DUE PROCESS AND FREE SPEECH UNDER COMMON-GOOD CONSTITUTIONALISM: TOWARD A REVIVAL OF THE CLASSICAL LEGAL TRADITION IN THE PHILIPPINES*

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ABSTRACT

An emerging legal theory has provoked strong reactions from both legal conservatives and progressives in the United States. Common-good constitutionalism, which departs from both originalism and progressive living constitutionalism, seeks to revive the classical legal tradition and return to the understanding of law as an ordinance of reason for the common good. It opposes the myth of the self-sufficient individual that has plagued modern times, and instead views the legal subject as a valued member of a wider community. Legal scholars from all over the world have weighed in on the debate. This Note seeks to participate in this ongoing conversation and examine whether common-good constitutionalism is a suitable method of constitutional and statutory interpretation in the Philippines, in view of the nation's legal history, as well as the values and traditions of the Filipino people.

Part I provides a brief primer on the classical legal tradition; it discusses the *telos* of law and government, what the common good means, and the place of individual rights under common-good constitutionalism. Part II examines the adverse consequences of constitutional transplantation and argues that common-good constitutionalism is particularly compatible with the values and traditions of the Filipino people. Part III shows that the common good has always suffused our law—our Constitution, statutes, and jurisprudence. Lastly, Part IV turns to application and looks at how two constitutional provisions—the due

* *Cite as* Joseph Sebastian R. Javier, *Due Process and Free Speech Under Common-Good Constitutionalism: Toward a Revival of the Classical Legal Tradition in the Philippines,* 97 PHIL. L.J. 1, 227 (2023). An earlier version of this Note won the University of the Philippines College of Law's 2023 Pacifico A. Agabin Prize for Best Paper in Legal Theory.

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The author wishes to thank Judge Raul C. Pangalangan, who was his adviser in Supervised Legal Research and for whom he had the privilege of serving as research assistant in his senior year.

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process and free speech clauses—will be construed under common-good constitutionalism. Under a common-good approach to constitutional interpretation, the Supreme Court will reject the highly individualistic understanding of liberty exemplified by the infamous American case of *Lochner v. New York*. Instead, it will adopt a comprehensive—not a myopic—understanding of liberty, one that embraces both positive and negative liberty, as well as both ancient and modern liberty. It will abandon the use of the overbreadth doctrine to strike down police power regulations that do not involve free speech, and it will construe freedom of speech not in self-regarding terms but as an instrument to achieve higher social ends, such as collective self-government and democratic participation. This Paper merely provides a preliminary sketch of how common-good constitutionalism might operate in Philippine law.

OUTLINE

This Note begins by discussing the recent emergence in the United States of a novel legal theory called common-good constitutionalism, which has sparked a spirited debate not only among American constitutional law scholars but also among legal theorists from around the world, including Ireland, the United Kingdom, Canada, Spain, and Venezuela. The introduction announces the aim of this Paper: to weigh in on the debate and determine whether common-good constitutionalism is a method of constitutional and statutory interpretation compatible with the Philippine legal tradition and Philippine constitutional culture.

Part I provides a brief primer on the classical legal tradition; it discusses the proper ends of law and government, what the common good means, and the important place of individual rights under common-good constitutionalism.

Part II examines the adverse consequences of constitutional transplantation and argues that common-good constitutionalism is a method of constitutional interpretation more compatible with Philippine constitutional culture than is either originalism or progressive living constitutionalism.

Part III shows that the common good has been a fixture of Philippine law since the American occupation, with abundant references being made to it in our Constitution, statutes, and jurisprudence.

Lastly, Part IV turns to application and considers how two constitutional provisions—the due process and free speech clauses—will be construed under common-good constitutionalism. The aim of this Note is not to exhaust the topic but merely to provide a preliminary sketch of how common-good constitutionalism might operate as a method of constitutional and statutory interpretation in Philippine law.

> "*The welfare of the people, and nothing else, is the real reason and object, the alpha and the omega, the beginning and the end, of all the duties of those who govern.*
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> *The welfare of the people is the only end of all the governments on earth, because the people are everything: blood and life, wealth and power, all are for the people."*
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> —Emilio Jacinto[1]
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> "Salus populi est suprema lex."
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> —Marcus Tullius Cicero[2]

INTRODUCTION

Two methods of constitutional interpretation have dominated the American legal landscape in recent decades: originalism, which interprets the text of the Constitution as it was understood by the framers at the time of ratification; and progressive living constitutionalism, which holds that constitutional doctrine must evolve in response to changing circumstances and values.[3] Originalism emerged in the 1970s as a reaction to what some viewed as the unmoored jurisprudence and judicial activism of the Warren court.[4] While originalism does not enjoy unanimous approval among American lawyers, it has had such a profound influence in American constitutional interpretation that Supreme Court Justice Elena Kagan, a liberal, once remarked: "We are all originalists now."[5]

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[1] EMILIO JACINTO, LIWANAG AT DILIM, *in* JOSÉ SANTOS, BUHAY AT MGA SINULAT NI EMILIO JACINTO (1935). The original Tagalog reads as follows:

> Ang kaginhawahan, wala na kundi ang kaginhawahan ng Bayan, ang siyang talagang katwiran at kadahilanan, ang simula't katapusan, ang hulo't wakas ng lahat ng katungkulan ng mga tagapamahala.
>
> Wala na kundi ang kaginhawahan ng Bayan ang tunay na sanhi ng alinmang kapangyarihan sa ibabaw ng lupa. Pagkat ang Bayan ay siyang lahat: dugo at buhay, yaman at lakas, lahat ay sa Bayan.

[2] MARCUS TULLIUS CICERO, DE LEGIBUS. "The welfare of the people is the supreme law."

[3] *See* Lawrence Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

[4] *See* Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

[5] *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan).

It therefore comes as no surprise that when Harvard Law Professor Adrian Vermeule published an essay in *The Atlantic* titled *Beyond Originalism*,[6] in which he declared that "originalism has outlived its utility," it provoked strong reactions from both the conservative and progressive camps. In the essay, which was published in 2020 in anticipation of the release of his book, COMMON GOOD CONSTITUTIONALISM,[7] Vermeule advocates a method of constitutional and statutory interpretation grounded in the classical legal tradition and its emphasis on the common good. He critiques not only originalism but also progressive living constitutionalism, the chief priority of which, he argues, is the relentless expansion of individualistic autonomy and the liberation of the self-sufficient individual from all unchosen bonds.[8] Under Vermeule's preferred approach, "the majestic generalities and ambiguities of the written Constitution" will be interpreted in a way that conduces to the common good.[9] Common-good constitutionalism eschews the moral agnosticism of originalism and does not shirk from construing constitutional provisions based on a set of substantive moral commitments.

Vermeule's proposal spurred a lively debate among American constitutional law scholars, forcing them to rethink the prevailing paradigms of constitutional interpretation and reconsider the merits of the classical legal tradition. Since the publication of Vermeule's essay in March 2020, dozens of journal articles, think pieces, and blog posts have come out in support of[10] and in opposition to[11] Vermeule's theory. Common-good constitutionalism has been

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[6] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC, Mar. 31, 2020, *available at* www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[7] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

[8] *Id.*

[9] Vermeule, *supra* note 6.

[10] *See, e.g.*, Conor Casey, *"Common-Good Constitutionalism" and the New Battle over Constitutional Interpretation in the United States*, 4 PUB. L. 765 (2021); Hadley Arkes, *Vermeule, His Critics, and the Crisis of Originalism*, AMERICAN MIND, May 6, 2020, *available at* https://americanmind.org/features/waiting-for-charlemagne/vermeule-his-critics-and-the-crisis-of-originalism/; Julia Mahoney, *A Common Good Constitutionalist Feminism*, LAW & LIBERTY, Aug. 24, 2022, *available at* https://lawliberty.org/forum/a-common-good-constitutionalist-feminism/; Garrett Snedeker, *Stricter Scrutiny for Common Good Constitutionalism*, LAW & LIBERTY, Aug. 17, 2022, *available at* https://lawliberty.org/forum/stricter-scrutiny-for-common-good-constitutionalism/; Xavier Foccroulle Ménard, *Reclaiming the Natural Law for 21st Century Constitutionalism*, IUS ET IUSTITIUM, Sept. 12, 2021, *at* https://iusetiustitium.com/reclaiming-the-natural-law-for-21st-century-constitutionalism/; Aaron Bondar, *The Living Voice of the Law: Debates over Common Good Constitutionalism*, AMERICAN AFFAIRS, Spring 2023, *available at* https://americanaffairsjournal.org/2023/02/the-living-voice-of-the-law-debates-over-common-good-constitutionalism/.

[11] *See, e.g.*, Richard Epstein, *The Problem With "Common Good Constitutionalism"*, HOOVER INSTITUTION, Apr. 6, 2020, *at* https://www.hoover.org/research/problem-common-good-constitutionalism; James Ceaser, *Adrian Vermeule's Sixteenth-Century Constitutionalism*, HERITAGE FOUNDATION, Apr. 17, 2020, *at* https://www.heritage.org/the-constitution/commentary/adrian232-vermeules-sixteenth-century-constitutionalism; Randy

dismissed as "an idea as dangerous as they come."[12] Others, however, have welcomed common-good constitutionalism for reintroducing morality and natural law into constitutional interpretation. One of them observes that common-good constitutionalism represents a "resurgence of interest in a morally thick jurisprudence that Vermeule appreciates in part."[13] Another has argued that common-good constitutionalism would bring about "significant gains for women" and help achieve core feminist objectives.[14] It has been credited with clearing up the common, modern confusion between license and true liberty, and it has been welcomed as a reminder that the American founding occurred within the matrix of natural law and not in a vacuum.

Legal debates in the United States rarely stay within the country's borders. They influence the development of law in countries all over the world, especially in countries whose Constitution and laws are patterned after those of the United States. Legal scholars from Ireland,[15] the United Kingdom,[16] Canada,[17] Spain,[18] and Venezuela[19] have shown receptiveness to common-good constitutionalism and weighed in on the debate. The aim of this Paper is to participate in this ongoing conversation and examine whether common-good constitutionalism is a

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Barnett, *Deep-State Constitutionalism*, CLAREMONT REVIEW OF BOOKS, Spring 2022, *available at* https://claremontreviewofbooks.com/deep-state-constitutionalism/; Jesse Meriam, *Post-Originalism Common Good*, LAW & LIBERTY, Aug. 10, 2022, *available at* https://lawliberty.org/forum/a-post-originalism-common-good/; Lee Strang, *Rejecting Vermeule's Right-Wing Dworkinian Vision*, LAW & LIBERTY, Apr. 2, 2020, *available at* https://lawliberty.org/rejecting-vermeules-right-wing-dworkinian-vision/; Jeffrey Pojanowski & Kevin Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403 (2022).

[12] Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, THE ATLANTIC, Apr. 3, 2020, *available at* www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/.

[13] Snedeker, *supra* note 10.

[14] Mahoney, *supra* note 10.

[15] Conor Casey, *Common-Good Constitutionalism: Lessons from the Irish Constitution*, IUS ET IUSTITIUM, July 31, 2020, *at* https://iusetiustitium.com/common-good-constitutionalism-lessons-from-the-irish-constitution/.

[16] Jamie McGowan, *Against Judicial Dyarchy*, IUS ET IUSTITIUM, July 16, 2020, *at* https://iusetiustitium.com/against-judicial-dyarchy/.

[17] Kerry Sun, Stéphane Sérafin, & Xavier Foccroulle Ménard, *Notwithstanding the Courts? Directing the Canadian Charter Toward the Common Good*, IUS ET IUSTITIUM, July 1, 2021, *at* https://iusetiustitium.com/notwithstanding-the-courts-directing-the-canadian-charter-toward-the-common-good/.

[18] Rafael de Arízaga, *Magín Ferrer and the Fundamental Law of the Spanish Monarchy,* IUS ET IUSTITIUM, Jan. 26, 2021, *at* https://iusetiustitium.com/magin-ferrer-and-the-fundamental-law-of-the-spanish-monarchy/#more-736.

[19] José Ignacio Hernández, *Common-Good Constitutionalism and the "Ius Constitutionale Commune" in Latin America*, IUS ET IUSTITIUM, Sept. 28, 2020, *at* https://iusetiustitium.com/common-good-constitutionalism-and-the-ius-constitutionale-commune-in-latin-america/.

suitable method of constitutional interpretation in the Philippines. This Paper ultimately argues that common-good constitutionalism is compatible with the Philippine legal tradition and the values and traditions of the Filipino people.

