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On Foxes and Hedgehogs

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ON FOXES AND HEDGEHOGS: JOHN NAGLE'S MANY MEANS TO ONE GREAT END

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"The fox knows many things, but the hedgehog knows one big thing."
—Archilochus

INTRODUCTION

"The fox knows many things, but the hedgehog knows one big thing," declared the Greek poet Archilochus. In 1953, Isaiah Berlin famously drew upon that ancient fragment of an idea to suggest that all writers and thinkers—indeed all human beings—fall along the dividing line between foxes and hedgehogs.[1] According to Berlin, the hedgehogs are those "who relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel—a single, universal, organising principle in terms of which alone all that they are and say has significance."[2] By contrast, foxes are "those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some de facto way, for some psychological or physiological cause, related to no moral or aesthetic principle."[3] According to Berlin, foxes "lead lives, perform acts and entertain ideas that are centrifugal," while the life and thought of hedgehogs are centripetal.[4]

The simplistic metaphor of the fox and the hedgehog has become a common rhetorical device to divide the world. As Berlin's biographer, Michael Ignatieff, noted, the fox and the hedgehog "has

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1 ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 2 (2d ed. 2013).

2 *Id.*

3 *Id.*

4 *Id.*

now passed into the culture as a way to classify those around us and to think about two basic orientations towards reality itself."[5] According to Ignatieff,

> It is not merely that the fox knows many things. The fox accepts that he can only know many things and that the unity of reality must escape his grasp. . . . A hedgehog will not make peace with the world. He is not reconciled. . . . He seeks to know one big thing, and strives without ceasing to give reality a unifying shape. Foxes settle for what they know and may live happy lives. Hedgehogs will not settle and their lives may not be happy.[6]

Today we use this metaphor to describe two types of people. Hedgehogs are the single-minded monists who know one great thing and deploy that grand vision to create a central, unifying framework for life. Foxes are the eclectic pluralists who know many things and are reconciled to many realities that form an incoherent worldview.

There is an inherent illogic in the distinction between hedgehogs and foxes. According to the typology, hedgehogs use narrow means to achieve narrow ends, while foxes use multiple means to achieve multiple ends. But of course, one can use narrow means to achieve multiple ends, or multiple means to achieve a narrow end. One also can be an eclectic pluralist in pursuit of a unifying worldview, or a single-minded monist who accepts that a coherent reality is beyond one's grasp. Hedgehogs can be at peace with the world and live happy in their simple, unified worldview. And foxes can be miserable in their pursuit of multiple paths toward knowledge, knowing that life ultimately is inexplicable and without moral truth.

I raise the matter of foxes and hedgehogs in this Article regarding my friend and colleague John Copeland Nagle because I find in his life and thought that he defies categorization. By traditional categories, he was neither a fox nor a hedgehog. He was not a hedgehog because he did not know just one great thing; he also knew many small things. But he was not a fox because his pursuit of many ideas was directly and emphatically connected to an overarching moral vision of God and God's creation. And by traditional categories, he was both a fox and a hedgehog. He was a fox with an insatiable curiosity about an endless number of intellectual and personal matters. But he was a hedgehog with a single, unifying worldview that gave his life meaning and purpose. Like a fox, John Nagle knew many things, and like a hedgehog he knew one great thing.

This Article is about John Nagle's many means to one great end. It will outline the many themes of his scholarship: (i) environmental

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5 *Id.* at ix.

6 *Id.* at x.

law, (ii) statutory interpretation, (iii) constitutional law, (iv) nuisance and pollution, (v) election law and campaign finance, (vi) Christianity and the environment, and (vii) national parks. It will offer conclusions on how he used his scholarly interests as a means to pursue his overarching worldview.

I. ENVIRONMENTAL LAW

If one were to casually summarize John Nagle's scholarship, one would simply say that he was an environmental law scholar. Most of his writings focused on some aspect of environmental law, and he was so prolific that it is difficult to summarize all of his environmental law work. But one can highlight a few central themes.

Because environmental laws are promulgated by statute, John Nagle has had much to say about various statutory frameworks. Nagle has been highly critical of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the imposition of liability on "responsible parties" for hazardous waste disposal in the absence of causation.[7] While Nagle was sympathetic to the difficulties plaintiffs face in proving causation, he argued that if a defendant can prove that it did not cause environmental harm, then liability should not attach.[8] And if it did cause harm, rather than joint and several liability, a defendant should only be responsible for the harm that it caused.[9] While the "text, structure, and history of the statute indicate that CERCLA does not require proof of causation,"[10] the obvious unfairness that results from such a scheme suggests that the law should be changed. If a party can prove it did not pollute a site, it should not have to pay, and if it caused some contamination, its liability should be limited to the extent it can prove the extent of the contamination it caused.[11]

CERCLA is such a mess, that Nagle has returned to it on numerous occasions for special opprobrium. He suggested that perhaps special rules should apply to hastily enacted statutes,[12] that lame-duck statutes like CERCLA perhaps should be held unconstitutional under the Twentieth Amendment,[13] that Congress

7 John Copeland Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1497 (1994).

8 *See id.* at 1536–39.

9 *See id.* at 1539–43.

10 *Id.* at 1507.

11 *Id.* at 1525, 1532.

12 *See* John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535, 549–53 (1996).

13 *See* John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 491–92 (1997).

should adopt a "Corrections Day" to fix statutory mistakes such as CERCLA,[14] and that CERCLA is so confusing that it confounds almost every theory of statutory interpretation.[15] One can take some solace in the fact that "poorly drafted statutory language, ambiguous legislative history, conflicting purposes, and widespread condemnation as a failure are not unique to CERCLA."[16] But what makes CERCLA especially problematic, Nagle argued, is that a lame-duck Congress and lame-duck President enacted and approved it knowing that it would not become law at all if it did not become law quickly.[17] Ouch.

John Nagle had kinder words for the Endangered Species Act[18] and the other canonical environmental statutes.[19] He wrote extensively on the importance of protecting biodiversity and discussed the various motivations behind protecting endangered species. Beyond mere utilitarian justifications, Nagle argued that there are moral, ethical, and religious reasons for preventing any species from going extinct.[20] Measuring its success is difficult and depends on the benchmark one employs, but generally speaking Nagle viewed the ESA as a success in protecting biodiversity, particularly when compared to its counterparts in other countries.[21]

Moreover, protecting endangered species speaks not only to our understanding of the law but also of our understanding of language. In his playful article about "Endangered Species Wannabees" he cites the numerous examples of employing the terminology of endangered species to an endless list of people, places, and things that face grave threats to their survival.[22] According to our elected officials, endangered species include fishermen, ranchers, loggers, shrimpers, rangers, Methodists, California taxpayers, libraries, public television, amusement parks, and unborn children.[23] Nagle argues that such rhetoric illustrates what our political actors consider worthy of

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14 *See* John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267 (1996).

15 John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1410 (1997).

16 *Id.* at 1462.

17 *Id.*

18 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544.

19 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387; Clean Air Act, 42 U.S.C. §§ 7401–7671q; National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h.

20 *See, e.g.*, John Copeland Nagle, *Biodiversity and Mom*, 30 ECOLOGY L.Q. 991, 993–94 (2003); John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1216–60 (1998).

21 *See* John Copeland Nagle, *The Effectiveness of Biodiversity Law*, 24 J. LAND USE & ENV'T L. 203, 247–52 (2009).

22 *See* John Copeland Nagle, *Endangered Species Wannabees*, 29 SETON HALL L. REV. 235 (1998).

23 *Id.*

preserving and the measures that we should employ to save those at risk. "The challenge . . . is to identify which aspects of our world should be preserved, and to determine how the law can facilitate that process."[24]

Nagle also wrote fondly of the great bipartisan era that brought us the "federal environmental law canon."[25]

> The brief period of environmental bipartisanship now seems like a mythic legend. During the thirty seven months between December 1969 and December 1972, Congress enacted the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, and the Endangered Species Act. These four statutes continue to represent four of the six laws that form the federal environmental law canon. Then the legislative window closed . . . .[26]

And ever since, that bipartisan consensus has eluded us, leading to bitter acrimony regarding the enactment and enforcement of environmental laws. John Nagle was unusual in trying to bridge the partisan divide and find common ground regarding the role of environmental laws in our society.

