5, 2004), available at <http://www.sehn.org/rtdocs/MarinCounty.doc>.

550. Mendocino County, Cal., Precautionary Principle Policy—Policy #43 (June 2006), <http://environmentalcommons.org/mendoprecaution/MendocinoPrecautionaryPolicy.pdf>; see also Science & Env’tl. Health Network, Mendocino County Supervisors Adopt Precautionary Principle (Apr. 3, 2006), <http://www.sehn.org/pdf/mendo2006.pdf> (displaying the full text of the county resolution).

551. See Environmental Law Conference, *supra* note 164 (outlining the topics and schedule of the Environmental Law Conference at Yosemite).

552. Political activists in Georgia have drafted a model Precautionary Principle ordinance for enactment by local governments in 2004, but thus far have had no success in getting it adopted. See Implementing the Precautionary Principle: A Tool for Georgia’s Local Governments, Model Precautionary Principle Ordinance for Georgia’s Local Governments, available at <http://www.eco-act.org/PPOrdinance.pdf> (last visited June 14, 2008) (providing a basis for future legislative efforts to implement the precautionary principle in Georgia); EMILY FRANZEN & LAURIE FOWLER, IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: A TOOL FOR GEORGIA’S LOCAL GOVERNMENTS (2004), available at <http://www.eco-act.org/PPBackground.pdf> (outlining previous efforts in other jurisdictions to implement the precautionary principle).

553. Multnomah County, Or. Resolution 04-140: Recognizing National Pollution Week (Sept. 23, 2004), available at <http://www2.co.multnomah.or.us/jsp/Public/EntryPoint?ct=f81cdf87476cc010VgnVCM1000003bc614acRCRD>.

554. Multnomah County, Or., Resolution 06-073: Adopting the Toxics Reduction Strategy (May 11, 2006), available at http://www2.co.multnomah.or.us/County_Management/Sustainability/toxics/Toxics%20Reduction%20Strategy%20resolution%205-06.pdf; see also MOLLY CHIDSEY ET AL., CITY OF PORTLAND & MULTNOMAH COUNTY, TOXICS REDUCTION STRATEGY (2006), available at <http://www.oregon-health.org/assets/Precaution/MultCo-Portland%20Toxics%20Reduction%20Strategy%202006.pdf> (outlining a comprehensive plan including recommendations and implementation strategy for reducing environmental toxins in Portland and Multnomah County).

555. See DEP’T OF PLANNING & DEV., CITY OF SEATTLE, COMPREHENSIVE PLAN: TOWARD A SUSTAINABLE SEATTLE 357 (2005), available at http://www.seattle.gov/DPD/stellent/groups/pan/@pan/@plan/@proj/documents/Web_Informational/cos_004504.pdf (adopting the Precautionary Principle as part of the city’s overall long-term development plans).

PBTs. In addition, the resolution “endorses the Precautionary Principle as a cornerstone of our preventive approach to public health in Washington State.”⁵⁵⁶

While no state to date has adopted the Precautionary Principle legislatively, Hawaii, New Mexico, and New York have proposed doing so. In 2004, both the Hawaiian Senate and House of Representatives introduced resolutions requesting study of the Precautionary Principle for adoption by the state legislature and urging state departments and agencies to adopt the Precautionary Principle in environmental policy.⁵⁵⁷ In 2005, New York considered bills that would have adopted the Precautionary Principle as state policy.⁵⁵⁸ That same year, the New Mexico Legislative Health and Services Committee requested that the State Department of Health create a task force to develop a long-term plan to implement the Precautionary Principle in state departments.⁵⁵⁹

CONCLUSION

It bears repeating that the purpose of this article is to ensure informed, common-sense-based lawmaking and regulatory action within U.S. state and local legislatures in the face of an all-out regulatory invasion by European “property-snatchers.”⁵⁶⁰ Indeed, European officials learned in the art of centralized planning are actively proselytizing U.S. governors and state and local legislators as they comb the American countryside in search of regulatory converts.