Part I[20] provides a brief primer on the classical legal tradition; it discusses the proper ends of law and government, what the common good means, and the important place of individual rights under common-good constitutionalism. Part II[21] examines the adverse consequences of constitutional transplantation and argues that common-good constitutionalism is more compatible with Philippine constitutional culture than are the current dominant modes of constitutional interpretation. Part III[22] shows that the common good has been a fixture of Philippine law since the American occupation, with abundant references being made to it in our Constitution, statutes, and jurisprudence. Lastly, Part IV[23] turns to application and considers how two constitutional provisions—the due process and free speech clauses—will be construed under a common-good approach to constitutional interpretation. The aim of this Paper is not to exhaust the topic but merely to provide a preliminary sketch of how common-good constitutionalism might operate as a method of constitutional and statutory interpretation in Philippine law.

I. A BRIEF PRIMER ON THE CLASSICAL LEGAL TRADITION

A. The Purpose of Law in the Classical Legal Tradition

The classical legal tradition defines law as "an ordinance of reason for the common good, promulgated by a public authority who has charge of the community."[24] Law is not simply the command of a lawgiver that ought to be followed to avoid the consequences of disobedience.[25] Law serves a particular purpose: to promote the common good of the polity. Its aim is not to achieve the liberation of the self-sufficient individual from the unchosen bonds of family, community, nation, and tradition;[26] nor is it to promote the interests of the few to the detriment of the whole. The definition of law in the classical legal tradition inevitably figures into the interpretation of constitutional and statutory text under common-good constitutionalism. Because law is designed to promote the common good of the polity, the lawmaker is presumed to have enacted a specific statute toward this end, and ambiguous provisions in the statutory text must be construed with this *telos* in mind. Since the Constitution forms part of law, vague

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[20] *See infra* pp. 9–14.
[21] *See infra* pp. 14–17.
[22] *See infra* pp. 17–32.
[23] *See infra* pp. 32–45.
[24] VERMEULE, *supra* note 7, at 3.
[25] *See* John Austin, *Lecture I*, *in* THE PROVINCE OF JURISPRUDENCE DETERMINED 1 (1832).
[26] *See, generally*, PATRICK DENEEN, WHY LIBERALISM FAILED (2018).

constitutional provisions must also be interpreted in a way that would conduce to the common good.

A common misconception posits that under a method of constitutional and statutory interpretation that takes the natural law into account, judges will be empowered to decide based on unexpressed principles of natural law *in lieu of* positive law enacted by Congress.[27] In fact, under common-good constitutionalism, the *ius naturale* primarily serves as an interpretive tool that helps judges discover the meaning of constitutional and statutory text.[28] The primary purpose of natural law principles in the classical legal tradition is not to supplant or override positive law but to shed light on the meaning of ambiguous provisions of enacted texts. Vermeule explains:

> It is entirely question-begging to say that interpretation in the classical tradition "departs from the meaning of the text" or "substitutes morality for law." Rather *the classical tradition, in appropriate cases, looks to general principles of law and the ius naturale precisely in order to understand the meaning of the text, as a mode of interpretation*. It claims that while there are powerful arguments of political morality to respect *lex* as law, it is also true that *lex*, precisely because it is law, must be interpreted in light of *ius*.[29]

While positivism views enacted texts as making up the entirety of law,[30] the classical legal tradition sees positive law as situated within a larger matrix of law, consisting of the *ius naturale* or natural law, the *ius gentium* or the law common to all civilized nations, and the *ius civile* or positive law.[31] Positive law is therefore part of law, but it is not the only law; there are other sources of law that transcend it. In the classical legal tradition, the task of the lawmaker is to specify general

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[27] *See* Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. L. & PUB. POL'Y 103, 124–27 (2022).

[28] VERMEULE, *supra* note 7, at 57–58. "Contrary to a pervasive modern assumption, the main point of invoking the *ius naturale* was not to 'strike down' statutes contrary to the natural law. Indeed, such an approach was extremely rare. Rather the pervasive assumption of the classical framework was that the civil law, the natural law, and the law of nations served different roles in the legal system, came to the fore at different stages, and could be harmonized with one another. The natural and positive law, for example, work together in a larger framework, in which the positive law specifies and gives concrete form to general principles established by the natural law." *See* STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 18–31 (2021).

[29] VERMEULE, *supra* note 7, at 18–19. *See* Casey & Vermeule, *supra* note 27. (Emphasis supplied.)

[30] *See* Leslie Green and Thomas Adams, *Legal Positivism*, *in* STAN. ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed., 2019), *at* https://plato.stanford.edu/Archives/Win2004/entries/legal-positivism/.

[31] VERMEULE, *supra* note 7, at 7–8.

principles of the *ius naturale* based on the peculiar circumstances and needs of the polity.[32] In other words, the lawmaker brings down lofty principles of natural law to the level of the concrete and the particular. This process is called determination, and it grants the lawmaker sufficient discretion, within reasonable limits, to concretize higher principles of law.[33] Vermeule provides an analogy: determination is akin to an architect who receives a general commission to build a hospital for a city.[34] The architect receives a kind of structured discretion; the end of the commission shapes and constrains the architect's choices. Under common-good constitutionalism, enacted texts are understood as specifications of general background principles; they do not arise out of the pure will of the lawgiver.

It bears noting that common-good constitutionalism does not prescribe a particular set of institutional arrangements or a specific allocation of lawmaking authority. Vermeule makes it clear that common-good constitutionalism does not require an activist judiciary or a strong executive. A variety of institutional technologies can be ordered to the common good. It is applicable in many forms of government, including parliamentary and presidential systems, monarchies, and republics. Courts need not be the primary institution charged with specifying and deciding what constitutes the common good. Common-good constitutionalism does not dictate the appropriate scope of judicial review; judicial deference to the legislature's determinations may in fact promote the good of the community.[35]

B. The Common Good Defined

The common good, simply defined, is "the flourishing of a well-ordered political community."[36] It is "unitary and indivisible, not an aggregation of individual utilities."[37] It is therefore not utilitarian; it does not refer to the state of

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[32] *Id.* At 43–47.

[33] *See* Adrian Vermeule, *Deference and Determination*, IUS ET IUSTITIUM, Dec. 2, 2020, *at* https://iusetiustitium.com/deference-and-determination/; McGowan, *supra* note 16.

[34] VERMEULE, *supra* note 7, at 10.

[35] *Id.* At 47–48. *See* McGowan, *supra* note 16; Michael Foran, *Rights and the Common Good*, IUS ET IUSTITIUM, Sept. 20, 2021, *at* https://iusetiustitium.com/rights-and-the-common-good/; de Arízaga, *supra* note 18.

[36] VERMEULE, *supra* note 7, at 7. *See* JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD (1947). For an overview of various definitions of the common good, *see* Waheed Hussain, *The Common Good*, *in* STAN. ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed., 2018), *at* https://plato.stanford.edu/entries/common-good/.

[37] VERMEULE, *supra* note 7, at 7.

affairs that would result in the greatest happiness for the greatest number.[38] The sum of individual private utilities can never amount to the common good, since the common good is attainable only by the community. Every member of the polity, however, shares in the common good, which retains its wholeness and is not diminished. While the common good is not a summation of individual goods, it is the good of individuals, in fact their highest good. It belongs jointly to all and severally to each. The common good is antithetical to rule for private benefit. Tyranny and rule by faction are antonyms of the common good.[39]

In the classical legal tradition, the common good is understood as being composed of a trinity of goods: justice, peace, and abundance.[40] Vermeule expands this formulation and adapts it to modern conditions; he adds to the list health, safety, and economic security.[41] Since in the classical legal tradition, government exists to promote the common good, and the common good is composed of justice, peace, abundance, health, safety, and economic security, then it follows that these specific goods are the legitimate ends of government. In the classical legal tradition, government exists primarily to promote the flourishing of the community and not mere private happiness. The common good is not only an instrument that the State must preserve in order to achieve other ostensibly higher ends, such as individual happiness or the happiness of family life. The common good is *itself* the *telos* of government. Common-good constitutionalism assumes that individual and private goods can be achieved only in a state of affairs where the common good is promoted.

C. Individual Rights and Human Dignity Under Common-Good Constitutionalism

It is completely facile and false to contend that there are no individual rights under common-good constitutionalism. On the contrary, individual rights are an integral part of the classical legal tradition. What makes the classical conception of rights different from the modern one involves the question of justification. Under the prevailing modern conception, rights are justified on strictly individualist and autonomy-maximizing terms.[42] In the classical legal

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[38] *See* Julia Driver, *The History of Utilitarianism*, *in* STAN. ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta & Uri Nodelman eds., 2022), *at* https://plato.stanford.edu/entries/utilitarianism-history/.

[39] VERMEULE, *supra* note 7, at 26–31.

[40] *Id.* At 31, *citing* GIOVANNI BOTERO, THE REASON OF STATE 71 (1589). *See* Vermeule, *supra* note 6.

[41] VERMEULE, *supra* note 7, at 7.

[42] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Jamal Greene, *The Supreme Court 2017 Term Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

tradition, rights exist for the good of the community and as an implement of justice—to give to each what is due to each.[43]

Under common-good constitutionalism, rights do not create duties; duties imply rights. Justice may of course be viewed from the perspective of the person *to whom* it is owed, who can then make a claim for what is properly due him. The starting point, however, is not the autonomous individual but the common good, a constitutive part of which is justice. The duty of a person to act in accordance with justice gives rise to a claim of rights on the part of the person to whom that duty is owed. To be sure, there are certain spheres over which the individual must be granted autonomy, not because the individual is an independent monad possessing inherent rights *a priori* but because the grant of such liberty and privacy is a requirement of justice. An opposite understanding—that subjective individual rights create duties—would risk the individualization of principles of right action and the abandonment of any reference to the community.[44]

The protection of individual rights is itself a common good: a community whose members are abducted, oppressed, tortured, or murdered with impunity is not a well-ordered political community. The community as a whole flourishes only when certain fundamental individual rights are protected. As Professor John Finnis notes: "[W]e should not say that human rights, or their exercise, are subject to the common good; for the maintenance of human rights is a fundamental component of the common good."[45] If the common good were aggregative, utilitarian, or majoritarian, the oppression of a few for the benefit of the many would perhaps be permissible, but as discussed above, the common good is *not* aggregative, utilitarian, or majoritarian. It refers to the good of the whole community, which is also the good of each individual. Properly understood, the common good is not antithetical to the fundamental rights of individuals. Since law in the classical legal tradition is an ordinance of *reason* directed toward the common good,[46] it follows that any cruel or unreasonable ordinance that violates the fundamental rights of individuals does not conduce to the common good.[47]

The definition of law in the classical legal tradition implies a particular conception of the human person as a legal subject. Since law is understood as an

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[43] Casey & Vermeule, *supra* note 27. The INSTITUTES OF JUSTINIAN define justice as "the set and constant purpose which gives to every man his due." J. INST. 1.1.1–4.

[44] *See, generally*, Michael Foran, *Rights, Common Good, and the Separation of Powers*, 86 MOD. L. REV. 599 (2023). For a more extensive explication of the relationship between justice and liberty, *see* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[45] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 218 (1980).

[46] *See supra* note 24.

[47] Foran, *supra* note 44, at 8–9.

ordinance of reason directed toward the collective flourishing of individuals, to be a legal subject means to be a valued member of the community, capable of flourishing, possessing an inviolable dignity,[48] and not a mere autonomous agent who follows legal ordinances for fear of the consequences. As Professor Foran explains:

> What gives humans value on this view is our radical capacity to flourish as persons. This value cannot be disentangled from individuals such that they become mere vessels of what is actually considered to be of fundamental value — utility, pleasure, freedom, etc. Rather, it is [one's] value as the thing that one is (and not the experiences one has or the consequences one produces) that grounds the natural law commitment to the dignity of persons. Recognition of this value requires appropriate respect be shown to each and every person.[49]

II. COMMON-GOOD CONSTITUTIONALISM AND PHILIPPINE CONSTITUTIONAL CULTURE

A. The Adverse Consequences of Constitutional Transplantation

Constitutional culture refers to a people's general attitude toward the nature, scope, and function of constitutional constraints.[50] Specifically, it includes the "implicit and explicit, stated and unstated, conscious and subconscious thoughts, feelings, beliefs, impressions, and norms a group holds about the nature and function of constitutional constraints."[51] When a constitution is imposed on a nation, as so often happens in colonization,[52] there is no guarantee that the imposed constitution would be suitable to the recipient. If the constitution is not compatible with the constitutional culture of the people on whom it is imposed, the constraints set out in the constitution will fail. The constitution must match the underlying constitutional culture; otherwise, the recipient will reject the constitutional graft.[53]

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[48] *See* Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39 (2014).

[49] Michael Foran, *Equal Dignity and the Common Good*, HARV. J.L. & PUB. POL'Y (forthcoming).