At the same time, John Nagle was his own person within the environmental law community. One of the more courageous aspects of John Nagle's environmental law scholarship was his willingness to challenge the prevailing wisdom. He wrote that the war on coal was misguided and that the better approach was a gradual weaning from reliance on coal determined by the availability of reliable alternatives and the economic development of the world's poorest communities.[27] He addressed the "green harms of green projects" and suggested that the law has a complex and sometimes contradictory approach to addressing environmental harms resulting from renewable energy projects.[28] He offered a strong dose of reality to environmentalists who attack environmental law as fundamentally broken and in need of a full paradigm shift.[29] He argued that the protection of wilderness areas has been so successful precisely because they are untrammeled by human activity—except when they are not.[30] And perhaps most importantly, he argued that we should take "legal humility" seriously, cautioning "against exaggerated understandings of our ability to create and implement legal tools that will achieve our intended

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24 *Id.* at 254.

25 John Copeland Nagle, *The Environmentalist Attack on Environmental Law*, 50 TULSA L. REV. 593, 593 (2015).

26 *Id.* (footnotes omitted).

27 John Copeland Nagle, *The War on Coal*, 5 LSU J. ENERGY L. & RES. 21, 21 (2017).

28 *See* John Copeland Nagle, *Green Harms of Green Projects*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 59, 60–73 (2013).

29 *See* Nagle, *supra* note 25.

30 *See* John Copeland Nagle, *Wilderness Exceptions*, 44 ENV'T L. 373, 376 (2014).

results."[31] In his unpublished manuscript, he concludes his chapter on humility as follows:

> All law struggles to be humble, but environmental law's ambitions make it especially susceptible to failure. It is only once we acknowledge the limits of our knowledge and actions both with respect to the natural environment and with respect to law that we can understand how we can best intervene in environmental decision-making.[32]

He was speaking, of course, to laws that attempt to address such complex problems as climate change. Nagle suggested a cautious approach to climate change, one that is willing to be humble about environmental science, environmental values, and our ability to apply the law to solve problems.[33] He was not minimizing the problem of climate change, but rather emphasizing the limits of our ability to enact laws to solve the problem.

One of the most notable aspects of John Nagle environmental law scholarship was his use of stories. He would routinely use a particular place, person, plant, or animal to highlight a legal point. Take, for example, how John Nagle would begin many of his articles. "Judge Dowd was far too modest."[34] "Noah didn't have this problem."[35] "The protagonist in our story has six legs, is one inch long, and dies two weeks after it emerges from the ground."[36] "Granger, Indiana is a collection of residential subdivisions filled with nearly 800 cul-de-sacs."[37] "The Mojave Desert symbolizes different things to different people."[38] "Giovanni di Pietro di Bernardone was born in Italy around 1181."[39] "'This miraculous plant' is how David Attenborough describes grass."[40] In his book, *Law's Environment*, Nagle proclaimed

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31 John Copeland Nagle, *Humility and Environmental Law*, 10 LIBERTY U. L. REV. 335, 336 (2016).

32 John Copeland Nagle, Making Environmental Law Humble: The Relationship Between God's Creation and Our Laws ch. 2, at 19 (Nov. 2, 2021) (unpublished manuscript) (on file with Professor Bruce Huber).

33 *See id.* at 16.

34 Nagle, *supra* note 15, at 1405.

35 Nagle, *supra* note 20, at 1171.

36 John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 174 (1998).

37 John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537, 537 (2009).

38 John Copeland Nagle, *See the Mojave!*, 89 OR. L. REV. 1357, 1357 (2011).

39 John Copeland Nagle, *Pope Francis, Environmental Anthropologist*, 28 REGENT U. L. REV. 7, 7 (2015).

40 John Copeland Nagle, *Restoring Grasslands by Restoring Species*, 26 KAN. J.L. & PUB. POL'Y 262, 262 (2017).

that "[e]nvironmental law thrives on stories."[41] Stories teach us how the law operates, remind us of past struggles, persuade us to reach certain decisions, encourage us to enact new laws, and exhort us to take action.[42] His book *Law's Environment* is about five stories—set in Adak Island, Alaska; Colton, California; the Badlands of North Dakota; the Susquehanna River; and Alamogordo, New Mexico—to illustrate how "we use the law and other devices to manage the natural environment."[43] Nagle took a counterintuitive approach, examining not how a single law applies in a variety of places, but rather how numerous laws affect a particular place.[44] His conclusion was that these stories illustrate how the "law governs nearly all human activities that affect the environment, for good or ill."[45]

Again and again, we saw John Nagle seize upon stories and then use them to illustrate a particular legal point. One of his most poignant stories was how the modest Pacific yew tree became his favorite tree when scientists discovered that it had medicinal properties—known as Taxol—that could treat his mother's ovarian cancer. "Taxol did not save Mom. Yet we know that there are many people alive today because scientists discovered that the Pacific yew tree contained a substance that could treat previously untreatable kinds of cancer. . . . Taxol offers just one illustration of the many hidden reasons for why we live amidst such an abundant array of biodiversity."[46]

Anyone who knows the Nagle family knows of their love for China. Not surprisingly, John Nagle frequently wrote about international environmental law, particularly China. Some of his earliest articles were about how environmental laws function in the Chinese legal system. The one-party system in China, the primacy of executive authority, and the lack of an independent judiciary has diminished the role of courts in interpreting environmental statutes and led to almost no private enforcement.[47] He has written about the growing threat to China's wildlife even as China has adopted laws to protect that wildlife.[48] He has studied endangered species in Asia, including China which has three of the most endangered species in the world: the giant

41 JOHN COPELAND NAGLE, LAW'S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE 1 (2010).

42 *Id.* at 2.

43 *Id.* at 8.

44 *Id.* at 252.

45 *Id.* at 8.

46 Nagle, *supra* note 20, at 1000–1001.

47 John Copeland Nagle, *The Missing Chinese Environmental Law Statutory Interpretation Cases*, 5 N.Y.U. ENV'T L.J. 517, 529–41 (1996).

48 *See* John Copeland Nagle, *Why Chinese Wildlife Disappears as CITES Spreads*, 9 GEO. INT'L ENV'T L. REV. 435 (1997).

panda, the black rhinoceros, and the Indo-Chinese tiger.[49] He has critiqued China's use of clean development mechanisms to construct dams pursuant to the Kyoto Protocol as a means to reduce greenhouse gas emissions.[50] Most importantly, Nagle has strongly criticized China as the "world's worst polluter" and offered concrete suggestions on how China could confront its pollution problems.[51] His scholarship reflects his desire to improve the environmental situation of a country he and his family treasured.

II. STATUTORY INTERPRETATION

Given that environmental law is almost exclusively statutory law, John Nagle has written extensively on statutory interpretation. Often his focus has been on interpreting environmental statutes, but just as often he has written on the method of statutory interpretation, with a decided preference for an originalist approach.

Nagle's first article, while still a young attorney at the DOJ's Environmental and Natural Resource Division, applied a traditional statutory interpretation approach to the question of severability.[52] His suggestions were straightforward: one should use plain meaning to interpret a severability clause, and in the absence thereof, traditional rules of statutory construction—structure, purpose, and legislative history. A clear statement rule should apply to create a presumption that all statutes shall be construed as severable absent a specific nonseverability clause.[53]

The severability approach applied at the time he wrote the article was a "vast and troubling terrain."[54] Today, it largely follows the approach Nagle outlined. As the Supreme Court recently opined, "[w]hen Congress includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause."[55] If Congress has not included a severability or nonseverability clause, the Supreme

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49 Nagle, *supra* note 21, at 218–19 (2009).

50 *See* John Copeland Nagle, *Discounting China's CDM Dams*, 7 LOY. U. CHI. INT'L L. REV. 9 (2009).

51 *See* John Copeland Nagle, *How Much Should China Pollute?*, 12 VT. J. ENV'T L. 591, 591, 625–32 (2011).

52 *See* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 206 (1993).

53 *Id.*

54 *Id.* at 211 (quoting J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 456 (1990)). Note, however, that Sidak described the severability approach as a "vast and puzzling terrain."

55 Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2349 (2020).

Court has "developed a strong presumption of severability."[56] The Supreme Court did not cite Nagle, but we can celebrate the outcome was just as Nagle had suggested.

