

# COMMON GOOD CONSTITUTIONALISM AND THE FUTURE OF ENVIRONMENTAL LAW

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## INTRODUCTION

Environmental law is an odd field. While it has an extensive pre-history, modern environmental law comes from an array of federal statutes passed during the 1970s.<sup>1</sup> The Environmental Protection Agency (EPA) and Council on Environmental Quality were created during the Nixon administration. This administration also saw the passage of the National Environmental Policy Act (NEPA), Clear Air Act (CAA), Federal Water Pollution Control Act, Endangered Species Act, Toxic Substances Control Act (TSCA), and Resource Conservation and Recovery Act (RCRA), among others.<sup>2</sup> The

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1. See generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW*, 47-97 (2004) (discussing the evolution of environmental law to modern era).

2. *Id.* at 70.

broad scope and quick implementation of these acts lead to material benefits in human health and in wilderness and species conservation. Over time, limitations inherent in an area of law created almost entirely by disparate statutes have become more apparent.<sup>3</sup>

Chief among these limitations is environmental law's lack of a central organizing principle. As environmental statutes and case law have increased, so have complaints that the field is overly complex and fragmented. This positive, statutory law has failed to develop into a cohesive structure and is "seldom read against a common law or constitutional base or taken as a source of new general principles."<sup>4</sup> This failure is reflected in the Supreme Court's mostly inconsequential early decades of environmental decisions.<sup>5</sup> The Court tended to "fritter away docket space on oddball environmental cases with little precedential value,"<sup>6</sup> including one particularly strange case on psychological trauma and nuclear power.<sup>7</sup> The Court left large areas of environmental law, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>8</sup> liability and toxic tort litigation basically untouched.<sup>9</sup> The Court often denied environmental appeals, was substantively deferential to administrative agencies, and resolved cases on narrow technical grounds.<sup>10</sup> A review of Supreme Court environmental decisions undertaken in 2000 found that most Justices considered environmental ramifications unimportant to their vote.<sup>11</sup> Justices tended to see environmental cases as just the factual background to more important crosscutting issues of law. This failure has limited environmental law's development as an autonomous field.

Environmental law's status as a predominantly statutory area of law has led it to struggle to adapt to new conditions and remain overly subject to changing political winds.<sup>12</sup> Throughout their history, environmental regulations have been withdrawn, altered, and underenforced by hostile

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3. A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENV'T L. 213, 216 (2004) ("Environmental law's rapid rise and great success is nonetheless a mixed blessing because it postponed consideration of the hard questions about the content and legitimacy of the field and of environmental protection generally.")

4. Dan Tarlock, *Is a Substantive, Non-Positivist United States Environmental Law Possible?*, 1 MICH. J. ENV'T & ADMIN. L. 159, 165 (2012) [hereinafter *Non-Positivist United States*].

5. See generally Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 547-69 (1997) (discussing the Supreme Court's inconsequential decisions).

6. *Id.* at 550.

7. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 763, 766 (1983).

8. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (2012).

9. Farber, *supra* note 5, at 553.

10. *Id.* at 555-62.

11. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 736-44 (2000).

12. Tarlock, *supra* note 3, at 232.

administrations. In recent decades the Court has become increasingly politically polarized and at times averse to the environmental cause. Richard J. Lazarus' 2000 environmental protection score rankings revealed dramatic decreases in these scores over time, with a substantial drop from the 1970s to the 1980s and a further decrease throughout the 1990s.<sup>13</sup> He noted the increasing importance of personal anti-environmental opinions among the Justices—including Scalia's stated opposition to the judiciary's "long love affair with environmental litigation"<sup>14</sup> and Justice Powell's experiences in private practice.<sup>15</sup> This trend continued in the Court's 2003–2004 term.<sup>16</sup> By the October 2008 term, Justices' environmental decision-making was firmly polarized—with the Court's four liberal Justices' environmental protection scores all sitting above 66% and the conservative Justices all around 33%.<sup>17</sup> Justice Scalia's record is illustrative. After 2000, his opinions in environmental cases became less stridently textualist where the method would have led to a victory for environmental advocates.<sup>18</sup> Political risks to the field remain incredibly high, with the EPA's ability to regulate carbon emissions at issue in this term's *West Virginia v. EPA*.<sup>19</sup>

There have been a few attempts to craft a non-positivist framework for environmental law. Dan Tarlock's *Is There a There There in Environmental Law* proposes five structural principles.<sup>20</sup> The principles are intended to legitimize and contour the field, create some "legal drag on the amplitude of political oscillations," and provide a background structure for negotiations.<sup>21</sup>

A second proposal is found in Todd S. Aagaard's *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*. Aagaard identifies two

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13. Lazarus, *supra* note 11, at 735–36.

14. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983).

15. Lazarus, *supra* note 11, at 729–30; JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL JR, 125–28, 189–93, (1994) (noting while Justice Powell worked at Hunton & Williams, he represented a variety of industrial clients, including the Albermarle Paper Company, Cheseapeake Corporation of Virginia, and the Virginia-Carolina Chemical Corporation. This included representing the Albermarle Paper Company in its acquisition of the Ethyl Corporation, a producer of tetraethyl lead, then used as a gasoline additive.).

16. Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term*, 42 HOUS. L. REV. 565, 568 (2005).

17. Stephen M. Johnson, *The Roberts Court, and the Environment*, 37 B.C. ENV'T AFFS. L. REV. 317, 348–49 (2010).

18. Rachel Kenigsberg, *Convenient Textualism: Justice Scalia's Legacy in Environmental Law*, 17 VT. J. ENV'T L. 418, 419, 430 (2016).

19. *West Virginia v. Env't Prot. Agency*, 985 F.3d 914 (D.C. Cir. 2021), *cert. granted*, (U.S. Oct. 29, 2021) (No. 20–1530).

20. Tarlock, *supra* note 3, at 248–53 (referencing the five principles as follows: 1) "Minimizing Uncertainty Before and As You Act," 2) "Environmental Degradation Should Be a Last Resort After All Reasonable, Feasible Alternatives Have Been Exhausted," 3) "Risk Can be a Legitimate Interim Basis for Prohibition of an Activity," 4) "Polluters Must Continually Upgrade Waste Reduction and Processing Technology," and 5) "Environmental Decision-making Should be Inclusive Rather Than Exclusive Within the Limits of Rationality.").

21. *Id.* at 220–21.

defining characteristics of the field—physical public resources and pervasive interrelatedness—and secondary characteristics including temporal and spatial disjunctions and scientific uncertainty.<sup>22</sup> From these, he created a conceptual diagram for environmental law that focuses on *use conflicts*.<sup>23</sup> Tarlock reviewed proposals from Aagaard and others and found them insufficient. Tarlock challenges the Constitutional or common law right to a healthy environment, a more comprehensive public trust doctrine, an expanded conception of public property rights, and the extension of legal personality to ecosystems.<sup>24</sup> Instead, he proposes an alternative set of principles modeled on international environmental law.<sup>25</sup>

Complicating these attempts is the fact that environmental law does not fit neatly within the liberal ideological framework. David A. Westbrook defines liberalism as “a social theory built upon the value of autonomy, which is the individual’s capacity to make choices.”<sup>26</sup> Foundational here is the idea that value statements are just expressions of personal taste. Rules should be crafted to emphasize individual freedom. Liberalism restricts environmental law to “harms that can be expressed as reductions of autonomy.”<sup>27</sup> General environmental harms—to wilderness areas, vulnerable species, and entire ecosystems—fall outside this framework. Westbrook considers a few attempts to articulate environmental values within a liberal framework, including public trust, public nuisance, and intergenerational equity arguments, and finds them inadequate.<sup>28</sup> He notes that “to speak of nature is to discuss both the purpose and bounds of humanity”—a conversation that liberalism retreats from.<sup>29</sup> A full realization of environmental goals requires “a political discourse more comprehensive than contemporary liberalism, a discourse that can articulate the future.”<sup>30</sup>

This article considers whether the environmental movement needs to integrate the insights of the past to prepare for the future. Over the past few years, internal disagreements on the right have begun manifesting themselves in new and unexpected ways. One development has been a revived interest in the classical legal tradition. Adrian Vermeule’s Common Good Constitutionalism is the clearest articulation of this development. Vermeule calls for a strong administrative power to protect the vulnerable from both

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22. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 264–71 (2010).