[50] Nikolai Wenzel, *Constitutional Culture, Constitutional Parchment and Constitutional Stickiness: Matching the Formal and Informal*, 31 J. JURIS 55 (2017). *See, generally*, J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 NOTRE DAME L. REV. 1145 (2022); Robert Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law,* 117 HARV. L. REV. 4 (2003); Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture,* 43 U. RICH. L. REV. 623 (2009).

[51] Wenzel, *supra* note 50, at 58–59.

[52] *See* Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263 (2015).

[53] Wenzel, *supra* note 50.

If law is understood as a "cognitive institution," the effectivity of which is dependent on the understanding of social actors within a community,[54] then it becomes apparent that laws transplanted without consideration of the peculiar customs, values, and traditions of the recipient nation would be less effective than they are in the originating nation. This disparity involves a probable divergence in interpretation; even a seemingly unambiguous rule could be interpreted differently in the recipient nation if it is not properly adapted to local conditions and circumstances.[55]

Some have argued that the reason why President Rodrigo Duterte enjoyed high approval ratings throughout his term[56] despite his open contempt for the rule of law was because our Constitution does not match the constitutional culture of the Filipino people.[57] Professor Nikolai Wenzel observes that some Filipino cultural characteristics are inimical to constitutional principles transplanted from the United States. He explains:

> First, the *caudillo* strongman tradition was particularly strong in the Philippines. Second, parallel to the Spanish colonial tradition of a government of men rather than laws, the Filipino constitutional culture was all too willing to place political expediency over constitutional principle[.] Third, the Filipino founding evinced a certain schizophrenia on the subject of rights, as the [C]onstitution's emphasis on individual rights was largely alien to the Spanish and Filipino traditions, which emphasized family/communal rights and *raison d'état*.[58]

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[54] For a general overview of the relationship between law and language, *see* Timothy Endicott, *Law and Language*, *in* STAN. ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed., 2022), *at* https://plato.stanford.edu/entries/law-language/.

[55] *See, generally*, Daniel Berkowitz, Katharina Pistor, & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

[56] Llanesca Panti, *Duterte Approval Stayed High Through Six Years — Pulse Asia Data*, GMA NEWS ONLINE, June 28, 2022, *at* https://www.gmanetwork.com/news/topstories/nation/836404/duterte-approval-stayed-high-through-six-years-pulse-asia-data-show/story/.

[57] Dante Gatmaytan, *Lost in Transmission: Rule of Law Challenges in the Philippines*, 8 IMPUNITY WATCH L.J. 6 (2017).

[58] *Id.*, *citing* Nikolai Wenzel, *Lessons from Constitutional Culture and the History of Constitutional Transfer: A Hope for Constitutionally Limited Government?*, 20 INT'L ADVANCES ECON. RES. 213, 221 (2014). For another example of how liberal constitutional principles could sometimes run counter to the deeply ingrained traditions of a nation, *see* Alessandra Stanley, *Rome Journal; Official Favors: Oil That Makes Italy Go Round*, N.Y. TIMES, Apr. 20, 2001, *available at* https://www.nytimes.com/2001/04/20/world/rome-journal-official-favors-oil-that-makes-italy-go-round.html. "'It is not a crime, as long as you do it well,' Franco Ferrarotti, an Italian sociologist said of the Wednesday ruling on 'raccomandazione,' the Italian custom of seeking and receiving special treatment from people in power, or close to it. 'This is our version of the Protestant ethic,' Mr. Ferrarotti said. 'When a favor works successfully, it ceases to be a crime and becomes a work

These observations are hardly new. General Douglas MacArthur noted "the pattern of Oriental psychology to respect and follow aggressive, resolute, and dynamic leadership," while Justice George Arthur Malcolm observed after he retired from the Philippine Supreme Court that Filipinos "react[ed] more favorably to one-man government than to more dispersed direction."[59] Supreme Court Justice and later Philippine Commissioner Charles Burke Elliott made similar observations in his book published in 1917:

> "Not everything that grows and prospers in the West, whether plants or governments, can be successfully transplanted to the Far East," and while some Filipinos "have been partially Americanized," it was "very doubtful whether we have materially changed the fundamental character of the Filipino people," who remained "Spanish in culture" and whose mental processes were "those of Latins, not Anglo-Saxons."[60]

The Supreme Court of the United States has "pervasive[ly], consistent[ly], and recurrent[ly]" looked to the nation's traditions to discern constitutional meaning.[61] It has taken into account the "presumptive influence of political and cultural practices of substantial duration"[62] in interpreting the free speech clause,[63]

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of art.'" *See also The Sopranos: For All Debts Public and Private* (HBO television broadcast Sept. 15, 2002).

[59] LEIA CASTAÑEDA ANASTACIO, THE FOUNDATIONS OF THE MODERN PHILIPPINE STATE: IMPERIAL RULE AND THE AMERICAN CONSTITUTIONAL TRADITION 10 (2016), *citing* GEORGE ARTHUR MALCOLM, AMERICAN COLONIAL CAREERIST: HALF A CENTURY OF OFFICIAL LIFE AND PERSONAL EXPERIENCE IN THE PHILIPPINES AND PUERTO RICO 122, 127 (1957).

[60] CASTAÑEDA ANASTACIO, *supra* note 59, at 10, *citing* CHARLES BURKE ELLIOT, THE PHILIPPINES TO THE END OF THE COMMISSION GOVERNMENT: A STUDY IN TROPICAL DEMOCRACY ii (1917).

[61] Marc DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020).

[62] *Id.* At 1125.

[63] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), where the Supreme Court of the United States recognized traditional forms of unprotected speech; United States v. Stevens, 559 U.S. 460 (2010), where the Court enumerated obscenity, defamation, fighting words, and incitement to violence as among the forms of speech traditionally excluded from the protection of the free speech clause; and New York v. Ferber, 458 U.S. 747, 764–66 (1982), where the Court concluded that child pornography was excluded from free speech protection by analogizing it to forms of speech traditionally considered unprotected speech.

the establishment clause,[64] the due process clause,[65] the speech or debate clause,[66] and the executive power of appointment and removal,[67] among other constitutional provisions. In *Washington v. Glucksberg*,[68] the Court upheld a Washington statute prohibiting assisted suicide and dismissed the argument that the due process clause protects a "right to die" or a "liberty to choose how to die." In so ruling, the Court held that for a practice to warrant protection under the due process clause, the right must be "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [the right] were sacrificed.'"[69] The practice must also involve a fundamental right, that is, a right that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[70]

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[64] *See* Lynch v. Donnelly, 465 U.S. 668 (1984), where the Supreme Court of the United States upheld a municipality's Christmas holiday display, which included a crèche, against an establishment clause challenge by acknowledging that Christmas was a "significant historical religious event long celebrated in the Western World"; American Legion v. American Humanist Ass'n, 139 S. Ct. 2067 (2019), where the Court ruled that a thirty-two-foot cross dedicated in honor of a county's fallen soldiers did not violate the establishment clause; Town of Greece v. Galloway, 134 S. Ct. 1811 (2014), where the Court upheld, on the ground of longstanding tradition, the constitutionality of opening prayers at legislative sessions.

[65] *See* Burnham v. Superior Ct., 495 U.S. 604 (1990), where the Supreme Court of the United States invoked an Anglo-Saxon tradition stretching as far back as the fifteenth century in holding that a defendant's physical presence in a State is sufficient to establish personal jurisdiction; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), where the Court considered traditional state tort law in holding that a jury had the discretion to consider the gravity of a wrong and the need to deter similar conduct in assessing the amount of punitive damages to be awarded to a plaintiff; Ownbey v. Morgan, 256 U.S. 94 (1921), where the Court, in ruling that an out-of-state creditor may attach the property of an in-state debtor without an opportunity to be heard, took into account a practice that had been observed in eighteenth-century England and adopted by the American States during the colonial and founding periods.

[66] *See* United States v. Brewster, 408 U.S. 501, 508, 512–13, 528–29 (1972), where the Supreme Court of the United States held that the longstanding tradition of protecting legislative speech did not encompass prosecutions for bribery involving the receipt of remuneration in exchange for a speech in the legislative chamber, provided there was no danger of an inappropriate inquiry into legislative acts. Chief Justice Burger's majority opinion distinguished between English and American tradition and noted that "[a]lthough the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system."

[67] *See* Nat'l Lab. Rel. Bd. v. Noel Canning, 134 S. Ct. 2550, 2560–61 (2014), where the Supreme Court of the United States took into account "three-quarters of a century of settled practice" in ruling that the President may make recess appointments while Congress is in session. The Court said that it "must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached."

[68] 521 U.S. 702 (1997).

[69] *Id.* at 720–21.

[70] *Id.*

If American constitutional doctrine were to be transplanted into Philippine law without taking account of the history and tradition of the Filipino people, then a constitutional provision whose interpretation is anchored on a distinctly American tradition will be construed incorrectly in Philippine law.

B. Common-Good Constitutionalism Is Aligned with the Values and Traditions of the Filipino People

Professor Virgilio Enriquez, pioneer of the *Sikolohiyang Pilipino* movement of the 1970s, identified *kapwa* as the foundation of Filipino values and the core concept of Philippine psychology.[71] *Kapwa* does not have any direct translation in English, but scholars have roughly translated it as "shared self," "shared identity," and "self-in-the-other."[72] *Kapwa* touches on the fundamentally relational, interdependent, and communitarian understanding of self that permeates Filipino values. This core value, Enriquez explains, "determines not only the person's personality but more so his personhood or *pagkatao*."[73] The idea of a completely autonomous individual, with duties toward none and dependent only on oneself, is utterly alien to the Filipino psyche.[74] It follows, then, that any constitutional design and any approach to constitutional interpretation that identify the self-sufficient individual as the locus of rights, without any consideration of the wider community and the relational nature of persons, are foreign grafts wholly unsuited to Philippine constitutional culture.

Father Jaime Bulatao, S.J., considered the father of Philippine psychology, offered an analogy: the Filipino conceives of the self as an egg in a batch of fried eggs whose yolks are still clearly separated but whose whites are joined. This is in contrast to a batch of hard-boiled eggs, which would represent sharply individuated selves, and scrambled eggs, which would represent unindividuated selves. Although the Filipino psyche sees people as individuals, it views them as inseparable from one another.[75]

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[71] Virgilio Enriquez, *Kapwa: A Core Concept in Filipino Social Psychology*, 10 PHIL. J. PSYCHOL. 3 (1977). *But see* Frankie Concepcion, *The Myth of "Kapwa,"* RAPPLER, Mar. 5, 2016, *at* https://www.rappler.com/moveph/124625-myth-kapwa-filipino-trait/.

[72] Jeremiah Reyes, *Loób and Kapwa: Thomas Aquinas and a Filipino Virtue Ethics* (unpublished dissertation for Doctor of Philosophy, Katholieke Universiteit Leuven, 2015).

[73] *Id.* at 96, *citing* VIRGILIO ENRIQUEZ, FROM COLONIAL TO LIBERATION PSYCHOLOGY 76 (1992).

[74] *See* Jacklyn Cleofas, *An Account of Virtue and Solidarity from* Pakikipagkápuwâ, 1 QUEST: STUD. ON RELIGION & CULTURE IN ASIA 73 (2016).

[75] Jaime Bulatao, *Hiya*, 12 PHIL. STUD. 424, 431 (1964).

It has been argued that the "exclusive individualism" bequeathed by the American intellectual tradition[76] to the Philippines is inconsistent with the idea of *kapwa* and Filipino virtue ethics. This type of individualism excludes anything outside the self from the definition of the good life. It puts individual autonomy and self-assertion above the general welfare and the good of the community. This exclusive individualism must be distinguished from a moderate individualism that values both individual fulfillment and the common good. The Canadian philosopher Charles Taylor elaborates on this exclusive individualism, which he calls an "individualism of self-fulfillment": "This individualism involve[s] a centring on the self and a concomitant shutting out, or even unawareness, of the greater issues or concerns that transcend the self, be they religious, political, historical. As a consequence, life is narrowed and flattened."[77]

Local scholars have also written about the foreignness of extreme Western individualism to Filipino values:

> The Western tradition found value in individuality, but also discovered its distortion in the extreme. That is why there is a nostalgia, if not a need to recover the value of community. Even if our Philippine tradition might need a bit more individualization, we have not yet fully given the values of relatedness their due. That relatedness is the relation of *pakikipagkapwa-tao*.[78]

> By cultural orientation, we are relationists, not individualists[.] Our current claim to individualism is not part of our traditional culture. It is derived from the Western-influenced foreign education we received when we were young.[79]

If the constitutional constraints in our fundamental law are to be effective, they have to be interpreted in accord with Filipino values,[80] which are founded on the idea of *kapwa* and a relational view of individuals. An approach to constitutional interpretation whose primary aim is to maximize individual autonomy without any regard for the wider community is utterly incompatible

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[76] *See* CHARLES TAYLOR, THE MALAISE OF MODERNITY 2–5 (1991).

