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Form and Norm: the Transformative Potential of Sub-National Environmental Solidarity

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I. INTRODUCTION

As Americans witnessed Lech Walesa's rise to power in Poland in the 1980's, many were exposed to solidarity for the first time.[1] The Polish Solidarity Movement, a political juggernaut built on labor unity,[2] was the embodiment of solidarity, a principle of focused cooperation among actors to achieve an outcome that benefits all.[3] Solidarity has evolved considerably since the heady days of Walesa. Today, solidarity is the foundation of numerous responses to international challenges, many of which deal with environmental issues. These responses require states to cooperate to protect

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1. G. Nelson Smith III, *The Real Challenge to the Polish Revolution: Cleaning the Polish Environment Through Privitization and Preventative Market-Based Incentives*, 19 PEPP. L. REV. 553 (1992); *see generally* BBC News Europe, *Poland Marks Solidarity's Birth*, NEWS.BBC.CO.UK, Aug. 31, 2005, http://news.bbc.co.uk/2/hi/europe/4199322.stm (noting the meteoric rise of Poland's Solidarity movement in 1980); BBC News Europe, *Walesa Threatens to Leave Poland*, NEWS.BBC.CO.UK, Mar. 30, 2009, http://news.bbc.co.uk/2/hi/europe/7972907.stm (describing Lech Walesa as the leader of the Polish trade union, Solidarity, that ultimately overthrew Poland's communist government).

2. Smith, *supra* note 1, at 564-65 (concluding that Polish environmentalists were at odds with solidarity, because labor interests feared environmental initiatives would result in job losses and an economic downturn).

3. *See* R. St. J. Macdonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 PACE INT'L L. REV. 259, 259-60 (1996).

common environmental interests in various ways.[4] This type of solidarity, which will be referred to here as environmental solidarity, results in the creation of agreements that impose legal duties or that alternatively generate soft law, which creates a pull of legitimacy without imposing binding obligations.[5] In either case, solidarity undeniably carries a force that impacts legal regimes.

Environmental solidarity is at work in the United States. It can be found in regional, multi-state, and even in neighborhood ventures. A prominent example is the Regional Greenhouse Gas Initiative (RGGI), a collaborative, multi-state arrangement that strives to decrease carbon dioxide emissions from the power sector in the Northeast.[6] Although sub-national efforts like RGGI have garnered a good deal of attention, they generally are not thought about in terms of solidarity. Instead, their cooperative nature, to the extent it is considered at all, is typically viewed as just that: cooperation.[7] Recasting these initiatives as examples of environmental solidarity is more than a descriptive novelty, because the solidarity label opens up other inquiries. For example, is there something about solidarity that changes the way one perceives these efforts from a legal standpoint? More specifically, does this epistemic exercise suggest a new way of thinking about the legal force these efforts wield? This article suggests that analyzing sub-national arrangements as examples of environmental solidarity presents an opportunity to consider in a special way their power as instruments of legal change.[8]

An examination of sub-national environmental arrangements as iterations of solidarity suggests that they are far more than isolated instances of cooperation with self-contained advantages. Rather, they are potent precursors of legal reform. Their impact can be as modest as informing national environmental regulation or as substantial as transforming the aesthetics of environmental law. As discussed here,

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4. *Id.* at 262-63.

5. *Id.*

6. Regional Greenhouse Gas Initiative, About RGGI, http://www.rggi.org/about (last visited June 16, 2009).

7. *See, e.g., id.* (describing RGGI as a "cooperative effort").

8. This article intentionally avoids the literature that questions the constitutionality of these agreements. *See, e.g.*, Katie Maxwell, *Multi-State Environmental Agreements: Constitutional Violations or Legitimate State Coordination?*, 15 PENN. ST. ENVTL. L. REV. 355 (2007) (presenting arguments based on the Compact and Commerce Clauses).

aesthetics refers to more than the "metaphysics of beauty," or the creation and response to beautiful things.[9] It is more generally "a way of knowing" that engages the senses rather than logic.[10] Understood in this way, aesthetics exist "in a legal text no less than in a play by Shakespeare . . . ."[11] The latter part of this article will suggest that the collective impact of new and existing sub-national solidarity ventures is changing the aesthetic inputs and outputs of environmental law.

Part I of this article explores the concept of solidarity, detailing its foundations in international law and Catholic Social Thought, and its appearance in critical legal studies, environmental rights, and environmental justice literature. Part II presents a number of collaborative environmental undertakings in the United States and offers them as examples of sub-national environmental solidarity. Finally, Part III analyzes the range of legal implications these efforts carry, including broader implications that suggest that these programs are collectively contributing to a new aesthetic in environmental law in the United States.

II. THE FOUNDATIONS OF SOLIDARITY

Solidarity has long been associated with labor movements, but it is solidarity's place in legal discourse that is of concern here. What follows is an overview of solidarity principles as they have been analyzed in selected disciplines. International law is a strong source in this regard; solidarity is a firmly-established guiding principle that influences various areas of multi-national regulation. In addition, solidarity and its companion principle, subsidiarity, also enjoy a rich tradition in Catholic Social Thought (CST), where they are expressly applied to social and environmental challenges. CST's understanding of solidarity and subsidiarity is not purely extra-legal, as shown by the commentary of a number of writers who have been drawn to the intersection of CST and the law. Other theoretical and outwardly legal references to solidarity can be found in works that address

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9. *See* KATHERINE EVERETT GILBERT & HELMUT KUHN, A HISTORY OF ESTHETICS 3 (1972) (describing the Greek origins of aesthetics).

10. DESMOND MANDERSON, SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE 10-11 (2000).

11. *Id.* at 11-12.

critical legal studies and environmental justice. These seemingly diverse shadings of solidarity create a palette that reveals the social and economic influence of solidarity as well as its legal force.

A. International Law

As a well-established principle of international law,[12] solidarity is understood "first and foremost [as] a principle of cooperation which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states."[13] The teleological thrust of solidarity – the common good – is what spurs action to improve the condition of all parties.[14] Originally understood as a principle of natural law in the mid-1700's, solidarity was used to justify colonial domination in the nineteenth century. By the twentieth century, however, it had become a legal basis for cooperation and mutual responsibility among nations.[15] Today, the principle of solidarity permeates international law, but its role and reach are unfixed. To some, solidarity imposes no extra-legal obligations; to others, it primarily obligates wealthy states to assist poorer ones; and still others claim it is merely a general principle that is "beginning to inform the entire system."[16] Regardless of which school of thought one accepts, it is clear that solidarity's reciprocal commitments have legal implications.[17]

Solidarity and cooperation often combine to motivate nations to work together to reach a common goal.[18] Not only do such arrangements create "a sense of commonality" among the actors, but

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12. The status of solidarity as a principle of international law is due to the fact that it "has existed within the discourse for a significant period; that it can be found in the work of qualified publicists; that it is evidenced in multilateral and bilateral treaties; and that it is a principle gaining both recognition and importance in the structure of the contemporary international legal order." Macdonald, *supra* note 3, at 259; Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843, 923 (2002).

13. Macdonald, *supra* note 3, at 259-60.

14. *Id.* at 260.

15. *Id.* at 260-62.

16. *Id.* at 262.

17. *Id.* at 265 (observing, "By definition, solidarity cannot impose a one sided obligation . . . ."). While some international agreements suggest that solidarity may be one-sided, more recent pronouncements impose uniform obligations. *Id.* at 266-67.

18. Drumbl, *supra* note 12, at 855.

they impose joint commitments and, at times, continuing obligations to one another.[19] Solidarity and cooperation may also create precedent for specific prescriptive practices that may be applied in the future.[20] While these arrangements undoubtedly serve the individual interests of the participating parties, it is solidarity aimed at a common objective that makes them possible.[21]

The norms and values that drive solidarity and cooperation are distinct. Solidarity "identifies as the goal of joint and separate state action an outcome that benefits all states" while cooperation is more focused on human welfare, as opposed to the mutual benefit of the parties.[22] Thus, solidarity triggers joint action directed at a common good that is narrowly defined by the interests of group members, while cooperation aims at the greater common good of all. Although this distinction exists, international agreements that impose procedural obligations that require states to work together, and substantive obligations that are directed at the achievement of common goals, frequently serve both narrow and larger interests.[23]

In its broadest sense, solidarity is "the basic condition for the existence of a community of states."[24] It is a principle that, in recent practice, has led to resource transfers from wealthy to poor nations.[25] These arrangements are more than unilateral acts of charity, as they create solidarity-driven rights that impose reciprocal duties. In the environmental arena, these arrangements often involve the transfer of technology in exchange for natural resource protection.[26] The obligations created by these agreements may not be equal, but solidarity nevertheless requires that all states accept that each has

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19. *Id.* (describing such arrangements as "shared compacts").

20. *Id.* at 860. As an example, Professor Drumbl points to the increasingly common agreements in international law that obligate developed nations to provide financial and technological resources to poor nations in exchange for commitments on the part of poor nations to abide by environmental obligations. *Id.* at 843 (mentioning the Montreal Protocol on Substances that Deplete the Ozone Layer as one example of such a finance/technology swap).

21. *See id.* at 859.

22. *Id.* at 923-24 (noting that the mitigation of environmental threats may be the focus of cooperation). *But see infra* text accompanying notes 97-98.

23. Drumbl, *supra* note 12, at 923 (mentioning obligations to transfer funds and technology as an example of a substantive obligation grounded in solidarity).

24. Macdonald, *supra* note 3, at 260 (noting the work of Emer de Vattel).

25. *Id.* at 280.

26. *Id.*

"obligations of the peace, prosperity, and cultural and environmental health of the global community . . . ."[27]

In many instances, solidarity grounds agreements that simultaneously serve economic and environmental policies. Typical agreements require states to cooperate to achieve general objectives and to protect the more specific economic and environmental interests of the parties.[28] An example is Article 3 of the Charter of Economic Rights and Duties of States, which obligates states to cooperate through consultation and information sharing in order to optimize the use of shared natural resources.[29] Similarly, the Declaration of International Economic Cooperation addresses the global threat of environmental degradation by requiring all countries to take steps to address environmental harms based on their financial ability.[30]

The increasing number of international agreements that embody solidarity reflects a shift in international law from a legal order that fosters co-existence to one that both values and requires cooperation.[31] Perhaps nowhere is this transition more obvious than in agreements that address global environmental challenges. For example, the Stockholm Declaration on the Human Environment prohibits states from undertaking activities within their borders that cause environmental harm to other states, and further requires states to develop liability regimes to address such problems.[32] A more pointed example of the emergence of solidarity in international agreements is the Organisation for Economic Cooperation and Development (OECD) Principles Concerning Transfrontier Pollution. This multilateral treaty explicitly references solidarity in its

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27. *Id.* at 281. Macdonald succinctly states that solidarity "changes the rules from the zero-sum game – 'In order to win, someone else must lose' – to 'No one wins unless everyone wins.'" *Id.*

28. *Id.* at 262-63.

29. G.A. Res. 3281 (XXIX), art. III, U.N. Doc. A/3281 (Dec. 12, 1974), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement.

30. Declaration of International Economic Cooperation, G.A. Res. S-18/3, U.N. Doc. A/RES/S-18/3 (May 1, 1990).

31. *See* Macdonald, *supra* note 3, at 283.