23. *Id.* at 279, fig 2.

24. *Non-Positivist United States*, *supra* note 4, at 179–80.

25. *Id.* at 192–93.

26. David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 682 (1994).

27. *Id.* at 694.

28. *Id.* at 695–708.

29. *Id.* at 710.

30. *Id.* at 710–11.

climate change and “the underlying structures of corporate power” that contribute to it.<sup>31</sup> This proposal stands in marked contrast to conservative jurisprudence on environmental matters over the past 40 years. For this reason alone, environmentalists should take an interest in understanding his approach.<sup>32</sup>

Part I situates the classical law revival in its political context. An examination of the blog *Ius & Iustitium* reveals five traits of the classical law revival. Following is an outline of the Common Good Constitutionalist (CGC) framework. Part II lays out a Common Good Constitutionalist environmental jurisprudence. Applying CGC principles to environmental law would lead to beneficial results in a variety of areas. Courts would be broadly deferential to legislative and administrative environmental actions and would interpret statutes in light of their purposes and aspirations. Property rights would be understood within their ecological and social context. Localities would be empowered and protected from state-level meddling. A more communal view of standing requirements would benefit conservation organizations. Part III argues that proponents of Common Good Constitutionalism should take environmental considerations seriously and ends with an argument for a substantive environmental law.

## I. COMMON GOOD CONSTITUTIONALISM

### A. Political Background

Conor Casey traces the origins of Common Good Constitutionalism to deep dissatisfaction within the conservative movement.<sup>33</sup> The present *fusionist* approach combines a cultural traditionalism with limitations on state regulatory power. This approach limits state regulatory power by “pursuing the privatization or reduction of government services, promoting international free trade and economic globalization,” and through “deregulation of the financial industry.”<sup>34</sup> In recent years an increasing number of conservatives have begun to feel that economic liberalism is incompatible with social traditionalism.

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31. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC: IDEAS (Mar. 31, 2020), [https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/?utm\\_source=copy-link&utm\\_medium=social&utm\\_campaign=share](https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/?utm_source=copy-link&utm_medium=social&utm_campaign=share).

32. This aspect of his proposal is already receiving notice. See Eric Segall, *Ten Observations About Adrian Vermeule's Book "Common Good Constitutionalism"*, DORF ON L. (Mar. 2, 2022), <http://www.dorfonlaw.org/2022/03/ten-observations-about-adrian-vermeules.html>.

33. Conor Casey, ‘*Common Good Constitutionalism*’ and the New Debate over Constitutional Interpretation in the United States, 4 PUB. L. 1, 4 (forthcoming) (unpublished manuscript available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3725068](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725068)).

34. *Id.* at 6.

Some broadly *postliberal* conservatives see the Trump presidency as an opportunity to begin forging a new conservative politics.<sup>35</sup> They oppose attempts to reconstruct the pre-Trump conservative *status quo*.<sup>36</sup> The postliberals are deeply critical of liberalism, believing that “its master commitments are a common dedication to individual autonomy and freedom from constraint inconsistent with a politics that can safeguard human flourishing.”<sup>37</sup> Both parties are seen as fundamentally liberal and as having a shared commitment to both cultural and economic deregulation.<sup>38</sup> Conservative postliberals criticize neoliberal economics on issues of inequality, trade, and the drug epidemic.<sup>39</sup>

### *B. Five Traits of the Classical Law Revival*

This dissatisfaction with the *status quo* has coincided with an interest in a revival of the classical law tradition. The blog *Ius & Iustitium (I&I)* has become a gathering place for those looking for “a fundamental re-thinking of jurisprudence that rejects the positivism and liberalism embedded in mainstream conservative thought and embraces the classical legal tradition.”<sup>40</sup> While writers in *I&I* have covered a wide variety of topics and are not always in agreement, their articles reveal five core themes. First, a deep interest in on the history of the classical legal tradition, particularly as expressed in Roman and medieval law. Second, a foreign and comparative nature. Third, emphasis on social issues, including abortion and gender issues. Fourth, the insights of the classical legal tradition are extended into economic matters, even when doing so conflicts with deregulatory orthodoxy. Finally, the movement includes a staunch criticism of originalism and textualism.

First, the classical law revival replaces originalism’s emphasis on the founding generation and the framers of the Constitution with references to Roman, medieval, and canon law. Cicero<sup>41</sup> and Justinian<sup>42</sup> replace Jefferson

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35. *Id.* at 6–7.

36. Sohrab Ahmari, et al., *Against the Dead Consensus*, FIRST THINGS (Mar. 21, 2019), <https://www.firstthings.com/web-exclusives/2019/03/against-the-dead-consensus>.

37. *Id.*; see generally PATRICK DENEEN, *WHY LIBERALISM FAILED* (2018).

38. R.R. Reno, *What Liberalism Lacks*, FIRST THINGS, (May 21, 2019), <https://www.firstthings.com/web-exclusives/2019/05/what-liberalism-lacks>.

39. Casey, *supra* note 33, at 8.

40. JAF, *Ius & Iustitium, One Year On*, IUS & IUSTITIUM (June 28, 2021), <https://iusetiustitium.com/ius-iustitium-one-year-on/>.

41. See generally Brian McCall, *Would Cicero Recognize America as a Commonwealth?*, IUS & IUSTITIUM (Feb. 17, 2021), <https://iusetiustitium.com/would-cicero-recognize-america-as-a-commonwealth/> (explaining Cicero’s legal and political philosophy as it relates to the United States).

42. See generally Yves Casertano, *Justinian Goes Fox Hunting*, IUS & IUSTITIUM (May 26, 2021), <https://iusetiustitium.com/justinian-goes-fox-hunting/> (revealing Justinian’s continuous influence on modern property law).

and Hamilton. St. Isidore,<sup>43</sup> St. John of Capistrano,<sup>44</sup> St. Benedict,<sup>45</sup> St. Thomas Aquinas,<sup>46</sup> and St. Thomas More<sup>47</sup> remain as relevant today as five hundred years ago. The revivalists see religion not as a personal quirk but as having unavoidable consequences for law. Sir John Fortescue,<sup>48</sup> Archbishop Wulfstan of York,<sup>49</sup> and Dante<sup>50</sup> make appearances. One writer recovers the classical conception of jurisprudence as a “subaltern” science, one “arrayed at the service of metaphysically and theologically rich conceptions of the common good.”<sup>51</sup> Another particularly interesting article compares contemporary natural law revivalists with the Bologna jurists who rediscovered Justinian’s *Corpus Juris Civilis* in the 11th Century.<sup>52</sup> Instead of “uncouth Germanic war bands,” today’s revivalists battle “the tangled vines of liberalism, positivism, and a panoply of related errors.”<sup>53</sup> The revivalists look to use the classical legal tradition to slowly—but surely—restore law in service of the common good.<sup>54</sup>

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43. See generally Pat Smith, *Recovering St. Isidore’s Etymologies in the Classical Legal Tradition*, IUS & IUSTITIUM (Aug. 31, 2020), <https://iustitium.com/recovering-st-isidores-etymologies-in-the-classical-legal-tradition/> (discussing natural law).

44. See generally Yves Casertano, *Feast of Saint John of Capistrano, Patron of Jurists*, IUS & IUSTITIUM (Oct. 23, 2020), <https://iustitium.com/feast-of-saint-john-of-capistrano-patron-of-jurists/> (recognizing St. John of Capistrano as a legal scholar).

45. See generally Pat Smith, *St. Benedict’s Rule and the Penal Law*, IUS & IUSTITIUM (Aug. 10, 2021), <https://iustitium.com/st-benedicts-rule-and-the-penal-law/> (referring to the influence of St. Benedict’s rule on modern American penal codes).