In particular, European Commission and Parliament officials, European Union national government officials, and a number of American politicians and activist groups are making a concerted effort to incorporate European health and environmental norms into American legal and business practices. Chief among these norms is the “standard-of-proof diminishing,” “burden-of-proof-reversing,” “guilty-until-proven-innocent,” “I fear, therefore I shall ban,” “hazard (not risk)-based” *extra-WTO Precautionary Principle*. European governments rely religiously upon this utopian nostrum of environment-centric sustainable development to correct what they believe are all the “market failures” that have resulted in humankind’s overuse of public environmental goods and precipitated

556. Wash. State Pub. Health Ass’n, Endorsing the Precautionary Principle as a Public Health Tool for Preventing Harm from Persistent Bioaccumulative Toxic Chemicals (PBTs), Resolution 06-02, available at http://www.wspaha.org/Resolution_06-02.pdf. Interestingly, the resolution was originally submitted for consideration in May 2005 with a much broader purpose in mind. See Wash. State Pub. Health Ass’n, Resolution for Protecting Public Health by Adopting the Precautionary Principle as an Approach to Decision Making (May 23, 2005), available at <http://washington.chenw.org/pdfs/WSPHAResolutionPP-05-23.pdf> (endorsing the Precautionary Principle as the basis for human and environmental health and encouraging statewide implementation of the principle).

557. See H.R. Con. Res. 49, 22d Leg., Reg. Sess. (Haw. 2004) (requesting that the Legislative Reference Bureau conduct a review that examines the San Francisco Precautionary Principle ordinance); S. Res. 86, 22d Leg., Reg. Sess. (Haw. 2004) (urging State departments and agencies to implement the Precautionary Principle policy framework for environmental protection in conducting the state’s affairs). 558. S. 4545, 2005 Leg., 228th Sess. (N.Y. 2005); Assem. 7526, 2005 Leg., 228th Sess. (N.Y. 2005).

559. S.J.M 54, 47th Leg., 1st Sess. (N.M. 2005); H.J.M. 24, 47th Leg., 1st Sess., (N.M. 2005).

560. See ITSSD, INVASION OF THE PROPERTY SNATCHERS (2006), <http://www.itssd.org/Publications/Invasion.pdf> (describing the increasing impact of communal conceptions of property in America and on American lawmakers in particular).

the serious global environmental crisis (i.e., global warming) that now confronts us.⁵⁶¹

In addition, European governments are desperately trying, with multiple intergovernmental and industry standards, to rapidly expand the body of international health and environmental law that calls for application of the *extra-WTO* Precautionary Principle. If they succeed, it will demonstrate to the many nations party to the growing dynamic network of UN multilateral environmental treaties that they, too, must adopt expressly or otherwise incorporate indirectly the *extra-WTO* Precautionary Principle into their national and provincial laws and regulations. Furthermore, WTO Director General Pascal Lamy himself has argued in favor of WTO reforms that would essentially permit national social and environmental preferences for certain types of goods, processes, and services (i.e., “public goods and services”) to be governed by the *extra-WTO* Precautionary Principle and, thus, escape strict scrutiny under WTO trade rules—i.e., to fall outside the need for trade liberalization.⁵⁶² Arguably, if WTO members, including

561. Mendez argues that:

The pattern of life on earth has changed radically and irreversibly in this century, and our institutions have not kept pace. Like the oceans themselves, the challenges we now face transcend national boundaries, and yet our laws and funding mechanisms, for the most part, operate at the national level.

A shift, however, seems to be taking place.

Ruben P. Mendez, *Ocean Governance and Development: The Question of Financing*, in OCEAN GOVERNANCE: SUSTAINABLE DEVELOPMENT OF THE SEAS (Peter Bautista Payoyo ed., 1994).