Nagle generally embraced originalism as the preferred method of statutory interpretation and was critical of other approaches. For example, he expressed deep skepticism about William Eskridge's approach of dynamic statutory interpretation.[57] Consistent with Nagle's personality, he goes out of his way to praise William Eskridge before he eviscerates his methodology.[58] According to Nagle, Eskridge proposed that statutes should be interpreted dynamically to reflect current political trends and the values and goals of current political actors.[59] Such a result-oriented approach may have fit Eskridge's preferred outcome in previous decades, but writing in 1995, Nagle playfully highlighted that such an approach must confront events such as the massive swing to the right in the 104th Congress and the emergence of Newt Gingrich as House Speaker.[60] Does Eskridge really believe that all statutes should be interpreted in light of the values of Newt Gingrich and the Contract for America?[61] Of course not. Nagle argued that an originalist approach to statutory interpretation—particularly textualism—is more faithful to the rule of law, is less indeterminant, and does not depend on the current Congress for interpretive guidance.[62] By contrast, Eskridge's dynamic statutory interpretation offers a "shriveled vision of the rule of law" that embraces the antithesis of the rule of law: the rule of men.[63] Quite a bold statement from a young, untenured professor at Seton Hall challenging one of the preeminent scholars of the day. But Nagle was right. Eskridge's approach has not stood the test of time, while originalism reflects the prevailing method of statutory interpretation.[64]

Consistent with his originalist impulses, Nagle also was critical of other methods of statutory interpretation that are less dangerous than William Eskridge's. William Popkin's method of "ordinary judging" offers a pragmatic approach that guides ordinary judges encountering specific cases to interpret a statute to fit the context without reliance

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56 *Id.* at 2350.

57 *See* John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209 (1995).

58 *See id.* at 2209–14.

59 *Id.* at 2212.

60 *See id.*

61 *See id.* at 2237–38.

62 *See id.* at 2214.

63 *Id.* at 2248.

64 *See* Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Antonin Scalia*, 91 ST. JOHN'S L. REV. 303 (2017).

on grand theories.[65] Popkin assumes that ordinary judges "will always act in a conscientious fashion to aid the legislature in the lawmaking fashion."[66] But he completely "neglects the consequences of ordinary judging gone bad."[67] Nagle canvasses the historical record to find egregious cases of ordinary judging gone bad. The case he cites is an 1854 decision from the California Supreme Court ignoring the text of a statute that precluded testimony from black, mulatto, or Indians to find that a murder conviction of a white person could not be based on the testimony of Chinese witnesses.[68] A Chinese immigrant, of course, was not a "black, mulatto, or Indian," but the California Supreme Court was undeterred and vacated the conviction of George Hall. "[A] race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development," the California Supreme Court declared, cannot have the right to "swear away the life of a citizen" or participate "with us in administering the affairs of our Government."[69] Nagle cited this outrageous and unjust case as illustrating how use of "even a modest judicial lawmaking power can yield results that no theory would want to defend."[70] A textualist approach, by contrast, would interpret the statute in question as not including Chinese immigrants like those who testified against George Hall.[71] The pragmatic approach of ordinary judging that Popkin proposes "only works if performed by an extraordinary judge, or at least an ordinary judge. Alas, not all judges fit that description."[72] In short, textualism saves us from the whims of bad judges.

Textualism is less effective at saving us from bad text. In an article discussing regulation of hazardous waste, Nagle highlighted the problems of textualism when dealing with a statute such as CERCLA that was rushed through a lame-duck Congress and signed by a lame-duck President, resulting in incoherent, vague, and ambiguous text, and sparse legislative history to provide context.[73] Nagle provided examples of three provisions of CERCLA that make it almost impossible to discern what Congress intended. Reliance on the traditional tools—the plain meaning, the legislative history, and the statute's structure and purpose—leaves even the most committed

65 *See* John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 NW. U. L. REV. 1445, 1446, 1456–59 (2000).

66 *Id.* at 1459.

67 *Id.*

68 *See* People v. Hall, 4 Cal. 399 (1854).

69 *Id.* at 405.

70 Nagle, *supra* note 65, at 1464.

71 *Id.* at 1468.

72 *Id.* at 1459.

73 *See* Nagle, *supra* note 15, at 1407–8.

textualist such as Judge Frank Easterbrook confounded as to the meaning of various provisions of CERCLA.[74] For Nagle, the answer to statutes like CERCLA is unsatisfying and incomplete. "[A] textualist approach will not solve many of CERCLA's riddles."[75] One must begin with the statutory text, and generally end there unless the result is absurd.[76] Congress always can address specific mistakes, and in the case of CERCLA has occasionally done so, even while it has failed to provide greater clarity through wholesale reforms. "CERCLA contains too many mistakes . . . to be remedied by any one approach. Therefore, the best way to correct CERCLA's mistakes is not by interpretation but by actual amendments to the statute."[77]

Nagle offered other examples where textualism can save us from problems that arise when the text of a statute is ignored.[78] In the case of the Endangered Species Act (ESA), the current management of the ESA has led to federal control over wildlife and land use that has engendered bitter frustration from the states, particularly the western states.[79] But the statute explicitly endorses cooperative federalism.[80] According to Nagle, reliance on the text of the ESA could empower the states to become more involved in fashioning conservation plans to avoid the need for listing species and participating in recovery efforts aimed at delisting species.[81] "The Congress that enacted the ESA expected the states to play a central role" in the task of "preventing extinction and achieving recovery."[82] "The restoration of that understanding of the law is what many states request."[83] All states need to do is step up and bear the cost anticipated in the statute and inherent in cooperative federalism.

III. CONSTITUTIONAL LAW

Environmental law raises a surprisingly small number of constitutional law issues, but not surprisingly, John Nagle found a way to write on the connection between the two. One of the more interesting constitutional law questions to arise from environmental

74 *See id.* at 1429–45 (discussing Judge Frank Easterbrook's efforts to apply textualism to CERCLA).

75 *Id.* at 1460.

76 *Id.*

77 *Id.* at 1462.

78 *See* John Copeland Nagle, *The Original Role of the States in the Endangered Species Act*, 53 IDAHO L. REV. 385 (2017).

79 *See id.* at 386–89.

80 *See id.* at 398–422.

81 *See id.* at 423.

82 *Id.*

83 *Id.*

law statutes is whether a federal law protecting endangered species exceeds congressional powers under the Commerce Clause. That was the question before the D.C. Circuit in 1997, when the County of San Bernardino challenged the constitutionality of the Endangered Species Act, which the federal government invoked to block the construction of a hospital that threatened the habitat of the Delhi Sands flower-loving fly in San Bernardino County, California.[84]

The D.C. Circuit issued a fractured opinion, with Judge Wald analyzing the connection between all endangered species and interstate commerce, Judge Henderson asking whether there was a connection between the hospital and interstate commerce, and Judge Sentelle examining whether there was a connection between the modest endangered fly and interstate commerce.[85] At bottom, the D.C. Circuit had to decide the locus of activity that may or may not trigger interstate commerce. In classic Nagle fashion, he offered tentative support of each judge's perspective, and then presented a lucid explanation of why enforcement of the ESA as applied to the fly was constitutional because the statutory prohibition was on the activity—the building of a hospital—that substantially interferes with the habitat of an endangered species. That activity undoubtedly implicates interstate commerce.[86] Whereas previous Commerce Clause cases focused on the amount of effect on interstate commerce, Nagle identified the locus of activity as the central constitutional question when federal authorities take action to protect the endangered Delhi Sands flower-loving fly.[87]

Nagle also has written articles on the Twentieth Amendment, an obscure constitutional amendment that attempted to address the problem of lame duck legislation.[88] Given his concerns about the haste with which CERCLA was passed in 1980 by the lame duck Congress and signed by the lame duck President, he has had more than a passing interest in the problem of lame duck legislation. In short, he has proposed that we interpret the Twentieth Amendment to impose limits on the President's powers during the lame duck period. As Nagle put it, "[t]he Constitution presumes that the regular exercise of the electoral franchise by the people is central to self government," and therefore, "lame ducks should be denied the power to take any irrevocable acts."[89] That is true of a lame duck President appointing

84 Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

85 *See id.*

86 *See* Nagle, *supra* note 36, at 174, 194–208.

87 *See id.* at 208–14.

88 *See* John Copeland Nagle, *The Lame Ducks of* Marbury, 20 CONST. COMMENT. 317, 340 (2003).