[77] CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 18 (1991). Taylor further explains: "[The] principle is something like this: everyone has a right to develop their own form of life, grounded on their own sense of what is really important or of value. People are called upon to be true to themselves and to seek their own self-fulfillment. What this consists of, each must, in the last instance, determine for him- or herself. No one else can or should try to dictate its content. *Id.* at 14.

[78] Reyes, *supra* note 72, at 62, *citing* DIONISIO MIRANDA, KALOOB NI KRISTO: A FILIPINO CHRISTIAN ACCOUNT OF CONSCIENCE 103 (2003).

[79] *Id.*, *citing* F. LANDA JOCANO, FILIPINO VALUE SYSTEM: A CULTURAL DEFINITION 63 (1997).

[80] *See supra* Part II.A.

with our constitutional culture. Common-good constitutionalism, with its emphasis on the common good,[81] is a theory of constitutional interpretation more compatible with Philippine constitutional culture than is either originalism or the autonomy-maximizing approach dominant in the United States.

III. THE COMMON GOOD AND THE PHILIPPINE LEGAL TRADITION

A. The Common Good in the Philippine Constitution

The 1987 Philippine Constitution contains many express references to the common good. The Preamble states that the sovereign Filipino people do ordain and promulgate the Constitution in order to "establish a Government that shall […] promote the common good."[82] By contrast, the Preamble of the 1973 Constitution used the term "general welfare" instead of "common good."[83] Father Joaquin Bernas, S.J., one of the framers of the 1987 Constitution, explained the rationale for the change:

> The change from "general welfare" to "common good" was intended to project the idea of a social order that enables every citizen to attain his or her fullest development economically, politically, culturally and spiritually. *The rejection of the phrase "general welfare" was based on the apprehension that the phrase could be interpreted as meaning "the greatest good for the greatest number" even if what the greatest number wants does violence to human dignity*, as for instance when the greater majority might want the extermination of those who are considered as belonging to an inferior race. It was thought that *the phrase "common good" would guarantee that mob rule would not prevail* and that the majority would not persecute the minority.[84]

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[81] *See supra* Part I.

[82] CONST. pmbl. The entire preamble reads: "We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society and establish a Government that shall embody our ideals and aspirations, *promote the common good*, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution." (Emphasis supplied.)

[83] CONST. (1973), pmbl. The entire preamble reads: "We, the sovereign Filipino people, imploring the aid of Divine Providence, in order to establish a Government that shall embody our ideals, *promote the general welfare*, conserve and develop the patrimony of our Nation, and secure to ourselves and our posterity the blessings of democracy under a regime of justice, peace, liberty, and equality, do ordain and promulgate this Constitution." (Emphasis supplied.)

[84] JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 2 (2003 ed.). (Emphasis supplied.) *See supra* Part I.B, which explains that the common good is not aggregative or utilitarian. This is perfectly in line with Commissioner Bernas' understanding of the common good as it was used in the preamble of the 1987 Constitution.

Article XII of the 1987 Constitution, which deals with the national economy and patrimony, mentions the "common good" four times.[85] Section 6 expresses the principle that private property is not absolute; rather, it is subordinated to the common good. This is an express rejection of *laissez-faire* economics and an endorsement of the principle of solidarity.[86] The provision states:

> The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.[87]

Despite the above provision enshrining in the fundamental law the principles of solidarity and distributive justice, the Constitution nonetheless provides that "[t]he State recognizes the indispensable role of the private sector, encourages private enterprise and provides incentives to needed investments."[88] This illustrates that in the Philippine legal tradition—as in the classical legal tradition—the ostensible tension between prosperity and the common good actually does not exist. These two governmental aims are not mutually exclusive; in fact, one cannot be achieved without the other. Recall that in the classical legal tradition, the common good is a tripartite concept consisting of justice, peace, and abundance; there can be no real abundance or prosperity without justice and peace. The Philippine Constitution, understood in its entirety under the whole-text canon of constitutional interpretation,[89] reflects this view that prosperity and the common good are interdependent and whatever apparent tension exists between the two is merely imaginary.

Article XII of the 1987 Constitution further provides that no franchise or right to operate a public utility shall be granted "except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the

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[85] CONST. art. XII.

[86] BERNAS, *supra* note 84, at 1202.

[87] Art. XII, § 6. *See* Rachael Walsh, *Property and the Common Good — Reviving Old Debates*, IUS ET IUSTITIUM, Sept. 14, 2021, *at* https://iusetiustitium.com/property-and-the-common-good-reviving-old-debates/; Gregory Chilson, *Man Is Known by the Company He Keeps: Corporate Law and the Common Good*, IUS ET IUSTITIUM, Dec. 11, 2020, *at* https://iusetiustitium.com/man-is-known-by-the-company-he-keeps-corporate-law-and-the-common-good/.

[88] Art. II, § 20.

[89] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); Antonin Scalia & Bryan Garner, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 JUDICATURE (2015), *available at* https://judicature.duke.edu/articles/a-dozen-canons-of-statutory-and-constitutional-text-construction/.

common good so requires."[90] It also states that "[g]overment-owned or controlled corporations may be created or established by special charters in the interest of the common good and subject to the test of economic viability."[91]

There are two references to the "common good" in Article XIII, which is made up of provisions on social justice and human rights.[92] Section 1 states that:

> The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.
>
> To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.[93]

The same Article compels the State, "by law, and for the common good," to "undertake […] a continuing program of urban land reform and housing which will make available at affordable cost decent housing and basic services to underprivileged and homeless citizens in urban centers and resettlement areas."[94]

Apart from expressly mentioning the phrase "common good" seven times, the 1987 Constitution is suffused with provisions consistent with the classical legal tradition. Article II enumerates principles and policies that the State ought to pursue, among which are social justice,[95] respect for human rights and the dignity of every human person,[96] the sanctity of family life,[97] the right to health,[98] the right to a balanced and healthful ecology,[99] and the welfare of

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[90] Art. XII, § 11.

[91] Art. XII, § 16.

[92] Art. XIII. *See* Sedfrey Candelaria & Jason Sy, *Social Justice: Strengthening the Heart of the 1987 Constitution for Those at the Margins of Philippine Society*, 64 ATENEO L.J. 1412 (2020).

[93] Art. XIII, § 1.

[94] Art. XIII, § 9.

[95] Art. II, § 10.

[96] Art. II, § 11.

[97] Art. II, § 12.

[98] Art. II, § 15. *See supra* Part I.B.

[99] Art. II, § 16. *See* Brian Quigley, *Common Good Constitutionalism and the Future of Environmental Law*, 23 VT. J. ENVTL. L. 349 (2022); Brian Quigley, *Environmental Law and the Classical Legal Tradition*, IUS ET IUSTITIUM, Oct. 10, 2022, *at* https://iusetiustitium.com/environmental-law-and-the-classical-legal-tradition/.

workers.[100] Section 12 provides that the State "shall equally protect the life of the mother and the life of the unborn from conception."[101]

Article XIII contains provisions that specify and concretize some of the policies in Article II across various sectors, including labor, agrarian reform, urban land reform and housing, health, women, and human rights.[102] It compels the State to "guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law."[103] Workers shall also be entitled to "security of tenure, humane conditions of work, and a living wage."[104] As part of its duty to implement an agrarian reform program, the State "shall encourage and undertake the just distribution of all agricultural lands, [. . .] taking into account ecological, developmental, or equity considerations, and subject to the payment of just compensation."[105]

Article XV recognizes the Filipino family as the "foundation of the nation."[106] The State has the duty to strengthen the solidarity of the family and actively promote its total development.[107] The foundation of the family, in turn, is marriage, an inviolable social institution that the State must protect.[108] Section 3 enumerates specific rights consistent with these principles, such as the "right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood."[109]

The 1935 Constitution already had a provision on social justice. It stated that "[t]he promotion of Social Justice to insure the well-being and economic security of all the people should be the concern of the State."[110] The constitutionalist Vicente Sinco explained why this provision on social justice was included in the 1935 Constitution:

> [A] new conception of justice becomes an imperative necessity, a conception that *takes into account not only the individual, as an independent unit,*

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[100] Art. II, § 18.

[101] Art. II, § 12. *See* Yves Casertano, *Yes, Courts Can Enforce Fourteenth Amendment Personhood for the Unborn*, IUS ET IUSTITIUM, Apr. 5, 2021, *at* https://iusetiustitium.com/yes-courts-can-enforce-fourteenth-amendment-personhood-for-the-unborn/.

[102] Art. XIII.

[103] Art. XIII, § 3.

[104] Art. XIII, § 3.

[105] Art. XIII, § 4.

[106] Art. XV, § 1.

[107] Art. XV, § 1.

[108] Art. XV, § 2.

[109] Art. XV, § 3.

[110] CONST. (1935), art. II, § 5.

> *and his legal rights as such but also his place as a member of the community, his relations with the social group, and the effect of his own social and economic condition upon the general welfare of the state and society.* This, in brief, is the conception of social justice. Its administration is not merely a judicial matter but is the concern of the different organs of the government.[111]

In the 1940 case of *Calalang v. Williams*, Justice Jose P. Laurel had the occasion to discuss what is meant by social justice:

> Social justice is "neither communism, nor despotism, nor atomism, nor anarchy," but the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may be approximated. *Social justice means the promotion of the welfare of all the people*, the adoption by the Government of measures calculated to insure economic stability of all the competent elements of society, through *the maintenance of a proper economic and social equilibrium in the interrelations of the members of the community*, constitutionally, through the adoption of measures legally justifiable, or extra-constitutionally, through the exercise of powers underlying the existence of all governments on the time-honored principle of *salus populi est suprema lex*.[112]

In contrast to the many references to the common good in the 1987 Constitution of the Philippines, the United States Constitution, which was ratified in 1788, makes no express mention of the common good, although it does include the phrase "general welfare" in its Preamble.[113] Neither does the United States Constitution contain any enumeration of principles and State policies akin to Article II of the 1987 Philippine Constitution. It does not have any article that deals comprehensively with social justice and human rights. It is a taut and concise document whose primary function is to set up the structure of government and demarcate the spheres of authority of the three branches.[114] The Amendments

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[111] Alberto Muyot, *Social Justice and the 1987 Constitution: Aiming for Utopia?*, 70 PHIL. L.J. 310, 321 (1996), *citing* VICENTE SINCO, PHILIPPINE CONSTITUTIONAL LAW 32–34 (1954). (Emphasis supplied.)

[112] 70 Phil. 726, 734–45 (1940). (Emphasis supplied, citations omitted.) In the same case, the Court explained: "Liberty is a blessing without which life is a misery, but liberty should not be made to prevail over authority because then society falls into anarchy. Neither should authority be made to prevail over liberty because then the individual will fall into slavery. [. . .] The paradox lies in the fact that the apparent curtailment of liberty is precisely the very means of insuring its preservation." *Id.* at 733–34.

[113] U.S. CONST. pmbl.

[114] *See* McCulloch v. Maryland, 17 U.S. 316 (1819). "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated,

that together comprise the Bill of Rights identify areas into which the government may not intrude.

The 1987 Constitution of the Philippines has more similarities with the Irish Constitution and Latin American constitutions than the American Constitution when it comes to provisions that promote the common good. The 1937 Constitution of Ireland makes an express reference to the common good ten times. Its Preamble provides, in part:

> We, the people of Éire,
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> * * *
>
> [S]eeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of the country restored, and concord established with other nations,
>
> Do hereby adopt, enact, and give to ourselves this Constitution.[115]

Many substantive provisions of the Irish Constitution have as their aim the promotion of the common good.[116] Similar to the Philippine Constitution, the Irish Constitution devotes an entire article to provisions that affirm the indispensable role of the family in the social order. Article 41 of the Irish Constitution provides that the State "recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."[117] The Irish Constitution guarantees the right of its citizens to "express freely their convictions and opinions," but the same provision limits this right and says that it "shall not be used to undermine public order or morality or the authority of the State."[118] It recognizes private property but does not consider it absolute: "The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods."[119]

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and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *Id.* at 407.

115 IRISH CONST. pmbl. The reference to "Prudence, Justice and Charity" is reminiscent of the enumeration of values in the preamble of the 1987 Philippine Constitution, which states that the sovereign Filipino people shall establish a government under "a regime of truth, justice, freedom, love, equality, and peace[.]"

116 *See* Casey, *supra* note 15; Conor Casey, *The Irish Constitution and Common Good Constitutionalism*, HARV. J.L. & PUB. POL'Y (2023).