The main threats to the long-term sustainability of our civilisation are *energy and climate change*. I would like to recall that less than two weeks ago the Heads of State and Government of the 27 EU Member States endorsed a very ambitious plan for an *EU integrated climate change and energy agenda*. Taxation is one of the instruments that come into play in this context. The need to enhance the sustainability of our economies *arises from the failure of market forces* to address properly the entire costs and benefits of certain activities. Since they are not reflected in the market price we do not take account of them in our consumer and production decisions.

László Kovács, Taxation for Sustainable Development, Opening Speech before the Brussels Tax Forum (Mar. 19, 2007), available at http://ec.europa.eu/taxation_customs/resources/documents/common/about/speeches/kovacs_taxforum_190307.pdf.

562.

The collective preferences argument, set out by Pascal Lamy when he was Directorate General Trade commissioner, isolates some objective reasons not to liberalise fully on social choice grounds (Lamy, 2004). Even if the argument is not fully expounded there, *it clearly asserts that the expansion of trade discipline to domestic policies jeopardises the “social fabric” by restricting legitimate choices a government may wish to embrace so as to satisfy its citizens’ preferences on societal issues. Essential services provision, precautionary environmental and health regulations, protection against child or forced labour product or services imports, appeared during the various public presentations of the argument as possible illustrations.*

Because there is no science-based definition nor universality in what is an “essential service” and what is not, different preferences regarding sectors to be open to free competition and those that should not be cannot be generalised across countries. A point conceded by some of those who normally dispute the validity of trade arguments related to collective preferences was made on the occasion of the WTO US–Antigua dispute over cross-border gambling (Thayer, 2004). This case exemplifies both an acceptance of collective preferences by some of those who normally advocate trade liberalisation, the

the United States, accept these proposed changes as inevitable, it will only further encourage U.S. state and local legislators to enact laws that incorporate this legal philosophy and embolden state governors to sign international executive agreements with European nations that potentially conflict with the conduct of U.S. foreign policy.

Already, based on the facts, it seems that a majority of the politicians from *one* major American political party are in accord with and have embraced this “better safe than sorry” credo for diplomatic purposes in the name of “multilateralism.” Yet, this has not prevented publicity-seeking governors from the other major political party, particularly those operating along the U.S. coastline, from mimicking these acts and adopting as their own what are essentially *European* laws and regulations. Even the legacy-oriented Bush administration has been guilty of such me too-ism during the past twenty-four months; first with respect to its ill-advised effort to secure U.S. ratification of the UN Law of the Sea Convention (for the alleged purpose of preserving the ocean’s critical ability to absorb atmospheric carbon dioxide)⁵⁶³ and, most recently, with respect to its stunning reversal on

current unwillingness of the WTO to recognise such preferences, and the difficulty of resolving such disputes through normal channels of negotiation.

. . . Article XX of the General Agreement on Tariffs and Trade (GATT) acknowledges that there are a number of reasons why some sectors should not necessarily be liberalised, and some practices should not be encouraged by free trade. *These reasons are essentially to do with human rights, the legitimate aspirations of state sovereignty and the public-goods type characteristics of some goods and services.* The specific examples in Article XX relate to human health, the conservation of natural resources and prison labour. It is to be expected that, with changing political and social priorities, other areas might be added to this list.

Tancrède Voituriez, et al., *Making Trade Sustainable Impact Assessment More Relevant to Trade Negotiations*, in 24 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 4, 339 (2006), available at http://www.cirad.fr/ur/index.php/normes_marches/content/download/1123/5475/version/1/file/iapa.pdf (emphasis added).

