this picture. Nor does it answer the first-order question of the extent to which prior doctrine and practice should shape contemporary constitutional interpretation. The editors are explicitly aware of these limits, but their significance becomes most apparent when thinking about the final section of essays in relation to the earlier portions of the book.

It will thus be interesting to see how practitioners use this book going forward. Regardless, Sloss, Ramsey, Dodge, and the other authors have provided an invaluable contribution to the scholarship on the Supreme Court and international law.

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Green Governance: Ecological Survival, Human Rights, and the Law of the Commons. By Burns H. Weston and David Bollier. Cambridge, MA: Cambridge University Press, 2013. Pp. xxvi, 363. Index. $99.

From the beginning of the modern environmental movement in the 1960s, some activists and scholars have argued that the environmental challenges we face are too large to be solved within our existing legal and political framework, and that we can meet them only by fundamentally changing the way that we think about and act towards natural resources. Sometimes called neo-Malthusians, they have argued not only, as Malthus did,[1] that a growing population will run short of food, but also that we will exhaust non-renewable resources.[2] That global population growth has greatly slowed in recent decades does not solve the problem, in their view, because consumption continues to rise at unsustainable rates. In the last twenty years, climate change has become the clearest example to many neo-Malthusians that the world has natural, non-negotiable limits to economic growth, which we cannot exceed without causing catastrophic damage to the environment and to ourselves.

The idea that our current trajectory may lead to environmental disaster has become part of popular culture,[3] but it has yet to convince us to change course. No alternative to our growth-oriented economic system has achieved widespread support, perhaps because none has seemed both environmentally satisfactory and politically viable. With their new book, Burns Weston and David Bollier aim to change that. They put forward a proposal that they hope will lead to a revolution in environmental governance.

They begin by citing the apocalyptic projections of writers such as James Lovelock, who predicts that unchecked climate change may cause the global population to drop below one billion by the year 2100 (p. xvii).[4] Weston and Bollier blame our situation on the failures of "the neoliberal State and Market alliance that has shown itself, despite impressive success in boosting material output, incapable of meeting human needs in ecologically responsible, socially equitable ways" (p. 3). Their criticism of the Market is the familiar one that it does not internalize environmental costs; their criticism of the State is that it is unwilling or unable to protect natural resources from the Market. They point to many reasons for this failure, including that "there is a cultural consensus that the mission of government is . . . to promote development through constant economic growth," (p. 10) and that "the State is too indentured to Market interests and too institutionally incompetent to deal with the magnitude of so many distributed ecological problems" (p. 20).

Having briefly sketched the picture of a rapidly deteriorating environment, plundered by a rapacious Market that the State is helpless to regulate, the authors spend the rest of the book presenting an alternative to the current political/legal system.

[1] THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (1798).

[2] *See, e.g.*, LESTER R. BROWN, PLAN B: RESCUING A PLANET UNDER STRESS AND A CIVILIZATION IN TROUBLE (2003); PAUL R. EHRLICH, THE POPULATION BOMB (1968); GARRETT HARDIN, THE OSTRICH FACTOR: OUR POPULATION MYOPIA (1999); DONELLA H. MEADOWS ET AL., THE LIMITS TO GROWTH (1972).

[3] Recent films depicting a future environmental dystopia include A.I. Artificial Intelligence (2001); The Day After Tomorrow (2004); Wall-E (2008); Metropia (2009); and Elysium (2013).

[4] *See* JEFF GOODELL, HOW TO COOL THE PLANET: GEOENGINEERING AND THE AUDACIOUS QUEST TO FIX EARTH'S CLIMATE 89–90 (2010).

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Their proposal for "green governance" has two interwoven strands: (1) an enlarged understanding of human rights, and (2) a systematic encouragement of a Commons approach to environmental management of common-pool resources (CPRs),[5] which would supplement and offset the State and Market approaches. As they use the term, "commons" are systems of governance that generally operate independently of State control, on the basis of norms and practices developed by a defined community of "commoners" (p. 124). The evolution of community social norms, which they call Vernacular Law in contrast to top-down State Law, and the promotion of "new policy structures and procedures that encourage and reward distributed, self-organized governance and bottom-up innovation," are, along with a renewed commitment to human rights, the "foundational precepts . . . critical to the evolutionary challenge of redesigning our mental operating systems and moving forward" (p. 81).

