RESEARCH SUPPORTING

Advocating Individual Rights-Based Federalism Amid a Quickly Converging World

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I. Introduction:

My Goals Within 15 Minutes:

Within the next 15 minutes I intend to stretch and contort you minds so that you consider a multitude of issues horizontally, vertically and diagonally. I will discuss the interaction between international trade and regulatory law; US constitutional law and policy; US vs. EU regulatory law; US federal, state and municipal law and policy.

II. The International and Policy Subtext:

There is a Widening Global Economic /Law Regulatory/Standardization ('Soft Power') Competition Between Europe and the US - *EU is Seeking to Secure Global Regulatory Control*:

"...Brussels has become the global pace-setter for regulation," says David Vogel, a professor of business and public policy at the University of California, Berkeley. Prof Vogel points out that even the US - the world's most powerful nation and the biggest economy - is finding it increasingly hard to escape the clutches of the Brussels regulatory machine: "The relative impact of EU regulation on US public policy and US business has been dramatically enhanced. Even if a country does not adopt the [European] standards, the firms that export to the EU do. And since most firms do export to the EU, they have adopted the EU's more stringent standards."... **Officials in Brussels say the EU will in future be in even better shape to dominate global-standard-setting**.

The second way in which the EU has stamped its authority on other jurisdictions is through influencing the decisions of international standard-setting organisations and global regulatory bodies such as the International Maritime Organisation or Unece, the Geneva-based branch of the United Nations that deals with economic co-operation.
Tobias Buck, *"Standard Bearer"*, FT 7/10/07.

"There is a genuine competition to set global regulatory standards...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 [EU] trade commissioner, Peter Mandelson, claiming that the export of 'our rules and standards around the world' was one source of European power. 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 (eg, 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

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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 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.***" *See* Charlemagne, *Brussels rules OK*, The Economist (Sept. 20, 2007), at: http://www.economist.com/node/9832900

The Growing Relevance & Impact of International Law & Policymaking:

"The range of domestic issues over which the federal government might be involved in international negotiations is vast... The traditional foreign policy agenda has expanded to include a wide variety of social, cultural, labor, environmental and health issues ***that were previously thought to be exclusively domestic concerns***."
BRIEF FOR AMICUS CURIAE MADELEINE K. ALBRIGHT IN SUPPORT OF PETITIONERS *In the Commonwealth of Massachusetts v. EPA* . http://209.200.74.155/doc/Amicus%20Brief%20of%20Madeleine%20K%20%20Albright.pdf

Citing:

See Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1671-72 (1997) ("**Traditionally, public international law regulated relations among nations**. **It rarely overlapped with domestic law, and it rarely**

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regulated private activity. ***Today, by contrast, it frequently regulates both public and private activities that were formerly domestic concerns***." (internal citations omitted)).

The Source of This Widening Transatlantic Philosophical Gap – Constitutionalism the Lack of Economic Freedom and the New World Order:

There is the great difference between democracy and constitutional government in the world.

We the People . . . do ordain and establish this Constitution." These words are contained in the Constitution's Preamble and give expression to the doctrine of **popular sovereignty, or rule by the people**. The Constitution's framers crafted a governing document, which they submitted for popular ratification, based on the conception that ***ultimate political authority resides not in the government or in any single government official, but rather, in the people.*** **"We the People" own our government, but under our representative democracy, we delegate the day-to-day governing powers to a body of elected representatives.** However, ***this delegation of powers in no way impairs or diminishes the people's rights and responsibilities as the supreme sovereign.*** The government's legitimacy remains dependent on the governed, who retain the inalienable right peacefully to alter their government or amend their Constitution.

Under constitutional theory, however, government must be just and reasonable, not only from the viewpoint of majority sentiment but also in conformity with higher law, what the Declaration of Independence refers to as "Laws of Nature and of Nature's God." The Declaratory Act of 1766, by which the British Parliament laid claim over the American colonies "to bind (them) in all matters whatsoever," dramatized the **contrast between rule of law and rule by law.**

There is a stark contrast between RULE OF LAW and RULE BY LAW.

Rule of law suggests **an appeal to a higher standard of law and justice -- transcendent and universally understood -- than the merely mortal or the enacted law of contemporary politicians.** The Founders believed that the rule of law was the lifeblood of the American social order and basic civil liberties. **The rule of law suggests that if our relationships with each other (and with the state) are governed by a set of relatively impartial rules -- rather than by a group of individuals -- then we are less likely to become the victims of arbitrary or authoritarian rule.** Note here that the political obligation implied by the rule of law applies not only to the rights and liberties of subject and citizen but also with equal claim to rulers and governors. **By precluding both the**

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individual and the state from transcending the supreme law of the land, the framers constructed a protective layer over individual rights and liberties.

...*Rule by Law* – Utilitarianism & Education Thru Legislation - A Frenchmen, Claude Adrien Helvetius (1715-1771) was the product of the social and moral decline of 18th century France and an influential enlightenment thinker who lived before the eve of the French Revolution (1788-1789). The philosophy of Helvetius contained the essence of humanism. He defined the object of life as earthly happiness, rather than salvation, and **advocated legislation... as the means by which happiness for the greatest number would be achieved...**

"Men develop according to the cultural pressures to which he is subject. Education accounts for all differences between individuals and must be utilized to realize "the ideal of general intelligence, virtue, and happiness." Even though he admitted there was no way to prove this, he said society must act as though it were true. Grossman, p. 122. Denying all absolutes of justice, good and evil, Helvetius held that self-love is the mainspring of human action. **In his system, the only pleasure that is immoral is one that conflicts with the pleasure of the greatest number. Grossman, p. 100. The final test of any action, then, is its utilitarian value - its use to the public. The ideal government, he believed, would bring the greatest happiness to the greatest number, and universal education would make children useful to such a society. He advocated legislation of punishments and rewards to force men to contribute to public welfare.** Under such a system, he felt only madmen could prevent themselves from being good citizens. **Individual preferences and rights are lost to Helvetius in the all-consuming importance of public interest.** He believed "only the union, the identification, of private and public interests," and suggested that "fine women" be offered as prizes for publicly beneficial acts."
Eric Samuelson, A BRIEF CHRONOLOGY OF COLLECTIVISM (1997) at:
http://www.mega.nu:8080/ampp/samuelson.html#preserve%20the%20rights

Empiricism vs. Rationalism-Determinism and Human Conduct – The Rise of Environmentalism:

During the late 1980s, EU Member State governments, inspired by the vision of the founding 'Fathers of Europe',11 had first embraced the newly articulated United Nations concept of negative Malthusian sustainable development (SD). That concept was defined in the 1987 UN report entitled Our Common Future,12 which had been premised, in large part, on the Club of Rome's13 controversial 1972 book Limits to Growth.14 SD, as so defined, responded to the environmental fears, economic frustrations, and social restlessness of a nascent civil society

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comprised of millions reared in Marxist ideology who, following the fall of the Berlin Wall, had found themselves politically 'free' but economically dislocated. The concept of negative SD not only facilitated political 'solidarity' among the EC, its Member States and their citizens, but also provided legal justification for the creation of a new centralized and paternalistic pan-European organization (the EU) with grand regional and international ambitions. In fact, Europe's 'manifest destiny' – achieving global SD (i.e., correcting the negatives of globalization, and thus, themarket failures of economic neo-liberalism and free trade) has remained one of the key tenets of the 1992 EC Treaty.15
Lawrence A. Kogan, *Discerning the Forests from the Trees* GTCJ

Global environmentalism, which harbors a deep skepticism, and even hostility, toward economic growth and international trade...Today we are in the midst of a new normative campaign on sustainable development within the United Nations and around the world, comparable to the campaign for decolonization in the 1960s and anti-apartheid in the 1980s6 It is particularly critical now that we shape the architecture of sustainable development in a way that best achieves the objectives of economic growth, social development and a secure environment.

The foundation for liberal democracy is at least a thousand years old. The cardinal principle of the Magna Carta was the idea, just beginning to germinate in England at the end of the first millennium, that freemen of the kingdom had rights as against the government, and that those rights should be secured to them by laws binding on the king.

During most of the twentieth century the English tradition of liberal democracy remained in conflict with the social or rationalist democracy of the French. This tracks back to the enlightenment period.

French revolutionary thinkers were optimistic about human nature, believing in the power of intellectuals to rearrange society. The English were more pessimistic, seeking to design institutions that would control human nature. The English view, derived from Scottish moral philosophers led by David Hume, Adam Smith, Adam Ferguson, and Edmund Burke, is **essentially empiricist – Think evidentiary, science, proof, actual risk of harm based on experience**. The French approach is informed by the French Enlightenment and Cartesian rationalism. Its most celebrated proponent is Rousseau.