563. However, see Lawrence Solomon, *Models Trump Measurements*, *CAN. FIN. POST* (July 7, 2007), available at <http://www.financialpost.com/story.html?id=433b593b-6637-4a42-970b-bdef8947fa4e>. “Since geologic processes ultimately determine the level of atmospheric CO₂,” the director of the Geological Museum at the University of Oslo, formerly an expert reviewer with the IPCC, argues that IPCC scientists must acquire the

[geologic] knowledge that is central to understanding climate change . . . “to avoid making fundamental mistakes” . . . [W]ith the advent of IPCC-influenced science, the length of time that carbon stays in the atmosphere became controversial. Climate change scientists began creating carbon cycle models to explain what they thought must be an excess of carbon dioxide in the atmosphere. These computer models calculated a long life for carbon dioxide.

Amazingly, the hypothetical results from climate models have trumped the real world measurements of carbon dioxide’s longevity in the atmosphere. Those who claim that CO₂ lasts decades or centuries have no such measurements or other physical evidence to support their claims.

. . . .

In the real world, as measurable by science, CO₂ in the atmosphere and in the ocean reach a stable balance when the oceans contain 50 times as much CO₂ as the atmosphere. “The IPCC postulates an atmospheric doubling of CO₂, meaning that the oceans would need to receive 50 times more CO₂ to obtain chemical equilibrium,” explains Prof. Segalstad. “This total of 51 times the present amount of carbon in atmospheric CO₂ exceeds the known

whether to sanction an EPA report finding that carbon dioxide emitted industrially and deemed many times greater than that emitted naturally by carbon life forms such as humans, animals and plants during respiration contributes to air pollution which may endanger public health or welfare.⁵⁶⁴ Each case insidiously helped to pave the way for very expensive politically motivated regulations, taxes and border tariffs similar to those which have besieged the nations of Europe, that are unlikely, in the end, to achieve the benefits claimed. Regardless of whether any of these acts constitute “leadership,” as some have asserted, or “follow the leader” politics, the American people ultimately must determine how much is at risk. And, the upcoming 2008 presidential and congressional elections provide the perfect forum for just such an evaluation.

As food for thought, Americans should know that the European regulators’ historical inclination is to subjugate individual rights and freedoms to “social obligations” and “socially beneficial” causes. International law experts agree that European citizens are deemed to enjoy only a *positive*⁵⁶⁵ *implied* conditional right⁵⁶⁶

reserves of fossil carbon—it represents more carbon than exists in all the coal, gas, and oil that we can exploit anywhere in the world.”

Id.

564. See generally U.S. CLIMATE CHANGE SCIENCE PROGRAM, ANALYSES OF THE EFFECTS OF GLOBAL CHANGE ON HUMAN HEALTH AND WELFARE AND HUMAN SYSTEMS (2008); see also David A. Fahrendthold & Juliet Eilperin, *Warming Is Major Threat To Humans, EPA Warns*, WASH. POST (July 18, 2008), available at http://www.washingtonpost.com/wp-dyn/content/article/2008/07/17/AR2008071701557_pf.html; Robert Winnett & Urmee Khan, *President George Bush: “Goodbye from the World’s Biggest Polluter,”* UK TELEGRAPH (July 10, 2008), available at <http://www.telegraph.co.uk/news/worldnews/2277298/President-George-Bush-‘Goodbye-from-the-world’s-biggest-polluter’.html#continue>.

George Bush surprised world leaders with a joke about his poor record on the environment as he left the G8 summit in Japan. The American leader, who has been condemned throughout his presidency for failing to tackle climate change, ended a private meeting with the words: “Goodbye from the world’s biggest polluter.” He then punched the air while grinning widely, as the rest of those present including Gordon Brown and Nicolas Sarkozy looked on in shock.

Id.

565. As I wrote in a previous article for ITSSD:

[T]he constitutional rights of European citizens have long been viewed as “positive rights” granted by the state to the people, rather than as “negative rights” of the people recognized by the state.

A brief review of German legal and political history is quite revealing. According to Humboldt University law professor Dieter Grimm, the constitutions and bills of rights previously enacted by successive German monarchs were intended to preserve the legitimacy and survival of their dynasties, and little more. As a result, they created “positive” rather than “negative” rights that subsequently failed to endure the political whims of national parliaments and to secure consent from short-term-minded monarchs and unelected bureaucracies.