32. Declaration of the United Nations Conference on the Human Environment, UN Doc. A/Conf. 48/14 (June 16, 1972), *available at* http://www1.umn.edu/humanrts/instree/humanenvironment.html.

preamble, which provides that countries should cooperate "in a spirit of international solidarity" to prevent and control transfrontier pollution.[33]

The common good that underlies both the Stockholm Declaration and the OECD Principles is freedom from harmful environmental externalities caused by one's neighbors, a goal that is more singly environmental than the dually-focused objectives of the Charter of Economic Rights. The considerable number of international agreements that are focused on achieving a common good tied predominantly to the environment reflects the emergence of what this article terms environmental solidarity. Examples of these agreements are plentiful, but two prominent examples are the Montreal and Kyoto Protocols, agreements that address ozone depletion and climate change.[34] These Protocols, like other environmental agreements, were not formed, and are not being implemented in an economic vacuum. Certainly, economic concerns play a major role in defining the obligations of parties to international treaties; however, there a numerous agreements that are primarily directed at environmental improvement.[35]

A common provision in the numerous treaties that embody environmental solidarity is one that obligates developed nations to provide financial assistance or technology transfers to developing nations to further environmental goals.[36] Once hesitant to accede to bilateral environmental agreements due to concerns about onerous resource-draining obligations, developing nations have become more willing to cooperate in exchange for financial and technological

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33. Organisation for Economic Co-operation and Development [OECD] *Doc.* C (74)224, 14 I.L.M. 242 (Nov. 21, 1974), *reprinted in* PHILLIPE J. SANDS, CHERNOBYL: LAW AND COMMUNICATION: TRANSBOUNDARY NUCLEAR AIR POLLUTION 150 (1988); Macdonald, *supra* note 3, at 283.

34. *See generally* Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1987); Kyoto Protocol of the U.N. Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 32 (entered into force Feb. 15, 2005).

35. For example, throughout the negotiations surrounding the U.N. Framework Convention on Climate Change, developing nations argued that any obligations imposed on them had to be accompanied by financial assistance from developed nations. *See* Harro van Asselt & Joyeeta Gupta, *Stretching Too Far: Developing Countries and the Role of Flexibility Mechanisms beyond Kyoto*, 28 STAN. ENVTL. L.J. 311, 318 (2009).

36. Drumbl, *supra* note 12, at 851, 853.

assistance.[37] Mark Drumbl refers to these agreements as "shared compacts," which he defines as arrangements "to come together strategically to attain a particular goal . . . [that] communicates a sense of commonality with others, responsibility, commitment, entitlement, and perhaps even an ongoing moral obligation."[38] Understood in this manner, shared compacts have all the markings of a solidarity rights regime, imposing mutual, but differing obligations on the parties directed at an environmentally-focused common good. These compacts appear in environmental agreements that address ozone depletion, climate change, and biodiversity protection.[39]

There is speculation that developed nations enter into these costly compacts in order to resolve environmental problems that threaten them directly, and that any global benefit created by these agreements is merely consequential.[40] Thus, while general solidarity-based obligations are undoubtedly at work in the shared compact scenario, more direct and individualized environmental concerns cannot be ignored as motivating factors.[41] The possibility that environmental or economic self-interest plays a role in these agreements does nothing to disturb their solidarity underpinnings. The common good remains environmental well-being. Further, the likelihood that commitments contained in these compacts will yield positive spill-over effects often guarantees that benefits will be enjoyed beyond any one party's borders.

The environmental solidarity at work in international agreements typically unites nation-states to address current environmental challenges. A more subtle element of environmental solidarity is

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37. *Id.* at 848-49, 851.

38. *Id.* at 855.

39. *Id.* at 862-94 (citing U.N. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; 31 I.L.M. 818; U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 108; 31 I.L.M. 849; Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 34). Solidarity and cooperation alone cannot be credited for all of these arrangements; indeed, domestic economic advantage is often a motivating factor. *See supra* text accompanying note 35.

40. Drumbl, *supra* note 12, at 931.

41. *Id.* Drumbl makes this point in part to explain why shared compacts have addressed only a handful of possible problems. *Id.* He suggests that, where the environmental threat to developed nations is less, shared compact language is more "tepid" or even nonexistent. *Id.* at 933-94 (citing the international response to desertification and the regulation of the oceans).

found in the pronouncements of intergenerational equity that appear in many agreements. At the 1992 Rio Earth Summit, nations agreed to incorporate a commitment to future generations into the global pursuit of sustainability.[42] The concern for future generations adds a moral component to the common good by forcing present actors to consider the earth's future inhabitants when making present day decisions about environmental policies. Intergenerational equity provisions can alternatively be understood to enlarge the field of parties who act in solidarity to include the voiceless, faceless members of future generations. Viewed in this manner, parties to treaties that include intergenerational equity language in effect agree to act in solidarity with one another as well as with future generations. Regardless of whether intergenerational equity commitments are read substantively, as a component of the common good, or procedurally, as an expansion of the class of interested parties who act as one, they reflect the fairness component of solidarity.[43]

The number of international agreements that bring parties together to address shared environmental challenges is increasing, further solidifying solidarity's status as a principle of international law.[44] The environmental common good that underlies these agreements may be global or localized; those who act in solidarity may be limited to existing states, or there may be a broader intent to include future generations. The possibilities are as diverse as the environmental challenges that threaten the earth.

B. Catholic Social Thought

The rich tradition of solidarity in international law is matched by its strong presence in Catholic Social Thought (CST). A historical review of numerous sources of CST reveals a commitment to environmental solidarity that rivals that in international law. CST's commitment, however, is grounded in faith while international law's

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42. *See* John C. Dernbach, *Sustainable Development and the United States*, *in* AGENDA FOR A SUSTAINABLE AMERICA 1, 4 (John C. Dernbach ed., 2009).

43. *See* Macdonald, *supra* note 3, at 262.

44. *Id.* at 283-84, 287 (citing the OECD Principles Concerning Transfrontier Pollution, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Mediterranean Action Plan, as examples).

commitment is grounded in the relations between states.[45] Religious institutions generally do not have a direct impact on environmental policy, and the Catholic Church is no exception;[46] nevertheless, authors have noted that CST embraces principles of environmental ethics that are commonly expressed in U.S. environmental statutes, and have further suggested that CST's principles may guide actors in dealing with other environmental problems.[47]

The Church has not shied away from environmental issues and has, instead, dealt with them directly in several papal documents and statements issued by the United States Catholic Conference.[48] Two of the Church's guiding principles – the belief that humans are at the center of creation, and respect for private property[49] – seem at odds with a liberal environmental ethic. These homocentric and consumer-friendly principles are buffered, however, by other directives to treat God's creation in a manner that serves the benefit of all,[50] and to take into account the interests of future generations.[51] Together, these supplementary principles reveal the Church's expansive vision of a common good that encompasses a healthy earth today as well as in the future.

As early as 1965, the Church confronted environmental issues by explaining that the relationship between humans and nature is directly linked to mankind's relationship with God.[52] This holistic vision of "faith, human relationships, and the created world" was

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45. For a comprehensive and insightful chronological review of the principles of environmental ethics – including solidarity – in Catholic social teaching, *see* Lucia A. Silecchia, *Environmental Ethics from the Perspectives of NEPA and Catholic Social Teaching: Ecological Guidance for the 21st Century*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 659 (2004).

46. *Id.* at 667.

47. *See id.* at 798 (citing CST's alignment with provisions of the National Environmental Policy Act); *see* Jamison E. Colburn, *Solidarity and Subsidiarity in a Changing Climate: Green Building as Legal and Moral Obligations*, 5 U. ST. THOMAS L.J. 232, 257-61 (2008) (promoting a subsidiarity-based approach to climate and energy issues).

48. *See generally* Silecchia, *supra* note 45, at 680-761.

49. *Id.* at 680-82.

50. *Id.* at 682.

51. *Id.* at 683.

52. *Id.* (citing Second Vatican Council, Gaudium et Spes (Dec. 7, 1965), *in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 166 (David J. O'Brian & Thomas A. Shannon eds., 1992)).

reinforced in later teachings, which added themes of intergenerational equity, human preeminence in creation, and obligations to use God's creation for the common good.[53] Convinced that human exploitation of nature would degrade humankind, the Church announced in 1971 that environmental challenges were not only the concern of all humans, but must be shared by all.[54] With this pronouncement, the Church hinted at what would become a global, solidarity-driven response to environmental destruction.

Pope John Paul II faced the limitations of the earth's natural resources and the intolerable pollution of God's gift of creation head-on.[55] In his 1988 encyclical, *In Sollicitudo Rei Socialis* (On Social Concern), he announced three ecological principles that echoed previous thought and that additionally introduced new perspectives that moved the Church towards a solidarity-grounded environmental world view. First, the Pope expressed the need for human understanding of "the nature of each being and of its mutual connection in an ordered system, which is . . . the 'cosmos.'"[56] With this statement, the Church acknowledged the ecological principle of the interconnection of living things for the first time.[57] Second, because natural resources are limited, the Pope declared that steps must be taken to preserve them for future generations.[58] Finally, the Pope drew a connection between environmental damage and development.[59]

Specific references to environmental solidarity first appeared in John Paul II's Peace Statement, delivered on the World Day of Peace in 1990.[60] Decrying the culture of consumerism and its failure to

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53. *Id. at* 688 (citing Pope Paul VI, Octogesima Adveniens (May 14, 1971), *in* CATHOLIC SOCIAL THOUGHT, *supra* note 52, at 265).

54. Silecchia, *supra* note 45, at 690 (citing Pope Paul VI, *supra* note 53).

55. *Id.* at 692-94 (citing Pope John Paul II, Laborem Exercens (Sept. 14, 1981), *in* CATHOLIC SOCIAL THOUGHT, *supra* note 52, at 352, and Pope John Paul II, Sollicitudo Rei Socialis (Dec. 30, 1987), *in* CATHOLIC SOCIAL THOUGHT, *supra* note 52, at 395 [hereinafter Sollicitudo Rei Socialis]).

56. Sollicitudo Rei Socialis, *supra* note 55.

57. Silecchia, *supra* note 45, at 696.

58. Sollicitudo Rei Socialis, *supra* note 55.

59. *Id.* The development-environment connection was to become a hallmark of John Paul II's thought.

60. Pope John Paul II, The Ecological Crisis: A Common Responsibility, Message for the Celebration of the World Day of Peace (Jan. 1, 1990), *available at* http://www.churchdocs.org/papal/jp.ii/ecology.crisis.

account for its contribution to global environmental degradation, the Pope announced a series of principles of environmental ethics.[61] Most pertinent to this discussion are two directives, both stemming from the Pope's call for an international response to address what he then saw as an ecological crisis.[62] Despite calling upon all countries to address this ecological crisis, the Pope acknowledged that developed and developing countries should have differing obligations: "These differing but complementary responsibilities . . . are urged as the basis of a 'new solidarity' between and among nations whose environmental problems, priorities, and resources are vastly different."[63] This new solidarity, which encourages a response of right action by all nations based proportionately on their problems and resources, has as its foundation the well-settled CST principle of subsidiarity, which dictates that "social problems should be addressed at the lowest level possible, but that higher levels of involvement, including that of the international community, are acceptable if lower levels are incapable of resolving the problem."[64]

The subsidiarity slant that CST works into its vision of solidarity at first appears strained. Solidarity's focus on cooperative response committed to the common good and subsidiarity's emphasis on the most suitable level of response may both be relevant to environmental solutions, but they are seemingly distinct ideas. Yet, as one commentator explains, the Church sees them as "two sides of the same coin."[65] Solidarity encourages a collective response based on the substance of the ultimate goal – the common good – while subsidiarity manages the response by taking into account the needs and resources of the actors. The concepts in effect work in tandem. Solidarity is called for when individual, piecemeal action is ineffectual to achieve the common good and, once solidarity takes

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61. *See* Silecchia, *supra* note 45, at 698-99.