See JAMES C. KRASKA, GLOBAL AND GOING NOWHERE: SUSTAINABLE DEVELOPMENT, GLOBAL GOVERNANCE & LIBERAL DEMOCRACY 34 DENV. J. INT'L L. & POL'Y 259, 297-298 (March 2007)

According to the doctrine of rationalism, "truth can be best discovered through reason and rational thought. **Rationalists assume that the world is deterministic, and that cause and**

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effect hold for all events. They also assume that these can be understood through sufficient understanding and thought. *A priori* (prior to experience) or rational insight is a source of much knowledge. **Sense experience, (empirical) on the other hand, is seen as being too confusing and tentative**. Logic and mathematics **are classic rational disciplines**, as is philosophy."
See "Rationalism", Changing Minds.org at:

Marx and Engels subscribed to a deterministic outlook (THEY CAN DETERMINE RATIONAL OUTCOMES) to the degree that they accepted the Hegelian model of necessity... As Marx and Engels saw it, **necessity provides for certain possibilities within relatively fixed bounds; it does not prescribe definite or absolute outcomes**...Marx and Engels did not see revolution as the inevitable triumph of a would-be ascendent class. Sometimes revolutions issue in "the common ruin of the contending classes" (*The Communist Manifesto*). **Communism, for Marx and Engels, was not inevitable but very possible. Essentially, Marx and Engels were Enlightenment optimists who believed that in the long struggle between reason and barbarism, reason was likely to be the winner.** ***It is this faith in the rational, transformative power of the human species that led Marx to write: "From the standpoint of a higher economic society, private ownership of the globe by single individuals will appear quite as absurd as private ownership of one man by another"*** (*Capital* Vol III). **Thus, when we think of the present hold of capitalism over our lives, we need** to keep in mind the wisdom of the radical abolitionist who did not **lose faith** after the Dred Scott decision of 1857 which effectively nationalized slavery, but quietly said to herself, to steel herself **for coming greater struggles, "it's never over until it's over."** *See* Jerry Phillips, University of Connecticut, "MARXISM AND UTOPIAN SOCIALISM at: http://www.english.ilstu.edu/strickland/495/utopia.html.

Although its adherents don't like to discuss the point, the liberal faith has much in common with Communism, including shared roots in the Enlightenment. **Human nature, philosophers once believed, could be remade in the classroom. People could be improved by "legislation alone," to quote the 18th-century *philosophe* Claude Helvetius**. Influenced by John Locke, he was in turn studied by the founder of Russian Marxism, G.V. Plekhanov, who befriended Lenin in Zurich.

Liberalism and Communism both regarded egalitarianism as an ideal and both were godless; Communism openly so, liberalism more obscurely. Democracy admittedly distinguished between them, but the liberal admiration for an ideological judiciary shows that they, too, would like nothing more than a government that is free to impose its will by

fiat (provided it is run by the right people).

The liberal faith fell with Communism. Both were based on extravagant optimism -- admittedly an unwarranted optimism. Human nature was on the verge of transformation. **Nineteenth-century thinkers really believed that people would soon be so good that the boundaries of property would no longer be required. The reversal of attitude today is most conspicuous in the environmentalists, whose rise coincided with the fall of the Soviet Union. Man now is widely perceived as a despoiler and menace to the planet.** *See* Tom Bethell, *The Decline of the Liberal Faith* The Spectator (3/23/05) at http://spectator.org/archives/2005/03/23/the-decline-of-the-liberal-fai/print

The question of **free will** is whether, and in what sense, rational agents exercise control over their actions and decisions. Addressing this question requires understanding the relationship between freedom and cause, and determining whether the laws of nature are causally deterministic.
Determinism is roughly defined as the view that all current and future events are necessitated by past events combined with the laws of nature. Neither determinism nor its opposite, non-determinism, are positions in the debate about free will.

Bentham pursued an explanation for punishment which contrasted sharply with the notion of the 'vengeance of the state' on which many governments in Europe relied.21 In dramatically redirecting the search for a clarified justification of legal punishment, Beccaria's ***appealing mixture of Helvétian proto-utilitarian thought and Rousseauean contractarianism inceptively stated the need for penal theory to pursue more directly the welfare of all those in society***.

Beccaria advocated the **protection of the liberties of those who adhered to the law; he emphasised the need to establish certainty and celerity of punishment for those who transgressed the law; and he sought to revive respect for the law by advocating a new mildness in the apportioning of punishment for those who broke the law**.23 These humane and liberal principles were rapidly adopted by reform-minded men and women across Europe;24 and in England... For Bentham, Beccaria's work was exceptionally influential, and he used the penal principles reflected in On Crimes and Punishment to connect his own **justifications for legal punishment firmly to a utilitarian base**. And, although influenced by the powerful, ever-present influence of Montesquieu, **Bentham's use of the catalytic thinking of Beccaria, combined with his own rejection of the traditional concepts of common law and social contract,26 produced a profound break with the prevalent English understanding of law and punishment** with which he was surrounded.
See Claude Adrien Helvétius, *De l'esprit* (Paris, 1758). Jean-Jacque Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (Amsterdam, 1755), and *Du Contrat Social*, (Amsterdam, 1762).

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See Tony Draper, "An Introduction to Jeremy Bentham's Theory of Punishment", Bentham Project, University College London at: http://www.ucl.ac.uk/Bentham-Project/journal/adpunt.htm#22

Positive Rights vs. Negative Rights of Exclusion: (Taken partly from LA Kogan, *Europe's Warnings on Climate Change Belie More Nuanced Concerns* – ITSSD website)

The 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.33**

And, a review of France's constitution is also instructive since it reveals the *current* status of private property rights in Europe. The French Constitution was recently amended in 2005 (for the 19th time since 2000) to include a new environment charter that provides French citizens with the 'positive' "right to live in a balanced healthy environment".34

According to at least one scholar, European citizens are deemed to enjoy only an *implied* conditional right 47 to private property that is highly subject to 'collective power' and the 'public interest' – i.e., the 'general will'.48 For example, it is these forces49 that often determine the scope and extent of an individual property right and how 'fair compensation' is to be calculated in the event government 'takes' property.50 This means that property rights are generally not thought of as being *in opposition to* collective power and the public interest51, as they are in the U.S. In other words, individual property interests within Europe are viewed consistent with national and regional societal interests, and are thus susceptible to override by social interest-prone national and regional parliaments and to reinterpretation by progressive European national and regional courts legislating from the bench.

47 According to at least one European constitutional law scholar, there is only "*an implied right to compensation* for the expropriation of property. *There is no express guarantee of compensation in P1-1* [the First Protocol to the European Convention on Human Rights],

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and hence the... European Court of Human Rights [has]...develop[ed]...compensation principles [that reflect its] views on the nature of the interest protected by a human right to property" (emphasis added). *See* Tom Allen, "Compensation for Property Under the European Convention on Human Rights", The Berkeley Electronic Press (2006) at pp. 2, 4, 7 and 9, at: http://law.bepress.com/expresso/eps/1875 .

48 *See, e.g.,* Article 1, Protocol 1, "Protection of Property", Ensuring the Collective Enforcement of Certain Rights and Freedoms Other Than Those Included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms (1952), "Convention for the Protection of Human Rights and Fundamental Freedoms" *supra* at p. 22. It 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 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" (emphasis added).

49 *See e.g.,* Article 17 'Right to Property' of the European Charter of Fundamental Rights which provides that, "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 as 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*" (emphasis added).

50 "The case law [of the European Court of Human Rights] reveals that the Court applies three different conceptions of the P1-1[property] interest...the legal, economic and social models...[T]he legal model conceives of the human rights interest in property in terms of the existing law of the relevant member state...The economic and the social models concentrate on the social function of property, although the focus is different. The economic model focuses on the objective value of the property; in most cases, the Court assumes that this is the market value... Finally, the social model...seeks to identify the values of individual autonomy, dignity and equality that underpin other Convention rights, but as they relate to access and control over resources...*[T]he member states generally do require compensation for expropriation*... "[I]t may be the case that compensation rules of a given state are indeed derived at least partly from a sense of fairness, and from a theory of the commensurability of money and property" (emphasis added). *See* Tom Allen, "Compensation for Property Under the European Convention on Human Rights", *supra* at pp. 33-36. P1-1 refers to Article 1, Protocol 1 of the European Convention on Human Rights.

51 "*[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, *it 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,

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as *it holds that the content of property can be determined without reference to the social context: the possibility that collective interests exert pressure for a re-drawing of the boundaries of individual autonomy does not mean that those boundaries are defined by collective interests*" (emphasis added). *Id*., at pp. 36-37.

