

### **Common Good Environmentalism**

In the words of English philosopher Edmund Burke, “A state without the means of some change is without the means of its conservation.” As humanity reflects on the past nearly two-hundred years of Western industrialization, many question what the consequences are of human industrial activity. Whether through air and water pollution or habitat destruction, the issue of the environment is more relevant than ever. As citizens demand accountability from their representatives on the environment, the question now is, how do we respond to environmental challenges on a governmental level, what role do the courts play in it, and ultimately, is there a Constitutional right to a healthy and clean natural environment? The answer is twofold: one philosophical, one political. To explain the right, it is necessary for us to first determine what is the fundamental purpose of government, and second, decide how that purpose can be received within The Constitution of the United States to effectuate environmental policy.

People, through their governments, enact laws for one purpose: the common good. The Western legal tradition has its beginnings with Roman law after the formation of the Republic in 509 B.C., but also relies heavily on the later works of Aristotle and Plato. This tradition understands that government is instituted and laws are written for the common benefit of all people. Drawing from this, it is evident that individuals have their societies and governments for order, justice, the common defense, the aid of one another, and to ultimately “achieve human flourishing.” This conception of laws and the common good would go on to grow throughout the West over hundreds of years, proving to be the basis of European governance through the Catholic Church and individuals such as Thomas Aquinas. Similarly, throughout the Catholic European tradition, there has been a call for humans to be stewards of the environment. By the late-1700s, this common good sentiment was at the forefront of the founding of the American

republic. The Founders, students of the Western legal tradition, held the necessity of government for the common good. *Federalist No. 57*, written by either Alexander Hamilton or James Madison, contends that, “the aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society...” Here, the Founder recognizes the necessity of seeking rulers who have the requisite virtue to seek policy that benefits all citizens, not just a singular group of leaders with corrupt personal ambitions. This concept was eventually effectuated through the ratification of the Constitution of the United States, which in its preamble states: “We the People...in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty...” Throughout the Constitution, numerous powers are granted to the government, including the General Welfare Clause (Article I, Section VIII, Clause I), all of which point to the government seeking the common good either through spending or taxation.

Since it has been established that government is for the common good, how does that reflect on, if any, environmental rights within the Constitution? An examination of the Constitution through a “textualist” or “originalist” reading of the Constitution would confer no such right. The Constitution lacks specific mention of the environment. However, taking a step back and understanding the philosophy that influenced the written text of the Constitution, there is much more to be understood. This understanding of jurisprudence and interpretation, commonly dubbed “Common Good Originalism,” is advanced by individuals such as Harvard law professor Adrian Vermeule and Newsweek Opinion editor and lawyer Josh Hammer. Each present two contending versions of Common Good Originalism, but both ultimately seek the

meaning in the Constitution for the common good without regard for legal positivism. Mr. Hammer's interpretation states:

“Common good originalism rejects the legal Right's decades-long infatuation with the great ‘strict constructionist’ founding-era Virginians, Madison and Jefferson, preferring instead the constitutional outlook of Hamilton...because of the strong view he took of English common law's role in early-republic American jurisprudence... Hamilton's commitment to [common good] constitutional originalism is seen most explicitly [when he said]: ‘whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction’” (Brackets mine).

Mr. Hammer and his colleagues espouse Hamilton's view of Constitutional Originalism: that there are necessary powers granted to the federal government through the Constitution, even if not explicitly stated because by virtue they are “necessary and proper.” Further, the judicial system must account for moral values and direction. Following Hamilton and Mr. Hammer's view, how does any of this relate to environmental policy? Nothing on the surface of the Constitution can be textually construed to directly confer government power to protect the environment. However, following Hamilton's understanding, the Constitution grants a broad slate of powers to the federal government, specifically Congress. These powers include the General Welfare Clause (Article I, Section VIII, Clause I) for spending, the Commerce Clause (Article I, Section VIII, Clause III) for regulating, and the Necessary and Proper Clause (Article I, Section VIII, Clause XVIII) for executing its established powers to achieve “justice, human flourishing, and the common good,” according to Mr. Hammer. Through this understanding, if deemed politically necessary, Congress could take a variety of steps to dictate environmental

policy. With its general spending power, Congress could effectuate a variety of programs to aid in environmental clean up, or with the Commerce Clause, could pass a variety of environmental regulations. Ultimately, there is no direct conferring of environmental protection or rights to the People from the Constitution. However, from the duty of the government to provide for the common good, it is implicit that if citizens are being harmed by pollution or environmental destruction, such a situation would not be for the common good, and as such the government has the power to act.