The authors spend about half of the book on each of the two components of their proposal.[6] They start by reviewing the status in international law of human rights to a "clean, healthy, biodiverse, and sustainable environment" (p. 28). Following Dinah Shelton's prescient analysis of twenty years ago,[7] they write that the "statist legal order" recognizes environmental human rights in three ways: as derived from other human rights, including rights to life and health; as a new, autonomous right to a healthy environment; and as a cluster of procedural entitlements, such as rights to information about the environment and participation in environmental decision-making. They conduct a careful, thorough review of how international institutions have brought existing human rights, such as rights to life and health, to bear on environmental problems, and how regional human rights treaties and domestic constitutions have adopted a free-standing right to a healthy environment.[8]

Despite this evidence that a rights-based approach to environmental protection is growing in popularity, Weston and Bollier conclude, without much elaboration, that

> as long as ecological governance remains in the grip of essentially unregulated (liberal or neoliberal) capitalism—a regime responsible for much if not most of the plunder and theft of our ecological wealth over the last century and a half—there will never be a human right to environment widely recognized and honored across the globe in any formal/official sense, least of all an autonomous one. (Pp. 48–49)

Nor are they optimistic about the chances for success of alternative approaches, such as recognizing rights of future generations or rights of Nature itself, which they argue face difficult barriers in the current statist legal system, including in finding legal surrogates for future generations or for Nature, and in assessing future damage.

Weston and Bollier believe that resistance to rights-based approaches to environmental protection can be overcome only by "asserting a foundation of values and principles profoundly different from that which defines and maintains the State/Market today" (p. 80). One aspect of this new foundation is to embrace anew the power of human rights, which should include a new human right to "commons- and rights-based ecological governance" (p. 81). The authors describe the attractions of human rights: they are "trumps," in Ronald Dworkin's phrase,[9] that override most if not all other claimed values; they signal the importance of non-discrimination, justice, and dignity; they help to support human security and democracy; they challenge "statist and elitist agendas"

[5] Common-pool resources are exhaustible resources that are difficult to protect from (over)use. Most natural resources, including the atmosphere, bodies of water, fisheries, and forests, can be described as CPRs.

[6] Not coincidentally, one imagines, these two aspects of the proposal correspond to the authors' own backgrounds and expertise. Burns Weston has written extensively on human rights law; David Bollier is the co-founder of the Commons Strategies Group, which seeks to promote the Commons approach to governance internationally.

[7] Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

[8] On the latter development, see David Boyd's *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012).

[9] *See* Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

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(p. 91); and they provide legal and political entitlements. But the public still has an "insufficient understanding of the power and potential of human rights beyond what is known by scholars, jurists, and activists . . . . To make the shift, a 'bottom-up' engagement of assorted commoners and sympathetic others everywhere—concentrated in focus and strong in conviction—is required" (p. 102).

Thus, the other foundational aspect of their proposal is to embrace a new, Commons-based approach to environmental management, relying on Vernacular Law and the encouragement of "self-organized governance." The authors believe that a Commons approach "offers several critical capacities that are sorely missing from the neoliberal State/Market system," including "*the ability to set and enforce sustainable limits* to resource consumption," and "*the ability to use resources to meet everyone's basic needs in an equitable way,* thereby helping to reduce inequality and insecurity and thus pressures for greater exploitation of nature" (p. 172, emphasis in original). A Commons approach to environmental governance therefore provides "a practical way to escape the growth imperative of the contemporary economy" (*id.*).