It is, perhaps, because the relationship between EU member state and European constitutional law has long remained in flux, especially on this point, that some European leaders are now endeavoring to amend the existing foundational treaties of the European Union/ European Community (e.g., the Treaty of Nice) so that they expressly incorporate what has, up until now, been recognized by European courts as only an implied right to property.

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).[52] 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[53], as well as, against the rights of all others.

[33] **"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 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.'** ***See*** **Elizabeth Katz, "German High Court Has More Power Over Legislature, Grimm Says", University of Virginia Law Blog (March 9, 2006)** at: http://www.law.virginia.edu/html/news/2006_spr/grimm.htm .

[34] French Constitution, Environment Charter, Art. 1. *See also* "The Need to Act", Ministere Des Affaires Etrangeres, Republique Francaise Government Portal at: http://www.diplomatie.gouv.fr/en/article-imprim.php3?id_article=4596 . "The adoption of the Charter is a crucial step in the history of rights in our country. As a result of President Chirac's unshakeable will, *the Charter raises sustainable development to the highest level in our legal structure*, alongside the 1789 Declaration of

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the Rights of Man and of the Citizen and the preamble to the 1946 Constitution. France will therefore be the first country to
devote an entire constitutional declaration to *the right to the environment*" (emphasis added); "Constitutional Bill on the
Environment Charter - Speech By Jean-Pierre Raffarin, Prime Minister, to the Meeting of Parliament in Congress", Embassy
of France in the United States (Feb. 28, 2005) at: http://www.ambafranceus.org/news/statmnts/2005/raffarin_environement_022805.asp .

[47] **According to at least one European constitutional law scholar, there is only "*an implied right to compensation* for the expropriation of property. *There is no express guarantee of compensation in P1-1* [the First Protocol to the European Convention on Human Rights], and hence the... European Court of Human Rights [has]...develop[ed]...compensation principles [that reflect its] views on the nature of the interest protected by a human right to property" (emphasis added). *See* Tom Allen, "Compensation for Property Under the European Convention on Human Rights", The Berkeley Electronic Press (2006)** at pp. 2, 4, 7 and 9, at: http://law.bepress.com/expresso/eps/1875 .

Lawrence A. Kogan, "Europe's Warnings on Climate Change Belie More Nuanced Concerns", ITSSD at: http://www.itssd.org/White%20Papers/Europe_sWarningsonClimateChangeBelieMoreNuancedConcerns.pdf

III. The Economic Dimension of Law as an Incentive – The Indispensability of Clearly Defined Individual Property Rights to ensure LEGAL & ECONOMIC EFFICIENCY

Economic Freedom vs. Political Freedom

"[T]he biggest threat to freedom, democracy, the market economy and prosperity now is ambitious environmentalism", which he equates with "a sort of centralized planning" reminiscent of communism. In his estimation, "The issue of global warming is more about social than natural sciences and more about man and his freedom than about tenths of a degree Celsius changes in average global temperature."

"As someone who lived under communism for most of his life, I feel obliged to say that I see the biggest threat to freedom, democracy, the market economy and prosperity now in ambitious environmentalism, not in communism. This ideology wants to replace the free and spontaneous evolution of mankind by a sort of central (now global) planning. The environmentalists ask for immediate political action because they do not believe in the long-term positive impact of economic growth and ignore both the technological progress that future generations will undoubtedly enjoy, and the proven fact

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that the higher the wealth of society, the higher is the quality of the environment. They are Malthusian pessimists".
See Vaclav Klaus, "Freedom, Not Climate is at Risk", Financial Times (June 13, 2007) at:
http://www.ft.com/cms/s/9deb730a-19ca-11dc-99c5-000b5df10621.html .

According to Morton Horwitz of Harvard Law School, "**Marxism treats law as 'superstructure', merely reflecting 'what is real in the 'base' of economic rationality...[I]t also noted the ways in which the law affects behavior, predicting 'how rational individuals will respond to [legal] rules'**...The law, whether made by legislatures or by courts, **is viewed as 'a system of incentives intended to affect behavior.**'" (Bethell at p. 314 – Tom Bethell, *The Noblest Triumph: Property and Prosperity Through the Ages*, NY Saint Martins' Press © 1998).

Thus, **the institutional setting in which law is employed must be recognized. *"When goods are owned, they can be used efficiently,*** and when they are not, they are used wastefully, and the cost of transferring them to others who value them more highly becomes prohibitively high." (Bethell p. 324) – 'enabling environment'.

According to Nobel Laureate Ronald Coase,

"It makes little sense for economists to discuss the process of exchange without specifying the institutional setting within which trading (the exchange of property) takes place, since this affects the incentives to produce and the costs of transacting."
(Bethell p. 324)

"Private property," writes Mr. Bethell, empowers people because it "builds a domain of autonomy around individuals, *permitting them to aspire to something more than obedience*. Because they can secure the fruits of efforts, they can make long-range plans."

In his article, "*The Problem of Social Cost*", Nobel Laureate Ronald Coase argued that, in cases of 'negative externality' (e.g., smoke in towns inflicts significant social cost - injures buildings and vegetables, requires clothes to be washed and rooms to be cleaned, etc.), government intervention is often NOT necessary because nearby owners can themselves negotiate mutually satisfactory solutions.

Also, **problems that arise between adjacent owners do not have to be resolved by state intervention; the parties affected can themselves negotiate a solution.**
.
When goods are owned in a well-defined way, and the rights to them are exchangeable, they will be purchased by those who value them most highly. Resources will be put to their highest-valued use.

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Problems arising at the 'borders' of property can be solved by private negotiation, and are not in themselves sufficient to overthrow market economics.
(pp. 316-17).

Transaction costs are the costs of making an exchange – over and above the price of the goods themselves – e.g., costs of time, transportation, etc. When transaction costs are high, then exchange or the transfer of property rights becomes an expensive business in itself. When the cost of negotiating would be higher than the benefits receivable, an economically 'inefficient' state of affairs is said to exist and the private solution becomes impossible. In the case of the factory and the homeowners, then a pollution tax or something like it may be the simplest solution.

According to Coase, such inefficiencies could be eliminated by reassigning the rights (to pollute) to the party that values it most highly. (p. 318). In other words, courts "should insofar as this is possible, without creating too much uncertainty about the legal position itself, take these economic consequences into account when making their decisions. Justice itself should be subordinated to efficiency – to economics. (Bethell p. 318).

Justice Richard Posner argued in his book, "The Economic Analysis of Law", that the criterion of efficiency could be used to determine the law, but that it often had been so used in the past. Common law judges had been closet economists, apparently and in making their rulings had often been guided by efficiency as a surrogate for justice. And, if only modern-day judges would learn a little economics, the 'efficient' solution to legal problems would become clear and age-old quandaries of the law would be resolved.

There appears to be 'no fundamental inconsistency' between justice and efficiency, and that such moral principles as honesty, trustworthiness charity and the avoidance of negligence and coercion 'serve in general to promote efficiency'. (p. 318)

Ronald Dworkin of Oxford concluded that **"The whole notion of efficiency was a 'consequence', NOT a 'cause' of individual (property) rights"**. Ronald Dworkin, *Taking rights Seriously* Harvard Univ. Press (1977). Bethell at p. 319).

Vilfredo Pareto defines efficiency as an "economic state arrived at by mutual consensual exchange. This means (neglecting transaction costs) that whatever owners voluntarily do with their property is by definition efficient. **Efficient is as property does**.

Cost-benefit analysis must include nonmonetary satisfaction on the 'benefit' side. Thus efficiency is in practice subordinate to property. 'Efficient' simply means 'property-respecting'.

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However, Posner's claims about the 'economizing character of the common law' suffers from the grave defect that economic costs and benefits include the subjective and unmeasurable element of 'satisfaction'. This means that it is always possible to look back at any judicial decision and decide that its basis was one of 'benefits' outweighing 'costs'. (Bethell at p. 321).

According to Lionel Robbins of the London School of Economics, "we lack information needed to make 'interpersonal comparisons' of utility". The shape and height of people's marginal utility curves are unknown and probably unknowable", Posner said.

Transaction costs cannot be measured and it is a defect of the law and economics approach that seeks to circumvent this by 'assuming' benefits and costs at a given level. (Bethell at p. 323)

The right people must first acquire the appropriate information and incentives to avoid inefficiency.

Paul Heyne wrote that **"Under a system of clearly defined property rights...people with information about the situation would have strong incentives to acquire control of whatever resources were needed to ('efficiently') move the food from where it had no use to where it did. - (THE RIGHT PEOPLE ARMED WITH INFORMATION GENERATE EFFECIENCY)** And **within a system that allows for free exchange among property owners, the necessary resources will quickly and at low cost come together under the control of those who can put them to valuable uses.** Thus transaction costs are minimized in an economy where property is privately owned and where rights are easily transferred.