46. See generally Anna Lukina, *St. Thomas Aquinas on Angels, Demons, and Evil ‘Law’*, IUS & IUSTITIUM (May 14, 2021), <https://iustitium.com/st-thomas-aquinas-on-angels-demons-and-evil-law/> (explaining St. Thomas Aquinas’ philosophy on impacts of law on morality).

47. See generally JAF, *Thoughts on the Feast Day of St. Thomas More*, IUS & IUSTITIUM (June 22, 2020), <https://iustitium.com/thoughts-on-the-feast-day-of-st-thomas-more/> (explaining St. Thomas More’s history and advocacy).

48. See generally Pat Smith, *Sir John Fortescue and the ius commune*, IUS & IUSTITIUM (Oct. 7, 2020), <https://iustitium.com/sir-john-fortescue-and-the-ius-commune/> (explaining influence on English law and eventually American law).

49. See generally Pat Smith, *A New Edition of Wulfstan’s Legal Writings*, IUS & IUSTITIUM (Nov. 24, 2020), <https://iustitium.com/a-new-edition-of-wulfstans-legal-writings/> (discussing Wulfstan’s legal codes and philosophy).

50. Anibal Sabater, *Dante’s Lawyers from Hell*, IUS & IUSTITIUM (Oct. 7, 2020), <https://iustitium.com/dantes-lawyers-from-hell/>; Anibal Sabater, *Dante’s Lawyers from Purgatory (II)*, IUS & IUSTITIUM (Aug. 24, 2021), <https://iustitium.com/dantes-lawyers-from-purgatory-ii-cato/>.

51. Rafael de Arízaga, *Jurisprudence as a Subaltern Science*, IUS & IUSTITIUM (Sept. 7, 2020), <https://iustitium.com/jurisprudence-as-a-subaltern-science/>.

52. Yves Casertano, *Reviving the Classical Legal Tradition in an Age of Legal Barbarism*, IUS & IUSTITIUM (Feb. 2, 2021), <https://iustitium.com/reviving-the-classical-legal-tradition-in-an-age-of-legal-barbarism/>.

53. *Id.*

54. *Id.*

The classical law revival transcends national boundaries. Writers from Venezuela,<sup>55</sup> Scotland,<sup>56</sup> Canada,<sup>57</sup> Austria,<sup>58</sup> Ireland,<sup>59</sup> Russia,<sup>60</sup> and Spain<sup>61</sup> have contributed to *Ius & Iustitium*. Canadian scholars advocate for an interpretation of Section 33 of the *Canadian Charter of Rights and Freedoms* “as a prophylactic for the shortcomings of an overly judicialized rights discourse, which may sometimes prescind from questions of the common good.”<sup>62</sup> Revivalists view the Scottish Court of Session’s decision overturning a pandemic restriction of public worship as an instance of a temporal power preventing interference with the independent legal order of the Church.<sup>63</sup> The Irish judicial system is held up an example of Common Good Constitutionalism in action. Irish judges have been deferential to legislative and executive determinations of how best to achieve the common good. They have not been hesitant to use the 1937 Constitution’s preamble “to pour substantive moral content into rights interpretation.”<sup>64</sup> Native American tribal sovereignty issues have been reviewed several times.<sup>65</sup> Laws as disparate as the Canon Law of the Catholic Church and the European Union’s Class Action Directive have been held up as examples of law serving the common good.<sup>66</sup> The classical law revival draws from both the past and from foreign and tribal law.

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55. José Ignacio Hernández G., “*Law & Leviathan*” in the age of coronavirus, IUS & IUSTITIUM (May 18, 2021), <https://iustitium.com/law-leviathan-in-the-age-of-coronavirus/>.

56. Jamie McGowan, *Against Judicial Dyarchy*, IUS & IUSTITIUM (July 16, 2020), <https://iustitium.com/against-judicial-dyarchy/>.

57. Kerry Sun et al., *Notwithstanding the Courts? Directing the Canadian Charter toward the Common Good*, IUS & IUSTITIUM (July 1, 2021), <https://iustitium.com/notwithstanding-the-courts-directing-the-canadian-charter-toward-the-common-good/>.

58. Gregory B.L. Chilson, *Man is Known by the Company He Keeps: Corporate Law and the Common Good*, IUS & IUSTITIUM (Dec. 11, 2020), <https://iustitium.com/man-is-known-by-the-company-he-keeps-corporate-law-and-the-common-good/>.

59. Conor Casey, *Common-Good Constitutionalism: Lessons from the Irish Constitution*, IUS & IUSTITIUM (July 31, 2020), <https://iustitium.com/common-good-constitutionalism-lessons-from-the-irish-constitution/> [hereinafter *Lessons from the Irish Constitution*].

60. Lukina, *supra* note 46.

61. Ricardo Calleja, *Imperare aude! Dare to command! (Part II)*, IUS & IUSTITIUM (Oct. 22, 2020), <https://iustitium.com/imperare-aude-dare-to-command-part-ii/>.

62. Sun et al., *supra* note 57.

63. Hernández G., *supra* note 55.

64. *Lessons from the Irish Constitution*, *supra* note 59.

65. Maria Messina, *McGirt and the Patchwork of American Sovereignties*, IUS & IUSTITIUM (July 10, 2020), <https://iustitium.com/mcgirt-and-the-patchwork-of-american-sovereignties/>; Jonathan Askonas, *Ius Gentium and Tribal Sovereignty*, IUS & IUSTITIUM (July 13, 2020), <https://iustitium.com/ius-gentium-and-tribal-sovereignty/>; JS, John Finnis, Ed Whelan, and Indian Tribes, IUS & IUSTITIUM (Apr. 8, 2021), <https://iustitium.com/john-finnis-ed-whelan-and-indian-tribes/>.

66. Rev. James Bradley, J.C.D., *Canon Law and Political Discourse: What the Church Can and Must Offer Politics*, IUS & IUSTITIUM (Aug. 24, 2020), and Yves Casertano, *The E.U.’s Class Action Directive: AN Inspiration for Corporatist Class Action Reform*, IUS & IUSTITIUM (Sept. 15, 2020), <https://iustitium.com/the-e-u-s-class-action-directive-an-inspiration-for-corporatist-class-action-reform/>.



Social issues, particularly abortion and religious liberty, are important to the movement. The Supreme Court's decision in *June Medical Services L.L.C. v. Russo* lead to a series of five articles. These five articles in *Ius & Iustitium* encapsulate some conversations among the classical law revivalists. The first criticizes originalists, noting that, in this instance, a consistent originalism on the part of Chief Justice Roberts lead to a defeat for the pro-life cause.<sup>67</sup> Another casts Chief Justice Roberts as playing the moderate in a drama that will always incline towards liberalism.<sup>68</sup> A third article criticizes the “Burkean virtue of epistemic humility” claimed by Roberts, and notes that, paradoxically, excessive deference to precedent actually places past judges in the arrogant position of fixing law for all time.<sup>69</sup> A fourth compares the pro-life movement to a bull in a bullfight—destined to lose under rules stacked against it.<sup>70</sup> The final article ties Burke's *Reflections* (quoted by Roberts in the decision) negatively to the “economic ‘system’ of capitalism.”<sup>71</sup> Other topics of discussion include Bostock,<sup>72</sup> ministerial exceptions and the Catholic Church,<sup>73</sup> 14th Amendment personhood for the unborn,<sup>74</sup> and the Court's decision in *Fulton v. City of Philadelphia*.<sup>75</sup>

The natural law revivalists often take economic stances at odds with those of the existing conservative movement. The common good is

67. Pat Smith, *Don't Let the Sunshine Fool You*, IUS & IUSTITIUM (June 29, 2020), <https://iustitium.com/dont-let-the-sunshine-fool-you/>.

68. Rafael de Arizaga, *John Roberts, Conservative*, IUS & IUSTITIUM (June 29, 2020), <https://iustitium.com/john-roberts-conservative/>.

69. Adrian Vermeule, *True and False Humility*, IUS & IUSTITIUM (June 29, 2020), <https://iustitium.com/true-and-false-humility/> (“Because the ‘private stock of reason . . . in each man is small, . . . individuals would do better to avail themselves of the general bank and capital of nations and of ages.” 3 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (1790)).