117 IRISH CONST. art. 41, § 1.

118 Art. 40, § 6(1).

119 Art. 43, § 1(1).

The same article, however, states that this right to own private property must be "regulated by the principles of social justice."[120]

The *Ius Constitutionale Commune* in Latin America ("ICCAL"), which refers to common constitutional principles among countries in the region, is aimed at ensuring that "authority advances the common good."[121] Latin American constitutions do not only limit the powers of government and define proper spheres of authority; they also facilitate social and economic progress. For instance, the Venezuelan Constitution devotes an entire chapter on social and family rights. This chapter compels the State to "protect families as a natural association in society."[122] It requires protection to be afforded to motherhood, fatherhood, and marriage.[123] It recognizes the right of every person to "adequate, safe and comfortable, hygienic housing, with appropriate essential basic services."[124] It guarantees the right to health,[125] the right to work,[126] and the right to social security.[127] These are provisions with parallels in the Philippine Constitution but none in the United States Constitution.

B. The Common Good and Philippine Police Power Jurisprudence

As early as the 1910 case of *United States v. Toribio*,[128] the Supreme Court has recognized police power as an inherent power of the State. Police power is the "power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society."[129] It has been called the "most essential," "insistent," and "least limitable" of powers. It is founded on the maxims *sic utere tuo et alienum non laedas*[130] and *salus populi est suprema lex*.[131] In *Churchill v. Rafferty*, the Supreme Court cited BLACKSTONE'S COMMENTARIES, which defines police power as:

The due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well governed family, are bound to

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[120] Art. 43, § 2(1).

[121] *See* Hernández, *supra* note 19, *citing* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE (Armin von Bogdandy et al. eds., 1st ed. 2017).

[122] VENEZUELAN CONST. art. 75.

[123] Art. 76.

[124] Art. 82.

[125] Art. 83–85.

[126] Art. 87–97.

[127] Art. 86.

[128] 15 Phil. 85 (1910).

[129] People v. Reyes, 67 Phil. 187, 190 (1939).

[130] "So use your property as not to injure the property of others."

[131] "The welfare of the people is the supreme law."

conform their general behavior to the rules of propriety, good neighborhood, and good manners, to be decent, industrious, and inoffensive in their respective stations.[132]

The police power framework has firm roots in the classical legal tradition.[133] The exercise of police power has as its end goal the promotion of the common good and the general welfare.[134] It is through the exercise of its police power that the State achieves its legitimate ends, namely: justice, peace, abundance, health, safety, and economic security.[135]

The Philippine Supreme Court has upheld the following regulations as a valid exercise of police power: a city ordinance making it unlawful to rent out a hotel room more than twice in a 24-hour period;[136] a law prohibiting the carrying of a concealed deadly weapon;[137] a municipal ordinance prohibiting the construction of gasoline stations within 500 meters from each other in order to reduce the risk of a conflagration;[138] a city ordinance prohibiting the sale of fresh meat anywhere outside the city markets;[139] a municipal ordinance prohibiting *panguingue*, a form of gambling, except on Sundays and legal holidays;[140] a municipal ordinance prohibiting *jueteng*;[141] a law granting the Collector of Internal Revenue the authority to direct the removal, by summary order, of any sign,

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[132] 32 Phil. 580, 603 (1915).

[133] VERMEULE, *supra* note 7, at 67.

[134] *Id.* at 62. In the Philippines, the police power has been delegated to local government units by the general welfare provision of the Local Government Code. The provision states: "Every local government unit shall exercise the powers expressly granted, those necessarily implied there from, as well as *powers necessary, appropriate, or incidental for its efficient and effective governance, and those which are essential to the promotion of the general welfare*. Within their respective territorial jurisdictions, local government units shall ensure and support, among other things, the preservation and enrichment of culture, promote health and safety, enhance the right of the people to a balanced ecology, encourage and support the development of appropriate and self-reliant scientific and technological capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of their inhabitants." LOCAL GOV'T CODE, § 16. (Emphasis supplied.) The enumeration of legitimate governmental aims in this provision is a helpful catalog of functions that the police power embraces.

[135] *See supra* notes 40–41. "[P]olice power concerns government enactments which precisely interfere with personal liberty or property in order to promote the general welfare or the common good." JMM Promotion and Mgmt., Inc. v. Ct. of Appeals, G.R. No. 120095, 260 SCRA 319, 325, Aug. 5, 1996.

[136] Ermita-Malate Hotel v. City Mayor of Manila, G.R. No. L-24693, 20 SCRA 849, July 31, 1967.

[137] United States v. Villareal, 28 Phil. 390 (1914).

[138] Javier v. Earnshaw, 64 Phil. 626 (1937).

[139] Co Kiam v. City of Manila, 96 Phil. 649 (1955).

[140] United States v. Salaveria, 39 Phil. 102 (1918).

[141] People v. Chong Hong, 65 Phil. 625 (1938).

signboard, or billboard exposed to public view and offensive to the sight;[142] a statutory provision authorizing the Energy Regulatory Commission to fix and impose a universal charge on all electricity end-users;[143] a law prohibiting the slaughter of carabaos for human consumption without a permit;[144] a municipal ordinance requiring a permit to hold a religious meeting in a public place; [145] and a law prohibiting an employer from refusing to pay the salaries of his employees on the fifteenth or last day of every month or every Saturday.[146]

The Court has generally adopted a deferential attitude toward the legislature's exercise of police power.[147] A notable outlier is the 1924 case of *People v. Pomar*,[148] in which the Philippine Supreme Court, following the doctrine set out in the American case of *Lochner v. New York*, struck down based on the principle of liberty of contract a statutory provision requiring employers to grant pregnant employees a thirty-day leave with pay before confinement and another thirty-day leave after confinement. The Philippine Supreme Court held that "the right to contract about one's affairs is a part of the liberty of the individual protected by the 'due process of law' clause of the [C]onstitution."[149]

In the past two decades, the Supreme Court has gradually departed from its deferential attitude and more frequently struck down police power regulations as violative of the due process clause. In *White Light Corporation v. City of Manila*,[150] the Court reversed its earlier ruling in *Ermita-Malate Hotel v. City Mayor of Manila* and struck down an ordinance prohibiting hotels and other similar establishments from charging wash-up rates and renting out rooms more than twice in a 24-hour period. The Court held that the prohibition constituted an "arbitrary intrusion into private rights," and that there were less intrusive measures to achieve the legitimate aim of curbing prostitution and drug use in the city. The Court further ruled that the ordinance suffered from overbreadth because it proscribed or impaired other legitimate activities, such as short stays by travelers.

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142 Churchill v. Rafferty, 32 Phil. 580 (1915).

143 Gerochi v. Dep't of Energy, G.R. No. 159796, 527 SCRA 696, July 17, 2007.

144 United States v. Toribio, 15 Phil. 85 (1910).

145 Gallego v. People, G.R. No. L-18247, 8 SCRA 813, Aug. 31, 1963.

146 People v. Reyes, 67 Phil. 187 (1939).

147 Father Joaquin Bernas, S.J., has similarly noted that "[f]rom the very beginning, the Philippine Supreme Court gave generous latitude to legislation designed to promote public health, public safety or public welfare." CASTAÑEDA ANASTACIO, *supra* note 59, at 128, *citing* JOAQUIN BERNAS, S.J., A HISTORICAL AND JURIDICAL STUDY OF THE PHILIPPINE BILL OF RIGHTS 91–96 (1971).

148 People v. Pomar, 46 Phil. 440 (1924).

149 *Id.*

150 G.R. No. 122846, 576 SCRA 416, Jan. 20, 2009.

In *City of Manila v. Laguio,*[151] the Supreme Court invalidated an ordinance that prohibited the establishment in the Ermita-Malate area of "any business providing certain forms of amusement, entertainment, services and facilities where women are used as tools in entertainment and which tend to disturb the community, annoy the inhabitants, and adversely affect the social and moral welfare of the community[.]"[152] The ordinance enumerated the following establishments as falling within the coverage of the prohibition: sauna parlors, massage parlors, karaoke bars, beerhouses, night clubs, day clubs, super clubs, discotheques, cabarets, dance halls, motels, and inns.[153]

The Supreme Court struck down the above regulation for being violative of the due process and equal protection clauses of the Constitution. The ordinance violated due process because it intruded into the right of privacy of individuals, and it covered within the prohibition establishments that were not necessarily offensive to the moral welfare of the community, such as sauna parlors, karaoke bars, and discotheques.[154]

The Court had arrived at a similar conclusion in the earlier case of *De La Cruz v. Paras.*[155] In it, the Court struck down for being overbroad a municipal ordinance prohibiting the operation of "night clubs, cabarets, [and] dance halls," as well as the issuance of licenses to "hostess[es], hospitality girls, and professional dancer[s]."[156] The ordinance was passed in view of the "decadence of morality" in the municipality.[157] The Court held that "[t]he objective of fostering public morals, a worthy and desirable end[,] can be attained by a measure that does not encompass too wide a field."[158] It said that the objective could have been achieved by reasonable restrictions rather than by an absolute prohibition. Thus, it held that "there was in this instance a clear invasion of personal or property rights, personal in the case of those individuals desirous of patronizing those night clubs and property in terms of the investments made and salaries to be earned by those therein employed."[159]

In *Metropolitan Manila Development Authority v. Viron Transportation Co., Inc.*,[160] the Supreme Court invalidated an executive order authorizing the

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[151] G.R. No. 118127, 455 SCRA 308, Apr. 12, 2005.
[152] *Id.* at 317.
[153] *Id.* at 317–18.
[154] *Id.* at 329–39.
[155] G.R. No. L-42571, 122 SCRA 569, July 25, 1983.
[156] *Id.* at 573–74.
[157] *Id.* at 573.
[158] *Id.* at 578.
[159] *Id.*
[160] G.R. No. 170656, 530 SCRA 341, Aug. 15, 2007.

Metropolitan Manila Development Authority (MMDA) to order the closure of bus terminals on major thoroughfares in Metro Manila. The executive order was issued with the view of decongesting traffic by constructing mass transport terminal facilities that would integrate all transport modes. The Supreme Court held that the MMDA acted *ultra vires*, and even if such an authority had been granted by law to the MMDA, the Court said that the regulation still would not have been valid because it failed to satisfy the two-part test for a valid police power measure.[161] The Court found that the closure of all bus terminals on major Metro Manila thoroughfares was not reasonably necessary to the accomplishment of the goal of traffic decongestion. The assailed regulation, therefore, failed to pass the second part of the test. The Court further noted that there were less intrusive means to achieve the governmental aim, such as the strict enforcement of traffic rules and the removal of obstructions on the thoroughfares.

The above cases show that although the Philippine Supreme Court has generally accorded the legislature a wide latitude of discretion when it comes to the exercise of police power,[162] the Court has in recent decades more frequently struck down police power regulations as violative of the due process clause.[163] In many of those cases, it also applied the overbreadth doctrine in arriving at the conclusion that the assailed regulation infringed upon constitutionally protected rights. The final part of this paper[164] looks at how the Court would have ruled differently in these cases had it adopted common-good constitutionalism as its method of constitutional interpretation.

One recent case where the Supreme Court bucked this libertarian trend and upheld the enforcement of a regulation on the ground of police power is *Maynilad Water Services, Inc. v. The Secretary of the Department of Environment and Natural Resources*.[165] In it, the Court affirmed the orders of respondent Secretary holding two water concessionaires liable for violating a provision in the Clean Water Act that required them to undertake the interconnection of all water supply and sewerage facilities in Metro Manila within five years following the effectivity of the Act. The Court took the occasion to introduce into Philippine jurisprudence the Public Trust Doctrine, under which the State holds all natural resources, including water, in trust for the benefit of present and future generations. Citing a paper published by the Center for Progressive Reform, an American think tank,

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[161] The two-part test requires that: "(1) the interest of the public generally, as distinguished from that of a particular class, [must require] its exercise; and (2) the means employed [must be] reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." G.R. No. 170656, 530 SCRA 341, 368–69, Aug. 15, 2007.

[162] *See supra* notes 136–46.

[163] *See supra* notes 150–61.

[164] *See infra* Part IV.A.

[165] [Hereinafter "*Maynilad*"], G.R. No. 202897, Aug. 6, 2019.

the Court explained that "certain natural resources belong to all and cannot be privately owned or controlled because of their inherent importance to each individual and society as a whole."[166] The doctrine is simultaneously a grant of and a limitation on State power. The paper cited by the Supreme Court discussed a number of American cases in which the doctrine was invoked. One of those cases is *Illinois Central Railroad v. Illinois,*[167] a seminal 1892 case in which the Supreme Court of the United States held that the State of Illinois did not have the power to wholly grant fee title to submerged lands in favor of a private entity where doing so would preclude the exercise of the public right to commercial navigation and fishing in navigable waters. The public trust doctrine, as adopted by the Philippine Supreme Court in *Maynilad*, aligns neatly with common-good constitutionalism.

