



*Advocating Individual Rights-Based Federalism  
Amid a Quickly Converging World*

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## **I. Framing the Issue of Climate Change**

### The International Policy Subtext and How it Has Become Personal

There is a widening global economic law/regulatory/standardization competition. The EU seeks ‘global regulatory control’ via the precautionary principle (“PP”) <risk vs. hazard> environment/health/safety; <PP denies economic cost-benefit analysis>.

There is no environmental crisis as claimed. There is instead a U.S. constitutional crisis concerning private property rights.

The common law and US constitutional tradition – everything is allowed unless it is forbidden – must be compared with the Napoleonic civil law tradition – codifies what the State allows and bans everything else.

The traditional foreign policy agenda has expanded to include a variety of social, cultural, labor, environmental and health issues. As a result, there is more regulation of private activity.

There is an effort to secure the aggregate communal preference and social esteem. Politics is changing such that what people’s preferences are informed largely by what people perceive to be the preferences of others. There is use of media representations of peoples’ perceptions to effectuate change – e.g., risk perception (one reason for the printing press).

To this end, Al Gore is a norm entrepreneur extraordinaire.

## **II. Our National Identity – “We the People”**

Ultimately, political authority resides not in government or in any government official, but rather in the people.

### a. Comparing “Rule of Law” With “Rule by Law” (Rule by Men)

“Rule of Law” (natural and civil law) – It is a notion is based on an appeal to a higher standard of law and justice than mere mortal or enacted law. It suggests that our relationships are governed by a set of relatively impartial rules, rather than by a group of individuals – an elite class. The supreme law of the land – the U.S. Constitution – must be viewed as the bulwark against federal and state government arbitrary action which protects individual rights and liberties.

“Rule by Law” (utilitarianism) – It reflects the notion of the greatest good for the greatest number of people, and has limited regard for individual rights. It is most closely associated with the “public good” articulated by Claude Helvetius during the French Enlightenment period. Claude Helvetius advocated in favor of national education and to harmonize the human

environment via legislation/regulation. He believed that this produces the greatest human happiness and equality. Helvetius advocated for the legislation of punishments and rewards to force men to contribute to the “public welfare”. Environmentalism and sustainable development during the post-Cold War period is rooted in Marxism and the socialist doctrine – “politically free, but economically dislocated”. Individual preferences and rights are lost to the public interest, which is of primary importance.

Liberal democracy vs. illiberal democracy;

U.S. vs. French rationalist-determinism;

Empirical (too confusing, complex and disorderly) vs. determinist *a priori* rationalism (more tidy and uniform).

Like Helvetius, Marxist faith redounds in the rational/transformational power of human species through rulemaking. Helvetius believed that people can be improved by legislation alone, and that people would soon be so good that the boundaries of property would no longer be required. Environmentalism has absorbed this credo.

Bentham/Rousseau employed utilitarianism through an appeal to the “general will”, to justify apportionment of punishment to those that transgressed the law and rewards for those who complied therewith. They rejected traditional common law concepts.

b. Positive vs. Negative Rights

i. Positive Rights:

German monarchs preserved legitimacy to rule by enacting constitutions and bills of rights, but failed to endure the political whims of the national parliament and unelected bureaucracies. Private property was and remains highly subject to and consistent with collective power and the public interest – i.e, the general will. Property rights are NOT in opposition to collective power and the public interest as in the U.S.

Positive rights are susceptible to override by social-prone national/regional parliaments and to reinterpretation by “progressive” EU national/regional courts. THERE IS NO EXPRESS GUARANTEE OF COMPENSATION FOR GOVERNMENT TAKINGS OF PRIVATE PROPERTY – THERE IS ONLY AN IMPLIED CONDITIONAL RIGHT TO PRIVATE PROPERTY.

ii. Negative Rights of Exclusion:

Reflect that private interests are in opposition to collective power and the public interest AND OTHER INDIVIDUAL INTERESTS.

They do not reflect an integrated view of private/public rights. The content of property is determined WITHOUT reference to the social context.

They are not subject to a redrawing of boundaries of individual autonomy by collective interests.

One purpose of the American Revolution was to strengthen and protect peoples' fundamental rights – negative rights via a bill of rights that preceded the formation of government. In Germany, and Europe generally, the government preceded the bill of rights.

c. Economic vs. Political Freedom

Vaclav Klaus, President of the Czech Republic, argues that the “isms” present the greatest threat to freedom in an economic sense. He has observed that environmentalism is reminiscent of Marxist central planning. The issue of global warming is actually one of regulatory control over the economic life of individuals. It is a form of “soft socialism”; it is a new European Napoleonic Code. This new “soft socialism” views law as a system of incentives and punishments.

The institutional setting in which economic law is employed is important. When goods are “owned” they can be used efficiently. Problems that arise between adjacent owners need not be resolved by state intervention. Rather, a negotiated solution can be pursued. The goal of law should be to minimize transaction costs; to make transactions more economically efficient, and to resolve environmental externalities.

Economic and legal efficiency is the consequence of individual property rights. Under a system of clearly defined property rights people with information about a given conflict/externality have strong incentives to acquire control of and preserve resources. This avoids the “tragedy of the commons”. In the spirit of Forrest Gump, “efficient is as property does”. Efficiency means and requires respect for private property.

### **III. State and Individual Rights Within a Federalist System**

The U.S. Constitution provides for three separate branches of government to prevent the formation of too strong a national government capable of overpowering individual state governments. The 10<sup>th</sup> Amendment made clear that States retained and were reserved spheres of activity.

a. 9<sup>th</sup> & 10<sup>th</sup> Amendments:

THE U.S. CONSTITUTION DOES NOT PROTECT THE SOVEREIGNTY OF STATES FOR THE BENEFIT OF STATES OR STATE GOVERNMENTS, BUT TO PROTECT INDIVIDUALISM.



States cannot consent to enlargement of the powers of Congress beyond those enumerated in the Constitution.

b. The Bill of Rights:

THE BILL OF RIGHTS LIMITS THE ABILITY OF GOVERNMENT – BOTH NATIONAL & STATE GOVERNMENT – TO TRESPASS ON INDIVIDUAL LIBERTIES.

The Bill of Rights places certain liberties beyond the reach of majorities on the grounds that depriving fundamental rights would diminish individuals' civil standing and humanity.

The Bill of Rights recognizes inalienable individual rights – namely, natural rights anticipated by the U.S. Constitution, including the right to private property.

James Madison elaborated on this concept in the Federalist Papers:

Federalist #10: In it, he argued that “the protection of the faculties of men from which the rights of property originate is the FIRST objective of government.”

Federalist #54: In it, he argued that “government is instituted no less for protection of the property than of the persons of individuals”.

National Gazette: In it, he argued that, “Just as a man may be said to have a right to his property, he may equally be said to have a property in his rights.

#### **IV. The Facts**

Environmentalists and European governments are actively promoting adoption of EU environmental, health and safety laws, regulations and standards within the U.S., and many of you are who are progressives are proud of this accomplishment. The message seems to be that “people want regulation” based on a perception of others' preferences shaped by States, media and norm entrepreneurs who shape public messages. This results in a “norm cascade”. Such messengers argue that there is implied authority in the U.S. Constitution to regulate global warming and the general welfare, that there is a “Government Protector-in-Chief”, and that there is an implied “property clause” to protect federal property.