89 *Id.* at 340.

judges and a lame duck Congress passing laws. Nagle argued that the history of the Twentieth Amendment makes it clear that when a lame duck Congress passes laws it is engaging in a congressional abuse of power.[90] "The primary concern about lame ducks is that it is undemocratic for them to enact new laws or take any other legally binding actions because the People have already voted for someone else to represent them."[91] And he employed the purposive method of constitutional interpretation employed by the Supreme Court in *Seminole Tribe* to write a colorful parable of the Twentieth Amendment in which a constitutional provision dreamed of finally taking its proper place in the constitutional fray.[92] Long resigned to live in obscurity, the Twentieth Amendment became excited about the meaning of *Seminole Tribe*. "If purpose is more important than text, as *Seminole Tribe* and the history of Eleventh Amendment interpretation suggests, then the Twentieth Amendment might spring to life after all."[93]

At the beginning of his career, Nagle wrote articles on the intersection of statutory and constitutional interpretation.[94] When interpreting a statute, one must consider whether a particular interpretation might render the statute unconstitutional. But as Nagle noted, there actually are two canons that address that problem.[95] One he called the "doubts" canon which directs a court to interpret a statute to avoid any constitutional doubts about the law.[96] The other he called the "unconstitutionality" canon, which directs a court "if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity."[97] One requires a court the decide the constitutional question while the other allows the court to avoid such a decision. Both approaches have their problems, and Nagle urged caution in recognizing the pitfalls of either approach.[98]

His most notable constitutional law article was *Congressional Originalism*, co-authored with Amy Coney Barrett before her appointment to the Seventh Circuit.[99] As noted above, Nagle has

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90 John Copeland Nagle, *Lame Duck Logic*, 45 U.C. DAVIS L. REV. 1177, 1179 (2012).

91 *Id.* at 1184.

92 Nagle, *supra* note 13.

93 *Id.* at 494.

94 *See, e.g.*, Nagle, *supra* note 12, at 537–40; John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495 (1997).

95 *See* Nagle, *supra* note 94, at 1496.

96 *Id.*

97 *Id.* (quoting United States v. Delaware & Hudson Co., 213 U.S. 366, 407 (1909)).

98 *See id.* at 1518.

99 Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1 (2016).

written several articles expressing support for originalism in the context of statutory interpretation, but this article addressed originalism from the perspective of the congressional obligation to support and defend the Constitution. How does a member of Congress committed to originalism honor the oath to support and defend the Constitution in the face of Supreme Court precedent—including super precedent—that is inconsistent with the original meaning of the Constitution?[100] Barrett and Nagle concluded that the Supreme Court avoids the problem of super precedent[101] through judicial agenda control. "Institutional features of Supreme Court practice permit all Justices to let some sleeping dogs lie, and so far as we are aware, no one has ever argued that a Justice is duty-bound to wake them up."[102] With respect to Congress, a similar approach should obtain. "Congress, like the Court, has the power to narrow the questions it addresses for the sake of efficiency and stability."[103] In the case of super precedent, Barrett and Nagle argue that Congress "can avoid the need to examine the soundness of super precedent by adopting a presumption that such precedent is constitutional."[104]

This article is the most cited one John Nagle ever wrote, no doubt in part because of the subsequent judicial appointments of Amy Coney Barrett. Much of the discussion regarding this article has focused on divining which cases qualify as super precedents.[105] Barrett and Nagle assiduously avoided that question. They emphasized that there "are

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100 *See id.* at 23–42.

101 *See id.* at 14 (identifying cases that most frequently appear on lists of super precedents).

102 *Id.* at 20.

103 *Id.* at 32.

104 *Id.* at 25, 34–42.

105 *See, e.g.*, Marcia Coyle, *Hunting for 'Super Precedents' in U.S. Supreme Court Confirmations*, CONST. DAILY (Oct. 20, 2020), https://constitutioncenter.org/blog/hunting-for-super-precedents-in-u.s-supreme-court-confirmations [https://perma.cc/H4VA-R5BQ]; Brian Naylor, *Barrett Says She Does Not Consider* Roe v. Wade *'Super Precedent'*, NPR (Oct. 13, 2020), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent#:~:text=Says%20Roe%20V.-,Wade%20Abortion%20Ruling%20Not%20A%20Super%2DPrecedent%20%3A%20Live%3A%20Amy,case%20that%20everyone%20has%20accepted.%22 [https://perma.cc/4XNZ-8S4R]; Debra Cassens Weiss, *Barrett Says She Doesn't See* Roe v. Wade *as 'Super Precedent'*, ABA J. (Oct. 13, 2020), https://www.abajournal.com/news/article/barrett-refuses-to-say-that-roe-v-wade-is-super-precedent [https://perma.cc/UWF8-QZD6]; Siobhan Hughes, *Barrett: Why* Roe *Isn't a Super Precedent*, WALL ST. J. (Oct. 13, 2020), https://www.wsj.com/livecoverage/amy-coney-barrett-supreme-court-confirmation-hearing-day-two/card/mvQLaARCKTb3gS16iE1z [https://perma.cc/HTA3-A2ZM]; *Nomination of the Honorable Amy Coney Barett to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 2 (2020).

[some] prominent decisions whose status as super precedents remains disputed" but that the point of the article was not to determine "the precise content of the list of super precedents" but rather address the "unique challenges" that super precedents present "for any theory of constitutional interpretation and for originalism in particular."[106] Their goal, rather, was to provide a pragmatic pathway for congressional originalists to take their oaths seriously without disrupting those super precedents that are firmly entrenched in our constitutional order.

IV. NUISANCE AND POLLUTION

One of the more consistent themes in Nagle's scholarship was a focus on nuisance and pollution. Beginning in 2000, Nagle began writing on the topic of pollution or nuisance as a metaphor for harmful conduct outside the environmental or tort context. In the *Yale Law Journal* in 2000, he described the problems related to campaign finance as more akin to pollution than corruption. Critiquing Elizabeth Drew's book arguing that campaign finance is a form of corruption,[107] Nagle offered an alternative metaphor of pollution. He stated that "money spent on political campaigns permeates the political environment and affects it for the worse. In other words, such money pollutes the system."[108] Nagle argued that the influence of money in politics, like pollution, is an

> unseen, incremental, yet real impairment that money works on the political and legislative system. The political environment . . . is as polluted as the air in Bangkok or the water in Nigeria. Those who must live in such a political environment suffer the same kinds of slow yet inexorable injuries as those individuals who breathe dirty air and drink contaminated water day after day.[109]

Rather than viewing campaign finance as a form of corruption related to improper influence and individual culpability, the better analogy is to consider campaign finance as a type of pollution of the political system. "Seeing campaign money as analogous to environmental pollution would encourage lawmakers to focus on the amount of money that the system can tolerate and the best way to eliminate the harm that too much money can cause."[110]

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106 Barrett & Nagle, *supra* note 99, at 14 n.43.

107 ELIZABETH DREW, THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY (1999).

108 John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 YALE L.J. 293, 320 (2000) (reviewing DREW, *supra* note 107).

109 *Id.* at 318–19.

110 *Id.* at 330.

The following year he published one of his most popular articles, *Moral Nuisances*.[111] As a young scholar I remember this fascinating article as my first introduction to John Nagle. Little did I know that years later I would be joining him as a colleague at Notre Dame Law School. In his article, he argued that injuries suffered by a landowner subject to a neighbor's immoral activity—such as nude beaches—fit comfortably within the kinds of injuries that the law routinely acknowledges as supporting nuisance claims.[112] He noted that historical nuisance law routinely recognized prostitution, saloons, and gambling parlors as nuisances, just as modern nuisance law routinely recognizes sensory harms such as noise, odors, and aesthetics.[113] The common theme in all those cases was not to reform society, but rather to protect those harmed.[114] Applying traditional nuisance law to moral harms, Nagle argued that neighbors should be able to bring claims related to harms arising from brothels, drug houses, or dilapidated properties.[115] It also could apply to hunting in urban environments where there is a community norm that harming animals is immoral.[116] "[H]arms involving offensive sights, the inability to use one's property because of embarrassment associated with a neighboring activity, reasonable fears, and more general concerns about noises or harassment are all sufficient to support a nuisance action."[117] The key insight was that community norms, not the moral sensibilities of particular individuals, can form the basis for nuisance suits arising from moral offenses.[118]

As these articles suggest, one of Nagle's great insights regarding pollution and nuisance is to apply the traditional understandings to novel contexts. In his article, *The Idea of Pollution*, he argued that "a broad understanding of pollution can assist in society's response to the full range of pollution claims."[119] Traditional environmental law identifies pollution as a violation of a boundary, in which a pollutant is introduced resulting in harm to the natural environment. Pollution is "a violation of each society's designated boundaries . . . . Each society determines what it regards as a pollutant and which environments are in need of protection."[120] The response to pollution is almost always

111 John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265 (2001).
112 *See id.* at 266–69.
113 *Id.* at 276–77.
114 *See id.* at 277–87.
115 *See id.* at 316–17.
116 *See id.* at 318–19.
117 *Id.* at 321.
118 *See id.* at 322.
119 John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1, 5 (2009).
120 *Id.* at 29.

the same, either toleration, prevention, or avoidance.[121] These tools, he argued, could be applied to other pollution claims.