'Efficient' should be read as 'property-respecting'.

If judges previously ruled in ways that made property more secure, and more easily exchangeable, and made free riding more costly, and encouraged competition, (all out of respect for common law rules of property and contract), they would also (incidentally) have enhanced economic efficiency.

IV. State and Individual Rights Within a Federalist US Constitutional System:

A) 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**

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government capable of overpowering individual state governments. *Greg Russell, "***Constitutionalism: America & Beyond",** Democracy Papers US Department of State International Information Papers at: http://usinfo.state.gov/products/pubs/democracy/dmpaper2.htm

B) 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 in a number of ways:**

1) **The 10th Amendment** to the Constitution made clear that a number of spheres of activity were to be reserved for the states.
    a. State governments, for instance, are largely responsible for managing their own budgets and making and enforcing laws in many areas that impact residents of the state.
2) States were also protected by their representation inside the U.S. Senate: two senators to a state, irrespective of the size of the state.
    a. The Electoral College, the body that formally elects the U.S. president, was to be an aggregation of electors selected by the states, with each state awarded a minimum of three delegates;
    b. The amending procedure of the Constitution itself also reflected state interests, for any amendment to the Constitution requires approval by three-fourths of all state legislatures as well as two-thirds of the members of both houses of Congress.
        i. These protections were built into the Constitution as well, to prevent the smaller states from being dominated by the power of the larger states. The sharing of power between states and the national government is one more structural check in an elaborate scheme of checks and balances.

3) **Case Law of 10th Amendment**

"The Tenth Amendment was intended **to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified."**
United States v. Sprague, 282 U.S. 716, 733 (1931).

"The amendment states but a truism that all is retained which has not been surrendered. **There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new**

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national government might seek to exercise powers not granted, ***and that the states might not be able to exercise fully their reserved powers.''***
United States v. Darby, 312 U.S. 100, 124 (1941).

"While the Tenth Amendment has been characterized as a 'truism," stating merely that 'all is retained which has not been surrendered,' [citing Darby], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." ***Fry v. United States***, 421 U.S. 542, 547 n.7 (1975). This policy was effectuated, at least for a time, in National League of Cities v. Usery, 426 U.S. 833 (1976).

It was also confirmed by Madison's remarks in the course of the debate which took place while the proposed amendment was pending concerning Hamilton's plan to establish a national bank.

"Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States." 2 Annals of Congress 1897 (1791).

In ***McCulloch v. Maryland***, 17 U.S. (4 Wheat.) 316 (1819), Justice Marshall rejected the proffer of a Tenth Amendment objection and offered instead an expansive interpretation of the necessary and proper clause to counter the argument. Supra, pp.339-44.

The counsel for the State of Maryland cited fears of opponents of ratification of the Constitution about **the possible swallowing up of states' rights and referred to the Tenth Amendment to allay these apprehensions**, all in support of his claim that the power to create corporations was reserved by that Amendment to the States. 7 Stressing the fact that **the Amendment**, unlike the cognate section of the Articles of Confederation, **omitted the word ''expressly'' as a qualification of granted powers, Marshall declared that its effect was to leave the question ''whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument.''**

"From the beginning and for many years **the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.''** United States v. Darby, 312 U.S. 100, 124 (1941).

In **National League of Cities v. Usery**, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was "undoubtedly within the scope of the Commerce Clause." 426 U.S. 833 (1976).**However, it cautioned that ''there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to**

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reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.'' 49 Id. at 845.

Justice Blackmun's majority opinion In **Garcia v. San Antonio Metropolitan Transit Authority** 54 concluded that **States retain a significant amount of sovereign authority ''only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.''** 57 469 U.S. at 549

The principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment or in the Commerce Clause itself, but in the structure of the Federal Government and in the political processes. 58

"Apart from **the limitation on federal authority inherent in the delegated nature of Congress' Article I powers**, ***the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.''***
469 U.S. at 550 .

''[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at 'the heart of representative government' [and] is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause].'' Id. at 463. In the latter context the Court's pinion by Justice O'Connor cited Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1 (1988). See also McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484 (1987) (also cited by the Court); and Van Alystyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985). ***Gregory v. Ashcroft*** **501 U.S. 452, 464 (1991).**

In ***New York v. United States***, 65 **112 S. Ct. 2408 (1992),** the Court held that Congress may not "commandeer" state regulatory processes by ordering states to enact or administer a federal regulatory program, in effect retreating from Garcia... [T]**he Court's opinion by Justice O'Connor declares that it makes no difference whether federalism constraints derive from limitations inherent in the Tenth Amendment, or instead from the absence of power delegated to Congress under Article I; ''the Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.''** **67** 112 S. Ct. at 2418

In rejecting arguments that New York's sovereignty could not have been infringed because its representatives had participated in developing the compromise legislation and had consented to its enactment, **the Court declared that ''[t]he Constitution does not protect the sovereignty of States for the benefit of the States or State governments, [but instead] for the protection of individuals.'' Consequently, ''State officials cannot consent to the**

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enlargement of the powers of Congress beyond those enumerated in the Constitution." 68 Id. at 2431-32

C) Individual Rights Protected at the State Level (Taken, in part, from LA Kogan, *Brazil's IP Opportunism Threatens U.S. Private Property Rights*, 38 Inter-American Law Review 17-18, 103-104, 106-107 (ITSSD website)

1) **Bill of Rights** - Antifederalists feared the power of the new national government and demanded that a series of specific protections of individual rights be written into the Constitution, in exchange for the states ratifying the Constitution. In 1789, the first Congress of the United States adopted the first 10 amendments to the Constitution. By 1791, the Bill of Rights, constituting these first 10 amendments, had been ratified by the required number of states.

   a. The Bill of Rights limits the ability of government to trespass upon certain individual liberties.

      i. **"The philosophical justification for the Bill of Rights is that it places certain liberties beyond the reach of majorities on the premise that depriving citizens of fundamental rights would diminish their civil standing and, in fact, their very humanity**. The vast array of rights secured by the Bill of Rights and Constitution compose the texture of a free government. Civil rights may arise directly from natural rights or indirectly through political arrangements in a society built upon the consent of the people given in constitutions, common law precedent, and statutes." Greg Russell, *Constitutionalism: America & Beyond* at: http://usinfo.org/enus/government/overview/dmpaper2.html

      ii. An individual's inalienable right to invent and create, and to enjoy the fruits of his or her labors (i.e., the private property he or she invents, creates, acquires, earns or converts to use), is recognized and protected by the U.S. Constitution and its accompanying Bill of Rights. These documents also guarantee individuals that their private property will be protected against arbitrary and wanton government interference, ostensibly intended to serve the public good.

("**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**." (emphasis added)). *See* **Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1-2 (1978)**

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"**The US system is *rooted in the Bill of Rights and the sanctity of the individual*. 'The Constitution of the United States . . . places great symbolic weight on human rights. It *elevates the basic rights of man to supreme constitutional status*.'"** (citation omitted) (emphasis added)). *See also* PETER GOLDSMITH ET AL., FOOD SAFETY IN THE MEAT INDUSTRY: A REGULATORY QUAGMIRE 8 (2002), *available at* http://www.ifama.org/conferences/2003Conference/papers/goldsmith.pdf (discussing the role of the individual in the U.S. Constitutional system in the context of food safety

iii. The U.S. Constitution and its accompanying Bill of Rights instructs us that an individual's rights, including his or her exclusive property rights, must be preserved and protected by *and* from government. "Property is not, however, entirely a natural right. The Founders understood that it would need to be further defined in statute." In support of this proposition, the U.S. Supreme Court, in the case of *Lynch v. Household Finance Corp.*, defined the right to private property as a basic *civil* right.

("[A] Bill of Rights directed against federal abuses was thought necessary in addition to separation and division of powers. . .institutional boundaries in the absence of such a list of liberties were not deemed quite sufficient to preserve individual rights." *See* Knapp v. Schweitzer, 357 U.S. 371, 376-77 n.4 (1958); TRIBE, *supra* note 445, at 3-4

Douglas W. Kmiec, *The Takings Clause, in* THE HERITAGE GUIDE TO THE CONSTITUTION 342 (Edwin Meese III et al. eds., 2005).

See Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) **("[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." (footnote omitted)).

iv. *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. Founding Father James Madison wrote in *Federalist Paper No. 10* that **"[t]he protection of . . . the faculties of men, from which the rights of property originate . . . is the first object of government.**" In addition, in *Federalist Paper 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."** Several years later, in an article published in the *National Gazette*, Madison wrote what is arguably his most articulate expose 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

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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.**67

v. The 'just compensation' requirement was added in 1791, as the Fifth Amendment to the U.S. Constitution. It effectively limits the powers of the federal government otherwise conferred by Articles I and II of the U.S. Constitution, including the power of eminent domain, which is the power to take private property for public use by federal, state, or local government. This limitation is intended to prevent government from sacrificing the rights of individuals for the public good. Several rationales have been advanced to explain the intention underlying the Bill of Rights' "no taking without just compensation" clause: 1) **to prevent the government from deliberately redistributing wealth, directly or indirectly**; 2) **to prevent the government from indirectly reallocating property among citizens by generating a uniformly desired good or by reducing a uniformly disliked public bad, without otherwise affecting the distribution of wealth**; and 3) **to prevent government from acting out of some high sense of morality to forbid a formerly accepted and tolerated use of property**.

vi. When first adopted, the Bill of Rights applied only to the actions of the national government. Many of the liberties provided for in the first 10 amendments have since been incorporated in **the 14th amendment's guarantee that no state shall deprive its citizens of either due process or equal protection of the law**.

2) **The Ninth Amendment** -- expressly protecting fundamental rights not specifically described in the Constitution -- laid to rest Federalist fears that singling out any right for protection would jeopardize the protection of all other rights not similarly identified.

V. THE FACTS: States & Individual Rights and European Incursion into the U.S. Federalist System:

General (Taken, in part from LA Kogan, *Precautionary Preference: How Europe's New Regulatory Protectionism Threatens U.S. Free Enterprise* – ITSSD website)

During July 2004, *The New York Times* reported about the growing collaborations taking place between the American and European

environmental and social responsibility movements. It noted how American groups are devoting substantial financial and human resources to European-based fear campaigns that intimidate Brussels Commissioners and Parliamentarians, sway European public opinion, threaten the reputations of nonenvironmentally or socially conscious businesses and **ensure the enactment of legislation based on the precautionary principle.** Ironically, European governments and the EU Commission have funded many of the campaigns that have challenged their credibility.[242] According to the Times article, **these non-governmental organizations (NGOs) are now using the stricter precaution-based European regulations as a lever/ platform to promote similar regulatory change in the U.S. 243**

The existence of such a movement was further described within a September 2004 editorial appearing in the activist periodical, ***The Multinational Monitor.*** **In fact, it effectively called upon environmental and consumer advocates to counter American business' resistance to these overtures and to take direct action in order to enshrine the precautionary principle within U.S. and international law.**

Apparently, this movement, assisted by liberal-minded American think-tanks and politicians, had been extremely active and influential in setting U.S. domestic and international policy during the Clinton Administration. Since that time, however, the movement has reorganized, attracted idealistic and opportunistic politicians from both parties, and has been operating largely underground.[245] As
the following discussion demonstrates, **precautionary 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'**. [246]

In the case of biotech, for example, one former Congressional staffer had previously expressed the federal government's longstanding fear that, if Europe's global precautionary principle movement were successful, it could eventually change U.S. domestic regulatory law.

One of the greatest U.S. fears is that a successful EU provision for labeling with its 1% [or less] threshold will become the de facto global standard, given the size of the European market and the influence of the EU nations in international forums. And *if the EC approach is successful, then the underlying philosophy of the U.S. regulatory system may be called into question and domestic forces may seek to reopen the regulatory system in the U.S.,* something that the biotechnology industry and the food and agriculture sectors would find extremely disruptive (emphasis added). [247]

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State Liaison & Executive Agreements With Foreign Governments

In late March, **a delegation of California government officials arrived in Brussels on a most unusual mission. Governor Arnold Schwarzenegger had sent them to meet their counterparts at the European Commission and explore whether his state could join one of Europe's most ambitious and controversial projects: the emissions trading scheme.**

Both sides emerged from the talks feeling optimistic that a deal was possible to link the European Union regime with a state that itself counts among the biggest emitters of carbon dioxide in the world. "**We hope that California will be able in the near future to be the first non-European region that would join the emissions trading system," a Commission official said.** California's eagerness to bypass the federal government in Washington and participate in a regime developed by lawmakers and governments more than 9,000km away may seem startling. But the US state is far from alone in following Brussels' regulatory and legislative lead: on issues such as product safety, financial regulation, antitrust, transport, telecommunications and myriad other policy areas, the EU is leaving an indelible mark on nations outside the bloc.

See "Global Politics in a Changing World: A Reader" (© 2009 Houghton Mifflin Harcourt Publishing Co.) at p. 195, at: http://books.google.com/books?id=fA3Qs_Qq1DwC&pg=PA195&lpg=PA195&dq=a+delegation+of+California+government+officials+arrived+in+Brussels+on+a+most+unusual+mission.+Governor+Arnold+Schwarzenegger+had+sent+them&source=bl&ots=Sd-clmsLog&sig=qzoHDYDmcaArXCc-EMgXorzD8dY&hl=en&sa=X&ei=-EB9UsfXG9Kr4AOFwYCICA&ved=0CCkQ6AEwAA#v=onepage&q=a%20delegation%20of%20California%20government%20officials%20arrived%20in%20Brussels%20on%20a%20most%20unusual%20mission.%20Governor%20Arnold%20Schwarzenegger%20had%20sent%20them&f=false.

Federal Climate Change Policy: (Taken from *Massachusetts v. EPA*, **Amicus Curiae Brief of Madeleine K. Albright in Support of Petitioners**, at pp. 13-14, at: http://www.law.harvard.edu/faculty/freeman/Albright%20brief.pdf.

"The United States has declined to pursue mandatory emissions reductions under the auspices of the U.N.

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Framework Convention on Climate Change,[9] the Kyoto Protocol,[10] or any other international bi-lateral or multi-lateral process whose purpose is to provide the forum for negotiating *quid pro quo* reductions in greenhouse gas emissions. Administration policy has remained consistent on this point. In 2001, the President sent a letter to four Senators stating his opposition to the Kyoto Protocol, and reversing his earlier
policy of calling for mandatory emissions cuts.[11] Two weeks later, the United States abandoned the Kyoto Protocol, announcing that it did not support the agreement and would not transmit it to the Senate for its advice and consent to ratification.[12] The government then began entering into bilateral and multilateral agreements with other nations geared *not* toward bargaining over targets and timetables for mandatory reductions, but instead toward voluntary programs.[13]"

[11] *See* Text of a Letter From the President, Mar. 13, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/03/20010314.html ("I do not believe, however, that the government should impose on power plants mandatory emissions reductions for carbon dioxide, which is not a "pollutant" under the Clean
Air Act.").
[12] *See, e.g., U.S. Won't Follow Climate Treaty Provisions, Whitman Says*, N.Y. TIMES (Mar. 27, 2001).

States & Climate Change Rules

INSERT

VI. CONSTITUTIONAL ISSUES TRIGGERED (Taken from LA Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export the U.S. Can Do Without*, forthcoming in 17 Temple Political & Civil Rights Law Review 491, 522-523, 528-532 (2008) (ITSSD website) **(**which served as the impetus for this Temple Political & Civil Rights Law Review Symposium**)**

Arguably, a number of U.S. constitutional issues are potentially triggered as the result of legislative and regulatory activities currently being undertaken at the state and local levels. They may involve violations of the interstate and foreign commerce clauses, the president and congress' plenary authority to conduct foreign affairs, the supremacy clause, and the 10th, 14th and 5th amendments to the Bill of Rights. In addition, it may even be argued that state constitutional guarantees have been breached.

1. Interstate and Foreign Commerce Clause:

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While many state initiatives appear to be proposed and/or adopted by individual states they may nevertheless be part of a larger coordinated regional effort undertaken between adjacent and/or contiguous states, and perhaps, even foreign nations, provinces and/or cities. To the extent that commerce crossing individual state and/or national lines is adversely affected by the imposition of what are arguably *other than* 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…to Regulate Commerce with foreign Nations, and among the several States…"[1] One interesting strategy employed by states participating in regional pacts to avoid such litigation, is that of promulgating proposed 'Model Rules' for consideration and adoption.