70. Yves Casertano, *June Medical and the Bull in the Arena of Liberal Neutrality*, IUS & IUSTITIUM (June 29, 2020), <https://iustitium.com/june-medical-and-the-bull-in-the-arena-of-liberal-neutrality/>.

71. Edmund Waldstein & O. Cist., *Edmund Burke and the Tragedy of Conservatism*, IUS & IUSTITIUM (June 29, 2020), <https://iustitium.com/edmund-burke-and-the-tragedy-of-conservatism/>.

72. Gregory Caridi, *Bostock's Hidden Trap*, IUS & IUSTITIUM (July 5, 2020), <https://iustitium.com/bostocks-hidden-trap/>; Pat Smith, *Bostock and the Tyranny of Values*, IUS & IUSTITIUM (Aug. 3, 2020), <https://iustitium.com/bostock-and-the-tyranny-of-values/>.

73. Pat Smith, *The Ministerial Exception and the Church's Jurisdiction*, IUS & IUSTITIUM (July 8, 2020), <https://iustitium.com/the-ministerial-exception-and-the-churchs-jurisdiction/>; Yves Casertano, *The Ministerial Exception and the Liberty of the Church*, IUS & IUSTITIUM (July 8, 2020), <https://iustitium.com/ministerial-exception-and-the-liberty-of-the-church/>.

74. See generally Yves Casertano, *Yes, Courts Can Enforce the Fourteenth Amendment Personhood for the Unborn*, IUS & IUSTITIUM (April 5, 2021), <https://iustitium.com/yes-courts-can-enforce-fourteenth-amendment-personhood-for-the-unborn/> (supplementing a Supreme Court ruling could provide concrete legal protection for the unborn under the 14<sup>th</sup> Amendment).

75. Gaius Musonius Rufus, *Dance Lessons with the Chief Justice: Fulton v. City of Philadelphia*, IUS & IUSTITIUM (June 18, 2021), <https://iustitium.com/dance-lessons-with-the-chief-justice-fulton-v-city-of-philadelphia/>; see also O.A.S., *What Both Sides got Wrong about Fulton*, IUS & IUSTITIUM (July 20, 2021), <https://iustitium.com/what-both-sides-got-wrong-about-fulton/>.

implicated in patent law,<sup>76</sup> copyright,<sup>77</sup> trademarks, freedom of speech, and the conflict of laws and public health.<sup>78</sup> American antitrust law is seen as insufficient in “the absence of a legitimate moral authority that can anchor antitrust regulation to the common good.”<sup>79</sup> One particularly interesting article (referenced further below) places property rights within the context of larger discussions of the common good.<sup>80</sup> Another draws on the Code of Canon Law and the writings of Pope Francis to discuss charity and the penal law.<sup>81</sup> Corporate law must also be made subject to the common good.<sup>82</sup> One article even reviews—and praises!—some of Joe Biden’s executive orders as conducive to the common good.<sup>83</sup>

Finally, the revivalists are strongly critical of originalism and textualism. The originalist project is seen to have been fundamentally confused. It serves as an attempt to escape judicial value judgements through commitment to “the Madisonian constitution, the legitimacy of the judiciary”—itself a value.<sup>84</sup> The way forward is not through shrinking from judicial value judgements but through grounding them in the truths of the natural legal tradition.<sup>85</sup> One article by a scholar of Lacanian psychoanalysis posits that textualism is fundamentally deconstructionist and describes Justice Gorsuch as “the deconstructionist’s useful idiot.”<sup>86</sup> Another notes that the Court’s decision in *United States v. Curtiss-Wright Export Corp.*<sup>87</sup> breaks the originalist vs. living constitutionalist paradigm by holding that sovereignty

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76. Jake Neu, *The Common Good in Patent Law*, IUS & IUSTITIUM (July 1, 2020), <https://iusetiustitium.com/the-common-good-in-patent-law/>; Jake Neu, *The Better Tool: Beneficial Utility in Patent Law*, IUS & IUSTITIUM (July 27, 2020), <https://iusetiustitium.com/the-better-tool-beneficial-utility-in-patent-law/>.

77. Jake Neu, *Copyright, Author’s Right, and the Common Good (Part 1)*, IUS & IUSTITIUM (November 9, 2020), <https://iusetiustitium.com/copyright-authors-right-and-the-common-good-part-i/>.

78. Jake Neu, *Trademarks and Free Speech*, IUS & IUSTITIUM (May 4, 2021), <https://iusetiustitium.com/trademarks-and-free-speech/>.

79. Maria Messina, *Antitrust and the Common Good*, IUS & IUSTITIUM (Oct. 28, 2020), <https://iusetiustitium.com/antitrust-and-the-common-good/>.

80. Rachel Walsh, *Property and the Common Good—Reviving Old Debates*, IUS & IUSTITIUM (Sept. 14, 2021), <https://iusetiustitium.com/property-and-the-common-good-reviving-old-debates/>.

81. Pat Smith, *Charity and the Penal Law*, IUS & IUSTITIUM (June 30, 2021), <https://iusetiustitium.com/charity-and-the-penal-law/>.

82. Gregory B. L. Chilson, *Man is Known by the Company He Keeps: Corporate Law and the Common Good*, IUS & IUSTITIUM (Dec. 11, 2021), <https://iusetiustitium.com/man-is-known-by-the-company-he-keeps-corporate-law-and-the-common-good/>.

83. Pat Smith, *Joe Biden’s Orders and the Common Good*, IUS & IUSTITIUM (May 4, 2021), <https://iusetiustitium.com/joe-bidens-orders-and-the-common-good/>.

84. Pat Smith, *Originalism and the Tyranny of Values*, IUS & IUSTITIUM (Mar. 30, 2021), <https://iusetiustitium.com/originalism-and-the-tyranny-of-values/>.

85. *Id.*

86. Vincent Clarke, *The Deconstructionist Ghost in the Textualist Machine*, IUS & IUSTITIUM (July 31, 2020), <https://iusetiustitium.com/the-deconstructionist-ghost-in-the-textualist-machine-2/>.

87. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

was not created anew by the Constitution, but results as a transfer of sovereignty from the British Crown.<sup>88</sup>

### C. Theory

The classical law revival has seen its fullest expression in the form of Adrian Vermeule's Common Good Constitutionalism. This method holds that law must focus on the common good of a given political community.<sup>89</sup> This common good is not mere preference aggregation or the summation of a number of private, individual goods but is rather the flourishing of the community itself.<sup>90</sup> This flourishing incorporates individual success but cannot be reduced to it. The common good is defined as follows:

(1) [I]t is the structural, political, economic, and social conditions that allow communities to live in accordance with the precepts of justice, yielding (2) the injunction that all official action should be ordered to the community's attainment of those precepts, subject to the understanding that (3) the common good is not the sum of individual goods, but the indivisible good of the community, a good that belongs jointly to all and severally to each.<sup>91</sup>

Proponents see all legal systems as assuming some conception of morality, even if that conception is left only hidden or implied.<sup>92</sup> Common Good Constitutionalists straightforwardly state that human flourishing is an objective good that should be sought by legal and political authorities. This flourishing is by its nature broad and includes, for example "health; bodily integrity; vigor; safety; the creation and education of new life; friendship in its various forms ranging from neighborliness to its richest sense in marriage; and living in a well-ordered, peaceful, and just polity."<sup>93</sup> Environmental justice is a particularly clear example of a common good. Indeed, Vermeule

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88. Adrian Vermeule, "The Union Existed Before the Constitution", IUS & IUSTITIUM (Oct. 6, 2020), <https://iustitium.com/the-union-existed-before-the-constitution/>.

89. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. L. & PUB. POL'Y 103, 105 (2022).

90. *Id.* at 109–10.

91. *Id.* at 110–11.