Much of the seminal work on commons was conducted by Elinor Ostrom,[10] who demonstrated that the use of a common-pool resource need not always end in tragedy, *contra* the title of Garrett Hardin's famous essay,[11] because the users of a CPR are sometimes able to regulate their own use and protect against overuse by outsiders. Weston and Bollier list Ostrom's principles for successful commons, including that the users of the CPR and the CPR itself must be clearly defined, that those affected by the operational rules of a commons can participate in modifying them, and that users who violate the rules are likely to be sanctioned (pp. 148–49).[12]

As the authors note, the successful commons that Ostrom studied were generally small-scale, regulating access to local forests, fisheries, or sources of water. Weston and Bollier recognize that the lessons that might be drawn from such commons do not obviously apply to global environmental challenges such as climate change. They propose policies and principles aimed at extending small commons to larger commons able "to cope with more complicated national and transnational ecological issues, and even global ones such as the atmosphere or the oceans" (p. 182).

Specifically, the authors propose internal principles for commoners to use in developing and maintaining commons, and external principles that State should use in encouraging the evolution of effective commons. The principles are stated at a fairly high degree of abstraction. For example, the internal rules include: incorporating a Vernacular Law of social trust and cooperation; embodying the values of the Universal Declaration of Human Rights and of the Universal Declaration of the Rights of Mother Earth; adhering to subsidiarity; and ensuring that commoners have collective control over surplus value created collectively. The principles for States include adopting the polluter-pays and precautionary principles, providing for "chartering" commons, and under some circumstances, States' acting as trustees of resources that belong to commoners (pp. 193–95).[13]

Unlike Ostrom's principles, which were based on empirical observation of actual commons, Weston's and Bollier's principles are aspirational. They believe no existing transnational or global commons meet all of their criteria, although they cite a few "planetary CPRs that are managed in some limited ways as commons," including Antarctica and the Moon, which could provide "crude templates for imagining future commons-based systems" (p. 216). Moreover, they do not believe that States should impose new commons. Instead, they propose that States act as gardeners, preparing the ground for Vernacular Law to develop

[10] *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

[11] Garrett Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1243 (1968).

[12] *See* OSTROM, *supra* note 10, at 90–91.

[13] An appendix sets out the principles in the form of a Universal Covenant Affirming a Human Right to Commons- and Rights-Based Governance of Earth's Natural Wealth and Resources (p. 269).

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commons at a number of levels, including the national and transnational. The authors highlight the difficulties of finding space for commons within "statist" regimes, since in their view State law is deeply hostile to commons (p. 173). Nevertheless, they cite examples of commons that have found ways to emerge within the State/Market paradigm, and they propose encouraging more commons through "catalytic strategies" such as community land trusts, the public trust doctrine, and "private law work-arounds" like the public copyright licenses championed by Creative Commons (pp. 229–42).

It is not clear, however, how such strategies can lead to effective large-scale commons that would address climate change, marine pollution, or other massive transboundary environmental problems. An important reason why successful commons tend to be small-scale is that, as Ostrom says,

> [T]he populations in these locations have remained stable over long periods of time. Individuals have shared a past and expect to share a future. It is important for individuals to maintain their reputations as reliable members of the community. These individuals live side by side and farm the same plots year after year. They expect their children and their grandchildren to inherit their land. In other words, their discount rates are low. If costly investments in provision are made at one point in time, the proprietors—or their families—are likely to reap the benefits.[14]

Successful commons governance seems much less likely where these conditions are not present, and it is very difficult to see how these conditions can hold at a global, or even a national, scale. We do not have a real global polity, much less a global community in which we recognize, for example, a shared interest in protecting the atmosphere from pollution by greenhouse gases.

The authors suggest that commons can be scaled up through innovative use of the Internet and by "nesting" lower-scale commons in larger ones (pp. 256–59). They do not explain, however, how such approaches could build a bottom-up, Vernacular Law-based commons able to regulate access to global CPRs such as the atmosphere. The authors state that the development of large-scale commons

> is likely to be an evolutionary process. If successful commons can be established at local and regional levels, one can imagine their operations giving rise to demands for larger governance structures, much as geographically based markets have given rise to larger structures to facilitate their operation on national and global scales. (P. 225)

But even if this evolution were feasible, it seems highly doubtful that it would occur quickly enough to address global environmental problems such as climate change before they cause the catastrophes that the authors predict.