C. Natural Law in Philippine Jurisprudence and Statutes

The Supreme Court has recognized the right to life,[168] the right to a balanced and healthful ecology,[169] and the right to health[170] as springing from natural law and already existing even before they were written in the Constitution. In *Imbong v. Ochoa*, the Court explained: "Even if not formally established, the right to life, being grounded on natural law, is inherent and, therefore, not a creation of, or dependent upon a particular law, custom, or belief. It precedes and transcends any authority or the laws of men."[171]

In the landmark case of *Oposa v. Factoran*,[172] the Court pointed out that the right to a balanced and healthful ecology and the right to health "need not even

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[166] Alexandra Klass & Ling-Yee Huang, Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates 1 (Ctr. for Progressive Reform, White Paper No. 908, 2009), *available at* http://progressivereform.net/articles/CPR_Public_Trust_Doctrine_Manual.pdf.

[167] 146 U.S. 387 (1892). An even earlier American case decided in 1877 traced the public trust doctrine to English common law. "The title to lands under tidewaters within the realm of England were by the common law deemed to be vested in the King as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The King, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge." People v. New York & Staten Island Ferry Co., 68 N.Y. 71, 76 (1877). In a yet older treatise titled *De Jure Maris*, the 17th-century English jurist Lord Matthew Hale explained: "The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use."

[168] This right is recognized in CONST. art. II, § 5; art. II, § 12; art. III, § 1.

[169] This right is recognized in CONST. art. II, § 16.

[170] This right is recognized in CONST. art. II, § 15.

[171] G.R. No. 204819, 721 SCRA 146, 292, Apr. 8, 2014.

[172] G.R. No. 101083, 224 SCRA 792, July 30, 1993.

be written in the Constitution for they are assumed to exist from the inception of humankind."[173] The Court said:

> If [the right to a balanced and healthful ecology and the right to health] are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless [these rights] are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.[174]

It should be noted, however, that in *Imbong v. Ochoa*, the Court categorically said that it could not invoke natural law to invalidate a law enacted by Congress. The petitioners in that case had argued that the Responsible Parenthood and Reproductive Health Act ("RH Law")[175] should be struck down for violating natural law. They contended that the use of contraception "opposes the initiation of life," which is a fundamental human good, and is therefore an "affront to the dignity of man."[176] The Court dismissed this argument and held that its "only guidepost is the Constitution," and "[w]hile every law enacted by man emanated from what is perceived as natural law, the Court is not obliged to see if a statute, executive issuance, or ordinance is in conformity to it."[177] The Court held that it could not strike down an enacted positive law for contravening natural law, but it acknowledged the existence of natural law and recognized that every law enacted by man emanates from natural law. It discounted the possibility of invoking natural law to invalidate positive law, but it did not dismiss the idea of using natural law as an interpretive tool to shed light on the meaning of enacted texts.

Many provisions in Chapter 1 of the Civil Code evince an implicit recognition of the existence of natural law and strengthen the proposition that common-good constitutionalism is particularly compatible with the Philippine legal tradition. Article 9 provides that "[n]o judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws."[178] The eminent civilist Arturo Tolentino wrote in his Commentary on the Civil Code that where the law is vague or obscure, courts should clarify it in light of the rules of

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[173] *Id.* at 805.
[174] *Id.*
[175] Rep. Act No. 10354.
[176] G.R. No. 204819, 721 SCRA 146, 290, Apr. 8, 2014.
[177] *Id.* at 372.
[178] CIVIL CODE, art. 9.

statutory construction, and where the law is silent or insufficient, courts ought to fill the deficiency by resorting to customs or general principles of law.[179] He cautioned, however, that "it is only when all the rules of interpretation have been exhausted that the court can create a rule on the facts[.]"[180] The Old Civil Code contained a more specific provision: "Where there is no statute exactly applicable to the point in controversy, the custom of the place shall be applied, and in the absence thereof, the general principles of law."[181] Tolentino opined that even though this provision is no longer found in the New Civil Code, it should still be deemed operative.[182]

Article 10 is an interpretive provision: "In case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail."[183] This provision encapsulates much of Vermeule's proposal for a common-good approach to the interpretation of law. It bears repeating that common-good constitutionalism does not necessarily advocate that judges be granted the power to strike down positive law based on principles of natural law. Vermeule clarifies that the classical legal tradition primarily views natural law not as an undiscovered body of law that can supplant positive law but rather as an interpretive tool that can shed light on the meaning of enacted texts.[184] In the classical legal tradition, law is an "ordinance of reason for the common good," and justice is a necessary component of the common good. In view of this definition of law, it is therefore reasonable for judges to presume, when interpreting ambiguous legal texts, that "the lawmaking body intended right and justice to prevail."[185]

The implied recognition of natural law in our statutes and jurisprudence is in stark contrast to the recent American case of *Bostock v. Clayton County*,[186] in which Justice Neil Gorsuch, an avowed textualist, wrote for the majority that "[o]nly the written word is the law[.]"[187] This pronouncement reflects a strictly

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[179] I ARTURO TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 39 (1990 ed.). *See* Adrian Vermeule, *Customary Law and Popular Sovereignty*, IUS ET IUSTITIUM, Jan. 12, 2022, *at* https://iusetiustitium.com/customary-law-and-popular-sovereignty/; Pat Smith, *The Unwritten Law and the Order of the State*, IUS ET IUSTITIUM, Sept. 18, 2020, *at* https://iusetiustitium.com/the-unwritten-law-and-the-order-of-the-state/.

[180] TOLENTINO, *supra* note 179.

[181] CIVIL CODE (1889), art. 6.

[182] TOLENTINO, *supra* note 179, at 40.

[183] CIVIL CODE, art. 10.

[184] *See supra* notes 27–29 and accompanying text.

[185] CIVIL CODE, art. 10.

[186] 140 S. Ct. 1731 (2020).

[187] *Id.* at 1737. *See* Jonathan Skrmetti, *The Triumph of Textualism: "Only the Written Word Is the Law,"* SCOTUSBLOG, June 15, 2020, *at* https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/; Ilya Shapiro, *After* Bostock*, We're All*

positivist conception of law, a conception that considers *lex* as comprising the entirety of *ius*.[188] This remark is inconsistent with the classical legal tradition and, as shown above, with the Philippine legal tradition.

IV. APPLICATION: DUE PROCESS AND FREE SPEECH UNDER COMMON-GOOD CONSTITUTIONALISM

Having established that common-good constitutionalism is particularly compatible with the constitutional culture and legal tradition of the Philippines, we now turn to application and consider how two constitutional provisions—the due process and free speech clauses in the Bill of Rights—will be construed under common-good constitutionalism. This Part provides cases that illustrate how common-good constitutionalism would result in different decisions than if any of the prevailing methods of constitutional interpretation had been adopted.

A. Due Process Under Common-Good Constitutionalism

1. Against Lochnerism

The infamous case of *Lochner v. New York*[189] is an example of a decision manifestly contrary to common-good constitutionalism. In it, the Supreme Court of the United States struck down as unconstitutional a New York law that set maximum working hours for bakers. It held that the law violated liberty of contract and was therefore a violation of the due process clause and an illegitimate exercise of police power. The right to purchase or sell labor, the Court held, was part of the liberty protected by the due process clause.

Conversely, Justice Harlan's dissenting opinion in *Lochner* is considered a model opinion for common-good constitutionalism.[190] Part of his dissent reads:

Textualists Now, CATO INSTITUTE, June 15, 2020, *at* https://www.cato.org/commentary/after-bostock-were-all-textualists-now.

[188] *See* Mitchell Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67 (2021); Pat Smith, *Bostock and the Tyranny of Values*, IUS ET IUSTITIUM, Aug. 3, 2020, *at* https://iusetiustitium.com/bostock-and-the-tyranny-of-values/; Vincent Clarke, *The Deconstructionist Ghost in the Textualist Machine*, IUS ET IUSTITIUM, July 31, 2020, *at* https://iusetiustitium.com/the-deconstructionist-ghost-in-the-textualist-machine-2/; Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027 (2022).

[189] 198 U.S. 45 (1905). *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001).

[190] *See* Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS ET IUSTITIUM, June 17, 2020, *at* https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion/.

> It is plain that this statute was enacted in order *to protect the physical well-being of those who work* in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that *employers and employ[ee]s in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength*. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments *may endanger the health of those who thus labor*.[191]

Justice Harlan cited *Jacobson v. Massachusetts*,[192] in which the Supreme Court of the United States upheld a Massachusetts law requiring smallpox vaccination on pain of a fine. The Court explained in that case that "[t]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[193] Rather, "[t]here are manifold restraints to which every person is necessarily subject for the common good."[194]

Under common-good constitutionalism, the liberty protected by the due process clause will not be construed as a highly individualistic autonomy that precludes economic and public health legislation for the common good. Common-good constitutionalism will reject Lochnerism and its modern iterations.[195]

2. Liberty Properly Understood

The due process clause provides that "[n]o person shall be deprived of life, liberty, or property without due process of law,"[196] but how should "liberty" be construed in this constitutional provision? The Supreme Court of the United States has in recent decades ruled that there are certain unenumerated rights so fundamental to the exercise of liberty that they are deemed protected by the due

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[191] 198 U.S. 45, 69 (1905). (Harlan, *J.*, *dissenting*). (Emphasis supplied.)

[192] 197 U.S. 11 (1905).

[193] *Id.* at 26.

[194] *Id.*

[195] *See* Thomas Colby & Peter Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020).

[196] CONST. art. III, § 1.

process clause.[197] This substantive aspect of due process has also been recognized by the Philippine Supreme Court.[198]

The identification of unenumerated rights deemed protected by the due process clause is necessarily shaped by the interpretation of liberty in the constitutional provision.[199] Liberty will be construed differently under common-good constitutionalism than under the prevailing methods of constitutional interpretation. Liberty under common-good constitutionalism is not license or the absolute absence of restraint. It is not only "freedom from" but also "freedom to," freedom to participate in public affairs and live together as citizens of a flourishing community.

It is helpful to consider the distinction between positive liberty and negative liberty. While positive liberty "aims at cultivating the skills and habits that enable people to live together as citizens of a flourishing community," negative liberty entails a state of affairs where people can boast: "There is no one else to hinder or stop me from doing what I want to do."[200] Whereas liberty in the modern conception is often interpreted to mean negative liberty, liberty in the classical legal tradition is primarily construed to mean positive liberty. To be sure, a certain degree of negative liberty is recognized and protected in common-good constitutionalism, but only to the extent that it is demanded by the requirements of justice and conducive to the common good. Under common-good constitutionalism, liberty is inevitably tied with justice, and justice is inevitably tied with liberty. One cannot be properly understood without the other.[201]

Another helpful distinction is that between the liberty of the ancients and the liberty of the moderns, a distinction first made by the 19th-century political philosopher Benjamin Constant and explicated further by retired United States

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[197] *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015). *See also The Fourteenth Amendment Due Process Clause*, NAT'L CONST. CTR. WEBSITE, *at* https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701.

[198] *See Maynilad.*

[199] *See* William Musgrove, *Substantive Due Process: A History of Liberty in the Due Process Clause*, 2 U. ST. THOMAS J. L. & PUB. POL'Y 125 (2008). *See also* Daniel Conkle, *Three Theories of Substantive Due Process*, 85 N. C. L. REV. 63 (2006); Randy Barnett, *Who's Afraid of Unenumerated Rights?*, 9 J. CONST. L. 1 (2006); Randy Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 615 (1991); BANNER, *supra* note 28, at 205–12.

[200] George McKenna, *Reclaiming a Positive Vision of Liberty*, FIRST THINGS MAG., Aug. 15, 2022, *available at* https://www.firstthings.com/web-exclusives/2022/08/reclaiming-a-positive-vision-of-liberty, *citing* RYSZARD LEGUTKO, THE CUNNING OF FREEDOM (2021). *See also* Edmund Waldstein, *Contrasting Concepts of Freedom*, JOSIAS, Nov. 11, 2016, *at* https://thejosias.com/2016/11/11/contrasting-concepts-of-freedom/.

[201] *See supra* Part I.C.

Supreme Court Justice Stephen Breyer.[202] The liberty of the ancients, which has also been called active liberty, refers to the freedom to "active[ly] and constant[ly] participat[e] in collective power."[203] The liberty of the moderns, on the other hand, means the freedom "to pursue [one's] own interests and desires free of improper government interference."[204] Constant argued—and Justice Breyer agreed—that both liberties are necessary in a free society; overemphasizing ancient liberty risks subjecting the individual to the tyranny of the majority, while overemphasizing modern liberty might bring about a situation in which citizens, "enjoying their private independence and in the pursuit of their individual interests," "too easily renounce their rights to share political power."[205]

Common-good constitutionalism takes into account both the liberty of the ancients and the liberty of the moderns, the latter understood as a corollary of justice.[206] On the other hand, the autonomy-maximizing and restraint-allergic method of constitutional interpretation dominant in the United States places too much emphasis on the liberty of the moderns and pays not nearly enough attention to the liberty of the ancients.[207] Common-good constitutionalism embraces both senses of liberty—and, therefore, a fuller account of liberty—in its interpretation of the due process clause. In the identification of unenumerated rights deemed covered by this constitutional provision, common-good constitutionalism will not only consider those freedoms that inhere in the individual *a priori* and into which the government may not intrude; it will also take account of those skills, habits, and virtues that enable citizens to exercise true freedom in their participation in collective power.