92. See Vermeule, *supra* note 31 ("[A]ll legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority.").

93. Casey & Vermeule, *supra* note 89, at 114–15; see also *id.* at 117 (noting that law is also seen to have an educative function, as "[t]hey can encourage citizens subject to the law to form desires, habits, and beliefs that better track and promote communal, and indeed their own, well-being").

notes that a right relationship to the environment is “arguably a precondition for the enjoyment of other goods.”<sup>94</sup>

Legal structures have an important role to play in promoting the common good. The classical legal tradition distinguishes between the broad, often vague principles of the natural law and the positive law determined by lawmakers. Lawmakers are charged with using reason to make determinations, or “the prudential process of giving content to a general principle drawn from a higher source of law, making it concrete in prudential application to local circumstances or problems.”<sup>95</sup> Governments have wide latitude in creating positive law to advance the common good. Once these laws are created, they ought to be interpreted in light of, and harmonized with, the background principles of natural law.<sup>96</sup>

In practice, this method would read “substantive moral principles . . . into the majestic generalities and ambiguities of the written Constitution.”<sup>97</sup> These include respect for authority and hierarchy, solidarity, subsidiarity, and an understanding of the moral ramifications of law.<sup>98</sup> Vermeule holds that existing rulings on “free speech, abortion, sexual liberties, and related matters will prove vulnerable under a regime of common good constitutionalism.”<sup>99</sup> The economic and administrative law ramifications of the approach are more central to environmental law. Common Good Constitutionalism would defer to strong presidential power and a strong administrative state. Rather than be seen through a originalist lens as a debatably constitutional and certainly inefficient bureaucracy, Vermeule sees administrative agencies as “the strong hand of legitimate rule.”<sup>100</sup> The state should protect individuals and communities from unjust economic forces and, notably, “from corporate exploitation and destruction of the natural environment.”<sup>101</sup> The state does not look to replace local institutions like trade unions and other solidaristic associations but will instead enable their flourishing. Importantly, the state will be able to protect the weak even in the face of claims of competing private rights.<sup>102</sup>

Vermeule’s *Common Good Constitutionalism: A Model Opinion*, uses Justice Harlan’s dissenting opinion in *Lochner v. New York*<sup>103</sup> as an example

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94. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION, 173.

95. Casey & Vermeule, *supra* note 89, at 120.

96. *Id.* at 124–25.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Lochner v. New York*, 198 U.S. 45, 45 (1905).

of a judicial opinion written along these lines.<sup>104</sup> Common Good Constitutionalism is situated not as an innovation but as a long running—if previously unsystematized—tradition in American law. Vermeule contrasts this with originalism, “a modern movement that has attempted, unconvincingly, to inscribe itself in the past.”<sup>105</sup> He notes a variety of cases beginning in the decades after the Civil War in which the Court upheld regulatory measures aimed at public benefit. These include *Munn v. Illinois*,<sup>106</sup> *Mugler v. Kansas*,<sup>107</sup> *Holden v. Hardy*,<sup>108</sup> and *Jacobson v. Massachusetts*.<sup>109</sup> Vermeule uses Justice Harlan’s opinion in *Mugler* to organize a framework for common good jurisprudence, as follows:

- (1) The public authority may act for the common good[;]
- (2) By making reasonable determinations about the means to promote its stated public purposes[; and,]
- (3) When it does, judges must defer.<sup>110</sup>

Vermeule sees this framework as derived “from the whole conception of the aims of government and of constitutionalism in the classical tradition.”<sup>111</sup> Under this reading, Common Good Constitutionalism, rather than something novel, is a return to form. He sees both progressive attempts to modernize jurisprudence and libertarian and conservative attempts to limit the size of government (itself a modern project) as in rebellion against the core of the common good tradition.<sup>112</sup> In opposition to both, “the police power framework has firm roots in the classical legal tradition.”<sup>113</sup>

*Lochner*, of course, used the theory of freedom of contract to invalidate a maximum hour law for bakers.<sup>114</sup> Vermeule draws a contrast between Justice Holmes’ and Justice Harlan’s dissents. Holmes based his dissent on judicial deference to the outcomes of the democratic process. Lost to

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104. Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS & IUSTITUM (June 17, 2020), <https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion/> [hereinafter *A Model Opinion*].

105. *Id.*

106. *See generally* *Munn v. Illinois*, 94 U.S. 113 (1876) (showing utilities could be regulated in the public interest).

107. *See generally* *Mugler v. Kan.*, 123 U.S. 623 (1887) (showing states could regulate property use for the public good).

108. *See generally* *Holden v. Hardy*, 169 U.S. 366 (1898) (showing states can regulate dangerous occupations for the public good).

109. *See, e.g.*, *Jacobson v. Massachusetts*, 25 S.Ct. 358 (1905) (holding that the Massachusetts statute allowed the police power of a state to be exerted to justify interference with the courts to prevent wrong and oppression).

110. *A Model Opinion*, *supra* note 104.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Lochner v. New York*, 198 U.S. 45, 60 (1905).

democratic deference is “the classical idea of a genuinely common good that transcends preference aggregation and that is entrusted to the care of the public authority.”<sup>115</sup> Harlan, on the other hand, forthrightly wrote that the state retains the power to regulate economic activity for the common good, even when this violates what market participants see as their rights.<sup>116</sup>

Vermeule ends by noting two ways in which, from a Common Good Constitutionalist perspective, judges can go astray. The first is through insufficient deference to public authorities. While there is no hard and fast determination for the balance of power between courts and public officials, “maturity is the realization that the absence of such a metric is hardly a decisive objection.”<sup>117</sup> The second is skepticism, either of the existence of an objective common good or that such a common good can be enacted through government action.<sup>118</sup>

## II. COMMON GOOD CONSTITUTIONALIST ENVIRONMENTAL JURISPRUDENCE

### *A. Statutory Interpretation*

One of the biggest benefits of a Common Good Constitutionalist approach is that it places environmental law in its broader context. Environmental statutes often consist of an unstable combination of broad, aspirational language about goals and purposes with more restrictive implementation provisions.<sup>119</sup> The first purpose of the Clean Air Act (CAA), for example, is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”<sup>120</sup> Textualists tend to overvalue enforcement provisions when they limit the applicability of otherwise broad and aspirational environmental statutes.<sup>121</sup> There are counterexamples where courts use the broad purposeful language as a lens through which to interpret the rest of the statute, as with the district court in *National Wildlife*

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115. *Id.*

116. *Id.*

117. *A Model Opinion*, *supra* note 104.

118. *Id.*

119. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L. Q.* 233 (1990); see also James A. Henderson Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 *COLUM. L. REV.* 1429 (1978) (describing how federal statutes, especially those related to environmental topics, often place more focus on aspirations rather than concrete solutions).

120. Clean Air Act, 42 U.S.C. § 7401(b)(1).

121. Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism*, 53 *WASH. & LEE L. REV.* 1231, 1254 (1996).

*Federation v. Gorsuch*.<sup>122</sup> Common Good Constitutionalists would favor the latter approach.

Illustrative here is a CGC reading of the Irish Constitution.<sup>123</sup> The Irish Constitution's preamble uses religious and moral language and posits government as created to secure the common good.<sup>124</sup> Indeed, "Irish courts have drawn prolifically on the preamble to the 1937 Constitution . . . to pour substantive moral content into rights interpretation."<sup>125</sup> This method is just as applicable to American environmental law. Environmental protection is inextricably tied to the common good. Centering the aspirational language of environmental statutes will help put them into full effect.

Irish Courts understand that the exhortation to promote the common good is not limited to them alone.<sup>126</sup> They have often found that "public authorities have ample authority and leeway when promulgating laws to secure the common good, even if individual entitlements or interests must give way."<sup>127</sup> The Irish Courts have maintained that the state has a wide latitude to regulate private uses of property.<sup>128</sup> They are conscious of their role and broadly deferential to the legislature.<sup>129</sup> In the American context, courts called upon to interpret environmental statutes would be conscious of the common good. They would be broadly deferential to legislative and administrative attempts to protect the environment. Courts would see themselves as cooperating with the other two branches to effectuate environmental protection.

### B. Property

Contemporary property law has struggled to integrate an understanding of ecological injury. One ahistorical<sup>130</sup> but common view is of property as

122. Nat'l Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291, 1311 (D.D.C. 1982).

123. *Lessons from the Irish Constitution*, *supra* note 59.

