 Sensing political storm clouds ahead, California Governor Jerry Brown yesterday issued a statement on the presidential election results that concludes: "We will protect the precious rights of our people and continue to confront the existential threat of our time–devastating climate change."

Several of my *Legal Planet* colleagues have recently posted thoughtful commentary on what Donald Trump's election as the nation's 45th president signifies for national environmental law and policy. By contrast, I'd like to focus on the potential for significant political dissonance between the incoming Trump Administration and the State of California. In my view, that potential is sky-high, given California's longstanding commitment to environmental and energy policies that are anathema to those articulated by Trump in the just-concluded presidential campaign and currently being reiterated by senior members of his transition team.

Business leaders, property rights advocates and Tea Party activists are all seeking the Trump Administration's active support for their efforts to re-energize the oil, gas and coal industries, aggressively promote private development of federal lands, dismantle or curb USEPA's regulatory programs and suspend the Obama Administration's aggressive pursuit of greenhouse gas reduction goals. California Governor Brown's above-quoted statement confirms that the Golden State will continue to pursue its environmental, conservation and climate change objectives notwithstanding the dramatic environmental policy shift we can expect under Trump's presidency.

Past political history demonstrates that such a clash between California and the federal government is likely. When Ronald Reagan was elected president in 1980, with both houses of Congress in Republican hands, similar political turbulence quickly developed between the Reagan Administration and Reagan's home state of California on a number of environmental issues.

At its heart, this was, and is, a battle of federalism principles: the proper, respective roles of the federal and state governments in charting public policy, together with the legal authority of both to act.

As we gird for likely legal and political battles between California and the federal government over environmental policy, three constitutional doctrines are likely to play a key role: preemption, regulatory takings and the dormant Commerce Clause. I briefly review each of those doctrines and their relevance below.

Preemption

The constitutional theory likely to be invoked most frequently by the incoming Trump Administration and its business sector allies is federal preemption. Business interests have routinely invoked the Supremacy Clause in their litigation efforts to nullify California environmental programs over the past 40 years. The only presidential administration over that same period to frequently lend support to those preemption challenges–and occasionally bring its own–was Reagan's in the 1980's. It seems likely that oil and gas, chemical, agricultural and other industries will vigorously lobby the Trump Administration to join them in challenging a variety of California environmental statutes and regulatory programs on preemption grounds. And, depending on Trump's Cabinet-level appointees, such entreaties may well get a positive response.

How the federal government's stance on preemption can affect even privately-brought preemption claims against the State of California is demonstrated by the California Supreme Court's recently-decided decision in *People v. Rinehart*. As Legal Planet colleague Sean Hecht previously reported, in *Rinehart* the court upheld a miner's criminal conviction for violating California's ban on suction dredging by conducting those activities on federal lands. In doing so, the justices forcefully rejected the miner's claim that California's suction dredging ban was preempted by the federal Mining Law of 1872. California's successful defense of its suction dredging ban in *Rinehart* was substantially bolstered by a remarkable and most welcome amicus brief the U.S. Department of Justice filed in the California Supreme Court arguing *against* federal preemption. In the Trump Administration, however, it's extremely unlikely that the federal government will lend similar support to state efforts to enforce state or local environmental measures. Far more likely, President Trump's Justice Department, USEPA and the Department of the Interior will aggressively assert that federal law preempts such state or local environmental laws–as the Reagan administration often did three decades ago.

Regulatory Takings

The Takings Clause of the Fifth Amendment to the U.S. Constitution declares that private property cannot be "taken" by government without payment of just compensation. Numerous Supreme Court decisions have held that the Takings Clause protects property owners from government regulations that destroy or substantially diminish the value and us of private property. Most often, such "regulatory takings" lawsuits have been brought to challenge land use and environmental programs.

Since the Takings Clause protects *private* property, regulatory takings claims are brought by property owners against the government; so a Trump Administration has no explicit role in advancing the property rights agenda through expansion of regulatory takings principles. But the federal government under President Trump can (and likely will) add its support to private regulatory takings challenges in two key ways.

First, it's quite possible that the Trump Administration's lawyers will support private takings claimants in litigation brought to challenge California's land use, coastal protection and pollution control rules. (The Reagan Administration did this several times in the 1980's; then-Attorney General Ed Meese was one of the earliest supporters of the Pacific Legal Foundation, and Meese was not shy about advancing PLF's property rights agenda while leading the Justice Department.)

Second, it seems likely that President Trump will appoint federal judges who embrace a far more muscular interpretation of the Takings Clause than did, e.g., President Obama's appointees. Since many regulatory takings challenges to California environmental and land use regulations are brought in federal court, Trump-appointed federal judges will tend to be more hostile to California's strong environmental and land use regulatory systems.

Dormant Commerce Clause

Search the U.S. Constitution high and low, and you'll find no express reference to the dormant Commerce Clause. Rather, it's a judge-created constitutional doctrine developed in a number of U.S. Supreme Court decisions. Dormant Commerce Clause principles hold that state and local governments can't adopt regulatory programs that discriminate against interstate commerce; impose an "undue burden" on interstate commerce; or attempt to regulate "extraterritorially"–i.e., beyond state borders.

In recent years, business interests have invoked dormant Commerce Clause principles to challenge in federal court numerous California environmental, public health and animal welfare laws. (Out-of-state energy companies' dormant Commerce Clause challenge to California's Low Carbon Fuel Standard–a key component of California's multifaceted

strategy to reduce state greenhouse gas emissions–is perhaps the most prominent example.) To date those constitutional challenges to California's cutting-edge environmental and related programs have been unsuccessful. But it seems likely that out-of-state energy corporations and other business interests will lobby the Trump Administration to provide full-throated support for their efforts to invalidate a host of California environmental, energy, animal welfare and other laws on dormant Commerce Clause grounds. And such importuning may well receive a warm response by the Trump Administration, since the President-elect has already expressed his scorn for several of those California laws.

In sum, we can expect increased tension–and litigation–between the incoming Trump Administration and the State of California over their dramatically contrasting environmental policies and regulatory programs. And expect much of that federalism-based litigation to focus on the key constitutional doctrines of preemption, regulatory takings and the dormant Commerce Clause.