EUROPE’S WARNINGS, *supra* note 17, at 4.

One purpose of the American Revolution, therefore, was to strengthen and protect the people’s fundamental rights. Consequently, fundamental rights “could from the very beginning be negative rights” that served primarily to protect individuals from the government In contrast . . . the inclusion of positive rights in German law can be traced to the fact that European constitutions, unlike the U.S. Constitution, did not establish an entirely new political entity because the nation-state existed before the constitutions

to private property that is highly subject to “collective power” and the “public interest”— that is, the “general will.”⁵⁶⁷ Indeed, it is these forces⁵⁶⁸ that often determine the scope and extent of an individual property right and how “fair compensation” is to be calculated in the event governmental action results in a

emerged. This meant “they never changed the tradition of the state,” and part of this saved tradition, especially in Germany, was that “the state always retained the role of being the representative of the higher aspirations of society.”

Press Release, Elizabeth Katz, University of Virginia School of Law, German High Court Has More Power Over Legislature, Grimm Says (Mar. 9, 2006), http://www.law.virginia.edu/html/news/2006_spr/grimm.htm.

566. According to at least one European constitutional law scholar, there is apparently only an implied right to compensation for the expropriation of property:

[T]he First Protocol (P1-1) to the European Convention on Human Rights . . . declares that everyone is “entitled to the peaceful enjoyment of his possessions,” and that the state can only take property in the public interest and according to the law, but it fails to tell us what we really want to know: if the state authorizes the taking of our property, how much money will we get? The Protocol itself appears to say nothing on this crucial point European Court of Human Rights['] decisions . . . on compensation [however,] provide a particularly valuable insight into its views on the right to property [W]e can now say that *the Protocol contains an implied right to compensation*.

Tom Allen, *Compensation for Property Under the European Convention on Human Rights*, 28 MICH. J. INT'L. L. 287, 288 (2007) (emphasis added) (citation omitted). Furthermore, as this scholar has noted, the lack of an express guarantee of compensation was intentional:

One of the [European] Council's first tasks was the preparation of a treaty on human rights. It took more time than anticipated, partly due to disagreements over the content of a right to property. In principle, the delegates agreed that the treaty should include a right to property, but they rejected every proposal that contained a reference to compensation, no matter how weakly drawn. They even rejected a prohibition on the “*arbitrary confiscation of property at one point, as some governments feared that it would be interpreted as a guarantee of compensation*.” Eventually, the delegates agreed to sign the Convention *without a right to property* but committed themselves to continue negotiations with a view to including such a right in a later treaty. The delegates who opposed a compensation guarantee were concerned that it might compromise plans for ambitious economic and social policies.

Id. at 291 (emphasis added).

567. The Convention for the Protection of Human Rights provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions *except in the public interest and subject to the conditions provided for by law and by the general principles of international law*. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest* or to secure the payment of taxes or other contributions or penalties.

Convention for the Protection of Human Rights and Fundamental Freedoms, art.1 protocol 1, March 20, 1952, Europe T.S. No. 9 (emphasis added).

568. The EU Charter of Fundamental Rights articulates the individuals' right to property in Article 17:

No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, art. 17, 2000 O.J. (C 364) 12.

“taking” of private property.⁵⁶⁹ In other words, property rights in Europe are generally not thought of as being *in opposition to* collective power and the public interest⁵⁷⁰ as they are in the United States. Rather, individual property interests within Europe are viewed to be consistent with national and regional societal interests and are thus susceptible to be overridden by social interest-prone national and regional parliaments and reinterpreted by progressive European national and regional courts legislating from the bench.