124. CONSTITUTION OF IRELAND 1937 (preamble), <http://www.irishstatutebook.ie/eli/cons/en/html> (last visited Oct. 5, 2021). ("In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.").

125. *Lessons from the Irish Constitution*, *supra* note 59.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. See John. F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (explaining the mistaken theory about the origins of traditional American property law).

consisting of a “bundle of rights”<sup>131</sup> able to be excised by an owner that went almost unimpeded up until modern times.<sup>132</sup> The enduring myth of strong, individualist property rights presents several problems in the environmental context.<sup>133</sup> Individual landowners can create environmental issues that impact others. Even land uses that could be practiced by one or a few landowners without issue can become destructive in the aggregate.<sup>134</sup> Intensive land uses have led to situations where “[e]cosystem processes are disrupted in ways that threaten the long-term fertility and health of entire regions.”<sup>135</sup> On the other hand, individual landowners are unable to resolve environmental issues on their own. Many problems can only be understood and remedied system wide.<sup>136</sup> Eric T. Freyfogle sees among the challenges of modern environmental law the “need to reconceive and reshape landed property rights.”<sup>137</sup>

The nature of environmental injury itself presents other problems. Environmental injuries can be irreversible and catastrophic, with far ranging economic, societal, and ecological effects.<sup>138</sup> Harms can change over time and manifest themselves across long distances.<sup>139</sup> These factors present inherent problems to legal systems used to adjudicating distinct violations of property rights. Uncertainty, caused by the “sheer complexity of the natural environment and, accordingly, how much is still unknown about it[,]” presents additional problems.<sup>140</sup> Ecological problems are often the result of multiple causes over time. Perhaps most problematic for the current model of property rights is the existence of purely (or at least in some combination with human and economic) ecological injury. Ultimately, “[t]he environmental dimension of environmental law teaches that the nonhuman, nonmonetizable dimensions of ecological injury not only exist but are worth protecting.”<sup>141</sup>

The Court’s decision in *Lucas*<sup>142</sup> is emblematic of the problems with the current conception of property and its resistance to incorporating the insights of ecology. The majority saw the land at issue as distinct asset—no different

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131. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

132. See Craig Anthony (Tony) Arnold, *The Reconstruction of Property: Property as a Web of Interests*, 26 HARV. ENV’T L. REV. 281, 286 (2002) (explaining that the “bundle of rights” theory is not conducive to an environmental understanding of property).

133. Eric T. Freyfogle, *Eight Principles for Property Rights in an Anti-Sprawl Age*, 23 WM. & MARY ENV’T L. & POL’Y REV. 777, 783–84 (1999).

134. *Id.* at 784.

135. *Id.*

136. *Id.*

137. *Id.* at 785.

138. Lazarus, *supra* note 11, at 745.

139. *Id.* at 746.

140. *Id.* at 747.

141. *Id.* at 748.

142. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1003 (1992).



than any other plot. The actual land at issue had been often partially or fully covered by water, and in fact “during the past fifty years, the shoreline itself had been landward of the landowner’s property 50 percent of the time because of the competing forces of accretion and erosion.”<sup>143</sup> An understanding of the complex ecosystems of coastal South Carolina would shed light on the reasoning of the Coastal Council. Moreover, the “economic loss” test used by the Justices failed to take in account the very ecological losses considered by lawmakers.<sup>144</sup>

Among the shortcomings of the environmental movement is “a particularly disturbing reluctance to phrase goals in terms of the common good.”<sup>145</sup> The movement’s language has tended to be liberal and individualistic—with an emphasis on personal effort and responsibility—or else clinical and scientific.<sup>146</sup> Eric T. Freyfogle calls for a reevaluation of property rights that takes the good of the surrounding community into greater account.<sup>147</sup> He advocates for a conservationist common good “conceived broadly enough to include ecological, economic, and general quality-of-life issues.”<sup>148</sup> Rachel Walsh sees similarities between this approach and St. Thomas Aquinas’s views on property rights.<sup>149</sup> While a person can privately possess property, this possession is always subject to the evolving needs of the community.<sup>150</sup> This principle is often known as the universal destination of goods.<sup>151</sup> Walsh correctly notes that the classical legal tradition’s conception of property as limited by the demands of the common good will “help smooth the way for tackling difficult problems like housing and climate change.”<sup>152</sup>

A Common Good Constitutionalist approach to property law will integrate the insights of modern ecology. Possession of property is not purely the assumption of rights but also serves as an assumption of responsibilities toward the community at large. Individual land use decisions, both solely and in aggregate, affect other people and the environment. The complex nature of environmental injury makes the importance of wise regulation particularly pressing. A CGC approach would be broadly deferential to federal, state, and local environmental restrictions on the exercise of property rights. After all,

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143. Lazarus, *supra* note 11, at 754.

144. *Id.* at 754–55.

145. Freyfogle, *supra* note 133, at 790.

146. *Id.*

147. *Id.* at 787–88 (“Property rights are sanctioned and supported within communities because community members collectively decide or sense, in one way or another, that a private-property regime will benefit them.”).

148. *Id.* 791.

149. Walsh, *supra* note 80.

150. *Id.*

151. *Id.*

152. *Id.*

rulers can exercise authority “for the good of subjects [in this case landowners] if necessary, even against the subject’s own perceptions of what is best for them.”<sup>153</sup> Rather than standing as an obstacle against environmental land use regulation, the judiciary would see themselves cooperating with the other branches in the promotion of the ecological common good.

### C. Environmental Federalism

Local governments are increasingly on the front lines of climate change response. Federal failure to respond to environmental problems has forced states and localities to attempt to fill the gaps.<sup>154</sup> While localities are unable to solve such systemic issues on their own, they can play an important role of mitigating harms and protecting their citizens.<sup>155</sup> Levels of local ability to act on environmental matters varies widely.<sup>156</sup> Most states have some grant of home rule authority that “combines elements of immunity from state interference and authority to take action on the local government’s own initiative.”<sup>157</sup> Local governments with this authority can act on local issues but are subject to state preemption.<sup>158</sup> State policy has begun to break along partisan lines.<sup>159</sup> Conservative state houses have begun to aggressively use preemption to prevent local regulation.<sup>160</sup> Even without explicit targeting, questions of preemption can be complex and leave localities unsure of how to proceed with attempts at reform.<sup>161</sup> Localities are not clearly included in the federal structure of the Constitution, which leaves them vulnerable to

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153. Vermeule, *supra* note 31 (editorial comment added).

154. Sarah J. Fox, *Why Localizing Climate Federalism Matters (Even) During a Biden Administration*, 99 TEX. L. REV. ONLINE 122, 123 (2020–2021); see also Heilke Schroeder & Harriet Bulkeley, *Global Cities and the Governance of Climate Change: What is the Role of Law in Cities*, 36 FORDHAM URB. L. J. 313, 315 (2009); Katherine A. Trisolini, *What Local Climate Change Plans Can Teach Us About City Power*, 36 FORDHAM URB. L. J. 863, 836–64 (2009).

155. Fox, *supra* note 154, at 123–24. For an empirical look at local government capacity for climate mitigation, see Uma Outka & Richard Feiock, *Local Promise for Climate Mitigation: An Empirical Assessment*, 36 WM. & MARY ENV’T L. & POL’Y REV. 635, 668 (2012) (citing the study conducted by the authors of Florida municipalities with over 1,000 residents finding that local government action had been “modest at best” but that there existed significant opportunities for improvement).

156. Fox, *supra* note 154, at 125.

157. *Id.*

158. *Id.* at 126. For one example of how state preemption can limit local action—in this instance Pennsylvania’s Uniform Construction Code’s impact on green buildings, see Shari Shapiro, *Who Should Regulate—Federalism and Conflict in Regulation of Green Buildings*, 34 WM. & MARY ENV’T L. & POL’Y REV. 257, 269 (2009).

159. Fox, *supra* note 154, at 147.

160. *Id.* at 126. Business interests play a major role in advancing bills preempting local environmental regulation. See Adam Wagner, *NC Governor Vetoes Bill That Would Keep Local Governments From Banning Natural Gas*, THE STATE (Dec. 9, 2021), <https://www.thestate.com/news/state/north-carolina/article256429936.html>.