2. Executive Plenary Authority of the Executive to Conduct Foreign Affairs, Subject to Constitutional Treaty Constraints vs. the 10th Amendment:

In some cases, individual state and/or multi-state initiatives involve the direct or indirect participation of foreign nation-states, provinces, and cities. To the extent that such initiatives influence, substantially affect or otherwise undermine U.S. foreign relations, including foreign commerce with any of those nation-states or U.S. foreign policy in general, it is arguable that such state and local 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. In that case, such initiatives may be susceptible to challenge under Article I, Sections 8 and 10, and Article II, Section 2, Clauses 1 and 2 of the U.S. Constitution.[2] 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 10th Amendment of the Constitution's Bill of Rights. In addition, they have argued that, in any event, their activities do not affect either U.S. foreign relations with those nation-states or U.S. foreign policy, including foreign commerce, generally conducted by the President and/or Congress through executive agreements and/or formal treaties.

3. Supremacy Clause – Preemption Doctrine vs. the 10th 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 10th Amendment of the Constitution's Bill of Rights. 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'* of regulation in these areas. They have utilized this strategy to employ the 10th Amendment to promote the Precautionary Principle throughout the U.S. at the state and local levels.

[1] *See* "Precautionary Preference: How Europe's Regulatory Protectionism Imperils American Free Enterprise", *supra* at fn #s 421-423, at pp. 135-36, and fn # 426, at p. 137.
[2] *Ibid*, at fn #s 424-425, at pp. pp. 136-37, and fn # s 427-428 at pp. 137-38.

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However, it is arguable, nevertheless, that existing federal laws and regulations, executive decisions not to enter into or ratify international environmental treaties, and congressional decisions *not* to legislate as aggressively in the environment and health areas in which the EU has regulated reflects Congress' direct and/or indirect preference for voluntary over mandatory measures. [3] As a result, it is arguable that these rules can be challenged under Article VI, Section 2 of the US Constitution.[4]

4. Fifth Amendment Takings and Due Process Clauses Extended By the 14th Amendment to Citizens via the States// Ninth Amendment:

The promulgation of onerous, costly and overly restrictive Precautionary Principle-based environmental and health regulations, especially those now being considered and adopted by U.S. state legislatures and administrative agencies *without* scientific or economic justification, substantially diminish the value of private property – plant and 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-out) (which may actually be a private use), without payment of just compensation. [5]

In addition, each of the EU-style Precautionary Principle-based regulations discussed 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. However, it is common knowledge that these regulations do not provide adequate intellectual property protection for such information. [6] Consequently, just like European regulators, U.S.

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[3] *Ibid*, at fn #s 418-420, at pp. 134-35.

[4] *See e.g.*, "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." Eric Lasker, "Federal Preemption and State Anti-'GM' Food Laws", Legal Backgrounder Vol. 20, No. 60 (12/2/05), at p. 4, at: (http://www.wlf.org/upload/120205LBLasker.pdf).

[5] "…[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 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 added). *See* Section 3(c), Presidential Executive Order 12630, *cited in* Lawrence A. Kogan, "Terminating Global Warming, Energy Dependence or Private Property Rights?", Institute for Trade, Standards and Sustainable Development (6/30/06), at: (http://www.itssd.org/Publications/Terminating-Global-Warming.pdf).

[6] "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." *See, e.g.*, Jeroen H. J. den Hartog and Mark G. Paulson, "Europe's

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state regulators 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 5th and 14th Amendments to the US Constitution.

5. 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 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 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 due process rights to adequate and timely notice and a full and impartial hearing under both the 14th Amendment to the US Constitution and similar provisions within many State Constitutions. [7]

VII. Applicable U.S. Constitutional Jurisprudence:

FEDERAL PREEMPTION

EXPRESS PREEMPTION

***Taiheiyo Cement Corp. v. Superior Court*, 129 Cal. Rptr. 2d 451 (Cal. App. 2 Dist., 2003) (Jan. 15, 2003). —*Express preemption*, as the term suggests, requires an affirmative declaration by Congress that federal law prohibits state regulation.** *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 738, 105 S.Ct. 2380, 85 L.Ed.2d 728; *Cipollone v. Liggett Group, Inc.* (1992), 505 U.S. 504, 516-518, 112 S.Ct. 2608, 120 L.Ed.2d 407; ***Tafflin v. Levitt* (1990) 493 U.S. 455, 466, 110 S. Ct. 792, 107 L. Ed. 2d 88 [it is**

'REACH' Initiative Will Impact Trade Secrets", Legal Backgrounder Vol. 21 No. 20, Washington Legal Foundation (6/16/06), at p. 4, at: (http://www.wlf.org/upload/061606dehartog.pdf).

[7] *See* Lawrence A. Kogan, "U.S. Property Rights Under International Assault", Presented at the Tenth Annual National Conference on Private Property Rights of the Property Rights Foundation of America, *Private Property Rights – The Record and the Vision* (10/14/06), at p. 20, at: (http://www.itssd.org/pdf/LAK-PrivatePropertyRightsUnderInternationalAssault.pdf).

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presumed Congress ordinarily does not intend to displace existing state authority].) ||

IMPLIED PREEMPTION

(em phasis added). 129 C al. R ptr. 2d 451, 458. **—[Implied Preemption –] Federal law 'implicitly overrides state law either when the scope of a statute indicates that *Congress intended federal law to occupy a field exclusively* [citation] or when state law is in actual conflict with federal law. *Freightliner Corp. v. Myrick* (1995), 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L.ed2d 385.** The Supreme Court has **found implied preemption 'where it is 'impossible for a private party to comply with both state and federal requirements' [citation] or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'' (emphasis added).** (Id). **'Preemption of a whole field…will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of states laws on the same subject.'' (*Hillsborough County v. Automated Medical Labs* (1985) 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714; See also: *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 507, 108 S.Ct. 2510, 101 L .E d.2d 442). || 129 C al. R ptr. 2d 451, 460.** [419] Federal preemption under the U.S. Constitution was also discussed by the federal California Appellate Court for the 2nd District, in *Bronco Wine Co. v. Espinoza*, 128 Cal. Rptr. 2d 320 (Cal. App. 3 Dist. 2002).

—Under the Supremacy Clause of the United States Constitution, federal statutes and regulations preempt conflicting state law. (U.S. Const., Art. VI, cl. 2; See: *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372, 120 S.Ct. 2288, 2293, 147 L.Ed.2d 352, 361). In determining whether federal law preempts state law, **the court's task is to determine congressional intent.** *English v. General Electric Co.* (1990) 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65, 74;
Northwest Cent. Pipeline v. Kan. Corp. Comm 'n (1989) 489 U.S. 493, 509, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509, 527). **That intent may be express or implied. It is express when Congress explicitly states it is preempting state authority. (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525, 97S.Ct. 1305, 1309, 51 L.Ed.2d 604, 614). *It is implied* (1) *when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the States to supplement federal law* (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed.1447). (2) *where the state law directly conflicts with federal law because compliance with federal and state regulations is a physical***

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***impossibility*. (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10**
L.Ed.2d 248, 257) *or* (3) *when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'*. (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581, 587; Capital Cities Cable, Inc. v. Crisp (1984) 467 U.S. 691, 699, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580, 588-589; *Barnett Bank of Marion Cty, N.A. v. Nelson* (1996) 517 U.S. 25, 31-32, 116 S.Ct. 1103, 1107-1108, 134 L.Ed.2d 237, 244-245). What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects. (*Crosby v. National Foreign Trade Council*, supra, 530 U.S. at p. 373, 120 S.Ct. at p. 2294, 147 L .E d.2d at p. 361) ‖ (em phasis added). 128 C al. R ptr. 2d 320 at 332.

420 According to constitutional law scholar L aurence T ribe, —Even where state regulation is found not to conflict in its actual operation with the substantive policies underlying federal legislation, it must still be established, if the state regulation is to survive judicial scrutiny, that Congress did not exercise its jurisdictional veto. For *if Congress has validly decided to 'occupy the field' for the federal government, state regulations will be invalidated no matter how well they comport with substantive federal policies*. **But federal occupation of a field will not be lightly inferred: 'The principle to be derived from [the Supreme Court's] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of *persuasive reasons* – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'… *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). See also *Allen-Bradley Local No.***
***1111 v. Wisconsin Employment Relations Board*, 35 U.S. 740, 749 (1941); Rice *v. Santa Fe Elevator Corp.*, 331 U .S . 218, 230 (1947).‖ (emphasis added). Tribe at p. 384**. —W here such _persuasive reasons have' been found, however, state action has been held to be preempted even prior to the effective date of the federal legislation; ***even nascent federal occupation of a field suffices to oust the states… Erie Railroad v. New York*, 233 U.S. 671 (1914). (emphasis added). The less**
comprehensive is a federal regulatory scheme, the more likely it is that a holding ousting state jurisdiction would create a substantial legal vacuum—and hence, the less likely is such a holding… See, e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973)… [*W]here Congress legislates* _in a field w hich the States have traditionally occupied… w e start with the assumption that the historic police powers of the States [are] not to be [ousted] by the Federal Act unless that was the clear and manifest purpose of Congress.'… *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). (emphasis added).