Applying this broad understanding of pollution to concrete examples, Nagle has addressed the question of other types of pollution, such as aesthetic or moral pollution. Nagle addressed whether cell phone towers constituted visual pollution, recognizing that aesthetic nuisance claims are not uncommon and that with such harms society routinely chooses between toleration, prevention, or avoidance.[122] The most common solution for aesthetic pollution is one of avoidance, allowing its existence but minimizing its aesthetic harm. But he notes that "[a]voidance will persist only so long as prevention is impossible or toleration is unacceptable."[123] In a similar fashion, Nagle argued that we rethink how the law addresses Internet pornography and reframe it as a pollution problem.[124] Because of First Amendment protections, Internet pornography is largely unregulated, such that the current approach is one of tolerance. But Nagle argued that "[o]ur experience addressing environmental pollution also identifies a broad middle ground between enforcing criminal prohibitions and relying upon moral condemnation."[125] Among those middle ground approaches is attacking the problem through evolving norms, emerging technology, and strategic avoidance.[126]

Other articles follow in this vein. He has analyzed "good pollution" such as party music that some enjoy but others perceive as harmful, or pesticides that are good at killing pests, but may also harm plants or wildlife.[127] "The existence of such contrasting effects confirms that the harms of pollution may be accompanied by benefits, too."[128] And he recognized that how one defines nuisance has changed over time, with wetlands providing a quintessential example.[129] While in the past a landowner had an unrestricted right to drain wetlands to "redeem his land from its swampy condition,"[130] today we should use nuisance law to restrict a landowner's ability to drain wetlands on his

121 *Id.* at 77.

122 *See* Nagle, *supra* note 37.

123 *Id.* at 567.

124 *See* John Copeland Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939 (2011).

125 *Id.* at 984.

126 *Id.* at 964.

127 John Copeland Nagle, *Good Pollution: A Response to Arden Rowell*, Allocating Pollution, *79 U Chi L Rev 985 (2012)*, 79 U. CHI. L. REV. DIALOGUE 31, 42–43 (2012).

128 *Id.* at 41.

129 *See* John Copeland Nagle, *From Swamp Drainage to Wetlands Regulation to Ecological Nuisances to Environmental Ethics*, 58 CASE W. RSRV. L. REV. 787, 787–88 (2008).

130 *Id.* at 790 (quoting 1 H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS: INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 505 (3d ed. 1893).

property, recognizing that "interferences with ecosystem services as the kind of harms for which nuisance law provides a remedy."[131]

The common theme in all these articles is to take traditional environmental understandings of pollution and extrapolate from those policies a broader understanding of how to protect society's boundaries from pollutants that threaten to harm the natural environment.

> In environmental law, practitioners often maintain that any harmful addition to the natural environment constitutes pollution. They are less willing to condemn all speech, money, foreign influences, and especially other people as pollution of human environments. Nevertheless, society continues to debate precisely whether those things pollute our nation, culture, workplaces, and other environments of our making. The task of analyzing pollution claims is really the task of constructing ideal environments and then describing which influences degrade them.[132]

Interestingly, Nagle has also gone in the other direction and reasoned that a broader definition of pollution should inform our understanding of traditional environmental pollution. Nagle argued that the Supreme Court in *Massachusetts v. Environmental Protection Agency*[133] was correct in finding that carbon dioxide was a pollutant that can increase climate change.[134] Carbon dioxide does not fit a traditional paradigm of a pollutant, nor do the activities that result in carbon emissions fit a traditional understanding of pollution. Rather than rely on traditional environmental understandings of pollution as rendering something unclean or impure,[135] Nagle recognized that "[e]verything is pollution—or at least it can be—for the concept of 'pollution' is socially constructed."[136] This broader definition of pollution allows for a broader set of responses than traditional environmental law would suggest. If a wide array of conduct may constitute polluting activity, it follows that this "broader understanding of pollution as a phenomenon that exists outside of environmental law shows why multiple responses to the emission of greenhouse gases such as CO_2 is preferable to mitigation, adaptation, tolerance, or any other single purported solution to the problem of climate change."[137]

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131 *Id.* at 788.

132 Nagle, *supra* note 119, at 49 (footnotes omitted).

133 549 U.S. 497 (2007).

134 *See* John Copeland Nagle, *Climate Exceptionalism*, 40 ENV'T L. 53, 88 (2010).

135 *See* Massachusetts v. EPA, 549 U.S. 497, 559 (Scalia, J., dissenting).

136 Nagle, *supra* note 134, at 55–56 (emphasis omitted).

137 *Id.* at 56–57.

V. ELECTION LAW AND CAMPAIGN FINANCE

Perhaps the most surprising thing about John Nagle's scholarship is that he has written several articles regarding election law and campaign finance. There is no obvious connection between environmental law and election law/campaign finance, but it appears that John Nagle developed an interest in the topic either because of his interest in the contested presidential election of 2000 or because of his idea, discussed above, that corruption in campaign finance is a form of pollution.

With respect to the 2000 presidential election, three of Nagle's articles focused on how to count votes, who should count votes, and the role of judges in resolving election disputes. The latter article arose in the context of the Florida Supreme Court's controversial ruling handing the election to Al Gore, and the United States Supreme Court's subsequent controversial decision in favor of George Bush.[138] Federal judges are appointed, state judges often are elected, or initially appointed and then elected for retention. A variety of criteria are factors in choosing judges, including diversity, merit, and judicial philosophy.[139] Given the increasing importance of the role of judges in society, Nagle argued that judicial philosophy is critical. "If we expect the courts to do things like resolve disputes about presidential elections, then judicial philosophy is paramount in selecting judges."[140]

Regarding the question of who should count votes, Nagle discussed the most controversial elections in American history—the 1876 and 2000 presidential elections—and highlighted the importance of who is responsible for reviewing the local returns and determining how many votes each candidate received.[141] The options include local election officials, state canvassing boards, state court judges, federal court judges, the Electoral Commission, and Congress.[142] Reviewing two books on the topic written by Chief Justice William Rehnquist and Roy Morris in the immediate aftermath of the 2000 election, Nagle concluded that the question of who should count votes should focus on a mechanism that employs "unbiased

138 John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 CAP. U. L. REV. 499 (2002).

139 *See id.* at 503–5.

140 *Id.* at 511.

141 John Copeland Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732, 1737 (2004).

142 *See id.* at 1739–50.

decisionmakers who are expert in the factual and legal questions that may arise and able to reach a decision in a timely manner."[143]

Regarding how to count votes, Nagle draws a wonderful analogy between how to interpret statutes and how to interpret ballots.[144] In his view, how to interpret voter intent mirrors debates about how to interpret congressional intent. Textualists insist that the plain meaning of statutory language must prevail even if there is contrary evidence, while "[i]ntentionalist theories . . . are much more willing to honor a variety of indicia of legislative intent even if that yields a result that conflicts with the apparent command of the statutory language."[145] Nagle argued that the same problem applies with ballots. George Bush's "textualist" approach to reading punch cards limited consideration to the hole punched out of the ballot or at least two corners displaced. Gore's "intentionalist" approach encouraged an examination of each ballot in an effort to ascertain the intent of the voter.[146] The central problem of the contested election of 2000 was that there was no clear standard for determining what counted as a vote and the collective weight of concerns about how votes were being counted manifested itself in the Supreme Court's decision in *Bush v. Gore*.[147]

John Nagle has also been interested in campaign finance reform, most notably using the analogy of pollution to address campaign finance.[148] But that suggestion is not his only one on how to address the problem. In John Nagle's two other articles on campaign finance reform, he offered one idea for reform that would be effective but is implausible, and another theory of reform that is plausible but would be ineffective. Regarding the former, Nagle argued that we should adopt a recusal approach to the problem of the corrupting influence of campaign contributions. His proposal was to allow contributors to give whatever they want to political candidates but require successful candidates to recuse themselves from voting on or participating in any legislation that directly affects those contributors.[149] Most of the article is addressed at the many problems presented by his "modest little proposal."[150] Regarding the latter, his other idea is more plausible:

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143 *Id.* at 1752–53.

144 *See* John Copeland Nagle, *Voter's Intent and Its Discontents*, 19 CONST. COMMENT. 483, 494 (2002) (reviewing ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001)).

145 *Id.*

146 *Id.* at 495–96.

147 *Id.* at 503–4; 531 U.S. 98 (2000).

148 *See supra* text accompanying notes 107–10.