By contrast, the Fifth Amendment to the U.S. Constitution recognizes the negative right of exclusion possessed by American citizens. It also subjects *government* to the legal obligation to pay the property holder “fair and reasonable compensation” where government is able to show that it has legally “taken” private property for a necessary and bona fide “public use,” considering the degree to which government action has impaired the exercise of the property right “taken” (i.e., the economic and social dislocation suffered by the property holder). It must be remembered that the U.S. “Bill of Rights” circumscribes and informs the U.S. Constitution, and both documents *anticipated* the natural and *common law* right to property *already possessed* by individuals that each successive American government has sworn to protect for nearly 220 years. Consequently, the U.S. Bill of Rights, unlike its European counterparts, expressly recognizes and protects private property as a fundamental natural “negative right” as against the arbitrary inclinations of government, as well as, against the rights of all others.⁵⁷¹

569. Tom Allen contrasts the American and European conceptions of property rights in their respective judicial systems, stating:

The case law reveals that the Court applies three different conceptions of the P1-1 interest . . . the legal, economic, and social models . . . the legal model conceives of the *human rights interest in property in terms of the existing law of the relevant member state* [T]he legal model does not fit with the integrated theory [of] [t]he economic and the social models [which] concentrate on the *social function of property* The economic model focuses on the *objective value of the property*; in most cases, the Court assumes that this is the *market value* . . . the social model reflects the integrated view, as it seeks to identify the values of individual autonomy, dignity, and equality that underpin other Convention rights, but specifically as they relate to *access and control over resources*.

Allen, *supra* note 566, at 305-306 (emphasis added).

570. Allen contrasts the collective interest with the legalist conception:

[A] *liberal/legalist conception of property puts private interests in opposition to collective power and the public interest*: “Collective forces, under this conception, are clearly external to the protection that property, as an entity, affords.” Moreover, *the liberal idea of rights assumes equal stringency for all rights of property, in the sense that all are equally worthy of protection against collective power*. This is what distinguishes it from the conceptual framework of the integrated view, as *it holds that one can determine the content of property without reference to the social context*. The possibility that collective interests exert pressure for a redrawing of the boundaries of individual autonomy does not mean that collective interests define those boundaries.

Id. at 307 (emphasis added) (internal citations omitted).

571. EUROPE’S WARNINGS, *supra* note 17, at 5 (second emphasis added) (citations omitted).

And, at least one other international law expert conceptualizes the “negative”-“positive” property right differential in terms of competing visions of capitalism.

The political-scientific elite in the West accept capitalism but not classical capitalism. They argue that a just society could exist [sic] in which people lived in peace and harmony, and that human reason is capable of discovering the institutions and policies required to bring such a society about. The contrast between their version of capitalism (hereafter: continental capitalism) and Anglo-American capitalism is striking. Reflecting its skepticism about rulers’ foresight and goodwill, classical capitalism considers any outcome to be fair and just as long as it emerges from the process of voluntary interactions under the umbrella of negative rights. In contrast, continental capitalism believes in rulers’ foresight and goodwill. It means that continental capitalism does not view the government as a predator requiring the rule of law to tame it. On the contrary, it wants the government to be an active factor in running the economy.

Continental capitalism is then more concerned with the desired outcome of economic activities than with the process of voluntary interactions leading to unanticipated results. Terms such as public interest, social justice and other grand-sounding names are used to justify the desired outcome of economic activities. Whatever term is used to explicate the desired outcome, it is a façade hiding subjective preferences of the political-scientific elite. For example, German law protects property rights only to the extent that they serve “human dignity” (as if free markets were not doing precisely that) and the German welfare state. Property rights in Italy are also attenuated; the Italian Constitution allows protection of private property insofar as it serves a social function. Thus, property rights in Germany and Italy neither protect the subjective preferences of their owners nor block legislative and regulatory redistributive measures.