T ribe at p. 385. —… On the other hand *, if the field is one that is traditionally deem ed 'national'*, the Court is more vigilant in striking down state incursions into subjects that Congress may have reserved to itself… S ee, e.g., N*orthern States Power Co. v. Minnesota*, 447 F.2d 143 (8th C ir. 1971), aff'd m em ., 405 U .S . 1035 (1972) (*state nuclear waste law preempted*) ‖ (emphasis added). Tribe at pp. 386.

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STATE LAWS & EXECUTIVE ACTIONS AFFECTING INTERSTATE COMMERCE

421 Laurence Tribe has comprehensively discussed the limited scope of state regulation of interstate commerce. —"In addition to isolating… the factors which the Supreme Court takes into account when it balances the importance of a state regulatory interest against the adverse effect of the regulation on interstate commerce, it is possible to note a number of more general elements often present in decisions dealing with the constitutional validity of state regulations affecting interstate commerce: ***the recurring distinction between economic and social regulation, the stress on local concerns,*** **and the focus on the availability of less restrictive alternatives (emphasis added)…** ***State regulations seemingly aimed at furthering public health or safety, or at restraining fraudulent or otherwise unfair trade practices, are less likely to be perceived as 'undue burdens on interstate commerce' that are state regulations evidently seeking to maximize the profits of local businesses*** **[emphasis added]. Indeed, where the Supreme Court has**
held that the national interest in the free flow of commerce supercedes a state interest in public safety, it has generally seemed that the challenged statute contributed only marginally if at all to the public safety". T ribe at pp. 340 -341. For example **in —*Dean Milk Co. v. City of Madison*… 340 U .S . 349 (1951), the Supreme Court struck down local regulations restricting the importation of milk because the local health interests there asserted could have been adequately served if the city had dispatched its inspectors to the out-of-state pasteurization plants to make their quality checks, or if the city had relied on available federal inspection services for the needed data: "in… erecting an economic barrier protecting a major local industry against competition from without the State, *Madison* plainly discriminates against interstate commerce. *This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available'*** [italics in original; boldfaced em phases added]… *Id*. at 354. ‖ T ribe at pp. 341 - 42.

422 Furthermore, the Court of Appeals for the 3rd Circuit, in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F. 3d 701 (C.A.3 1995), discussed the parameters of the interstate commerce clause as concerns state regulation. —**The Commerce Clause grants to Congress the affirmative power [] to regulate Commerce… among the several States.' U.S. Cons. Art. I, Sec. 8, cl. 3.**

DORMANT COMMERCE CLAUSE

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_Although the Clause thus speaks in terms of powers bestowed upon Congress, the [Supreme] Court long has recognized that it *also limits the power of the States to erect barriers against interstate trade.*' *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 64 L.Ed.2d 702 91980). [emphasis added.] The negative or dormant aspects of the Commerce Clause that limit state authority apply to subject areas in which 'Congress has not affirmatively acted to either authorize or forbid the challenged state activity.' *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir. 1987). *Thus, any state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause unless such regulation has been preempted or expressly authorized by Congress. 48 F. 3d 701 at 710*. —… The fundamental issue presented by this appeal is **whether the district court erred in concluding that the New Jersey regulatory waste flow scheme does not violate the dormant Commerce Clause. To determine this fundamental issue, three subsidiary issues must be decided: (1) whether the district court erred in applying the Pike balancing test, rather than what we have termed the 'heightened scrutiny' test… *Norfolk Southern Corp. v. Oberly*… ; (2) whether the New Jersey waste flow regulations are excepted from the strictures of Commerce Clause scrutiny under the market participant doctrine; and (3) if not, whether these regulations meet the applicable Commerce Clause test in light of New Jersey's particular circumstances. We conclude that *New Jersey's waste flow regulations, in effect and by design, discriminate against interstate commerce and that heightened scrutiny under the dormant Commerce Clause is required*. ‖ (emphasis added.) 48 F. 3d 701, 709-710.** —… T he **Supreme Court's decision in *C&A Carbone Inc. v. Town of Clarkstown*, 511 US 383 , 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), provides significant guidance with respect to these issues… 48 F . 3d 701, 710. —...Having concluded that the town's ordinance affected interstate commerce, the Court addressed whether its effect was a discriminatory one – whether it operated to favor local commercial interests or disfavor out-of-state ones. This was important because *a local measure that discriminates against interstate commerce on its face or in effect can be upheld only if it falls within 'a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.'* *Id.* at ---, 114 S.Ct. at 1683. *Such protectionist measures are thus***

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subjected to heightened scrutiny **as compared with local measures that pursue a legitimate local interest evenhandedly and impose only an incidental burden on interstate commerce [emphasis added]. Nondiscriminatory measures will be upheld unless the incidental burden on interstate commerce… is _clearly excessive in relation to the putative local benefits.'" *Id*. at --, 114 S.CT. 1682 (quoting *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)).** .....

423 **Dormant Commerce Clause jurisprudence has not treated state utility regulation any differently than other state regulation**. —**When state utility regulation is *protectionist*, the Supreme Court has employed *heightened scrutiny*; where it is not, a *benefits and burdens analysis* has been applied.** [emphasis added]. **In *New England Power Co. v. New Hampshire*, 455 U.S. 331, 334-36, 102 S.Ct. 1096, 1098-99, 71 L.Ed.2d 188 (1982), the Supreme Court** reviewed an order of the New Hampshire Public Utility Commission that required the New England Power Company, a consortium of Connecticut River hydroelectric power companies, to reserve for New Hampshire residents an amount of power equal to the amount generated by the consortium within that state. The Court **found that the Commission's order was essentially an 'exportation ban' that placed a direct and substantial burden on interstate commerce and therefore applied the heightened scrutiny test to the discriminatory order. Id. at 339, 102 S.Ct. at 1100-01. ‖ 48 F . 3d 701, 713 - 714**. —Subsequently, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S.CT. 1905, 76 L.Ed.2d 1 (1983), in rejecting an outdated Commerce Clause utility test that focused on whether the state was regulating wholesale or retail sales of gas or electricity, the Supreme Court noted: *_Our constitutional review of state utility regulation in related contexts has not treated it as a special province insulated from our general Commerce Clause jurisprudence.'* [emphasis added]. *Id*. at 391, 102 S.Ct. 1916 (citing *New England Power Co*…)… —More recently, **the Supreme Court applied the heightened scrutiny test to protectionist state public utility regulation in *Wyoming v. Oklahoma*, 502 U.S. 437, 455, 112 S.Ct. 789, 801, 117 L .E d.2d 1 (1992)… The state statute there under attack required that all coal-fired electricity plants located within the state of Oklahoma burn at least ten percent Oklahoma mined coal. The Court concluded that the statute discriminated against interstate commerce and struck it down under the dormant Commerce Clause, noting that the question of which level of scrutiny to apply to the protectionist measure was 'not a close call'. *Id*., at 800 n.12., 112 S.Ct. at 455 n. 12.** Based on this S uprem e C ourt case law , w e reject the D epartm ent's co ntention that because the waste flow regulations are part of a larger utility regulation system, they are not subject to the heightened scrutiny test despite any discriminatory effect.

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STATE LAWS, EXECUTIVE ACTIONS AFFECTING FOREIGN COMMERCE & U.S. FOREIGN POLICY (Taken from footnotes 424-431, accompanying pp. 187-189, of LA Kogan, *Precautionary Preference: How Europe Employs Disguised Regulatory Protectionism to Weaken American Free Enterprise*, 7 Int'l Journal of Economic Development Nos. 2-3 (2005))

424 **As Professor Tribe describes it, — _*[P]ower over external affairs [generally] is not shared by the states*; it is vested in the national government exclusively.' *United States v. Pink*, 315 U.S. 203, 233 (1942). The declaration of *Article I, Sec. 10, that _[n]o State shall enter into any Treaty, Alliance or Confederation,' or, 'without the consent of the Congress, lay any imposts or duties on imports or exports,'* is thus but one manifestation of a general constitutional principle that, whatever the division of foreign policy responsibility within the *national* government, *all* such responsibility is reposed at the national level rather than dispersed among the states and localities. 'For local interests the States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581, 606 (1889). [emphasis added] … *[A]ll state action, whether or not consistent with current federal foreign policy, that has significant impact on the conduct of American diplomacy is void as an unconstitutional infringement upon an exclusively federal sphere of responsibility.***

Thus, **in *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court struck down, as 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress,' an Oregon statute which required probate courts to make a three-leveled inquiry _into the type of governments that obtain in particular foreign nations 'before permitting citizens of those nations to receive property left them by Oregon residents. [389 U .S . 429, at 432, 434.]** || (emphasis added). Tribe at p. 172. Furthermore, ***the Restatement (Third) of the Foreign Relations Law of the United States provides, —under the United States Constitution, a state of the United States may make compacts or agreements with a foreign power with the consent of Congress (Article I, Section 10, clause 2), but such agreements are limited in scope and subject matter.*** **"In**

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addition, —[a] State may make some agreements with foreign governments without the consent of Congress so long as they do not impinge upon the authority of the foreign relations of the United States." "According to Professor Louis Henkin, —in the governance of their affairs, states have variously and inevitably impinged on U.S. foreign relations." *See* Hal Shapiro, —Is There a Role for Sub-Federal Governments in International Trade Policy Formation?", *Ius Gentium*, Journal of the University of Baltimore Center for International and Comparative Law (Vol.9 Fall 2003) at pp. 60, 74, *citing* L. Henken, *Foreign Affairs and the United States Constitution*, 162 (2d ed. 1996).