Lastly, what role do the Courts actually play in recognizing these powers and the common good? Through this “new” Common Good Originalism, the Courts will have a much more active role in interpreting various virtues, directions, and powers within the Constitution. However, in the words of Founder and Supreme Court Justice James Wilson, “our Constitution was not established to invent new rights, but to secure and enlarge those rights we already have by nature.” This right to the common good is *not* an emanation from a penumbra, but rather an inherent philosophical and political call for the People and their government to do what is right for the environment. This position will safeguard the environment while also respecting our republican tradition. It will be up to the new generation to determine what is necessary for being stewards of the environment, as ultimately all of us are impacted, students and citizens alike. In respecting the separation of powers, courts will never be able to “amend” the Constitution, dictate legislative policy, or say what the government *should* do, much less interpret what the government *must* act on. Rather, We the People must recognize the purpose of government and have our representatives act accordingly to legislate what is politically and environmentally necessary. This is where the real debate for the common good concerning environmental policy will begin.

## Bibliography

### Primary Sources:

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*. New York: Bantam, 1982. Print.

*The Constitution of the United States: A Transcription*. National Archives, U.S. National Archives and Records Administration, 4 May 2020, [www.archives.gov/founding-docs/constitution](http://www.archives.gov/founding-docs/constitution).

### Secondary Sources:

Arkes, Hadley, et al. “A Better Originalism.” *The American Mind*, The Claremont Institute, 19 Mar. 2021, <https://americanmind.org/features/a-new-conservatism>.

Bagenstos, Samuel R. “For a Broad Spending Power.” *National Constitution Center*, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i>.

Brown, Patrick T., et al. “The Limits of the Free Market: Four Responses to Samuel Gregg.” *Public Discourse*, The Witherspoon Institute, 19 Apr. 2021, <https://www.thepublicdiscourse.com/2021/>.

Etzioni, Amitai. “Common Good.” *The George Washington University*, 2015, <https://icps.gwu.edu/sites/g/files/zaxdzs1736/f/downloads/>.

Foley, Michael P. “The Catholic Contribution to Western Law.” *Catholic Education Resource Center*, <https://www.catholiceducation.org/en/culture/catholic-contributions>

The Green Medium. “A Brief History on Environmentalism.” *The Green Medium*, 8 Aug. 2017, <http://www.thegreenmedium.com/blog/2015/9/2/a-brief-history-on-environmentalism>.

Hammer, Josh, et al. “Common Good Originalism.” *The American Mind*, The Claremont Institute, 7 May 2020, <https://americanmind.org/features/waiting-for-charlemagne>.

“Handout H: How Has the Supreme Court Interpreted the Commerce Clause?” *Bill of Rights Institute*, <https://billofrightsinstitute.org/activities/handout-h-how-has-the-supreme-court>.

Lawson, Gary, and Neil S. Siegel. “Necessary and Proper Clause.” *Interpretation: Necessary and Proper Clause*, The National Constitution Center, <https://constitutioncenter.org/interactive-constitution/interpretation>.

Miller, Fred. “Aristotle's Political Theory.” *Stanford Encyclopedia of Philosophy*, Stanford University, 7 Nov. 2017, <https://plato.stanford.edu/entries/aristotle-politics/>.

Schaefer, Jame. “Catholic Foundations for Environmental Ethics: A Critical-Creative Approach to Patristic and Medieval Notions.” *Current Issues in Catholic Higher Education*, 1 July 2004, <https://epublications.marquette.edu/cgi/viewcontent>.

“Science Quotes by Edmund Burke.” *Today In Science History*, TODAYINSCI, [https://todayinsci.com/B/Burke\\_Edmund/BurkeEdmund-Quotations.htm](https://todayinsci.com/B/Burke_Edmund/BurkeEdmund-Quotations.htm).

Vermeule, Adrian. “Beyond Originalism.” *The Atlantic*, Atlantic Media Company, 31 Mar. 2020, <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.

“When Roman Law Ruled the Western World.” *Constitutional Rights Foundation*, <https://www.crf-usa.org/bill-of-rights-in-action/bria-17-4-b-when-roman-law-ruled>.