149 John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 81 (2000).

150 *See id.* at 85–100.

that politicians should voluntarily accept campaign finance restrictions.[151] Because the First Amendment limits the government's ability to regulate campaign finance, Nagle argued that the best one can hope for is some form of reform that the government encourages but does not require.[152] The trick is to provide "enough incentives to get candidates to join but not so many incentives that it becomes coercive."[153] He conceded that the purely voluntary arrangements have been largely unsuccessful and that government-induced limits will only occur if the public wants it.[154]

VI. CHRISTIANITY AND THE ENVIRONMENT

Not surprisingly, John Nagle wrote several articles on the intersection of Christianity and the environment. In the late 1960s critics blamed Christianity for our environmental predicament because it is an anthropocentric religion that "encourag[es] a system of thought in which scientific progress without regard to its consequences for the natural environment was possible."[155] Nagle offered a compelling response. He noted that similar and often worse environmental damage plagued nations such as China and the Soviet Union that have not embraced Christianity. More importantly, he argued that there are Biblical themes that reflect a profound respect for the environment, including "that God created the world and pronounced the creation to be good, that God charged men and women with the responsibility of caring for creation, and that God will redeem His creation."[156] For Nagle, Christianity offered a spiritual basis for protecting the environment, not destroying it.

Occasionally John Nagle argued that Biblical themes could be helpful in understanding and interpreting environmental laws. In *Playing Noah*, Nagle wrote an insightful article about the Endangered Species Act and the moral, religious, and ethical arguments for protecting all species.[157] Nagle made the audacious claim that the story of Noah and the Ark offered lessons about how one should interpret and apply the Endangered Species Act. In the book of Genesis, when

151 John Copeland Nagle, *Voluntary Campaign Finance Reform*, 85 MINN. L. REV. 1809, 1810 (2001).

152 *Id.* at 1820.

153 *Id.* at 1828.

154 *See id.* at 1830–40.

155 John Copeland Nagle, *What Hath Lynn White Wrought?*, 2 FARE FORWARD 44, 44 (2012).

156 *Id.* at 46.

157 John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171 (1997).

God entrusted man to have dominion over the earth,[158] the meaning was one of stewardship, positing that "God is the owner of creation who has asked us to serve as a trustee responsible for managing the earth on God's behalf."[159] Rather than rely on utilitarian argument for protecting species—Nagle argued that a Noah principle would establish a moral principle that reflects a strong presumption in favor of protecting all endangered species.[160] But if protecting all species proves impossible because of limited resources, he also argued that the story of Noah offered several principles in making such difficult choices. First, the more species the better, meaning that efforts to save an endangered species that will also benefit other endangered species would have the highest priority.[161] Second, we should promote diversity among species, meaning that we should favor preservation efforts that benefit species in different biological classifications.[162] Finally, we should prioritize species that provide the greatest utility for humans, while still recognizing that God considers all creatures to be valuable regardless of their utility.[163] "The means that we should use to try to protect endangered species present exceedingly difficult questions in a society with limited resources and seemingly unlimited needs, but the original goal of the ESA—to protect every species—remains sound. We should keep trying to play Noah after all."[164]

In a similar fashion, Nagle argued that Biblical principles should inform our understanding of laws protecting the wilderness. In *The Spiritual Values of Wilderness*,[165] Nagle posited that the wilderness is a "profoundly spiritual concept" and that "[m]uch of the American thinking about wilderness derives from the biblical scriptures."[166] Just as religious arguments were influential in securing congressional approval of the Civil Rights Act, Nagle argued that religious understandings of the wilderness were critical in the enactment of the Wilderness Act. There are several spiritual values supporting wilderness preservation. "First, wilderness leaves land the way it was created by God."[167] "Second, wilderness is a place of encountering

158 *Genesis* 1:28 ("Be fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth.").

159 Nagle, *supra* note 157, at 1227.

160 *Id.* at 1231.

161 *Id.* at 1249.

162 *Id.* at 1252.

163 *Id.* at 1254.

164 *Id.* at 1260.

165 John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 ENV'T L. 955 (2005).

166 *Id.* at 969.

167 *Id.* at 981.

God."[168] "Third, wilderness provides spiritual renewal."[169] "Fourth, wilderness offers escape."[170] Fifth, "[w]ilderness is a place of spiritual testing."[171] These spiritual values provide insights on how the law should protect and manage wilderness areas and complement the other reasons for wilderness preservation.[172] Consistent with these values, the Wilderness Act should seek to protect and manage wilderness in its natural condition, preserve biodiversity, promote solitude, and permit limited human use of the wilderness to escape from the trappings of human society.[173]

John Nagle also critiqued the apocalyptic warnings of imminent global destruction from climate change as reminiscent of biblical warnings of the Apocalypse in the books of *Daniel* and *Revelation.* Writing in *Law and The Bible: Justice, Mercy and Legal Institutions*, John Nagle and his co-author Keith Mathison note that contested claims about the end of times have been used to shape the law, notably with respect to threats of nuclear holocaust, population explosions, and climate change.[174] Nagle and Mathison argue that it is right to emphasize the impact of our laws on future generations, and biblical warnings of the apocalypse "encourage us to use the civil law with care and humility about the future that is in God's loving hands."[175] But we should also be cautious about using "the law to respond to the latest vision of the world's purportedly imminent demise."[176] Incidentally, this book was the only occasion I had to work directly with John Nagle on a scholarly project, with my wife Leslie and I both contributing a separate chapter to the same book.[177] We both have fond memories of gathering in Malibu, California with John Nagle and the other co-authors discussing the vision for the book.

John Nagle was deeply interested in Christian perspectives on the environment and analyzed how different Christian traditions offered moral and spiritual arguments to protect the environment. In *The Evangelical Debate Over Climate Change*, Nagle recognized the

168 *Id.* at 983.

169 *Id.*

170 *Id.* at 984.

171 *Id.* at 992.

172 *Id.* at 960.

173 *See id.* at 998–1000.

174 John Copeland Nagle & Keith A. Mathison, *Expectation and Consummation: Law in Eschatological Perspective, in* LAW AND THE BIBLE: JUSTICE, MERCY AND LEGAL INSTITUTIONS 239, 250–53 (Robert F. Cochran Jr. & David VanDrunen eds., 2013).

175 *Id.* at 253.

176 *Id.* at 252.

177 Roger P. Alford & Leslie M. Alford, *The Law of Life: Law in the Wisdom Literature, in* LAW AND THE BIBLE: JUSTICE, MERCY AND LEGAL INSTITUTIONS 101 (Robert F. Cochran Jr. & David VanDrunen eds., 2013).

importance of evangelical support for climate change in shaping the political debate.[178] Generally, "evangelicals acknowledge that the earth is warming, but they are divided about what that means and what to do about it."[179] This division is rooted in fundamental disagreements among evangelicals about theology, science, law, and the political process.[180] Nagle's own personal view is that "decisive action against the emission of greenhouse gases that contribute to climate change is appropriate," but that there are more pressing environmental problems, such as clean water in developing countries.[181]

He also analyzed Pope Francis's Encyclical *Laudato Si': On Care for Our Common Home* from the broader perspective on Christian environmental thought.[182] He offered praise and criticism for Pope Francis, arguing that the Encyclical is at its strongest when it makes moral arguments such as concern for the poor and how a degraded environment harms the poor.[183] But Nagle questioned the Encyclical's fundamental skepticism of the global market economy generally, and corporations in particular.[184] He also noted that Pope Francis omits entirely any accountability for government actors, including socialist and totalitarian governments that have produced their own environmental catastrophes.[185] He praised Pope Francis's humility, recognizing that the Church cannot offer a definitive opinion on what must be done.[186] It is a theme Nagle offers time and again: "Humility toward the *environment* emphasizes the need for restraint and for care given our lack of knowledge about the environmental impacts of our action. Humility toward the *law* cautions against exaggerated understandings of our ability to create and implement legal tools that will achieve our intended results."[187]

For Nagle, humility is the fundamental virtue that a Christian perspective offers to environmental law. Humility emphasizes human limits, limited knowledge about ourselves, about others, and the world around us. Humility also respects the knowledge of others—their skills, their experiences, and their achievements.[188] From an

178 John Copeland Nagle, *The Evangelical Debate over Climate Change*, 5 U. ST. THOMAS L.J. 53 (2008).
179 *Id.* at 65.
180 *See id.* at 66–84.
181 *Id.* at 85.
182 Nagle, *supra* note 39.
183 *Id.* at 25.
184 *See id.* at 33–36.
185 *Id.* at 36.
186 *Id.* at 45.
187 *Id.* at 46.
188 Nagle, *supra* note 31, at, 340–41.