425 —[T]he Constitution plainly grants the President the initiative in matters directly involved in the conduct of diplomatic and military affairs. Article II Sec. 2 provides that '[t]he President shall… have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and that the President 'shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls… 'Similarly, Article II, Sec. 3, states that the P resident _shall receive Ambassadors and other public Ministers… '*Taken together with the com m and of Article II, Sec. 3, that the P resident 'shall take Care that the Laws be faithfully executed', these constitutional provisions have come to be regarded as explicit textual manifestations of the inherent presidential power to administer, if not necessarily to formulate, the foreign policy of the United States*." (emphasis added). T ribe at p. 164. —*Although influenced (often decisively) by congressional action or constitutional restraint, the President thus has exclusive responsibility for* announcing and implementing military policy; *for negotiating, administering and terminating treaties or executive agreements; for establishing and breaking relations with foreign governments; and generally for applying the foreign policy of the United States*." (emphasis added). Tribe at p. 164 -165… [E]xecutive agreements have the same weight as formal treaties in their effect upon conflicting state laws. The Supreme Court held in *United States v. Belmont*… [301 U .S . 324 (1937)]… that 'in the case of all international compacts and agreements… complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.'… [301 U .S . at 331.] [… *United States v. Belmont* has been read as intimating that the permissible scope of executive agreements is largely, if not completely, coextensive with that of treaties.]" Tribe at p. 171. 426

—Article I, Sec. 8 of the Constitution grants Congress the authority to _to regulate commerce with foreign nations.' This clause has been construed as all but exclusive: _It is an essential attribute of the power that is… plenary… [and that] its exercise m ay not be limited, qualified, or impeded to any extent b y state action'… [(*Board of Trustees of the University of Illinois v. United States*, 289 U.S. 48, 56 (1933)])] _Foreign commerce has been defined broadly: it includes 'intercourse, navigation, and not traffic alone'… *Lord v. Steamship Co.*, 102 U.S. 541, 544 (1881)… Thus congressional authority embraces not only trade with foreign nations, but also the regulation of shipments on the high seas, even where the ports of embarkation and destination are in the same American state… [T]he Supreme court, *in the face of congressional silence*, has allowed *only such state action as seems consistent with the nationalizing policies perceived to underlie the congressional power delegated in the commerce clause itself*. Thus, in *Cooley v. Board of Wardens of the Port of*

***Philadelphia*… 53 U.S. (12 How.) 298 (1851)… the Court allowed state regulation even of some aspects of in-port piloting and navigation of ships _in 'foreign commerce"** (emphasis added). Tribe at p. 369. —**In cases involving foreign commerce, however, the judicial interest-balancing which lies behind a determination under *Cooley* is strongly affected by *the inherently national character of most regulation of external affairs*… [emphasis added].** See, e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968). Tribe at pp. 369-70. **If state action touching foreign commerce is to be allowed, *it must be shown not to affect national concerns to any significant degree*, a far more difficult task than in the case of interstate commerce" (emphasis added). Tribe at p. 370.**

427 As explained by **the court in *Taiheiyo Cement Corp. v. Superior Court*, 129 Cal. Rptr. 2d 451 (Cal. App. 2 Dist., 2003), —*Zschernig* articulated the dormant foreign relations preemption' doctrine, which holds the federal government has exclusive power in the field of foreign relations even *in the absence of any federal law or treaty*. (*Gerling Global Reinsurance Corp. of America v. Low* (9th Cir. 2001) 240 F.3rd 739, 751, fn 9 (Gerling Global); *National Foreign Trade Council v. Natsios* (1st Cir. 1999) 181 F.3rd 38, 58-59, fn. 14).** ‖ (emphasis added). 129 C al. R ptr. 2d 451, 461. —… Writing for the Court, Justice Douglas concluded, _… [State] regulations must give way if they impair the effective exercise o f the Nation's foreign policy [citation]… **[E]ven in the absence of a treaty, a State's policy may disturb foreign relations.' (*Id* at pp. 440-441, 88 S.Ct. 664) [emphasis added].** [cf. *Clark v. Allen* (1947) 331 U.S. 503, 67 S.Ct. 1431, 91 L .E d. 1633]. [em phasis added]… Under *Clark* and *Zschernig*, a statute will be invalidated if its application involves a state making inappropriate inquiries and criticisms regarding the operations of foreign governments so that the statute has 'more than' some incidental or indirect effect in foreign countries. (*Zschernig*, supra, 389 U.S. at p. 434, 88 S.Ct. 664; see also *Gerling Global*, supra, 240 F.3d at p. 752- 753; *Trojan Technologies, Inc. v. Com. of PA* (3rd Cir. 1990) 916 F.2d 903, 913… [em p hasis added]. **In *Zschernig*, the Supreme Court held, _an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the P resident and the Congress' is unlaw ful if the state law _has a direct im pact upon foreign relations and may well adversely affect the power of the central government to deal with those problem s'. (*Zschernig*, supra, 389 U.S. at pp. 432, 441, 88 S.Ct. 664). States may enact laws affecting local concerns that touch upon foreign affairs, but only if their actions have some incidental or indirect effect in foreign nations' (*Id*. A t p. 4 33, 88 S .C t. 664) [emphasis added].** ‖ **129 Cal. Rptr. 2d 451, 462.**

428 —In *Taiheiyo*, **the court found that the California statute did not** —create[] a cause of action w here none previously existed [and did not] **interfere with the federal government's ability to conduct foreign affairs… First, we discern no**

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improper foreign policy purpose underlying the enactment of section 354.6… We reject the contention that section 354.6 was enacted for an improper foreign policy purpose because it is directed toward a specific foreign country… By its term s, section 354.6 does not target a specific foreign country nor implicate any foreign policy between the United States and Japan…Second section 354.6 does not involve the type of wide-ranging government scrutiny or criticism of a foreign governm ent's practices that the Supreme Court found objectionable in *Zschernig*. **The statute does not require a state court to inquire into current policy of a foreign nation or the structure of its government. In addition, the statute does not make any statement concerning or criticizing the current or past foreign policies of any country… [em phasis added]… Third, section 354.6 does not have m ore than _an incidental or indirect effect' on the federal governm ent's current or future relations with any foreign country… because the statute applies retroactively, not prospectively… ‖ (emphasis added), 129 Cal. Rptr. 2d 451, 465-466**… In *Miami Light Project v. Miami-Dade County* (S.D. Fla. 2000) 97 F. Supp.2d 1174, ordinances were enacted requiring persons seeking to contract with Miami-Dade County to sign affidavits stating they did not transact business w ith C uba or C ub an nationals… In partially granting the plaintiff's motion for a preliminary injunction, the court co ncluded the plaintiffs were likely to prevail on their claim that the ordinances were unconstitutional under *Zschernig* because **_[t]he stated purpose of the law is to protest and condemn Cuba's totalitarian regime… [and] designed to specifically impact and affect the affairs of a foreign country.'** (*Id*. At p. 1180) [emphasis added]. In *National Foreign Trade Council v. Natsios*, 181 F.3d 38, a Massachusetts law was enacted restricting the ability of state agencies to purchase goods from companies doing business in Burma. **The court held the law had a significant direct effect on a foreign government and therefore inappropriately interfered with the federal foreign affairs power under *Zschernig*. The court arrived at this conclusion because the design and intent of the law demonstrated displeasure for B urm a's hum an rights policies, thereb y affecting that country's affairs.** (*Id*., at p. 53). ‖ (emphasis added). 129 Cal. Rptr. 2d 451, 467 [429] *See* discussion, *infra*.

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