62. Silecchia, *supra* note 45, at 701. The need for a global response stemmed from the Pope's understanding of the transboundary effects of polluting activities. *See* Pope John Paul II, *supra* note 60, ¶ 9.

63. Pope John Paul II, *supra* note 60, ¶10; Silecchia, *supra* note 45, at 702.

64. Silecchia, *supra* note 45, at 701.

65. Colburn, *supra* note 47, at 238 (remarking that, "[s]ubsidiarity demands that the central state defer to its subordinate ranks of government and civil society whenever possible just as solidarity demands that no one's needs be ignored").

shape, subsidiarity searches for the optimal decision making level based on each level's capabilities.[66]

The Church's pairing of subsidiarity with a broad view of environmental solidarity has remained constant, making it clear that Catholicism's concern for the human environment is no less important than its concern for the natural environment.[67] In fact, at the 1992 Earth Summit, the Holy See consistently emphasized the importance of human dignity while simultaneously urging the need for solidarity between rich and poor nations to address environmental challenges.[68] Ten years later, Pope John Paul II again espoused the goals of subsidiarity and solidarity in the Venice Declaration.[69] By that time, shared-compact agreements involving finance and technology swaps by wealthy nations in exchange for pro-environment initiatives by poor nations were on the rise.[70] In the United States, the 1991 Catholic Conference pastoral statement, *Renewing the Earth*, reiterated much of Pope John Paul II's teaching and expanded on it as well,[71] underscoring the global understanding

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66. Jerome M. Organ, *Subsidiarity and Solidarity: Lenses for Assessing the Appropriate Locus for Environmental Regulation and Enforcement*, 5 U. ST. THOMAS L.J. 262, 265, 270 (2008) (Dean Organ applies his two-step process to the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), concluding that the former is aligned with the solidarity/subsidiarity framework while the latter is not.).

67. Silecchia, *supra* note 45, at 706.

68. *Id.* at 717-19. The Earth Summit, also informally referred to as the Rio Conference, is formally known as the 1992 U.N. Conference on Environment and Development. *See id.* at 712.

69. Common Declaration of Pope John Paul II and the Ecumenical Patriarch Bartholomew I (June 10, 2002), *in* MARJORIE KEENAN, FROM STOCKHOLM TO JOHANNESBURG: AN HISTORICAL OVERVIEW OF THE CONCERN OF THE HOLY SEE FOR THE ENVIRONMENT 1972-2002, 72-77 (2002); *see also* Silecchia, *supra* note 45, at 720.

70. *See generally* Drumbl, *supra* note 12; *supra* text accompanying note 17.

71. *See* Silecchia, *supra* note 45, at 724 (referring to Renewing the Earth as a "landmark" event in CST). The American bishops ventured beyond Rome's teachings by specifically raising the issue of environmental justice, emphasizing the disproportionate environmental harms being suffered by the poor. *See* United States Catholic Conference, Renewing the Earth: An Invitation to Reflection and Action on Environment in Light of Catholic Social Teaching (Nov. 14, 1991), *in* "AND GOD SAW THAT IT WAS GOOD": CATHOLIC THEOLOGY AND THE ENVIRONMENT 225 (Drew Christiansen & Walter Grazer eds., 1996).

of the common good and the need to pursue the "ethics of solidarity."[72]

One cannot summarize the environmental ethics of CST without including intergenerational equity, solidarity, and subsidiarity.[73] All nations are on an equal footing in terms of the moral obligation to resolve the current environmental crisis, which affects both present and future generations. The common good that is the object of CST's solidarity is respect for, and preservation of God's creation, which is meant to be enjoyed by all. CST builds into its vision of solidarity a subsidiarity principle that defines each nation's obligation to address environmental problems based on its unique circumstances. CST's desire for intergenerational equity is strong, but it cannot be interpreted to mean that those who act in solidarity to care for the earth include members of present and future generations. Instead, improving the environment for future generations is better understood as a component of the common good. As in the case of environmental solidarity in international law, the power of solidarity as conceived by CST to suggest, if not drive concrete responses to environmental threats is undeniable. [74]

C. Solidarity Rights

Solidarity rights are more conceptually tenuous than the principles of solidarity found in international law and CST. With solidarity rights, a right's status is bestowed on solidarity; no longer is it merely a guiding principle. In some international law and in Critical Legal Studies (CLS) circles this elevated legal status exists.[75]

In debating the nature of an international "right to environment," some scholars have explored its human-rights foundation and have

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72. Silecchia, *supra* note 45, at 725-26 (quoting United States Catholic Conference, *supra* note 71).

73. Professor Silecchia includes intergenerational equity and subsidiarity in her list of six themes that emerge from CST. *Id.* at 731-61. Although solidarity is not specifically included among these themes, it unquestionably underlies the ethic of subsidiarity, which devolves from the Church's vision of a "new solidarity." *See supra* text accompanying notes 61-63.

74. As Professor Jamison Colburn acknowledges, solidarity and subsidiarity are capable of "guiding action without having to govern it." Colburn, *supra* note 47, at 256.

75. *See, e.g.*, *supra* text accompanying notes 34-35 (describing the shared compact as establishing solidarity rights).

pointed to its grounding in solidarity rights.[76] The right to environment in this sense protects individuals from environmental threats, drawing upon the principles that recognize the interconnectedness of all living things and intergenerational equity.[77] The right is primarily anthropocentric in that it seeks environmental well-being for human benefit, but it has also been partnered with a "right *of* environment," which recognizes the intrinsic value of the environment in and of itself.[78]

Solidarity rights are described as "third-generation rights, . . . characterized as individual and collective rights or aspirations that require for their realization the cooperation or solidarity from the individual, the state, public and private bodies, and the international community."[79] The solidarity-rights basis of the right to environment is admittedly controversial,[80] but it seems particularly well-suited for environmental problems, which nearly all perspectives believe demand a collective response.[81] Thus, a solidarity rights approach configures a right to environment that includes individual protection from environmental harm and "a collective right obligating the state to resolve environmental problems through international cooperation."[82] Despite the persuasiveness of this concept and its recurrence in current literature,[83] solidarity rights have been looked

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76. *See generally* Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2001).

77. *Id.* at 9, 14, 16.

78. *Id.* at 15.

79. *Id.* at 21. The third-generation concept of solidarity rights first appeared in the work of Dr. Karel Vasak in 1979, which described human and political rights and economic and social rights as first and second generation rights, respectively. *See id.* at 20-21.

80. *Id.* at 1.

81. *See id.* at 21.

82. *Id.* at 21 (arguing that the Stockholm Declaration and the general growth of international environmental law support such a right).

83. *See, e.g.*, Mariana T. Acevedo, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*, 8 N.Y.U. ENVTL. L.J. 437, 459 (2000) (promoting a solidarity rights-based right to environment in international law).

on with disfavor by traditionalists[84] and have been largely ignored by international courts.[85]

An even more radical conception of solidarity rights appears in CLS literature. Flowing from Roberto Unger's vision of "institutional reconstruction" aided by deviationist doctrine,[86] solidarity rights give legal effect to moral obligations that "arise from relationships of interdependence that have been only partly articulated by the will and only obliquely influenced by the state." [87] These rights form part of a larger system of rights that would ideally inform the realm of communal life, which Unger describes as "those areas of social existence where people stand in a relationship of heightened mutual vulnerability and responsibility toward each other."[88]

Solidarity rights transform expectations of "mutual reliance and vulnerability" into legal obligations in a two-part process:

> The initial moment of the right is an incomplete definition that incorporates standards of good-faith[,] loyalty or responsibility. The second moment is the completing definition through which the rightholders themselves (or the judges if the rightholders fail) set in context the concrete boundaries to the exercise of the right according to the actual effect that the threatened exercise seems likely to have upon the parties to the relationship.[89]

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84. A common criticism of the solidarity rights theory is that it fails to consider the option of "progressive development of the content of existing rights." Rodriguez-Rivera, *supra* note 76, at 22 (citing Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307, 316-17 (1982)).

85. Acevedo, *supra* note 83, at 438 (promoting a solidarity rights-based right to environment in international law, but concluding that the European Court of Human Rights instead derives environmental rights from individual civil and political rights).

86. ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 36, 43 (1986).

87. *Id.* at 37 (stating that the various iterations of "communal experience . . . need to be thought out in legal categories and protected by legal rights").

88. *Id.* at 36.

89. *Id.* at 39-40. As an example, Unger uses fiduciary law, which departs from general contract doctrine, pursuant to which one contracting party need not take

The transformation of communal practice and preference into solidarity rights is not meant to replace entire branches of legal doctrine. Instead, it serves to expand existing doctrine[90] or explain incongruous legal exceptions to mainstream principles.[91] In both cases, solidarity rights acknowledge that the line between law and community is blurred in ways that the law fails to articulate.[92] Unger does not anticipate rapid legal change; instead, he envisions a slow process towards a realization of more precise and explicit legal systems accompanied by changes in governmental and economic institutions as well.[93] The goal is to construct legal doctrine in a manner "that can more readily accommodate both a broad range of different sorts of rights or obligations and a conception of community, as a zone of heightened mutual vulnerability, that gives a more satisfactory account of what attracts us to the communal ideal in the first place."[94]

The solidarity rights of Unger's reconstituted legal system seek to give legal weight to existing communal and moral obligations of mutual loyalty that have had no voice in the law or that have seeped into doctrine without adequate substantiation or explication.[95] These rights provide a means of doing the work of existing law "without the capricious distinctions and confining premises of established doctrine."[96] Alternatively, they can articulate a countervision to legal

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account of the other party's interests. *Id.* at 83. In contrast, fiduciaries are legally obligated to give another's interests "a weight greater than . . . his own." *Id.*

90. *Id.* at 45-57 (explaining how deviationist doctrine can expand existing equal protection doctrine).

91. *Id.* at 83-85 (noting the fiduciary law exception to basic contract law).

92. *Id.* at 83. Unger admits that the general application of solidarity rights to a broad legal doctrine such as contract law would pose problems, but he believes that is no reason to abandon solidarity rights in exceptional circumstances especially when, in practice, parties act with a sense of responsibility toward one another. *Id.*

93. *Id.* at 39, 85.

94. *Id.* at 86.