Weston and Bollier also suggest that large-scale commons "will require the delegation of authority to governmental and intergovernmental institutions and processes working cooperatively" (p. 252). They thus expand the concept of the commons to include "State-trustee commons," in which the State "acts as a formal trustee or steward of CPRs" (p. 170). As examples of such hybrid commons, they cite national parks, wildlife protection laws such as the Endangered Species Act (ESA), and, at the international level, treaty regimes such as that governing Antarctica. But these examples raise more questions than they answer. Laws such as the ESA and the Antarctic Treaty's Madrid Protocol on Environmental Protection are essentially top-down regulatory regimes that restrict access to CPRs. They rely on State law, not Vernacular Law. If they count as commons, then it is unclear why many other top-down regulatory regimes, including the Clean Air Act, the Clean Water Act, and the Montreal Protocol on Substances that Deplete the Ozone Layer, do not count as well, since they also restrict use of CPRs such as the lower atmosphere, water bodies, and the ozone layer.

This creates a conundrum for advocates of a Commons approach to environmental governance. To assign credit for the success of such regimes to their being commons requires abandoning some of the fundamental precepts of the Commons approach, including the reliance on Vernacular Law and bottom-up governance. But if these successful regimes are not commons, then

[14] OSTROM, *supra* note 10, at 88.

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they provide powerful evidence that the State/Market approach to environmental protection can be effective after all. After all, environmental statutes and treaties have greatly reduced pollution, saving countless lives. Unfortunately, the authors do not address this problem, or even mention laws such as the Clean Air Act or the Montreal Protocol. Instead, they simply dismiss the possibility that State Law can protect the environment from Market depredations.

The work of Elinor Ostrom and other commons scholars has gone far to add commons regimes as one of the options in the environmental policy toolbox, and the authors are undoubtedly correct that it is a tool that should be taken more seriously in many situations. But it remains something of an Allen wrench—uniquely valuable in certain circumstances, but not obviously superior to every other tool in the box.

Human rights, however, are different. As the authors explain, human rights fit very well with the Commons approach. The emphasis in the emerging environmental human rights law on rights to information and participation, for example, helps to support and shape some of the fundamental aspects of a commons, including that the "commoners" have the right to control their own commons. And while the idea of a human right to a commons may seem somewhat far-fetched, human rights law is helping to protect commons in some areas. The Inter-American human rights system, in particular, has issued a series of decisions holding that indigenous and tribal peoples are entitled to exercise their human right to property collectively, and that before authorizing development of their land, the government must provide for prior assessment of the environmental and social impacts, ensure the effective participation of the peoples affected, and guarantee that they receive a reasonable benefit.[15] If large-scale development would have a major impact within their territory, then it may proceed only with their free, prior, and informed consent.[16]

But human rights are not valuable only with respect to commons. In principle, at least, human rights help to strengthen virtually every approach to environmental protection. To use the toolbox metaphor, human rights norms do not add new tools so much as they help to clarify how *all* of the tools should be used: any attempt to address environmental problems should respect the human rights of those affected. If anything, the authors may be too pessimistic about the prospects of a rights-based approach to environmental protection. While human rights are certainly not a panacea for all environmental problems, they are being embraced by the many governments that have adopted environmental rights in their constitutions and in international agreements, and by the environmental advocates who are increasingly bringing environmental human rights claims to domestic and international tribunals.[17]

Even the UN human rights bodies, which have traditionally been cool to the idea that human rights norms are applicable to environmental concerns, have changed their views. Since 2008, the Human Rights Council has adopted a series of resolutions drawing attention to the implications of climate change for human rights,[18] and its special rapporteurs regularly address environmental issues in their work.[19] In March 2012, the Council

[15] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, para. 88 (Nov. 28, 2007).

[16] *Id.*, para. 134. *See* Marcos Orellana, *Saramaka People v. Suriname,* 102 AJIL 841 (2008).

[17] Many of the international claims have been to regional human rights tribunals. *See, e.g.*, Decision Regarding Communication 155/96, Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria, Case No. ACHPR/COMM/A044 (Afr. Comm'n Hum. & Peoples' Rts. 2002); Öneryildiz v. Turkey, 2001-XII Eur. Ct. H.R. 79, Taşkin and others v. Turkey, 2004-X Eur. Ct. H.R. 179; Marangopoulos Foundation for Human Rights v. Greece, Complaint No. 30/2005 (Eur. Comm. Soc. Rts. 2006); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001).