The attenuation of private property rights is a mechanism that enables the government to interfere with the right of individuals to seek the best use for the goods they own. And government’s interference with the freedom of choice in competitive markets creates (or recreates) differences between private and social costs. Clearly, the pursuit of subjective preferences of the political-scientific elite is costly. And they know it. However, the political-scientific elite consider the pursuit of “their concept” of social justice worth the costs.⁵⁷²

In the end, true American leadership must reflect the making of an important choice. Will our leaders decide to defend the founding principles of our society, chief among them economic and political freedom and the rule of law that incorporate the basic notions of free markets, individualism, and exclusive *negative*

572. Svetozar (Steve) Pejovich, Private Property—A Prerequisite for Classical Capitalism 12 (2005), <http://www.easibulgaria.org/docs/Pejovic.doc> (emphasis added).

private property ownership enshrined within the U.S. Constitution and its accompanying Bill of Rights, which have enabled us to remain a nation without peers? Or, will they decide it is now time to abrogate these unique principles in favor of assimilating American society into the quickly converging global village of politically correct multiculturalism and reconstituted, communitarian,⁵⁷³ and centrally-planned values, such as conditional *positive* private property rights based on rule by law (rule of men),⁵⁷⁴ that call for a renewed emphasis on establishing a

573.

["Communitarianism" is] a political movement

. . . .

Communitarians . . . argue that we all are born with many particular obligations, such as to give to this body of persons—called a state or, more nebulously, a nation, community, or folk—so much money, so much obedience, or even one's life. And they argue that those particular obligations can be coercively enforced. . . .

To repeat, communitarians maintain that we are constituted as persons by our particular obligations, and therefore those obligations cannot be a matter of choice. Yet that is a mere assertion and cannot substitute for an argument that one is obligated to others; it is no justification for coercion. One might well ask, If an individual is born with the obligation to obey, who is born with the right to command? If one wants a coherent theory of obligations, there must be someone, whether an individual or a group, with the right to the fulfillment of the obligation. If I am constituted as a person by my obligation to obey, who is constituted as a person by the right to obedience? Such a theory of obligation may have been coherent in an age of God-kings, but it seems rather out of place in the modern world. To sum up, no reasonable person believes in the existence of abstract individuals, and the true dispute between libertarians and communitarians is not about individualism as such but about the source of particular obligations, whether imposed or freely assumed.

Tom G. Palmer, *Myths of Individualism*, CATO POL'Y REP., Sept./Oct. 1996, http://www.cato.org/pubs/policy_report/cpr-18n5-1.html.

The typical communitarian response to the "individualism" and "selfishness" of the Reagan and Thatcher years exemplifies the same helpless invocation of the state as the one thing that can supply the deficit in social feeling without upsetting the liberal agenda. In response to the "callousness" of a society organized on capitalist principles, communitarians propose to increase spending on welfare, health, and support for the unemployed. The victims of society are hunted down and rewarded with taxpayers' money. In this way, the state becomes the enemy of society by removing the incentive to live in socially responsible ways.

Roger Scruton, *Communitarian Dreams*, CITY J., Summer 1996, http://www.city-journal.org/html/6_4_communitarian.html. Cf. Lee Rademacher, Warped Individualism: A Recognition of a Communitarian Approach to Peace, presented at the annual meeting of the Midwest Political Science Association, Palmer House Hotel, Chicago, IL, Apr 12, 2007, available at http://www.allacademic.com/meta/p197628_index.html ("This paper explores the problems of methodical individualism in contrast to communitarianism theory as espoused by Amitai Etzioni and Jean-Paul Sartre. While Sartre's philosophy does not carry the label communitarianism, he understands the problem of radical subjectivity as it relates to social responsibility.").