3. Abandoning the Overbreadth Doctrine in Non-Free Speech Cases

An earlier part of this paper[208] discussed four relatively recent cases in which the Philippine Supreme Court struck down laws passed in the exercise of police power for being violative of the due process clause. In three of these four cases—namely, in *White Light*,[209] *Laguio*,[210] and *De La Cruz*[211]—the Court held that

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[202] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005), *citing* Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), in CONSTANT: POLITICAL WRITINGS 309-28 (Biancamaria Fontana trans. & ed., 1988). *See also* Note, *Justice Breyer: The Court's Last Natural Lawyer?*, 136 HARV. L. REV. 1368 (2023).

[203] BREYER, *supra* note 187.

[204] *Id.*

[205] *Id.*

[206] *See supra* Part I.C.

[207] *See supra* note 8.

[208] *See supra* Part III.B.

[209] G.R. No. 122846, 576 SCRA 416, Jan. 20, 2009.

[210] G.R. No. 118127, 455 SCRA 308, Apr. 12, 2005.

[211] G.R. No. L-42571, 122 SCRA 569, July 25, 1983.

the assailed regulation suffered from overbreadth, and for this reason, was violative of the due process clause.

However, the Supreme Court had already established in *Estrada v. Sandiganbayan*[212] and *Romualdez v. Sandiganbayan*[213]—both of which were decided prior to *Laguio* and *White Light*—that the overbreadth doctrine applied only to free speech cases. The doctrine allows a facial challenge to an overbroad statute for its possible chilling effect on protected speech. The United States Supreme Court has held that the overbreadth doctrine can be invoked only in First Amendment cases, particularly those that involve freedom of speech.[214] In *United States v. Salerno*,[215] the Supreme Court said that it had "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."[216] And in *Broadrick v. Oklahoma*,[217] the Supreme Court explained that even within the limited context of the First Amendment, the overbreadth doctrine is "manifestly strong medicine" that must be employed "sparingly, and only as a last resort."[218] Where a limiting construction could be employed on the challenged statute, facial overbreadth should not be invoked.

In *White Light*,[219] *Laguio*,[220] and *De La Cruz*,[221] what was involved was not speech but conduct. The Court, therefore, improperly applied the overbreadth doctrine to strike down the challenged statutes. Given that all three cases involved mere economic and commercial regulations, the Court should have limited itself to determining whether there was a rational relation between a legitimate governmental interest and the means employed to achieve that interest. Since common-good constitutionalism favors granting the legislature a wide latitude of discretion, subject to the requirements of justice, in its exercise of police power for the common good, overbreadth would not be a valid ground for striking down a reasonable regulation that does not involve free speech.

In *White Light*, the Court invoked the doctrine of overbreadth and applied the strict scrutiny test after finding that a fundamental right—the right to privacy—was involved. It is a stretch, however, to hold that depriving individuals of the option to rent rooms for lower rates violates their right to privacy. Nothing

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[212] 421 Phil. 290 (2001).
[213] G.R. No. 152259, 435 SCRA 371, July 29, 2004.
[214] *See* Richard Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).
[215] 481 U.S. 739 (1987).
[216] *Id.* at 745.
[217] 413 U.S. 601 (1973).
[218] *Id.* at 613.
[219] G.R. No. 122846, 576 SCRA 416, Jan. 20, 2009.
[220] G.R. No. 118127, 455 SCRA 308, Apr. 12, 2005.
[221] G.R. No. L-42571, 122 SCRA 569, July 25, 1983.

in the assailed ordinance prohibited guests from leaving a hotel room before 12 hours had lapsed; they could still stay for a shorter period, provided that they pay the rate for a half day. It was the business establishments that were prohibited from renting out a room more than twice a day and charging less for shorter stays. All that their patrons suffered as a result of the ordinance was having to pay more for short stays than they would have if wash-up rates were still allowed. Nothing in the challenged ordinance authorized the government to physically enter a hotel room and intrude into the privacy of guests.

If the Court had adopted common-good constitutionalism as the method of interpretation in *White Light*, it would have applied the rational basis test[222] and recognized curbing prostitution and drug use as legitimate governmental objectives. It would have also found that there was a rational relation between these governmental objectives and the prohibition against charging wash-up rates. Having to pay higher rates for shorter stays provides an economic disincentive to conduct the illicit activities sought to be prevented by the ordinance. Since the regulation passes the rational basis test, the Court would have upheld it as a valid exercise of police power.

In *Viron*,[223] the Court did not invoke the overbreadth doctrine but held that the closure of bus terminals on major Metro Manila thoroughfares was not reasonably necessary to the achievement of the governmental objective of traffic decongestion. It applied a two-part test to determine the validity of the assailed police power measure: "(1) the interest of the public generally, as distinguished from that of a particular class, [must require] its exercise; and (2) the means employed [must be] reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."[224] Since the regulation in *Viron* failed to pass the second part of the test, the Court held that it was an invalid police power measure that violated the due process clause.

The two-part test adopted by the Court in *Viron* is different from the rational basis test[225] usually applied when determining the validity of a police power measure that regulates mere property rights. The test in *Viron* was first applied by the Philippine Supreme Court in the 1910 case of *United States v.*

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[222] "The rational basis test requires only that there be a legitimate government interest and that there is a reasonable connection between it and the means employed to achieve it." Zomer Dev't Co., Inc. v. Special Twentieth Div. of the Ct. of Appeals, Cebu City, G.R. No. 194461, 928 SCRA 110, 137, Jan. 7, 2020, *citing* Samahan ng Progresibong Kabataan v. Quezon City, G.R. No. 225442, 835 SCRA 350, 451, Aug. 8, 2017 (Leonen, *J.*, *concurring and dissenting*).

[223] G.R. No. 170656, 530 SCRA 341, Aug. 15, 2007.

[224] *Id.* at 368–69. The same two-part test was applied in United States v. Toribio, 15 Phil. 85 (1910), which in turn cited Lawton v. Steele, 152 U.S. 133 (1894).

[225] *See supra* note 222.

Toribio,[226] which in turn transplanted the test from the 1894 American case of *Lawton v. Steele*.[227] While the rational basis test only requires a rational relation between a legitimate governmental objective and the means employed by the assailed regulation, the two-part test in *Viron* requires that the means employed be reasonably necessary for the accomplishment of the purpose sought to be achieved. In other words, unless the governmental objective could not be achieved without the means employed by the regulation, the police power measure would be invalid and violative of due process.

Had the Court adopted common-good constitutionalism as the method of interpretation in *Viron*, it would have abandoned the two-part test first applied in *Toribio* and opted for the rational basis test, under which the assailed ordinance would have been upheld, setting aside the issue of whether the MMDA acted ultra vires. There is no doubt that traffic in Metro Manila—which causes PHP 3.5 billion in economic losses every day[228] and unimaginable stress to commuters[229]—is a problem the solution to which is a legitimate governmental objective. There is a rational relation between this governmental aim and the closure of bus terminals on major Metro Manila thoroughfares with a view to establishing centralized mass transport terminal facilities. The Court would have adopted Thayerian deference[230] and accorded great respect to the determination of the legislature for the common good.

B. Free Speech Under Common-Good Constitutionalism

1. Traditions of Free Speech Jurisprudence in the United States

Freedom of speech in the United States has been understood and justified within the framework of two traditions: the liberal tradition and the republican

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[226] G.R. No. L-5060, Jan. 26, 1910.

[227] 152 U.S. 133 (1894).

[228] Revin Mikhael Ochave, *PCCI seeks immediate action on NCR traffic to remove drag on economy*, BUSINESS WORLD ONLINE, May 9, 2022, *at* https://www.bworldonline.com/economy/2022/05/09/447325/pcci-seeks-immediate-action-on-ncr-traffic-to-remove-drag-on-economy/.

[229] *Stress, pollution, fatigue: How traffic jams affect your health*, GMA NEWS ONLINE, Sept. 9, 2015, *at* https://www.gmanetwork.com/news/lifestyle/healthandwellness/536203/stress-pollution-fatigue-how-traffic-jams-affect-your-health/story/.

[230] *See* James Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143–44 (1893). "[The Court] can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it."

tradition. The liberal tradition understands citizens as *a priori* autonomous individuals who exercise free speech for self-expression, self-realization, and self-determination. On the other hand, the republican tradition considers free speech as a social good where individuals exercise free speech as an instrument to accomplish broader public purposes.[231] In the liberal tradition, the primary purpose of free speech is to protect and advance individual rights; the speaker's right to free speech is an end in itself. In the republican tradition, free speech is meant to promote collective self-determination, self-government, social values, and the public good; the speaker's individual right to free speech, while important, is merely instrumental and not an end in itself.[232]

A new tradition has emerged and gained ground in the United States since the 1970s. This new tradition has been called the libertarian tradition, and it departs from both the liberal and republican traditions in a number of ways. The libertarian tradition conceives of listeners as individual consumers or voters with an interest in making informed choices in a *laissez-faire* market for goods or candidates. This is a departure from the republican tradition, which understands listeners as a stand-in for the public, as well as from the liberal tradition, which conceives of listeners as individuals whose primary interests in free speech are self-expression, self-realization, and self-determination.[233]

The libertarian tradition traces its genesis to the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[234] in which the Supreme Court of the United States struck down on free speech grounds a Virginia statute that prohibited licensed pharmacists from advertising the prices of prescription drugs. The Court invoked listeners' rights and held that it was in the interest of listeners to have access to all the information necessary to make the most informed choices in the free market. Listeners had a right to the "free flow of commercial information," and the Virginia statute infringed on this right by making less information available to consumers. This is a clear departure from the republican tradition, which understands listeners not as individual consumers but as a proxy for the public. The ruling is also inconsistent with the liberal tradition because it does not anchor its justification on the right of individuals to self-expression, self-realization, and self-determination. *Virginia State Board* would lead

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[231] The First Amendment philosopher Alexander Meiklejohn, whose views fall under the republican tradition, wrote: "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said," so that "all the citizens shall, so far as possible, understand the issues which bear upon our common life." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 & 75 (1960).

[232] *See, generally*, Morgan Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017).

[233] *Id.* at 1414–15.

[234] 425 U.S. 748 (1976).

to a number of subsequent decisions that ultimately engendered corporate speech rights.[235]

The culmination of this shift toward extending constitutional protection to corporate speech came in the landmark case of *Citizens United v. Federal Electoral Commission*.[236] The Supreme Court of the United States ruled in that case that prohibiting independent corporate expenditures for electioneering communications violated freedom of speech. In invoking listeners' rights to justify its deregulatory ruling, the Court narrowly understood listeners not as a proxy for the public or as individuals with a right to self-expression but as individual voters with an interest in making informed choices in the market for candidates. Similar to its decisions affording protection to commercial speech, the Court in *Citizens United* adopted a libertarian understanding of listeners' rights and assumed that more information available necessarily benefited listeners.[237]

It bears noting that in the early American Republic, freedom of speech was understood as a natural right that could be constrained in order to achieve certain collective social goods.[238] Congress was not kept from evaluating and regulating the content of speech in order to promote public morals and the general welfare. Laws punishing blasphemy, for instance, were not considered violative of

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[235] Two years after *Virginia State Bd.* was decided, the Supreme Court in *First Nat'l Bank of Boston v. Bellotti* struck down a Massachusetts statute that prohibited certain expenditures by banks and corporations for the purpose of influencing the vote on referendum proposals. The Court in effect recognized that corporations, like natural persons, enjoy the right to free speech. The dissenting Justices pointed out the absurdity of corporations having individual rights such as freedom of speech; corporations, unlike individuals, do not have an interest in self-expression, self-realization, and self-fulfillment. In its decision, the Court, as in *Virginia State Bd.*, understood listeners not as a stand-in for the public or as individuals with a right to self-expression but as individual voters who need information to make informed choices in the market for candidates. 435 U.S. 765 (1978).