95. *Id.* Unger again points to the fiduciary law exception to contract law's firm acceptance of "unadulterated self-interest and pure calculation." *Id.* More specifically, he argues that mainstream contract doctrine "foster[s] the confusion of mutual loyalty with acquiescence in a regime of personalistic power while depriving of appropriate legal help the elements of trust and interdependence in business life." *Id.*

96. *Id.* at 53. Here, Unger critiques existing equal protection jurisprudence and introduces the benefits of an expanded vision based on destabilization rights:

principles and their exceptions that currently can be explained only in "clashing ways."[97]

International law's solidarity rights, which mandate obligations of cooperation and loyalty among states to address common challenges, are easily distinguished from the solidarity rights of CLS, which provide a means of giving legal life to communal obligations in cases where legal principles are unnecessarily narrow and capricious, or doctrinally discordant.[98] Despite their differences, both theories demonstrate the transformative potential of solidarity rights. In international law and CLS alike, solidarity rights elevate communal values to normative status such that community members are expected to act in compliance with widely shared beliefs and practices.[99]

International law, CST, and the theories associated with solidarity rights provide insight into the doctrinal status of solidarity, but they fail to furnish a practical explanation of the conditions that ripen to the point of inciting a unified response. Under these three perspectives, the community of nations, moral or religious obligation, and legal indeterminacy are formative of solidarity in the abstract. Political, legal, economic, and environmental conditions, on the other

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> [Equal protection's] safeguard against the discriminatory persecution of the individual . . . would expand into a guarantee against whatever might threaten his richly defined position of immunity. The correction of irremediable collective disadvantages through checks upon legislative classification . . . would undergo two complementary expansions. It would free itself from its arbitrarily selective focus upon some sorts of group inferiority . . . to the exclusion of others . . . [and] it would also seek to break up entire areas of institutional life and social practice that run contrary to the scheme of the new-modeled constitution.

Id.

97. *Id.* at 88. The countervision adjusts legal understanding to form a "more comprehensive legal theory" that may become generally applicable to other areas of law. *Id.* at 88-89 (acknowledging that the process will be "destabilizing").

98. Some writers have taken solidarity rights further by, for example, using them as a vehicle to inject communitarian values into property law. *See, e.g.*, Thomas F. McInerney III, *Common Ground: Reconciling Rights and Communal Concerns in Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 831, 847-49 (1998).

99. See *id.* at 849. McInerney notes that Unger's work, among others, can make an important contribution to property jurisprudence, as it both incorporates individual expectations in relation to community and addresses a "need to develop a political theory supportive of communities." *Id.* at 854 (also citing the work of Ronald Dworkin and Eric Freyfogle).

hand, typically furnish the immediate motivations for specific solidarity ventures. An examination of examples of solidarity initiatives in the United States sheds more light on the social, political, and legal preconditions that may combine to unify actors in solidarity.

III. SUB-NATIONAL SOLIDARITY IN THE UNITED STATES

The identification of activities in the United States that can rightfully be characterized as instances of environmental solidarity requires an understanding that solidarity transcends coordinated action and mere cooperation. The distinction between cooperative ventures and solidarity centers on an intensity and focus that give solidarity the potential to push the legal envelope in various ways. Cooperation is defined as a "common effort" or an "association of persons for [a] common benefit," while solidarity refers to "unity (as of a group or class) that produces or is based on community of interests, objectives, and standards."[100] These definitions indicate that cooperation involves coordinated action among people with a common goal of a general nature[101] that tolerate self-centered action by individual actors as long as a common objective is shared. Solidarity has more focus and vigor, and requires a unity among actors directed at specific concerns of the community. The complete unity of solidarity[102] includes cooperation, but it requires considerably more.

Solidarity's focused energy creates a "collective force" among actors that often generates uniformity and consistency of action.[103] This contrasts sharply with collective action undertaken by actors who may share common interests but who are nevertheless primarily focused on benefits for themselves.[104] Thus, when searching for examples of sub-national solidarity, many traditional regional

100. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 255, 1118 (10th ed. 1993).

101. *See supra* text accompanying note 19.

102. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1355 (1992).

103. *See* James Ruhl, Note, *Quicksilver Alchemy: New England's Mercury Control Programs and the Clean Air Mercury Rule*, 32 VT. L. REV. 525, 543 (2008).

104. *See* John M. Olin, Note, *State Collective Action*, 119 HARV. L. REV. 1855, 1855-56 (2006) (explaining that such ventures risk creating negative externalities that may harm the nation as a whole).

alliances must be rejected. "Regionalism" in this sense is any cooperative grouping of smaller governmental entities that work together to address a common problem.[105] A primary goal of regional efforts is to create a total effect that is greater than the sum of its parts;[106] however, regional efforts do not reach the level of solidarity until there is a buy-in by all participants of a common good tied to community-wide well-being combined with focused action that demonstrates acceptance of uniform, consistent response.[107]

There are numerous environmental initiatives in the United States that share these characteristics. A few are described below, organized by three common goods to which they are directed. Even this small sampling suffices to demonstrate their variety and hint at their impact.

A. Air Quality

The regional greenhouse gas initiatives in the United States are among the strongest examples of environmental solidarity. Two of these efforts, the Regional Greenhouse Gas Initiative (RGGI) and the Western Climate Initiative (WCI) have brought states and, in the case of the WCI, western states and Canadian provinces, together to reduce greenhouse gas (GHG) emissions.[108] Each initiative seeks to establish a cap-and-trade regime to achieve GHG reductions. RGGI focuses on reducing carbon dioxide emissions from power plants, while WCI is directed more generally at reducing all GHGs.[109] These unified coalitions were motivated, in part, by the growing threat of climate change and the need to plan and work together to

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105. James L. Olmsted, *The Global Warming Crisis: An Analytical Framework to Regional Responses*, 23 J. ENVTL. L. & LITIG. 125, 125 (2008).

106. *Id.*

107. *Id.* at 138 (suggesting that regional solidarity involves actors working as one toward the goals of the whole body).

108. *See generally* Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1636-37 (2008). RGGI involves the united effort of the northeastern states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. *See* Regional Greenhouse Gas Initiative, *supra* note 6. WCI joins together California, Arizona, New Mexico, Oregon, Utah, Washington, British Columbia and Manitoba. Kysar & Meyler, *supra*, at 1636.

109. *See* Kysar & Meyler, *supra* note 108, at 1636.

develop programs that would integrate easily with other GHG emission trading regimes.[110]

RGGI and the WCI are more than loose groupings of neighboring states that have agreed to cooperate to address the problem of global warming. Although they may aptly be described as ethical, or even competitive efforts,[111] they additionally exemplify the unity of action, uniformity, and consistency that typify solidarity. All participants in RGGI have agreed to cap carbon dioxide emissions from power plants and reduce emissions by ten percent within the next decade.[112] Further, participants have adopted the RGGI Model Rule as a blueprint for their own implementing regulations.[113] Although each RGGI jurisdiction will eventually have its own regulatory program, RGGI will ultimately "function as a single regional compliance market for carbon emissions."[114]

Similarly, the WCI reflects a unified effort to develop a cross-jurisdictional strategy to address climate change.[115] Since 2007, the WCI participants have worked toward developing a regional target to reduce GHG emissions. They also plan to establish a shared GHG tracking registry and institute a cap and trade program to achieve GHG reduction goals.[116] WCI participants have joined in a commitment to "identify, evaluate, and implement policies to tackle climate change at the regional level,"[117] reflecting the unified action toward a common good that is the hallmark of solidarity.

The solidarity of RGGI and the WCI is to be contrasted with situations where a handful of states react simultaneously and similarly to an environmental issue, such as the multi-state response

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110. *Id.* The Bush administration's reluctance to act to reduce domestic GHG emissions was another motivating factor. *See id.* at 1622.

111. *See* Barry G. Rabe, Mikael Román & Arthur N. Dobelis, *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVTL. L.J. 1, 21 (2005).

112. Regional Greenhouse Gas Initiative, *supra* note 6.

113. *Id.*

114. *Id.*

115. Western Climate Initiative, About the WCI, http://www.westernclimateinitiative.org/about-the-wci (last visited on June 16, 2009).

116. Western Climate Initiative, History, http://www.westernclimateinitiative.org/history (last visited on June 16, 2009).

117. Western Climate Initiative, Organization, http://www.westernclimateinitiative.org/organization (last visited on June 16, 2009).

in New England to address mercury emissions.[118] Concerned about EPA's Clean Air Mercury Rule (CAMR), which they believed inadequately regulated mercury emissions from electric utility steam generating units (EGUs),[119] four New England states chose to implement more stringent mercury control programs.[120] Each state imposed its own mandatory reductions in EGU mercury emissions with a strict compliance date, representing a radical departure from the cap and trade rule promulgated by the EPA, a rule that was later invalidated.[121] The states' disagreement with the EPA and the similarity of their mandatory mercury regulations was an aggressive response, but fell short of what solidarity would entail: a cohesive approach by the region as a whole.[122] The lack of unity led Professor James Ruhl to point out that the New England region may have had more success in dislodging the EPA from what it believed to be a weak mercury emission stance if it formed a RGGI-like regional alliance.[123] In a rare reference to "regional solidarity" in the United States, Professor Ruhl suggests that the "collective force,"

118. *See generally* Ruhl, *supra* note 103.

119. In 2000, the EPA determined it was "necessary and appropriate" to regulate mercury emissions from electric utility steam generation units (EGUs) pursuant to section 112 of the Clean Air Act, 42 U.S.C. § 7412 (2006). Ruhl, *supra* note 103, at 526-27. Five years later, however, the EPA reversed its decision and removed EGUs from regulation under section 112 because of what it believed to be a tenuous relationship between mercury emissions and human health. *Id.* at 529-30. Based on this reversal, the EPA promulgated the Clean Air Mercury Rule (CAMR) pursuant to § 111 of the Act, establishing a cap and trade program to reduce mercury emissions from EGUs that would be implemented in 2010. *Id.* at 534, 535. The rule was widely criticized as too weak when compared to the mandatory technology that would have been required if mercury was regulated under section 112. *Id.* at 534.

120. Ruhl, *supra* note 103, at 541. The states included Connecticut, Maine, Massachusetts, and New Hampshire. Rhode Island and Vermont were not subject to the EPA rule. *Id.* at 542.

121. The states were later vindicated when the CAMR was vacated due to EPA's failure to adequately explain the delisting of mercury as a hazardous air pollutant. *Id.* at 541-42; *see* New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008), cert denied, 129 S. Ct. 1308 (2009); DAVID WOOLEY & ELIZABETH MORISS, CLEAN AIR ACT HANDBOOK § 6:32 (2009); Meghan McGuinness & A. Denny Ellerman, *The Effects of Interactions Between Federal and State Climate Policies*, 5 & n.14 (Ctr. for Energy and Envtl. Policy Research, Working Paper No. 0804, 2008), *available at* http://tisiphone.mit.edu/RePEc/mee/wpaper/2008-004.pdf.

122. *See* Ruhl, *supra* note 103, at 542.

123. *Id.* at 543-44.

"uniformity," and "consistency" of initiatives such as RGGI are what give them force.[124]

B. Water Quality

Increasing attention to watershed health in the United States has given rise to coordinated, collective endeavors to improve the quality of some of the nation's most compromised water resources. Two notable examples are the Chesapeake Bay program and the Great Lakes initiative.[125]

After several years of regulation under the Clean Water Act, cleaning up the Chesapeake Bay remained an elusive objective.[126] The inadequacy of the Act's provisions led to the creation of the Chesapeake Bay program in 1983, which partnered the EPA with three states and the District of Columbia, all of which work jointly to improve the quality of one of the east coast's critically important ecosystems.[127] The program is comprehensive and further devolves responsibility to "tributary teams" comprised of business and agriculture interests, scientists, and government agents.[128] Guided by mutually agreed upon objectives, participants commit to obligations under the EPA's supervision.[129] The program is not merely an arrangement for mutual consultation, but rather a legitimate governance structure that unifies government and non-government actors in a collaborative enterprise focused on a common good.[130]

A similar effort has united the United States and Canada in the Great Lakes initiative, which also arose in the face of inadequate progress under the command and control provisions of the Clean Water Act.[131] It, too, involves a nested framework of actors focused on aquatic ecosystem management, supervised by liaisons from the

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124. *Id.* at 543.