161. Fox, *supra* note 154, at 126.

state preemptions of their ability to protect local environments.<sup>162</sup> One idea to circumvent hostile state governments is through creative use of Congressional funds.<sup>163</sup> Another is to use federal regulatory authority to empower local governments.<sup>164</sup> While precedent supports the latter idea,<sup>165</sup> it has not been tried out in front of the current Court.

Vermeule identifies one of the principles of the common good as the “appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society.”<sup>166</sup> Subsidiarity is a complex concept within Catholic social teaching that aims to properly allocate power within society.<sup>167</sup> Smaller social groups or associations are generally seen as being better able to respond to social needs. As such, their role should not be unnecessarily usurped by more powerful and larger bodies.<sup>168</sup> Subsidiarity takes two considerations into account. The first is a pragmatic view that the common good is most effectively served by local associations.<sup>169</sup> The second is that certain functions are properly the role of particular institutions.<sup>170</sup> This propriety determination is made “prior to and apart from the consequences that may be generated by that distribution of authority.”<sup>171</sup> These two factors often create a productive tension. Subsidiarity seeks to “prescribe limitations on the reach of the state while also resisting unfettered liberal individualism.”<sup>172</sup>

Subsidiarity is often invoked in the American context as a purely devolutionary principle.<sup>173</sup> This oversimplification fails to see that the principle allows for higher level action when that action is pragmatically necessary or appropriate to a governmental or non-governmental association’s societal role.<sup>174</sup> Calabresi and Bickford write that subsidiarity and constitutional federalism can be linked by allowing the lowest competent

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162. *Id.* at 168.

163. *Id.* at 136.

164. *Id.* at 137.

165. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958).

166. Vermeule, *supra* note 31.

167. David Golemboski, *Federalism and the Catholic Principle of Subsidiarity*, 45 *PUBLIUS J. FEDERALISM* 526, 527 (2015).

168. *Id.* at 528.

169. *Id.*

170. *Id.* at 529.

171. *Id.* at 535.

172. *Id.* at 529.

173. See Robert K. Vischer, *Subsidiarity as a Principle of Governance*, 35 *IND. L. REV.* 103 (2001) (noting that during the George W. Bush administration “subsidiarity is treated as a strictly devolutionary principle compelling the reallocation of social functions from higher to lower government bodies, or from the government to non-government entities”); Golemboski, *supra* note 170, at 530 (“Subsidiarity, in particular, is routinely interpreted as a synonym for unequivocal devolution of authority and has been misguidedly appropriated as a justification for policies more consistent with small-government libertarianism.”).

174. Golemboski, *supra* note 167, at 531.

level of government to make decisions. Additionally, power allocation should be made on the grounds of greatest economic efficiency.<sup>175</sup> This and other accounts differ from the Common Good Constitutionalist concept of subsidiarity because they do not adequately integrate the factor of propriety.<sup>176</sup>

Subsidiarity relies on a concept of natural law pluralism.<sup>177</sup> Societal entities are not antagonistic but “possess their own unique ends and dignity and occupy a distinct and intrinsically meaningful place in society.”<sup>178</sup> This complicates the devolutionist view, as there are plenty of roles best suited to national and even international organizations. Importantly, natural law pluralism includes not only governmental but nongovernmental associations as well.<sup>179</sup> This includes close consideration on how “market activity relates to, supports, or undermines the various forms of association, political and nonpolitical alike.”<sup>180</sup> Associations need to be evaluated in their appropriate context.<sup>181</sup>

The interactions between local and state environmental regulations are likely to increasingly end up in front of the Court. Judges should implement the principle of subsidiarity to leave localities able to act for the common good, while still allowing them to involve state and federal enforcement as necessary. A correct understanding of the proper role of differing societal entities will help make these determinations. Local governments are often most understanding of, and responsive to, local needs. This is especially true in the face of increasingly nonresponsive state and federal legislatures. Environmental advocacy groups are often able to have the biggest impact locally. Even associations that are not explicitly environmental in nature can have their voices heard. On the other hand, localities can be subject to the market effects, creating a race to the environmental bottom. A few businesses may be able to wield outsized influence.

A Common Good Constitutionalist approach would treat state environmental laws and regulations as floors rather than ceilings. Localities would be free to protect their citizens while being somewhat protected themselves from market pressures. States can set environmental rules that work effectively statewide with the assurance that localities can fill gaps. The subsidiarity approach to local environmental regulation would empower cities without leaving states and the federal government unable to pass broad and generally applicable environmental laws. Common Good

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175. *Id.* at 537.

176. *Id.*

177. *Id.* at 539.

178. *Id.* at 539–40.

179. *Id.* at 542.

180. *Id.*

181. *Id.*

Constitutionalism holds that “a just state is a state that has ample authority to protect the vulnerable from the ravages of pandemics, natural disasters, and climate change.”<sup>182</sup> Protecting local government’s ability to regulate would contribute to the functioning of this just state.

#### D. Environmental Standing

Environmental cases have played an integral role in the development of the modern standing doctrine. Under common law there existed a right to bring actions on behalf of the public, and this right was affirmed by the Supreme Court in 1875.<sup>183</sup> At issue in *Scenic Hudson Preservation Conference v. Federal Power Commission* was the Federal Power Act which included a requirement that a party must be “aggrieved” by a Federal Power Commission action in order to bring suit.<sup>184</sup> The Second Circuit held that the category of the “aggrieved” included those “who by their activities and conduct have exhibited a special interest” in the “aesthetic, conservational, and recreational” aspects of a Commission action.<sup>185</sup> This decision created a limitation on the expansive conception of standing found in the common law.

In *Sierra Club v. Morton*<sup>186</sup> the Sierra Club argued for standing to challenge the construction of the ski resort not “over a possible interference with the Sierra Club’s pack trips”<sup>187</sup> but over “the injury to its concrete aesthetic and conservational interest in Mineral King.”<sup>188</sup> It intentionally chose this strategy to establish a right to standing for environmental organizations with an interest in particular environmental issues.<sup>189</sup> An Amicus brief filed by the National Environmental Law Society notes that there are many situations where no individual suffers a loss but society as a whole suffers an environmental loss.<sup>190</sup> In these instances “a demonstrated interest, though non-economic, in environmental protection and preservation of natural resources” should be enough to establish standing.<sup>191</sup>

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182. Vermeule, *supra* note 31.

183. Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 FORDHAM ENV’T L. REV. 21, 31 (2019); *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 343 (1875).

184. Federal Power Act § 313(b), 16 U.S.C. § 825 (b).

185. *Scenic Hudson Pres. Conf.*, 354 F.2d at 616.

186. *Sierra Club v. Morton*, 405 U.S. 727, 727–30 (1972).

187. Reply Brief for the Petitioner at 6, *Sierra Club v. Morton*, 405 U.S. 727. The Sierra Club notes that “This activity is of so little importance to the Club that it would not incur all of the disadvantages of litigation in an attempt to protect it.”

188. *Id.* at 6.

189. *Id.* at 60.

190. Brief for the National Environmental Law Society as Amicus Curiae at 9, *Sierra Club v. Morton*, 405 U.S. 727.

191. *Id.* at 21–22.