environmental perspective, humility encourages us to recognize our place in the world and the value of creation.[189] There is no such thing as environmental certainty, only environmental humility. Humility of our limited knowledge and understanding of our place in the world.[190] "We cannot anticipate natural changes to the world around us, and the task only gets harder when we factor our own actions into the equation."[191] Humility applies also to efforts to address environmental concerns through law. Any law we pass to address a particular problem should be approached with humility. "The lesson of legal humility, then, is that we should not exaggerate our ability to identify and achieve our desired societal goals. We do not always know enough about a problem, its causes, and the effects of various solutions to produce the results that we seek."[192] The crux for Nagle is that contradictory impulses arise from humility:

> Environmental humility counsels restraint lest our actions harm the natural environment out of ignorance or indifference. Environmental humility, in short, supports greater environmental regulation. Legal humility pushes in the opposite direction. Humility toward the law cautions against exaggerated understandings of our ability to create and implement legal tools that will achieve our intended results. In short, environmental humility favors human restraint and actions to address our impacts, while legal humility cautions against ambitious schemes to mandate the preservation or remediation of the environment. The two often collide when the environment is combined with law.[193]

This humility extends to the limits of applying Christian principles to inform public law. For example, he has identified several themes that provide a Christian perspective on the environment. They include: (1) God created the world; (2) God pronounced the creation to be good; (3) God is the owner of all creation; (4) God gave humanity dominion over creation; (5) God charged men and women with the responsibility of caring for creation; (6) God alone is worthy of worship; (7) Creation has suffered the effects of the entry of sin into the world; and (8) God will redeem His creation.[194] These themes are notably theocentric rather than anthropocentric or biocentric.[195] But when it comes to applying these themes through environmental law he

189 *See id.* at 348–50.

190 *Id.* at 348.

191 *Id.* at 346.

192 *Id.* at 363.

193 *Id.*

194 John Copeland Nagle, *Christianity and Environmental Law*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 435, 438–442 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001).

195 *Id.* at 442–43.

is more complicated. He argued that we must balance our concern for creation with other concerns, such as protecting the poor and the needy, and concerns about equity and justice "that prevent the government from placing a disproportionate burden on any individuals" in defense of the common good.[196] "[T]here can be no confident conclusions about the relation between Christian environmental teaching and federal environmental statutes."[197] Thoughtful Christians will disagree about environmental law, just as they disagree about other legal and political issues.

VII. NATIONAL PARKS

One of the most endearing interests that John Nagle had was national parks, particularly near the end of his career. It is the scholarly interest that he talked about the most in my interactions with him, and almost everyone on the Notre Dame law faculty has stories of John Nagle's national park stories. Nagle's trips to national parks were anything but wasteful or pointless, for John Nagle was quickly becoming one of the country's leading legal experts on national parks. He visited fifty-two of the sixty-three national parks in the country, and he would always return from those trips with stories and photos. Even the most obscure and remote national park was worthy of his time and attention. His uncompleted manuscript was entitled *America the Beautiful: Saving the Scenery of Our National Parks.*[198] In that manuscript he wrote, "[w]hile other nations celebrate their history and their culture, we proclaim our land's beauty."[199] The thesis of his unfinished book was that the scenic beauty of the national parks is taken for granted and is under threat. Nagle sought to answer why we care so much about scenic beauty, how do we decide which places are especially scenic, and what do we do to ensure that we can enjoy the most scenic places that our land has to offer.[200]

Other articles relating to national parks came in two forms. First, he has written about the patchwork of laws that impact the management and protection of national parks. One of John Nagle's most interesting articles on this subject was *How National Park Law Really Works*, examining in great detail the legislation governing the management of our national parks—the Organic Act of 1916—and its dual purpose to promote conservation and enjoyment of our national

196 *Id.* at 449–50.

197 *Id.* at 444.

198 John Copeland Nagle, America the Beautiful: Saving the Scenery of Our National Parks (Nov. 11, 2017) (unpublished manuscript) (on file with author).

199 *Id.* at 3.

200 *See id.* at 4–5.

parks.[201] In the absence of any significant judicial scrutiny over the National Park Service's exercise of its discretion to balance conservation and enjoyment, it might appear that the NPS has broad authority to strike the proper balance between those two fundamental objectives.[202] But "[t]he very characteristics of a national park—rare wildlife, wilderness areas, clean air and water, abundant wetlands, historic structures, free-flowing rivers—subject park management" to additional federal regulation pursuant to other environmental laws.[203] The consequence of this statutory overlay is that "courts have overturned NPS management decisions that would have authorized opportunities to enjoy national parks because those decisions violated these other federal environmental statutes."[204] At the same time, Congress has passed site-specific statutes that promote the mandate for enjoyment. In national park designation statutes, Congress often includes provisions for how the park should be managed, including the construction of roads and lodging, the use of recreation vehicles, and the authorization of hunting, fishing, and trapping.[205] In addition, Congress also has passed legislation to resolve NPS management decisions regarding the proper use of national parks.[206] Nagle praised this patchwork of laws as an appropriate way to balance the conservation and enjoyment of our national parks. It presumes NPS expertise but also recognizes that certain environmental values are entitled to special protection, while also acknowledging that Congress may mandate a particular result based on its own balance of competing values.[207]

His interest in national parks led him to write on a broader category of laws—he called them site-specific laws—in which Congress has legislated with respect to specific places.[208] While we typically analyze laws of general application, those laws "should not overshadow the important role available to laws focusing on particular places."[209] Among such site-specific laws is the Organic Act,[210] which grants Congress the exclusive authority to determine which federal lands qualify for status as a national park. Nagle argued that "site-specific legislation is appropriate when (a) there are convincing reasons for

201 John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861 (2015).
202 *See id.* at 865.
203 *Id.*
204 *Id.*
205 *Id.* at 903–4.
206 *See id.* at 909–22.
207 *Id.* at 866.
208 John Copeland Nagle, *Site-Specific Laws*, 88 NOTRE DAME L. REV. 2167 (2013).
209 *Id.* at 2187.
210 *Id.* at 2169.

adopting special rules for a particular place, (b) there is no agreement for the establishment of a new general rule, and (c) the legislation is enacted through transparent procedures."[211] The designation of national parks satisfies all of those criteria.

Second, Nagle wrote about specific national parks and the legal issues that arise in the context of those parks. Much to the chagrin of local Indiana boosters,[212] Nagle sharply criticized the establishment of the Indiana Dunes National Park. Although the Indiana Dunes in his adopted state are "a treasure," according to Nagle they are not in the same league as national parks such as Yosemite, the Grand Tetons, and the Grand Canyon.[213] "The problem with making the dunes a national park is that it would dilute what a national park means."[214] Such designations, along with other mistakes like the Hot Springs National Park, the Cuyahoga Valley National Park and the Gateway Arch National Park, are inconsistent with the original vision of national parks recognized for the most scenic and special places in the country.[215] "National parks will remain our most special places only if our most special places are made national parks."[216]

His article on the Katmai National Park—located 300 miles southwest of Anchorage—highlighted the difficulty of balancing the statutory mandate in the Organic Act of conservation with the enjoyment of the scenic beauty of our national parks.[217] For Katmai, conservation is easy, but enjoyment is difficult. How does the National Park Service exercise its broad discretion and properly fulfill the mandate to promote enjoyment of an amazing national park that is so remote and inaccessible? Katmai is among the least visited national

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211 *Id.* at 2180.

212 *See, e.g.*, *Our Opinion: Indiana Dunes Deserving of National Park Designation*, S. BEND TRIB. (Jan. 24, 2019), https://www.southbendtribune.com/story/opinion/2019/01/24/our-opinion-indiana-dunes-deserving-of-national-park-designatio/46363663/ [https://perma.cc/7AD8-SXDX].

213 John Copeland Nagle, *Upgrading the Indiana Dunes to a National Park is a Horrible Idea*, CHI. TRIB., Dec. 5, 2017, at 20; John Copeland Nagle, *Viewpoint: Indiana Dunes a Deserving Lakeshore, Not an Undeserving National Park*, S. BEND TRIB. (Feb. 1, 2019), https://www.southbendtribune.com/story/opinion/2019/02/01/iewpoint-indiana-dunes-a-deserving-lakeshore-not-an-undeserving-national-park/45726209/ [https://perma.cc/3ZZS-S84Z].