125. *See* Bradley Karkkainen, *Marine Ecosystem Management & A "Post-Sovereign" Transboundary Governance*, 6 SAN DIEGO INT'L L.J. 113, 126-32 (2004) (citing the Chesapeake Bay program and the Great Lakes initiative as examples).

126. *Id.* at 126.

127. *Id.* at 126-27.

128. *Id.* at 127.

129. *Id.* at 128.

130. *See id.* at 124. The Program has served as a model for other threatened watersheds. *Id.* at 126.

131. Karkkainen, *supra* note 125, at 130.

EPA and Environment Canada.[132] As is true of the Chesapeake Bay program, the Great Lakes effort represents a joint commitment by state and non-state actors to collaborate across borders to insure the viability of a major natural resource.[133]

The EPA offices that spearhead the Chesapeake Bay and Great Lakes programs help coordinate policies, but they do not exercise decision-making powers for either alliance.[134] Further, although these efforts rely on a mix of regulatory tools, legal instruments, and voluntary practices that are implemented by actors at all conceivable levels in a vertical hierarchy,[135] they are nonetheless singularly focused on improving the quality of two of the nation's most important aquatic ecosystems. Each is an example of sub-national environmental solidarity arising from an alliance of actors who face serious transboundary ecosystem degradation.[136]

C. Environmental Justice

In their provocative work detailing the disintegration of social identity in the environmental justice movement, Mihaela Popescu and Oscar Gandy address at length the nature of solidarity among inhabitants of environmental justice communities.[137] They explain:

> The significance of the disruptive event and the solidarity with communities in similar situations are critical elements in the establishment of a sense of community. Claims of solidarity and significance represent strategic rhetorical resources with which communities express their identity. Therefore, the basis for asserting solidarity and significance

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132. *Id.* The EPA's Great Lakes National Program Office was modeled after the Chesapeake Bay office. *Id.*

133. *Id.* at 133.

134. *Id.*

135. *See id.* at 127-128 (noting the devolution of responsibilities from higher levels of governance to local management efforts).

136. *Id.* at 124 (describing these initiatives as "dynamic and continuously evolving polyarchic arrangements" occurring in an era of "post-sovereign governance")

137. *See generally* Mihaela Popescu & Oscar H. Gandy, Jr., *Whose Environmental Justice? Social Identity and Institutional Rationality*, 19 J. ENVTL. L. & LITIG. 141 (2004).

> in the context of the environmental justice movement must be understood.[138]

The "disruptive event" for an environmental justice community is an environmental harm which is thought to affect the community disproportionately when compared to more affluent white communities.[139] The event triggers solidarity among community members, which is deeply and simultaneously informed by three factors: the environment, community identity, and rights.[140] The deteriorating environment unites the community, as does the identity of the community itself, which is formed by the interaction of a number of factors that include race, socioeconomic status, culture, location, and significance.[141] In the environmental justice context, the rights component of solidarity refers to the legal theory chosen by plaintiffs to pursue their claims. Often, environmental justice plaintiffs prefer to pursue sophisticated equal protection claims and injunctive relief rather than tort-based causes of action that provide monetary awards.[142] The common good that unifies communities in these cases is not the prospect of financial compensation for environmental injury; instead, it is the hope of restoring neighborhoods to healthy places in which to live and work.[143]

The unity of environmental justice communities is a cogent example of solidarity, but Popescu and Gandy warn that various practices associated with environmental justice litigation are increasingly inhibiting communities from relying on the rhetoric of

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138. *Id.* at 156.

139. *See id.* at 157.

140. *Id.*

141. *Id.* Popescu and Gandy argue that "significance" is as important to an environmental justice community's identity as is solidarity. *Id.* at 156 (noting that claims of solidarity and significance represent strategic rhetorical resources with which communities express their identity). They explain, "Community significance is constructed by its internal identification as a symbolic unit, its dependence or autonomy to a larger unit that contributes to the development of a symbolic border as a means of external identification, and the emphasis on the common experience of oppression." *Id.* at 164.

142. *Id.* at 157.

143. *Id.* Compensating communities when they agree to host polluting businesses is not out of the question; however, formal compensated siting programs have not proven successful. *Id.*; *see generally* Vicki Been, *Compensated Siting Proposals: Is it Time to Pay Attention*, 21 FORDHAM URB. L.J. 787 (1994).

solidarity and significance.[144] Like other examples of environmental solidarity, grassroots environmental justice advocates are united in their quest for an environmental good, one that, in their case, centers on the fair allocation of environmental harms and benefits. Their fight for an environment as clean as that enjoyed by more privileged communities is also evocative of the consistency and uniformity that identifies solidarity.

IV. LEGAL IMPLICATIONS

There are numerous regional, state, and community environmental initiatives in the United States that have been celebrated for their success. This article challenges readers to think about some of these efforts as environmental solidarity in action and to focus attention on their ability to impact the legal system. The forces of solidarity operate both within and beyond the immediate reach of these efforts to nudge other legal entities into action and lure outside parties toward their alliances. These initiatives embody both subsidiarity and solidarity, which combine in the hope of attaining common environmental goods that are greater than what could be achieved by individual actions.[145] If achieved, the environmental benefits are not only enjoyed by the participants, but are often scaled "up and out."[146] It is this outward and upward momentum that gives these projects the potential to affect the law in various ways. Solidarity's potential raises practical legal considerations that deal with the status of sub-national programs vis-á-vis co-existing regional and federal programs. It also yields practical benefits that are associated with experimentation and political strategies. Solidarity additionally provides substantive legal impacts that directly impact the content of similar laws enacted by higher levels of governance. Together, these impacts coalesce in ways that can affect the manner in which environmental law is perceived.

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144. *See* Popescu & Gandy, *supra* note 137, at 182-83 (noting that, in litigation, environmental justice communities must deal with assumptions based on "science, reason, and rationality").

145. Colburn, *supra* note 47, at 261 (stating, "[t]hese are the epistemic opportunities of subsidiarity and solidarity: one leverages the other into a whole greater than their sum as parts").

146. *Id.*

A. Practical Considerations and Advantages

One recurring practical consideration associated with environmental solidarity has to do with linkage. An alliance may wish to take into account the probability that one sub-national environmental effort may encourage the formation of similar efforts elsewhere. Understanding the value of coordination with similar climate change programs, California designed a statewide carbon policy to facilitate linkage with regional and international cap and trade programs.[147] This type of provision, aimed at achieving integration with other initiatives, can lay important groundwork for efficient planning and coordination in the future.[148] The goal of future integration is tempered, however, by policies that value the diversity of distinctive, experimental solidarity initiatives, and by the reality that differences in approaches between similar programs may be difficult to reconcile.[149] Nevertheless, there are advantages to designing collaborative efforts in ways that ease mergers with other initiatives, especially in cases where the common objective is widely shared.

A related consideration deals with the legal status of sub-national efforts in the event of a response by higher levels of governance. If the success and energy of a regional solidarity program leads national lawmakers to consider legislating in the same area, practical questions about the legal status of the original program will need to be addressed. Regional solidarity efforts that are designed to integrate with a future federal program may ease a transition to a national regime, but there is no guarantee that regional efforts will survive should a federal law be enacted. Unlike the issue of linkage, which is in the control of each environmental solidarity initiative, the survival or demise of sub-national programs under principles of concurrency or preemption is for Congress to decide.[150] The

147. Kysar & Meyler, *supra* note 108, at 1630-31 (explaining that an executive order issued by Governor Schwarzenegger mandated linkages with other programs).

148. *Id.* at 1637 (citing RGGI as an example).

149. *Id.* at 1635-36 (noting that smooth integration can be hindered by uneven enforcement and administration by participating jurisdictions).

150. *See generally* Jonas Monast, *Integrating State, Regional, and Federal Greenhouse Gas Markets: Options and Tradeoffs*, 18 DUKE ENVTL. L. & POL'Y F. 329 (2008).

Lieberman-Warner Bill, an early attempt to regulate GHG emissions nationally, allowed regional cap and trade programs to survive as long as state regulations were at least as stringent as the Act's provisions.[151] Other proposed federal legislation has been silent on the status of regional initiatives.[152] One way or another, any federal GHG program eventually will have to address whether sub-national initiatives will be integrated into the federal framework or preempted.[153]

The weeding-out function of solidarity programs is one of their practical advantages. In addition to addressing the common good through environmental improvement, environmental solidarity yields better informed participants, efficiencies of scale,[154] and as noted above, experimentation.[155] As one author explains, solidarity offers "the experimentalist recourse to more modest options first, the use of persuasive over coercive means that treat others as potential partners not competitors, and the collection of data from whole experiences revealing optimal solutions or, barring that, suboptimal solutions acceptable to all."[156] But there are potential drawbacks. Solidarity efforts that form at an ill-advised level of governance may inadequately serve the common good if they fail to consider the interests of other jurisdictions or create inefficiencies and inconsistencies that encourage a race to the bottom.[157] This has been a particular concern in the area of GHG regulation, where it is feared that stringent reduction targets in certain regions will result in leakage.[158] The possibility also exists that program choices made by an alliance will not perform as expected. Despite these drawbacks, the ability of sub-national solidarity to form, flourish, and potentially fail helps separate the good from the bad more efficiently than could be accomplished by larger programs.

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151. *Id.* at 331 (citing S. 2191, 110th Cong. § 9004 (2007)).

152. *Id.* at 332. This is true of the recently passed Waxman-Markey legislation. *See* American Clean Energy and Security Act of 2009, H.R. 2998, 111th Cong. (2009).

153. Monast, *supra* note 150, at 346. *See also* McGuinness & Ellerman, *supra* note 121.

154. *See* Olin, *supra* note 104, at 1859.

155. Colburn, *supra* note 47, at 258-59.

156. *Id.*

157. Organ, *supra* note 66, at 271, 273.

158. Monast, *supra* note 150, at 335.

There are political expediencies associated with solidarity as well. Sub-national collaborations diffuse political risk by spreading it among numerous parties,[159] an advantage that may attract parties to an alliance who might otherwise be hesitant to join. At the same time, solidarity enhances the "representational power" of individual participants, allowing them to enjoy the considerable political clout that such efforts generate.[160] The leveraging of individual commitment to achieve a common environmental goal, accomplished with diminished political exposure and the prospect of political gain, not only creates an appealing prospect for many states, but generates a vibrant political energy.

A final consideration straddles the line between the practical and substantive. The intertwined workings of solidarity and subsidiarity can furnish an analytical matrix for regulators to use in choosing the optimal level of governance for environmental responses in general.[161] By first focusing on an environmental problem, decision makers can determine the nature of the common good to be achieved.[162] The scope of the environmental good may then indicate the need for action at a purely local level or may suggest an opportunity for statewide or regional response. In short, a decision to work in solidarity with others leads to further questions about the levels of governance best suited for the various tasks associated with the effort. These questions put principles of subsidiarity into play,[163] requiring decision makers to respect the abilities and needs of lower levels of governance.[164] Thus, solidarity and subsidarity can serve as practical guides to aid decision makers confronting a variety of environmental problems.