An Amicus brief filed on behalf of the Wilderness Society, Izaak Walton League of America, and Friends of the Earth agreed that there should be an expanded right of standing for environmental organizations.<sup>192</sup> They make this case on four separate grounds. First, national conservation organizations have a special interest in environmental protection that should—on its own—satisfy standing requirements.<sup>193</sup> This was shown by the organization’s longstanding and substantial interest in environmental protection. National organizations are particularly well suited to protect the national environmental interest in cases where local groups prefer development.<sup>194</sup> Second, in this case the Sierra Club has standing as a local organization with a then eighty-year history of advocacy for protection of the Sierra Nevadas.<sup>195</sup> Finally, if those arguments did not prove persuasive, the Sierra Club deserved standing on behalf of individual members with a citizen’s interest in lands held in public trust, or on the grounds of the Club and its members use of the area in question.<sup>196</sup>

The Court held that while aesthetic and recreational interests could qualify a party for standing, it also “requires that the party be himself among the injured.”<sup>197</sup> In the opinion, Justice Stewart went on to note that the Sierra Club could gain standing if it could show that its members would have “any of their activities or pastimes” affected by the development of the ski resort in Mineral King.<sup>198</sup> In his dissent, Justice Douglas advocated that a right to standing should be extended to natural object themselves. In doing so, he drew heavily on Christopher D. Stone’s *Should Trees Have Standing—Toward Legal Rights for Natural Objects*.<sup>199</sup>

Justice Blackmun’s dissent noted the limitations of the standing doctrine in light of “the Nation’s and the world’s deteriorating environment with its resulting ecological disturbances.” He advocated for an expanded conception of standing that would “enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and

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192. Brief for the Wilderness Society, Izaak Walton League of America, and Friends of the Earth as Amici Curiae at 14, *Sierra Club v. Morton*, 405 U.S. 727. The brief is critical of use requirements on the grounds that: (“There is frequently no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to protect eagles).”

193. *Id.* at 34–38.

194. *Id.* at 42–43.

195. *Id.* at 54–55.

196. *Id.* at 62.

197. *Sierra Club*, 405 U.S. at 734–35.

198. *Id.* at 735.

199. Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 CAL. L. REV. 450, 450 (1972); see CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT* xi-xvi (3rd ed. 2010) (demonstrating more on the interesting story behind Stone’s attempt to get the article in front of Douglas before the ruling, as well as the broader reaction to the article, including via multiple poems).

purposes in the area of environment, to litigate environmental issues.”<sup>200</sup> He wrote that this would be a relatively minor change to the standing doctrine and courts would still be free to exercise their judgement in standing determinations.<sup>201</sup> Blackmun connected this idea to Douglas’s more imaginative argument, noting that they both added a requirement that “the litigant be one who speaks knowingly for the environmental values he asserts.”<sup>202</sup>

Through application of the principle of subsidiarity, a Common Good Constitutionalist approach would arrive at a position similar to Justice Blackmun’s dissent in *Sierra Club v. Morton*. As noted above, subsidiarity is not a purely devolutionary principle. It holds that society is not composed only of the individual and the state but includes a variety of intermediary associations or *societies*.<sup>203</sup> These each have “their own proper ends, which imply the authority, principles of actions, and rights that are appropriate to that individual society.”<sup>204</sup> It is important that these intermediary associations be free to effectively play their assigned role. This natural law pluralism requires complex systems of interaction between individuals, various associations, and the state.<sup>205</sup> In the environmental context, this would recognize the important role played by conservation organizations. Individuals with an interest in conservation rarely have the resources and expertise to adequately defend their rights. National conservation organizations are designed to effectively advocate for the natural world and those who enjoy it.<sup>206</sup> These organizations can represent the national interest in environmental protection against potentially hostile state structures and local interests. Ultimately, this approach would allow conservation organizations to protect the environmental common good.<sup>207</sup>

### III. SUBSTANTIVE ENVIRONMENTAL LAW

Common Good Constitutionlists and environmentalists have at least one thing in common: discontent with our current legal paradigm. This article is intended as the start of a long and fruitful discourse at the intersection of the classical law tradition and the insights of modern ecology. This conversation should be important to Common Good Constitutionalism’s

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200. *Sierra Club*, 405 U.S. at 757 (Blackmun, J., dissenting).

201. *Id.*

202. *Id.*

203. Golemboski, *supra* note 167, at 536.

204. *Id.*

205. *Id.* at 540–41.

206. Brief for the Wilderness Society as Amici Curiae at 14, *Sierra Club*, 405 U.S. 727, at 38 (No. 70-34).

207. Vermeule discusses the importance of allowing standing for general, common harms. VERMEULE, *supra* note 94, at 174–77.

proponents. As noted above, environmentalism fits naturally into a framework centered on making communities flourish. Indeed, one of the most interesting sections of *Common Good Constitutionalism* concerns the public trust doctrine and the importance of stewardship.<sup>208</sup> Ecology can help the movement better refine its thinking on a variety of areas of law. Importantly, this is one area where the Common Good Constitutionalists can distinguish themselves from adversaries within the conservative legal movement. Criticisms from originalists<sup>209</sup> and libertarians<sup>210</sup> see the movement as a definitive break from the conservative status quo. In the environmental context, the risk is not of too great a break but too little of one. Attempts at crafting a halfway position, like Josh Hammer's Common Good Originalism<sup>211</sup> (an inherently unstable project)<sup>212</sup> fail to adequately consider the ecological common good. Emphasizing the environmental aspects of a common good proposal will also prove effective at attracting attention from across the legal field.<sup>213</sup>

For environmentalists, the approach points towards a substantive basis for environmental law. Environmental law is very much a new field created primarily by statute. It fits uneasily in liberalism's framework that denies that "humans can ever discern the truth or agree on the good amidst the chaos of life" and limits its conception of harms to those done (even indirectly) to people.<sup>214</sup> Liberalism's reliance on market forces fails to take noneconomic goods into account. As seen at length above, consistent application of the Common Good Constitutionalist framework would have beneficial results in the areas of statutory interpretation, property, federalism, and standing.

One does not need to subscribe to the Common Good Constitutionalist approach to see its utility as an example for environmentalists. Discontent with the existing conservative legal movement lead to a resurgence in interest in the classical law tradition.<sup>215</sup> The tradition's focus on substantive goods

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208. *Id.* at 177–78.

209. See Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, THE ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> (criticizing attempts at public debates about morality, holding that "legislators will just vote their own morality and the legislative majority will prevail." As CGC proponents correctly note, morality and law are closely linked, and there is no legal philosophy without a substantive account of the good—whether that be individual autonomy, property rights, or something else).

210. Richard A. Epstein, *The Problem with "Common Good Constitutionalism"*, HOOVER INST.: PUBL'NS: DEFINING IDEAS (Apr. 6, 2020), <https://www.hoover.org/research/problem-common-good-constitutionalism>.

211. Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J. L. & PUB. POL'Y 917 (2021).

212. Adrian Vermeule, *On "Common Good Originalism"*, MIRROR JUST. (May 9, 2020), <https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/common-good-originalism.html>.

213. Segall, *supra* note 32.

214. Westbrook, *supra* note 26, at 710.

215. See Casey, *supra* note 33, at 3.



has given its advocates a framework for discussion and collective action. The environmental movement itself has an existing substantive tradition, associated with figures like Henry David Thoreau, John Muir, Gary Snyder, and Marjorie Stoneman Douglas and organizations like the Sierra Club and National Audubon Society.<sup>216</sup> This substantive vision—that the natural world has value apart from its utility to humans—has been a motivation for environmental advocates throughout American history.<sup>217</sup> David A. Westbrook notes that “[a] vision of nature adequate to inform environmental jurisprudence would have to account for the way we understand nature in our lives, and the way we understand ourselves in nature.”<sup>218</sup> Making existing presumptions overt and stating them not as an expression of individual preference but as a statement of objectively existing values would assist in crafting an environmental jurisprudence up to the significant challenges we face.

#### CONCLUSION

It remains to be seen how successful the Common Good Constitutionalist movement will be. The movement’s success—wholly or in part—would have major ramifications to environmental law. While interpreting statutes, the method is broadly deferential to the environmental protection efforts of elected officials and administrative agencies. It gives weight to the expansive and aspirational language of environmental statutes. Common Good Constitutionlists would be supportive of environmental restrictions on property rights. Through a correct understanding of the principle of subsidiarity, they would empower localities to act on ecological problems and give environmental advocacy groups standing in court. Understanding the importance of environmental law will help Common Good Constitutionalism’s proponents to refine their thinking, distinguish themselves from their competitors, and attract attention from the curious. Environmental advocates can benefit both from considering the common good constitutionalist approach in its own right and as a catalyst for action. Recognizing and refining the substantive tradition in American environmental law is essential to prepare for the future of the field.

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216. Author’s assertion.

217. Author’s assertion.

218. Westbrook, *supra* note 26, at 711.