574. According to one European legal expert:

The purpose of the *rule of law* is to tame the discretionary power of government and thus enable individuals to pursue their private ends in efficiency-friendly way[s]. On the other hand, the *rule of men* is about the power of the ruling group to make discretionary changes in the pursuit of its own ends. *A major difference between the rule of law and the rule of men is that the rule of law requires a well-defined, stable and credible process by which formal rules can be changed. In a rule of men state, changes in formal rules are a vehicle through which the ruling group seeks its ends.*

“global commons” with global public goods⁵⁷⁵ via the execution of multilateral environmental agreements, including the UN Law of the Sea Convention, which incorporate the extra-WTO Precautionary Principle? How could our “leaders” conscientiously proceed down this path without first undertaking a thorough, open, and publicly transparent due diligence review that takes into account the stark differences between these two models of governance and places into context the desperate but disingenuous efforts of biased European governments, environmental activists, liberal academics, and non-journalist media sources to broad-brush these differences away?⁵⁷⁶

Capitalism is the only system in the recorded history that has been successful in pulling the average person above the subsistence level and sustaining a steady, if cyclical, rate of economic development. Yet, from the very beginning capitalism has had numerous critics. The demise of two major socialist movements of the last century, National-Socialism and Marxism did not discourage the critics of capitalism. *As we enter the 21st century, environmentalism, multiculturalism, welfarism and EU bureaucracy have become the homes for the critics of capitalism.* In addition to the systems that have been tried to replace capitalism, many critics find capitalism, *as it exists*, inferior to blackboard models that *have never existed*.

....

The two cornerstones of capitalism are methodological individualism and classical liberalism.

Methodological individualism means that the unit of economic analysis is the individual. *Decisions made by governments, parliaments, corporations, and other organizations are actually decisions made by individuals who conceive ideas, invest time and effort in formulating policies and convince others to accept those policies.* Holding the individual to be superior to any group encourages behavior based on the principles of *self-interest, self-responsibility, and self-determination*.

....

Classical liberalism is about individual liberty, openness to new ideas, tolerance of all views, private property rights, the rule of law, and the freedom of contracts. Individual liberty, openness to new

SVETOZAR (STEVE) PEJOVICH, CAPITALISM AND THE RULE OF LAW: THE CASE FOR COMMON LAW 5 (2007) <http://economics.gmu.edu/pboettke/Boettke/workshop/fall07/Pejovich.pdf> (emphasis added) (permission for citation obtained).

575. According to a disturbing report prepared on behalf of one coalition of American Precautionary Principle proponents, it is essential to “resurrect” the notion of a “commons” in order to ensure a “precautionary future” beyond individual-based capitalism: “This wide-ranging, powerful concept offers an essential understanding for a precautionary future. Unfortunately the idea of the commons has been so undermined by centuries of capitalist enclosure that it’s hard to even insert into the contemporary political debate.” THE FUTURE OF FORESIGHT, *supra* note 60, at 35.

576. See, e.g., Clive Crook, *The End of the American Exception*, ATLANTIC, Mar. 5, 2008, <http://www.theatlantic.com/doc/200803u/no-american-exceptionalism>.

ideas, and tolerance of the values held by others create an environment in which individuals are free to pursue their private ends.

....

Classical liberalism in England harbors a strong dose of skepticism about the rulers' foresight and their goodwill. It considers that the primary function of laws and regulations is to support the objectives of interacting individuals rather than to seek specific outcomes. What we today call Anglo-American capitalism is the institutionalized version of the classical liberalism of England.

Classical Liberalism in Western Europe rests on two assumptions: (1) there exists a just society, and (2) human reason is capable of discovering the formal rules required to bring about such society. *These two assumptions of the Continental tradition provided both the philosophical raison d'être for the academic community to support social engineering, and the political justification for governments to pursue it. Contrary to the English and American experiences, the role of a powerful state has never been seriously questioned on the European continent.*⁵⁷⁷

Perhaps it would behoove our "leaders" (U.S. federal, state, and local legislators and regulators; U.S. governors; and especially the candidates for U.S. President) to keep these thoughts in mind as they formulate their future visions for twenty-first century America.

577. PEJOVICH, *supra* note 574, at 2-4 (emphasis added).