B. Substantive Impacts

The substantive legal impacts associated with environmental solidarity are distinct from its practical considerations. The substantive consequences can be informative, formative, reformative,

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159. *See* Note, *supra* note 104, at 1859.
160. *See* Maxwell, *supra* note 8, at 358.
161. *See generally* Organ, *supra* note 66.
162. *See id.* at 270.
163. *Id.*
164. *Id.* at 265.

or normative, depending on political, regulatory, and environmental conditions as well as the scope of the solidarity initiative itself.

The situations that trigger a community or a coalition of communities to unite to address a common environmental problem vary, but at least four pre-conditions have already been suggested. First, environmental solidarity may respond to a federal regulatory vacuum, where actors are convinced that immediate action is needed and political backlash is either unlikely or will be too weak to derail the effort. This type of situation is best exemplified by RGGI and the WCI.[165] At other times, collective commitment arises when actors believe it is necessary to supplement what they perceive to be limited, or incomplete federal regulatory programs, a situation that spurred the solidarity found in the Chesapeake Bay and Great Lakes initiatives.[166] Solidarity that serves a gap-filling function is often less of a political target than solidarity that propels efforts to create something totally new, as the former works within a pre-existing regulatory program, often with federal acquiescence.[167]

Third, solidarity may be triggered to counteract federal law that is perceived to be wrong altogether. Had the New England states mounted a cohesive effort to combat the EPA's mercury rule, their initiative would have served as an example of this type of solidarity.[168] Compared to the regulatory vacuum and regulatory supplement scenarios, this type of initiative may create the greatest political risk because it is likely to frustrate federal law makers as well as lobbyists whose efforts were successful at the federal level.[169] Finally, environmental solidarity may arise from a sense of "linked fate" shared by otherwise disempowered community members who face an immediate environmental threat. This is the situation of environmental justice communities.[170]

Regardless of their impetus, environmental solidarity programs provide a means of informing existing or future laws. This impact unfolds in two steps. Solidarity programs initially announce to the rest of the nation and the global community that diverse and

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165. *See* Colburn, *supra* note 47, at 233.

166. *See* Karkkainen, *supra* note 125, at 121-22.

167. *See id.* at 132.

168. *See* Ruhl, *supra* note 103, at 543-44.

169. *See* Colburn, *supra* note 47, at 259 (stating that solidarity and subsidiarity may lessen the influence of lobbyists).

170. *See* Popescu & Gandy, *supra* note 137, at 190.

otherwise independent actors from regions within the United States are willing to work together to confront serious environmental challenges.[171] This simple communicative function is significant because it forces others to take notice of the serious, unified efforts of others. Once underway, the wide sharing of solidarity experiences additionally disseminates information that can provoke, and then guide similar sub-national initiatives or future legal response, an effect which, in and of itself, can be transformative.[172] In the United States, solidarity experiences in one area of the country have prompted similar efforts elsewhere and have furnished valuable data for lawmakers. One need only consider the Great Lakes initiative and the WCI, which followed on the heels of the Chesapeake Bay program and RGGI, respectively, to witness the informative potential of solidarity at work.[173]

Flowing naturally from the information-generating function of environmental solidarity is its potential to aid in the formation of supplemental legal regimes. When the common good to which solidarity aspires involves filling a gap in a functioning but incomplete or inadequate federal program, successful stand-alone collaborative efforts may eventually be subsumed into the federal framework, forming a supplemental legal program.[174] An analogous phenomenon occurs at the international level when multi-lateral treaties prove inadequate to deal with smaller, ecosystem-wide

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171. *See* Kysar & Meyler, *supra* note 108, at 1628 (noting that U.S regional climate change initiatives informed the world that, despite the Bush administration's failure to act, unified state initiatives were addressing the problem).

172. *See* Colburn, *supra* note 47, at 261. One example of the type of useful information generated by environmental solidarity is the information that will be amassed in the GHG registry of the WCI. *See* Western Climate Initiative, *supra* note 116. This second type of informative potential is recognized internationally as well. Judge Macdonald notes that solidarity has the potential to "inform the major choices states make about their right to achieve their fullest potential while not gravely interfering with first-order principles of the community of nations." Macdonald, *supra* note 3, at 301.

173. *See* Karkkainen, *supra* note 125, at 133 (noting that the Great Lakes initiative emulates the Chesapeake Bay program). RGGI likely spurred the development of the WCI, the latter of which will develop a regional GHG market similar to RGGI's carbon market. *See* Monast, *supra* note 150, at 330-31.

174. *See generally* Karkkainen, *supra* note 125, at 126-32.

degradation.[175] Although these smaller problems affect numerous countries, global efforts are not always the optimal response. Similarly, certain multi-state, ecosystem-wide challenges in the United States may be unsatisfactorily addressed by the relevant federal regulatory program, in part because those challenges demand something less than a national response.[176] At the same time, something more may be required than individual state response.[177] In these scenarios, environmental solidarity among the jurisdictions that share a threatened natural resource may be a wise alternative. These coalitions, which respond to ecosystems in a "regionally tailored, broadly interactive, collaborative, experimental, and adaptive" manner, are on the rise.[178] It is a trend that demonstrates the linkage between solidarity and subsidiarity while at the same time expanding the categories of participants to include non-governmental actors.[179] The gap-filling success of these initiatives, in turn, can help supplement overarching regulatory programs.

The formative potential of environmental solidarity is also evident in the regulatory vacuum scenario. In these cases, regional efforts can provide a political spark that ignites federal action.[180] Likewise, regional efforts can generate regulatory tools that can be used as models for national programs. It is likely that the provisions of both RGGI and WCI will exert some influence on federal GHG regulation;[181] indeed, the RGGI members themselves have hoped to

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175. *Id.* at 114-15.

176. *See id.* at 117.

177. *Id.* at 120 ("[A] strategy that relies exclusively or excessively on states to address transboundary environmental problems is likely to find a tough going. Strategies that involve other actors whose interests are better matched to the scale and nature of the resource and with greater incentives to initiate and sustain action have a better chance of success.").

178. *Id.*

179. *Id.* at 123-24.

180. *See* Kysar & Meyler, *supra* note 108, at 1628.

181. *See, e.g.*, Tessa Schwartz, William Sloan & Adam Young, *Legal Issues for Carbon-Related Transactions: Regulations, Markets, Technology & Enhancing Value* 73, 82 (PLI Corp. Law & Practice, Course Handbook Series No. 18722, 2009) (stating, "the system that emerges in the United Sates will likely be influenced by existing international protocols – namely the Kyoto Protocol and the EU Emissions Trading Scheme – and the existing structure created by regional players in the United States").

impact the substance of federal law.[182] It is also possible that generic approaches taken in one solidarity program may help shape responses to totally different environmental challenges, including those touching on biodiversity loss, air quality, and watershed management.[183]

Just as it may help inform and form new law, solidarity has reformative potential that can trigger revisions to flawed federal policies. For example, the environmental justice movement, strongly driven by solidarity, led directly to changes in the EPA's policy for investigating civil rights complaints.[184] A sharp increase in the number of these complaints in the 1990s, filed by communities claiming that state and federal environmental management activities resulted in disparate impacts, led the EPA to issue draft guidance documents in 2000 that institutionalized an environmental justice complaint process.[185] Although the administrative complaint process is not without its critics, it continues to serve as an important mechanism by which environmental justice groups can seek relief from inequitable permitting decisions.[186]

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182. Maxwell, *supra* note 8, at 364.

183. *See* Kysar & Meyler, *supra* note 108, at 1626.

184. *See generally* CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE LAW, POLICY & REGULATION 351-52 (2003). These complaints are brought under Title VI of the Civil Rights Act of 1964, and must allege discrimination by a state permitting agency that receives federal funding. *Id.* at 353. For a summary of the complaint procedure, see *id.* at 354. Prior to the EPA's response, the solidarity of the environmental justice movement led President Clinton to issue an executive order requiring every federal agency to make environmental justice a part of its mission. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898 § 1-101, 59 Fed. Reg. 7629 (Feb. 11, 1994), *reprinted in* 42 U.S.C. § 4321 (2006). In that sense, environmental justice solidarity was formative of national policy.

185. RECHTSCHAFFEN & GAUNA, *supra* note 184, at 351-52.

186. *Id.* at 354 (noting the "legal uncertainty over private remedies and the costs of prosecuting court cases"); *see also* THE LAW OF ENVIRONMENTAL JUSTICE 23-25 (Michael B. Gerrard and Sheila R. Foster eds., 2d ed. 2008). The recent announcement by EPA Administrator Lisa Jackson that she is making environmental justice one of her top priorities is a hopeful sign that some of the concerns about the vitality of the agency's environmental justice efforts will be addressed. *See* Memorandum From Lisa P. Jackson, Administrator to All EPA Employees (Jan. 12, 2010) *available at* http://yosemite.epa.gov/opa/admpress.nsf/2010%20Press%20Releases!OpenView

Environmental solidarity's informative, formative, and reformative powers are readily identifiable. However, its normative force is more elusive, particularly in the United States. It is the widely-held acceptance by a community of actors that certain behavior is appropriate that establishes a norm.[187] Norms, rules, and regimes tend to blend into one another, but they are nevertheless distinct.[188] As one author explains:

> Norms contain somewhat clearer injunctions to members about legitimate and illegitimate behavior, still defining responsibilities and obligations in relatively general terms . . . . The rules of a regime are difficult to distinguish from its norms; at the margin they merge into one another. Rules are, however, more specific: they indicate in more detail the specific rights and obligations of members.[189]

In searching for solidarity as a norm, then, one can look to a variety of sources, including agreements, compacts, programs, and positive law. Regardless of the legal source, a norm of environmental solidarity requires that solidarity itself – the unity of multiple actors to achieve an environmental common good – becomes the standard of practice.

As mentioned previously, international law has adopted a norm of solidarity between developed and developing countries to address environmental harms.[190] Even though there is no environmental norm that unites rich and poor states in the United States, examples

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&Start=100 (follow "Memorandum From Lisa P. Jackson, Administrator to All EPA Employees" hyperlink).

187. Gerry J. Nagtzaam, *The International Whaling Commission and the Elusive Great White Whale of Preservationism*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 375, 377 (2009) (quoting Jeffrey T. Checkel, *Norms, Institutions and National Identity in Contemporary Europe*, 43 INT'L STUD. Q. 83, 83 (1999)).

188. International law scholars define regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." *Id.* at 377 (quoting Stephen D. Krasner, *Structural Causes and Regime Consequences*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983)).

189. *Id.*

190. *See* Drumbl, *supra* note 12, at 951, 958 (explaining that the shared compact has achieved "normative status").

of solidarity norms still exist.[191] Within the regulatory regime of the Clean Water Act, the Chesapeake Bay program and the Great Lakes initiative have instituted a norm of solidarity among diverse groupings of actors to address watershed well-being.[192] The early success of the Chesapeake Bay effort gave that effort a legitimacy which led directly to a similar effort for the Great Lakes. The norm is one of solidarity among those who share an interest in an ecosystem to unite to preserve and improve a precious natural resource. The normative status of ecosystem-based collaboration is reflected by its long-standing practice and duplication with the approval of the EPA.