[18] Human Rights Council, Human Rights and Climate Change, UN Doc. A/HRC/RES/7/23 (Mar. 28, 2008), A/HRC/RES/10/4 (Mar. 25, 2009), A/HRC/RES/18/22 (Sept. 30, 2011).

[19] *E.g.*, Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, UN Doc. A/HRC/19/55 (Dec. 21, 2011); Report of the Special Rapporteur on the human rights and fundamental freedoms of indigenous people, James Anaya, UN Doc. A/HRC/15/37 (July 19, 2010); Report of the Special Rapporteur on adequate housing

created a new three-year mandate for an independent expert on human rights and the environment to study the human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, and to identify and promote views on best practices relating to the use of such obligations to inform, support, and strengthen environmental policymaking.[20] Whatever the fate of the commons as an organizing principle, it seems evident that human rights are fast becoming an integral part of environmental governance.

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International Law in Financial Regulation and Monetary Affairs. Edited by Thomas Cottier, John H. Jackson, and Rosa M. Lastra. Oxford, New York: Oxford University Press, 2012. Pp. xiv, 455. Index. $105, £60, cloth.

Serious academic efforts to reconsider the legitimacy and integrity of international financial systems followed in the wake of the 1997–98 Asian financial crisis, which originated in developing economies but threatened global financial stability. Scholars and practitioners identified a host of structural problems in the international financial markets that hampered rational and efficient operations, and offered a variety of reform proposals—albeit mostly from a strictly economics perspective.[1] Only a few legal studies tackled the fundamental issues of the international financial system, such as externality problems of regulatory discrepancy, systemic gaps between domestic regulations and international markets, and, most importantly, the lack of effective multilateral treaties.[2] And in 2007–09, before any significant reform measures were incorporated into the international financial system, the world economy experienced an even greater crisis; the structural problems of international financial markets, the result of weak regulatory frameworks, were made well apparent. The question confronting the world economy is no longer whether the international financial system demands "hard" law; instead, we need to determine how international economic law can be brought to bear on increasingly fluid financial and monetary affairs.

The twenty-two articles in *International Law in Financial Regulation and Monetary Affairs* were originally published in the September 2010 special issue of the *Journal of International Economic Law*. Both the special issue and this book were edited by Thomas Cottier of the University of Bern, John Jackson of the Georgetown University Law Center, and Rosa Lastra of the Centre for Commercial Law Studies, Queen Mary, University of London.

In 1998, writing the lead article of that journal's inaugural issue, Jackson as editor-in-chief envisioned "a very high probability that the international community will turn toward the formation and designing of a treaty-based multilateral institution which could enable it appropriately and efficiently to respond to the problems of such regulation," and he presented a series of legal issues that needed to be considered when designing international institutions.[3] Many of those same issues are addressed in the essays presented in the book under review, with leading legal scholars

as a component of the right to an adequate standard of living, Raquel Rolnik–Mission to Maldives, UN Doc. A/HRC/13/20/Add.3 (Jan. 11, 2010).

[20] Human Rights Council, Human Rights and the Environment, UN Doc. A/HRC/RES/19/10 (Mar. 22, 2012). The present reviewer was appointed to the position in July 2012 and submitted his first report the following December. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, UN Doc. A/HRC/22/43 (Dec. 24, 2012).

[1] See, for example, the works listed by the Group of Thirty, *at* http://www.group30.org/publications.shtml, and also the *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System* (2009) ("Stiglitz Commission Report") *at* http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf.

[2] *See, e.g.,* THE REGULATION OF INTERNATIONAL FINANCIAL MARKETS: PERSPECTIVES FOR REFORM (Rainer Grote & Thilo Marauhn eds., 2006); GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK (Kern Alexander, Rahul Dhumale & John Eatwell eds., 2006).

[3] John H. Jackson, *Global Economics and International Economic Law,* 1 J. INT'L ECON L. 1, 21–23 (1998).

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