214 John Copeland Nagle, *Viewpoint: Indiana Dunes a Deserving Lakeshore, Not an Undeserving National Park*, S. BEND TRIB. (Feb. 1, 2019), https://www.southbendtribune.com/story/opinion/2019/02/01/iewpoint-indiana-dunes-a-deserving-lakeshore-not-an-undeserving-national-park/45726209/ [https://perma.cc/3ZZS-S84Z].

215 *See id.*

216 John Copeland Nagle, *Upgrading the Indiana Dunes to a National Park is a Horrible Idea*, CHI. TRIB., Dec. 5, 2017, at 20.

217 *See* John Copeland Nagle, *Enjoying Katmai*, 33 ALASKA L. REV. 65 (2016).

parks in the country, and Nagle argued that efforts to increase the number of visitors requires a more concerted effort to promote more access and more facilities.[218] "The challenge remaining for those crafting the laws and management policies for Katmai is to enable additional enjoyment while conserving the features that make Katmai worth visiting."[219] While environmentalists typically express concern about promoting conservation in our most visited national parks, Nagle noted that we also should be concerned about promoting enjoyment in our least visited parks.

He wrote a long article on the Mojave Desert that addressed the issue of "aesthetic regulation."[220] It tells the story of how desert landscapes such as the Mojave Desert—which encompasses the Mojave National Preserve, Death Valley National Park, and Joshua Tree National Park—have been perceived "as a wasteland to be avoided, a resource to be exploited, or a beautiful landscape to be preserved."[221] These "different reactions from different people" are "strongly held and reasonable, which challenges the law's ability to accommodate them."[222] The law typically identifies scenic places and then designates them accordingly. But the law has been less helpful in instructing federal, state, and local authorities how to maximize the visual experience of deserts such as the Mojave Desert in the face of contrasting perceptions and competing demands to use such deserts for productive purposes, such as for solar energy.[223] Nagle argued that government decisions about how to manage contested landscapes suggest that the best approach is a prospective decision-making process that solicits public involvement to identify contrasting perceptions and find ways to honor them.[224]

Finally, in his article on the history of the Grand Canyon—the last article John Nagle ever published—he addressed the counterintuitive story of how national park designation played only a modest role in protecting its scenic beauty.[225] From the time President Benjamin Harrison proposed designating the Grand Canyon as a national park in 1882, the scenic beauty of the canyon was preserved because of its protected status based on other designations. The Grand Canyon was a national forest in 1893, then a game reserve in 1906, and a national

218 See *id.* at 97.
219 *Id.*
220 Nagle, *supra* note 38, at 1358.
221 *Id.* at 1361.
222 *Id.* at 1360.
223 *See id.* at 1404–5.
224 *Id.* at 1360.
225 John Copeland Nagle, *What if the Grand Canyon Had Become the Second National Park?*, 51 ARIZ. ST. L.J. 675, 678 (2019).

monument in 1908, and then finally a national park in 1919.[226] Nagle noted that "the contrast between national park status and other land conservation designations was not nearly as striking as one may anticipate"[227] and that the previous designations "enabled the Grand Canyon to resist the despoliation that many conservationists feared."[228]

A footnote to this last article read:

> Professor John Copeland Nagle passed away on May 18, 2019, during the editorial process. Final edits were overseen by Professor Nagle's colleagues at the Notre Dame Law School. His colleagues and his family are deeply grateful to the *Arizona State Law Journal* for its work in bringing this article to publication. He will be dearly missed. *Requiescat in pace.*[229]

Funny how a footnote can bring a smile to your face.

CONCLUSION

On June 30, 2016, John Nagle hosted a group of Notre Dame faculty at his house for a discussion on an early draft of his forthcoming book on environmental humility. The tentative title for his book was *Making Environmental Law Humble: The Relationship Between God's Creation and Our Laws.* By his own admission the book was an early draft. But it was of immense importance to him. In an email to the group, he wrote, "I suspect that I could continue to work on it for years and years, but now I am decidedly ready to get your thoughts about it before I proceed."[230] He wanted our help on key issues in the book, and so he decided to bring all of us together at his house to discuss his draft manuscript.

I remember the gathering well. Among the participants were Amy Coney Barrett, Nicole Garnett, Rick Garnett, Bruce Huber, Bill Kelley, Randy Kozel, Mark Noll, and Carter Snead. We sat together around the Nagle's large dining room table overlooking their lush, wooded backyard. We discussed the plan of the book, the concept of the ideal environment, and his chapters on the improved, natural, and harmonious environment. We shared lunch together. We then continued in the afternoon to discuss the separation of environmental powers, environmental and legal humility, and the proper role of environmental lawmaking. We concluded with general suggestions for how John Nagle should complete the manuscript—the manuscript

226 *Id.* at 691–711.

227 *Id.* at 711–12.

228 *Id.* at 717.

229 *Id.* at 675, annot.

230 Email from John Nagle, Professor of L. at Notre Dame L. Sch. to Roger Alford, Professor of L. at Notre Dame L. Sch., et al. (June 13, 2016) (on file with author).

that remains unpublished due to his untimely death. Unlike a typical scholarly workshop, the discussion around John Nagle's dining room table felt different, somehow intimate. It was an early draft with plenty of gaps and omissions. But this reflected John's willingness to be humble, genuine, and vulnerable to criticism among friends and colleagues, which included the most prolific and gifted members of the faculty. Throughout the day there was a warmth, a kinship, and an affection for John and his scholarship.

It was just one day in the life of John Nagle. But that gathering was emblematic of the spirit of John Nagle. The scholarship of John Nagle flowed out of the person of John Nagle. Because he was inherently social, his writing was typically narrative and colloquial, imbued with stories of people and places. In truth, there were almost always people and places connected to his scholarship. During John Nagle's memorial service on June 3, 2018, constitutional scholar Michael Paulsen said that "John Nagle was the best friend I ever had and the best man I've ever known . . . . Being a friend of John Nagle was the easiest, most natural thing in the whole world . . . . John was a best friend to many people."[231] Paulsen said that John would call him out of the blue and say, "Guess where I'm calling you from now?" As Paulsen put it, invariably John would be on a remote highway headed to a national park nobody visited in order to research an endangered species nobody cared about.[232] His daughters Laura and Julia similarly spoke at his service about memorable travels with him to remote parts of the country and the world. "I love that Dad prioritized taking his girls on trips with him. He joyously showed me the world, and gave me so many memories with him," Laura said in her remarks. "Dad's joy of exploring national parks or areas of outstanding natural beauty was contagious."[233] His youngest daughter Julia said simply, "My Dad taught me how to love all of God's creation."[234] As these stories suggest, John Nagle always found ways to include his friends and family in his research and travels and included them in his exploration and work related to the beauty of God's creation.

John Nagle once described his "lifetime project" as learning "how to best integrate Christian teaching and environmental law."[235] But as this brief summary of his scholarship suggests, John Nagle was not only

231 Audio tape: John Nagle Memorial Service, at 38:40 (June 3, 2018) (on file with author).

232 *Id.* at 36:00.

233 *Id.* at 51:00.

234 *Id.* at 55:00.

235 John Copeland Nagle, Making Environmental Law Humble: The Relationship Between God's Creation and Our Laws ch. 1, at 1 (Nov. 2, 2021) (unpublished manuscript) (on file with Professor Bruce Huber).

an environmental law scholar, much less a Christian environmental law scholar. He was both of those, and yet much more. Lisa Nagle recalled recently to me that John was *always* writing, *always* excited about his latest project. Those projects were varied and eclectic. In this sense he was a fox who pursued many ends, often unrelated to one another. Who else but John Nagle wrote about lame duck presidents, Delhi Sands flower-loving flies, Noah's ark, Katmai National Park, Chinese immigrants, wilderness spirituality, campaign finance reform, statutory originalism, Pope Francis's anthropology, obscure constitutional amendments, the Badlands of North Dakota, hanging chads, moral nuisances, evangelical environmentalists, congressional recusals, aesthetic pollution, and legal humility? Honestly, who does that? But despite his eclectic interests, John was fundamentally a hedgehog. He deployed his grand vision of the world to create a central, unifying framework for his life. His insatiable curiosity about the world reflected his core belief about the world. John's fundamental belief was in the love of God manifest in the special revelation of Jesus Christ and in the general revelation of God's creation. He had a foundational desire to display love of God, care for God's children, and curiosity about God's creation. His scholarly work was rarely explicitly Christian. But all his scholarly work—and indeed all of his life—reflected the unique and amazing Christian scholar and person that was John Copeland Nagle. Like a fox, John Nagle knew many things. Like a hedgehog, he knew One Great Thing.