Intergenerational equity has also achieved normative status in federal environmental policy. The National Environmental Policy Act, for example, specifically lists concern for future generations in its enumeration of the nation's environmental policies,[193] and the myriad of sustainability programs across the nation have adopted intergenerational equity as a norm as well.[194] Additionally, state constitutions that recognize a right to the environment often reference concern for future generations.[195] Whether one accepts a procedural or substantive understanding of intergenerational equity,[196] solidarity with or for future generations can rightly be characterized as a norm of environmental solidarity.[197]

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191. McInerney, *supra* note 98, at 832, 848, 861(suggesting a communitarian theory of property built on Unger's solidarity rights, noting the normative implications of how rights are defined).

192. *See supra* text accompanying notes 126-33.

193. 42 U.S.C. § 4331(b)(1) (2006).

194. *See* Dernbach, *supra* note 42, at 4-5.

195. See, *e.g.*, PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

196. *See supra* text accompanying notes 42-43. Notably, the text of Pennsylvania's environmental rights amendment makes clear that "people" include both present and future generations. *See* PA. CONST. art. I, § 27.

197. Solidarity, and in particular solidarity rights theory, is leaving an imprint in other legal areas as well. As earlier noted, Thomas McInerney has suggested a modification of private property theory to incorporate community-based norms drawn from Unger's work on solidarity rights. *See generally* McInerney, *supra* note 98.

This discussion is not meant to imply that the legal outcomes noted above are solely the result of solidarity initiatives. Certainly, other circumstances combine to influence the law. Nevertheless, the potential for sub-national environmental solidarity to steer national environmental policy is a force to be acknowledged, not only because it is a legitimate contributor to the law, but also because those contributions are helping to reshape environmental law in significant ways.

C. An Aesthetic Shift

As the force of individual solidarity efforts continues to influence discrete areas of environmental regulation, the totality of the pressure exerted by these initiatives is likely to leave a broader imprint on federal environmental law as a whole. This is perhaps the most significant implication of sub-national environmental solidarity, as it portends an adjustment in the aesthetics of environmental law.

In the last decade, the field of legal aesthetics has garnered a fair amount of attention from a variety of scholars who have offered unique theories and insights.[198] Anyone who delves into the literature, however, will quickly conclude that the meaning of legal aesthetics to a great extent lies in the eye of the beholder.[199] The understanding of legal aesthetics that drives the argument made here, however, is captured in the thinking of two noted authors. Desmond Manderson explains that "aesthetics is a way of knowing" that involves engagement with something as well as its symbolic meaning.[200] When it comes to matters of law, he further explains:

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198. *See, e.g.*, ADAM GEAREY, LAW AND AESTHETICS (2001); MANDERSON, *supra* note 10; Heather Hughes, *Aesthetics of Commercial Law – Domestic and International Implications*, 67 LA. L. REV. 689 (2007); Tan Pham, *Unseen Yellow*, 7 HOW. SCROLL SOC. JUST. L. REV. 1 (2004); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002); Jacqueline Stevens, *Legal Aesthetics of the Family and the Nation: Agoraxchange and Notes toward Re-Imagining the Future*, 49 N.Y.L. SCH. L. REV. 317 (2005).

199. Professor Jacqueline Stevens states, "In some approaches, legal aesthetics is simply the use of law to regulate images. For others, legal aesthetics is akin to an epistemology or a method implicit in judicial opinions and scholarly texts. Finally, some scholars . . . see the law as a wide-ranging aesthetic activity in itself." Stevens, *supra* note 198, at 319.

200. MANDERSON, *supra* note 10, at 10, 21.

> The relationship to law is twofold. First, aesthetics affect the values of our communities, values which are in their turn given form and symbolism within the legal system. In the law, then, we find not only evidence of our beliefs but traces of the aesthetic concerns that have propelled them. But the converse also holds. The legal system is not merely the passive mirror of a worldview. The law is a kind of discourse whose outlook on the world takes its place as one (frequently privileged) way of perceiving events around us . . . . *The gaze of the law influences all of us: it defines a situation in a certain way and encourages us all to look at it likewise.*[201]

Thus, the law not only drinks in the aesthetic-informed beliefs of the community it governs,[202] it also provides an outpouring of symbols which comprise images for public understanding.

Pierre Schlag identifies four legal aesthetics that that are at play in the two-way process Manderson describes.[203] The grid aesthetic presents the law as comprised of separate spaces and categories;[204] the energy aesthetic reflects law as dynamic and changing amidst the dynamic interaction of politics, values, and policy;[205] the perspectivist aesthetic creates an image of the law as mutating to take on the social perspective of the observer;[206] and the dissociative

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201. *Id.* at 27 (emphasis added).

202. *See, e.g.*, Pham, *supra* note 198 (explaining how this phenomenon led to laws that incorporate negative images of Asian American males); Neal Milner & Jonathan Goldberg-Hiller, *Reimagining Rights*, 27 LAW & SOC. INQUIRY 339, 342-43 (2002) (citing the aesthetic of respectability and normalcy that dominates the law of nationhood).

203. Schlag, *supra* note 198, at 1051 (noting that these aesthetics are "recurrent forms that shape the creation, apprehension, and identity of law").

204. *Id.* at 1055 (explaining that the grid has places for doctrines, rules, and elements). Some have criticized the grid aesthetic for being static and too rigid. *Id.* at 1061.

205. *Id.* at 1070. Although there is much appeal in seeing the law as something in motion, there is also a need for structure. *Id.* at 1075.

206. *Id.* at 1052. Schlag explains that, with the perspectivist aesthetic, "the social or political identity of the legal actor or observer becomes the crucial situs of law and legal inquiry." *Id.* The idea that law changes based on context has brought new perspectives into the law, including those of feminists and critical race theorists. *Id.* at 1085-87. Yet Schlag warns that, "[p]ushed to its limits, perspectivism devotes

aesthetic portrays the law as unstable and in danger of collapse.[207] These aesthetics combine in countless ways, creating a diversity of outcomes that significantly impact law's observers. Schlag elaborates:

> In shaping our apprehension, experience, and creation of law, the aesthetics leave their marks. In doing so, they bring what we call law into being. Indeed, the aesthetics have an important ontological effect: they fashion law as a presence, an identity, something that is there, that we have, that we can reflect upon, and over which we can argue.[208]

The legal aesthetics associated with environmental law in the United States can be described within the Manderson-Schlag framework. At a bare minimum, the aesthetic impulses that feed environmental law include the imaginings of preservationists, conservationists, religious communities, scientists, and economists.[209] All of these groups are guided by aesthetic concerns that have infiltrated the halls of Congress since the inception of the environmental movement. Each of these constituencies has a vision of an environmentally sound nation: the preservationist's dream is one of natural resources that are cared for and largely left intact; the conservationist's desire is for sustainable use of natural resources; religious imaginings range from an earth as the mother of us all to an earth created by God and cared for by human stewards; scientists see a nation's people and resources made healthy through the measurement and attainment of acceptable levels of risk; and

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itself to the exploration of perspective, form, and representation at the expense of object, content, and referent." *Id.* at 1092.

207. *Id.* at 1092-94 (explaining that this aesthetic is both "a radicalization of perspectivism" and "a movement toward the loss of form). Schlag states that the dissociative aesthetic, which threatens all the other aesthetics, is not found in positive law, but rather in the "brainstorming" undertaken by judges and legislators as they engage in decision-making. *See id.* at 1099. For an application of Shlag's energy and grid aesthetics to commercial law, see Hughes, *supra* note 198, at 706-23. For a critique of Schlag's categories, see Stevens, *supra* note 199, at 320-21.

208. Schlag, *supra* note 198, at 1053.

209. Numerous law school texts describe these foundations of federal environmental law. *See, e.g.*, ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 3-35 (3d ed. 2004) (detailing the insights of Aldo Leopold, Rachel Carson, Garrett Hardin, and Ronald Coase).

economists envision a prosperous nation that addresses pollution with optimal efficiency. These characterizations are admittedly broad and are not meant to capture the aesthetic inclinations of all relevant viewpoints.[210] They do, however, suffice to provide a general sense of the variety of aesthetic images incorporated into and, to various extents, mirrored by environmental law.

Environmental law's gaze embodies the agreed-upon norms by which the nation addresses environmental degradation, and that gaze is taken in and returned by all who choose to engage it. The aesthetics of law's outlook can easily be perceived as a grid, comprised of laws that are divided into categories that address air, water, land, endangered species, forests, and the like. The grid is further divided within each of those laws into separate components that address various sub-categories. For example, the Clean Air Act separately regulates mobile sources, stationary sources, attainment areas, non-attainment areas, criteria pollutants, and toxics.[211] The Endangered Species Act imposes separate prohibitions on federal agencies and private parties,[212] and the Resource Conservation and Recovery Act divides the solid waste universe into hazardous and non-hazardous waste.[213] Beyond basic divisions such as these, statutory sections are further divided into subsections that are comprised of further elemental divisions, only to be even more carefully delineated in regulations. [214]

The grid aesthetic also establishes a hierarchy within environmental law, which generally places federal law and EPA regulation at the highest level of governance with state

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210. Two other viewpoints worth noting are those of green economists, who seek to assign values to the world's ecosystems and the services they provide for humans, and ecofeminists, who see parallels between the masculine domination of women and man's domination of nature. *See generally*, Robert Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE 253 (1997); Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63, 83 (2003).

211. *See generally* 42 U.S.C. §§ 7401-7671q (2006).

212. 16 U.S.C. §§ 1536, 1538 (2006).

213. 42 U.S.C. §§ 6921, 6941 (2006).

214. *See, e.g.*, 42 U.S.C. § 7410(a) (2006) (setting forth mandatory requirements for a state implementation plan under the CAA); 40 C.F.R. § 52.21(b)(1)(ii) (2006 & Supp. 2009) (listing various categories of sources that must include their fugitive emission when determining whether they are major stationary sources for the purposes of the Clean Air Act's Prevention of Significant Deterioration Program).

implementation of certain programs conditioned on federal permission and oversight.[215] With rare exceptions, states remain free to enact their own environmental laws as long as they are at least as stringent as federal laws.[216] The grid aesthetic thus presents a highly compartmentalized image of media-specific, top-down regulation with close control of state environmental initiatives.

The energy aesthetic of environmental law is evident in the relatively short, but rich history of Congressional response to a host of environmental threats.[217] Congressional action has at times been swift – typically in response to well-publicized environmental crises -[218] and at other times has been painstakingly slow.[219] Nevertheless, Congressional action by way of legislation and oversight has been the norm since 1970. The energy aesthetic is more specifically reflected in numerous provisions that allow or require regulatory revisions to a host of environmental standards and lists in response to scientific advances or other developments. Animals and plants can be added to and removed from the endangered species list based on scientific and commercial data.[220] Criteria pollutants and toxic pollutants can be added to the lists of those already regulated under the Clean Air Act, and allowable concentrations of those pollutants may be adjusted as science improves.[221] Effluent limitations and water quality standards are routinely modified under the Clean Water Act.[222] New sites can

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215. Two prominent examples are state implementation of national ambient air quality standards under the Clean Air Act, 42 U.S.C. § 7410 (2006), and NPDES permitting under the Clean Water Act, 33 U.S.C. § 1342(b) (2006).

216. *See* PLATER, *supra* note 209, at 328 (noting that federal environmental laws "leave room" for more stringent state laws); TOD I. ZUCKERMAN ET AL., ENVIRONMENTAL LIABILITY ALLOCATION: LAW AND PRACTICE § 9.11 (2009) (stating that "federal environmental statues do not preempt state statutes if the state statutes are, at a minimum, as tough as their federal counterparts").