In *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, the Supreme Court struck down a regulation enforced by the California Public Utilities Commission to include a third-party newsletter in the billing envelopes of privately-owned utility companies. The petitioner corporation had contended that it disagreed with the contents of the third-party newsletter, and the regulation, therefore, violated its First Amendment rights. By agreeing with the corporation's argument, the Supreme Court handed down a decision that resulted in *less*, not *more*, information flowing in the marketplace of ideas, thus undermining listeners' rights as understood in the *Virginia State Bd.* case. *Pac. Gas* vindicated corporate speech rights without reference to the rights of listeners as consumers in the market. By granting free speech rights to corporations, the Supreme Court shifted from the justification of autonomy as understood in the liberal tradition to what has been called "thin autonomy," a mere naked right against the State divorced from the values of self-expression, self-realization, and self-fulfillment. 475 U.S. 1 (1986).

[236] 558 U.S. 310 (2010).

[237] *See* Weiland, *supra* note 232, at 1439–44.

[238] *See, e.g.*, Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689 (2021).

free speech. The right was construed in "instrumental, communal, and other-regarding terms," not as a means of self-actualization or self-fulfillment.[239]

Only in the late 20th century did free speech begin to be understood as "solipsistic, personalized, changeable, deracinated from any common purposes and traditions, and often unchallengeable inasmuch as there were no acceptable, extrinsic criteria for doing so[.]"[240] From being viewed as an instrument to achieve greater, broader collective ends, free speech began to be justified as "self-authenticating, self-validating, [and] identity-forming[.]"[241] This has resulted in more categories of speech falling within constitutional protection and beyond the ambit of legislative regulation, to the detriment of the common good. As a reaction to this shift in understanding, legal academics and judges have recently called for more constrictions of free speech by setting it against other rights and interests that certain speech could at times undermine, such as "democracy, dignity, equality, sexual autonomy, antidiscrimination, decency, and progressivism."[242]

2. Free Speech Justifications in Philippine Jurisprudence

The Philippine Supreme Court has drawn on both the liberal and republican traditions in providing justifications for the right to free speech. In Gonzales v. Commission on Elections,[243] the Court explained that freedom of speech is vital in a constitutional democracy because it is a "means of assuring individual self-fulfillment, of attaining the truth, of assuring participation by the people in social, including political, decision-making, and of maintaining the balance between stability and change."[244] While "individual self-fulfillment" is a justification consistent with the liberal tradition, "attaining the truth," "participation [. . .] in social, including political, decision-making," and "[balancing] stability and change" are in line with the republican tradition.

Under common-good constitutionalism, freedom of speech will be construed as an instrument to achieve higher social ends, such as collective self-government and democratic participation. The right of an individual to free speech is a fundamental right that must be actively protected, but it is not an end

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[239] Marc DeGirolami, *The Sickness Unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL'Y 751, 752 (2019).

[240] *Id.* at 753.

[241] *Id.* at 776.

[242] *Id.* at 753.

[243] G.R. No. L-27833, 27 SCRA 835, Apr. 18, 1969. *See also* ABS-CBN v. COMELEC, G.R. No. 133486, 323 SCRA 811, Jan. 28, 2000; Chavez v. Gonzales, G.R. No. 168338, 545 SCRA 441, Feb. 15, 2008.

[244] G.R. No. L-27833, 27 SCRA 835, 857, Apr. 18, 1969.

in itself. Common-good constitutionalism will reject the emerging libertarian tradition in American free speech jurisprudence, and it will by and large be in favor of the republican tradition. It has been discussed in an earlier part of this paper[245] that individual rights are an integral part of common-good constitutionalism; however, rights under common-good constitutionalism are justified not by individual autonomy but by reference to justice.

An article published following the burial of Ferdinand Marcos, Sr. in the Libingan ng Mga Bayani argued that memory laws prohibiting the denial of historically established Marcosian atrocities committed during Martial Law would not run afoul of the free speech clause.[246] The authors applied the fact-opinion distinction adopted by the German Constitutional Court when it upheld the constitutionality of a law that criminalized Holocaust denial.[247] They cited a United Nations document that recognized the "inalienable right to truth," "the duty to preserve memory," and "the right to know" of human rights victims.[248] In asserting that a person may be prohibited from denying a historically established fact in the interest of preserving the historical memory of a people, the authors put forth an argument that fell squarely within the republican tradition. Under common-good constitutionalism, a law criminalizing the denial of historically established facts relating to human rights violations committed during Martial Law will withstand a free speech challenge.

In *Pharmaceutical and Health Care Association of the Philippines v. Secretary of Health*,[249] the Supreme Court invalidated a Department of Health administrative regulation that imposed an absolute ban on the advertisement of breastmilk substitutes for children two years old or younger. The Court struck down the administrative regulation for being violative of the law that it sought to implement. In his separate concurring opinion,[250] however, Chief Justice Puno offered another reason why the absolute advertising ban must be invalidated: the advertising of breastmilk substitutes was commercial speech that fell under constitutional protection. He cited the American cases of *Virginia State Board* and *Central Hudson Gas*[251] and applied the four-part test adopted in the latter case to

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[245] *See supra* Part I.C.

[246] Raphael Pangalangan, Gemmo Fernandez, & Ruby Rosselle Tugade, *Marcosian Atrocities: Historical Revisionism and the Legal Constraints on Forgetting*, 19 ASIA-PACIFIC J. ON HUM. RTS. & L. 140 (2018).

[247] *Id.* at 170.

[248] *Id.* at 164 nn.157–60.

[249] G.R. No. 173034, 535 SCRA 265, Oct. 9, 2007.

[250] *Id.* (Puno, *J.*, *concurring*).

[251] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Utility Comm'n, 447 U.S. 557 (1980). In this case, the Supreme Court of the United States invalidated on free speech grounds a regulation enforced by the New York Public Service Commission imposing on electric utilities a complete ban on any advertising that promoted the consumption of electricity. The Court applied the

evaluate the validity of laws regulating commercial speech. Chief Justice Puno ultimately found that the absolute advertising ban was unduly restrictive and was more than necessary to further the avowed governmental interest of promoting the health of infants. The regulation, therefore, failed to pass the fourth part of the test and should be struck down as violative of freedom of speech. Although the separate opinion of Chief Justice Puno is not part of the Court's *ratio decidendi* and therefore does not have the force of precedent, it prefigures a probable shift in Philippine law toward extending constitutional protection to commercial speech.

In *Disini. v. Secretary of Justice*,[252] the Court struck down as violative of freedom of speech a provision in the Cybercrime Prevention Act that prohibited, with narrow exceptions, the transmission of "unsolicited commercial communications" that sought to advertise, sell, or offer for sale any product or service. It ruled that the prohibition "would deny a person the right to read his emails, even unsolicited commercial ads addressed to him."[253] The Court then cited the separate concurring opinion of Chief Justice Puno in *Pharmaceutical v. Secretary of Health*[254] and held that commercial speech, though not accorded the same level of protection as other constitutionally protected forms of speech, is nonetheless entitled to protection under the Constitution.[255] The Court categorically said that "unsolicited advertisements are legitimate forms of expression."[256]

The Government had argued in *Disini* that unsolicited commercial communications were a "nuisance that wastes the storage and network capacities of internet service providers, reduces the efficiency of commerce and technology, and interferes with the owner's peaceful enjoyment of his property."[257] It further contended that unsolicited commercial communications intruded into the right of

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intermediate scrutiny test and held that although energy conservation was a substantial governmental interest that warranted the restriction of commercial speech, the government's total ban on advertising went beyond what was necessary to achieve that interest. The regulation prohibited all forms of promotional advertising by electric utilities, including the promotion of electric devices or services that caused no net increase in total energy use. Commercial speech was protected by the First Amendment, the Court said, and it could not be suppressed unless there was a substantial governmental interest involved and the regulation was not more extensive than was necessary to serve that interest. The Court relied on *Virginia State Bd.* and cited the informational function of advertising as its justification for extending constitutional protection to commercial speech.

[252] [Hereinafter "*Disini*"], G.R. No. 203335, 727 Phil. 28, Feb. 11, 2014.

[253] *Id.* at 110.

[254] G.R. No. 173034, 561 Phil. 386, Oct. 9, 2007. (Puno, *C. J., concurring.*)

[255] *Id.* at 449.

[256] *Disini*, 727 Phil. 28, 110.

[257] *Disini*, 727 Phil. 28, 109.

privacy of the recipient, who received the spam without his or her prior permission.[258] The Court dismissed these arguments and pointed out that unsolicited ads received by mail had never been considered a nuisance,[259] and that the Government presented no evidence that unsolicited commercial communications reduced the efficiency of computers.[260]

Justice Leonen dissented from the Court's decision to strike down as violative of freedom of speech the provision that prohibited the transmission of unsolicited commercial communications.[261] He noted that the provision had a valid purpose and that it was narrowly drawn to achieve its objective. He nevertheless conceded that commercial speech deserved some level of constitutional protection, owing primarily to its "informational function." Justice Leonen in effect applied the intermediate scrutiny test adopted by the United States Supreme Court in *Central Hudson:*[262] the State must assert a substantial interest to be achieved by the restriction on commercial speech, and the restriction must be narrowly drawn.

The justification that the Court provided in *Disini* regarding the issue of unsolicited commercial communications is consistent with the libertarian tradition, which views listeners as consumers whose primary interest in free speech is to have access to as much information as possible to help them make informed choices in a *laissez-faire* market. By holding that the regulation "den[ied] a person the right to read his emails,"[263] including unsolicited commercial ads, the Court indirectly vindicated the right of corporations to advertise as much as they wanted in cyberspace without any governmental interference. In other words, the Court impliedly affirmed corporate speech rights. On the other hand, Justice Leonen's opinion is more consistent with the republican tradition and its consideration of broader public purposes.

Under common-good constitutionalism, the Court would have construed the right to free speech in accordance with the republican tradition, and it would have conceived of listeners not as autonomous consumers in a *laissez-faire* market but as a stand-in for the public. It would have looked more carefully into the contention of the Government that unsolicited commercial communications "reduce[d] the efficiency of commerce and technology."[264] And it would not have impliedly affirmed the right of corporations to advertise as much as they want on

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[258] *Id.*
[259] *Id.* at 109–110.
[260] *Id.* at 109.
[261] *Id.* (Leonen, *J.*, *concurring and dissenting*).
[262] *See supra* note 251 and accompanying text.
[263] *Disini*, 727 Phil. 28, 110.
[264] *Disini*, 727 Phil. 28, 109.

the ground that corporate speech is entitled to constitutional protection. Under common-good constitutionalism, as in the republican tradition, corporations will not have a naked right against the State to put their speech beyond the ambit of legislative regulation at the expense of the common good.

CONCLUSION

Common-good constitutionalism is likely to keep fueling debates among constitutional law scholars in the United States and around the world. This Paper has shown that common-good constitutionalism is a suitable method of constitutional and statutory interpretation in the Philippines, in view of the nation's values, traditions, and legal history. Common-good constitutionalism, which understands law and government as existing to serve the good of the community, aligns with the idea of *kapwa* and the relational view of individuals embedded in the Filipino psyche.[265] The adoption of common-good constitutionalism in the Philippines could blunt the adverse consequences of importing American constitutional doctrines into Philippine law without taking account of important cultural differences.[266]

This Note has also shown that the common good and natural law have always suffused Philippine law, including our Constitution, statutes, and jurisprudence. The 1987 Constitution expressly mentions the common good seven times, while the United States Constitution does not even mention it once. The Philippine Constitution contains many other provisions that are consistent with the classical legal tradition and the promotion of the general welfare; it has an article devoted to social justice and human rights and another article that protects marriage and the family as inviolable social institutions. The Philippine Supreme Court has generally adopted a deferential attitude toward the legislature's exercise of police power for the common good, and only in recent decades has it frequently struck down police power regulations on the ground that they infringe upon the liberty protected by the due process clause. The implicit recognition of natural law is easily discernible from our statutes and jurisprudence, particularly from the Preliminary Title of the Civil Code and the landmark cases of *Oposa v. Factoran* and *Imbong v. Ochoa*. All of these show that common-good constitutionalism is compatible with Philippine constitutional culture and the Philippine legal tradition.[267]

If the Supreme Court were to adopt common-good constitutionalism as its method of constitutional interpretation, it would construe the due process and

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[265] *See supra* Parts I.A, I.B, & II.B.
[266] *See supra* Part II.A.
[267] *See supra* Part III.

free speech clauses differently.[268] It will reject the highly individualistic and autonomy-maximizing understanding of liberty exemplified in the infamous American case of *Lochner v. New York*, and it will abandon the use of the overbreadth doctrine to strike down police power regulations that do not involve free speech. It will interpret the free speech clause as an instrument to achieve higher social ends, such as collective self-determination and democratic participation. Many other constitutional and statutory provisions will be construed differently under common-good constitutionalism than under the current dominant methods of legal interpretation. The aim of this Note is merely to provide a preliminary sketch and to start a conversation about how common-good constitutionalism could be adopted as a theory of constitutional and statutory interpretation in Philippine law.

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[268] *See supra* Part IV.