217. *See generally* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 88-94 (5th ed. 2006) (providing a succinct history of environmental law).

218. *See* PLATER, *supra* note 209, at 886 (noting that the toxic contamination at Love Canal and Times Beach ignited public furor that led to the enactment of the Comprehensive Environmental Response, Compensation and Liability Act).

219. The failure of the federal government to meaningfully address climate change led directly to the formation of RGGI. *See* text accompanying note 165.

220. 16 U.S.C. § 1533(a)(b) (2006).

221. 42 U.S.C. §§ 7408(a), 7409(d), 7412(b)(2) (2006).

222. 33 U.S.C. §§ 1312(b), 1313(c) (2006).

be added to the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act.[223] A complete list is hardly needed to make the point that environmental laws are designed to adapt to scientific advances and changed conditions.

Energy of a different sort is emitted by the vertical hierarchy of the grid. This image is one of strong action by the federal government directed at states and regulated entities. The flow and force of this energy has earned environmental law its "command and control" moniker.[224] A similar sort of power is reflected in statutory sections that force disclosure by regulated entities,[225] prohibit certain activities outright,[226] and threaten to end the EPA's foot-dragging by Congressionally-imposed draconian provisions if statutory deadlines are not met.[227] The energy aesthetic, then, is one that presents environmental law as responsive to present developments and moving forward to address new challenges and scientific findings, while exerting firm federal control from a position of superiority.

A perspectivist aesthetic pictures environmental law as a regime that mutates to address the perspectives of its observers. The mere welcoming of diverse views does not create such an aesthetic in the law. What is additionally necessary is a change in the law to reflect new perspectives. The law has, from time to time, departed from its command and control tradition to respond to market-based perspectives. Congress did so when it created the Clean Air Act's

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223. 42 U.S.C § 9605(g) (2006).

224. The use of that three-word phrase to refer to the traditional approach to environmental regulation is ubiquitous in environmental law commentary. *See, e.g.*, WILLIAM H. RODGERS, JR., RODGER'S ENVIRONMENTAL LAW § 1:3 (2009) (referring to environmental law's "conventional command-and-control" regulation).

225. *See, e.g.*, 42 U.S.C. § 4332(C) (2006) (requiring disclosure, by way of an environmental impact statement, of the environmental impacts caused by federal agency action); 42 U.S.C. § 9603(a) (2006) (requiring notification to the National Response Center when reportable quantities of hazardous substances are released).

226. *See, e.g.*, 16 U.S.C. § 1538(a)(1)(B) (2006) (prohibiting the taking of endangered species).

227. *See, e.g.*, 42 U.S.C. § 6924(d) (2006) (banning the land disposal of certain hazardous wastes altogether unless the EPA promulgated risk-based disposal standards by a firm deadline).

acid rain program and similar programs in its wake.[228] And as noted earlier, the perspectives of struggling, underserved communities have been accommodated by the EPA's environmental justice initiatives. In these examples, environmental law has shown a propensity to transform entrenched provisions and practices to respond to previously ignored or under-valued perspectives.[229]

As Schlag explains, the dissociative aesthetic emerges when there is an overabundance of perspectivism.[230] This aesthetic presents itself as the law sifts through and seeks to respond to an array of viewpoints. Environmental law's much-celebrated pluralism[231] has created an aesthetic of inclusion, diversity, and the give and take of political bargaining, but those components alone are insufficient to cast an image of instability and disintegration. That level of disruption emerges most often during the course of legal decision-making and is not normally found in positive law.[232] Nevertheless, arguments exist that certain environmental statutes or portions of statutes project so many perspectives that they in fact present an aesthetic of insecurity.[233] The competing perspectives of federal agencies, interested parties, and the courts, in combination with procedural practices that arguably short-change statutory objectives, have led some to question whether NEPA is anything more than a "paper tiger" or "a symbolic assurance sham."[234] Some have

228. Congress responded to increased calls for the use of market instruments to deal with environmental problems in 1990, when it codified a cap-and-trade program to reduce sulfur dioxide emissions from coal-fired power plants. *See* 42 U.S.C. §§ 7651–7661f (2006); PLATER, *supra* note 209, at 713. The Waxman-Markey Bill, the first piece of GHG legislation to pass either house in Congress, also included a cap-and-trade program. *See* John M. Broder, *Adding " Something for Everyone, House Leaders Gained a Climate Bill"*, N.Y. TIMES, July 1, 2009, at A20.

229. To a certain extent, environmental law's mutation in these examples is also reflective of the energy aesthetic.

230. Schlag, *supra* note 198, at 1092 ("Paradoxically, even as it drives itself into the ground, the ever-increasing, ever more radical reflexivity of perspectivism leads to disintegration. Indeed, it leads to the dissociative aesthetic.").

231. *See* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 24 (1998) (remarking that environmental law is "pluralist-created and pluralist-driven").

232. Schlag, *supra* note 198, at 1099.

233. *See id.* at 1092.

234. *See* PLATER, *supra* note 209, at 475. NEPA pronounces a strong national environmental policy comprised of numerous objectives, and requires federal

similarly argued that endangered species listing decisions and critical habitat designations have become so riddled with delays and impasses due to the intransigence of competing interests that the Endangered Species Act's provisions have become unworkable.[235] NEPA and the ESA are routinely identified as laws that announce and further expressly enumerated environmental policies and that protect endangered and threatened species and their habitats, respectively. To the extent perspective-induced impasses, tensions, and retreats have begun to dissolve the identities of these statutes, the dissociative aesthetic has presented itself.[236]

These observations are derived from the inclinations of the author's own aesthetic sensibilities, and a variety of other formulations of the aesthetics of environmental law are undoubtedly plausible. Still, the core image of environmental law as an intricately divided patchwork, capable of change under the firm hand of the federal government, responsive to the perspectives of others, with some components in danger of failing to live up to their promise, seems a fair one. It is offered here as a conglomerate aesthetic against which sub-national

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agencies to further those goals in part by issuing Environmental Impact Statements (EISs) when they propose major actions with significant environmental impacts. 42 U.S.C. §§ 4331-4332 (2006). In recent years, agencies have avoided the burdensome preparation of EISs by issuing shorter environmental assessments that include mitigation provisions, a process that allows agencies to issue Findings of No Significant Impact (FONSIs), thus avoiding the preparation of full-blown EISs. *See* Matthew J. Lindstrom, *Procedures without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 263 (2000). Further, the originally permissive judicial attitude toward NEPA's provisions has become increasingly unsympathetic. *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390 (1976) (establishing that an EIS need not be prepared until an agency has a formal proposal for agency action); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (noting that NEPA is "essentially procedural").

235. *See* PLATER, *supra* note 209, at 793; PERCIVAL ET AL., *supra* note 217 (citing the "inadequacies of [the Endangered Species Act's] eleventh-hour, species-by-species approach to conservation" that has spurred new approaches to species protection).

236. In the case of NEPA, one scholar believed this threshold was reached some time ago. Writing in 1992, Philip Ferester observed, "NEPA is far past its best days, *and has faded to a mere shadow of its former self.*" Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 224 (1992) (emphasis added).

solidarity's legal force can be considered. The inquiry as to the impact solidarity is or is not making on environmental law's aesthetics builds on the thesis that solidarity is working in various ways that are already impacting environmental law. The acknowledgement of the outward and upward impulses of sub-national solidarity lends a significant layer to the analysis and leads to the conclusion that an aesthetic shift is underway.

Environmental law's outward gaze, as perceived by its observers in Schlag's categories, has become more complex, swirling, welcoming, and perhaps precarious at the hands of sub-national solidarity. As solidarity initiatives reach a formative, reformative, and normative pitch, the complexity of environmental law's grid aesthetic intensifies. The watershed-driven programs for the Chesapeake Bay and Great Lakes are now embedded in the Clean Water Act as distinctly unique entities. Title VI environmental justice complaint procedures supplement the EPA's permit review. Additionally, the House of Representative's passage of cap-and-trade regulation for greenhouse gasses, spurred to some extent by RGGI and the WCI, would add an entire regulatory program to environmental law's matrix.[237] The impact of each solidarity initiative discussed in this article has, in its own way, contributed to a more intricate and complicated grid. Further, the increased numbers and successes of the state solidarity programs have expanded the size of the grid space occupied by the states, local governments, and non-governmental organizations, all of which are squeezing more room out of a more finely delineated grid.

The legal forces associated with environmental solidarity are also modifying the largely top-down energy aesthetic of environmental law. The informative capacity of solidarity clearly fuels the legal energy that is emited by environmental law's response to new developments, but it does more. When state and other sub-national efforts strengthen to the point of becoming formative of federal law, a more intense legal energy flows from the bottom up and between regional actors, creating a swirling, multi-directional energy that was less apparent before. The give and take between regional actors and the upward impetus of RGGI and the WCI demonstrate this new dynamic.

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237. *See* American Clean Energy and Security Act of 2009, H.R. 2998, 111th Cong. (2009).

Environmental law has also made adjustments to account for the different perspectives of parties who act in solidarity. The EPA's development of administrative procedures in response to environmental justice solidarity is one example; another is the Clean Water Act's acquiescence and ultimate acceptance of regional watershed programs that include the perspectives of non-state actors including NGOs. In both of these examples, the strength of solidarity provided groups and regions with the clout they needed to motivate lawmakers to change the law to reflect the perspectives of the groups or regions, thereby enriching the perspectivist aesthetic of environmental law.

A broader perspectivism in environmental law's aesthetics seems laudable, but it leads one to question whether it risks blurring or destabilizing the image of environmental law. The perspectivist aesthetic casts an image of law that not only welcomes diverse insights, but that mutates in response to new viewpoints. Sub-national solidarity's growth, persistence, and influence may motivate Congress or the EPA to adjust various programs, but federal acceptance of localized collective action can result in negative spill-over effects.[238] To the extent federal environmental law is willing to adjust in response to efforts that privilege the perspectives of some sub-national groups to the detriment of others, its image as a firm and fair controller of national environmental policy begins to dissipate. The perception of Congress and the EPA as the dominant, even-handed drivers of environmental law in the United States is weakened. The risk of this type of dissociative outcome is mitigated by political, market-based, and judicial constraints,[239] making it unlikely that a multitude of solidarity-driven changes in environmental law will create an aesthetic of uncomfortable instability. Nevertheless, the workings of sub-national environmental solidarity often mean eventual change in federal law, and to the extent that change is disruptive in any way, there will be dissociative shadings in the legal aesthetics that emanate from environmental law.

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238. *See* Olin, *supra* note 104, at 1856.

239. *Id.* at 1865-72 (pointing to the requirement of Congressional approval for some interstate agreements, business flight from regions adopting stringent environmental measures, and resort to the courts to curtail sub-national efforts under the Commerce Clause and antitrust law); *see also* Maxwell, *supra* note 8, at 355-60 (generally discussing legal constraints on interstate compacts).

V. CONCLUSION

Characterizing sub-national environmental efforts as solidarity in action does more than provide a refreshing nuance to environmental discourse; it provides an opportunity to consider the power of these initiatives and the impact that power may have on the formation and structure of federal environmental law. As these initiatives proliferate, their legal impact will be felt in various ways. The collective force of these efforts has the potential to significantly transform portions of environmental law, and as it does, it also may transform the way environmental law defines itself and how it is perceived.