

Cambridge University Press

978-1-107-03436-5 - Green Governance: Ecological Survival, Human Rights, and the Law of the Commons

Burns H. Weston and David Bollier

Excerpt

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## PART I

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## 1

## Trends That Point Toward a New Synthesis

The future of a commons- and rights-based approach to a clean and healthy environment – green governance – cannot be considered in isolation from the larger realities of domestic and international markets and public policies, but neither can it be held hostage to a discourse that limits our sense of the possible. To actualize a flourishing ecological governance paradigm that respects all life on Earth now and in the future, we must upgrade our mental operating system from Neolithic to Anthropocene and strive for a worldview that accommodates qualitatively different relationships with Nature itself and with each other. We must cultivate a practical governance paradigm driven simultaneously by a *logic* of respect for nature, sufficiency, interdependence, shared responsibility, and fairness; and an *ethic* of integrated global and local citizenship that insists on transparency and accountability in all environmental dealings. Our willingness to perpetuate an economics and supporting civic polity that valorizes growth and material development as the preconditions for virtually everything else is, over the not-so-long run, a dead end – literally.

Reframing the goals of contemporary economics and public policy is a good way to begin opening new vistas of possibility. Properly done, it can move us beyond the neoliberal State and Market alliance<sup>1</sup> that has shown itself, despite impressive success in boosting material output, incapable of meeting human needs in ecologically responsible, socially equitable ways. It is now clear that the present-day regulatory State cannot be reliably counted

<sup>1</sup> For syntactical convenience, we oftentimes use the term “State/Market” to refer to the close symbiotic relationship between the State and Market in contemporary global governance. Each serves different roles and is formally separate from the other, but both are deeply committed to a shared political and economic agenda and to collaborating intimately to advance it. We do not mean to suggest that there are not significant variations in how the State and Market interact from one nation to another, but the general alliance between the two in promoting economic growth as an overriding goal is unmistakable.

on to halt the abuse of natural resources by markets.<sup>2</sup> It is an open secret that various industry lobbies have corrupted if not captured the legislative process. The regulatory apparatus, for all its necessary functions, has shown itself to be essentially incapable of fulfilling its statutory mandates, let alone pioneering new standards of environmental stewardship.<sup>3</sup> Furthermore, regulation has become ever more insulated from citizen influence and accountability as scientific expertise and technical proceduralism have come to be more and more the exclusive determinants of who may credibly participate in the process.<sup>4</sup> Given the parameters of the administrative State and the neoliberal policy consensus, we have reached the limits of leadership and innovation.

This book seeks to imagine new paradigms of ecological governance that might improve the management of natural systems while simultaneously advancing human rights. We do so in full recognition that many entrenched, unexamined premises about the future must be brought to light and challenged and that the vision we are proposing is fragile and evolving. In introducing his once-novel economic ideas, John Maynard Keynes warned: “The difficulty lies, not in the new ideas, but in escaping from the old ones, which ramify, for those brought up as most of us have been, into every corner of our minds.”<sup>5</sup> This is precisely the problem we face in overcoming some old and deeply ingrained habits of thought and action to entertain a new, unfamiliar paradigm that conjoins a new economics, participatory/networked commons, and human rights. The logic, vocabulary, and inventory of relevant examples of this new worldview, while still embryonic, are rapidly expanding.

<sup>2</sup> See, e.g., Earth Justice, *History of Regulatory Failure*, available at [http://www.ucsusa.org/assets/documents/clean\\_vehicles/historyofdelayupdated\\_jano5.pdf](http://www.ucsusa.org/assets/documents/clean_vehicles/historyofdelayupdated_jano5.pdf) (accessed May 17, 2011) (documenting the history of regulatory failures under the Clean Air Act since 1990).

<sup>3</sup> See, e.g., D. J. Fiorino, *The New Environmental Regulation* (2006); Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 *Wm. & Mary L. Rev.* 823 (1990); Howard Latin, *Overview and Critique: Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 *Envtl. Law* 1647 (1991).

<sup>4</sup> The regulatory process in this way discriminates against localism because local communities and citizen groups are likely to have few scientific or legal resources at their command. See, e.g., Frank Fischer, *Citizens, Experts and the Environment: The Politics of Local Knowledge* (2000) (calling for “meaningful nonexpert involvement in policymaking” because it “can help solve complex social and environmental problems by contributing local contextual knowledge to the professionals’ expertise”). Among the examples Fischer cites are “popular epidemiology” in the United States, a process in which lay persons gather statistics and other information and curate the knowledge, *id.* at 151–57; the Danish consensus conference, a “citizen’s tribunal” process that invites direct public participation on policy debates involving technological and environmental risk, *id.* at 234–41; and “participatory resource mapping” in Kerala, India, which actively enlisted citizens to become involved in local infrastructure planning. *Id.* at 163–66.

<sup>5</sup> John Maynard Keynes, *The General Theory of Employment, Interest and Money*, at vii (1936).

As it happens, a number of powerful trends – in economics, digital technology, and human rights – are converging in ways that can help us address this challenge. They are: (a) a search for new holistic economic frameworks resulting from the failure of neoliberal economics policy and practice to name and manage “value” in its broadest sense, especially ecologically; (b) new types of commons-based governance that are proliferating, on the Internet and in civic and ecological contexts; and (c) a new surge of worldwide protests against top-down autocratic rule and a corresponding assertion of basic human rights. These acts of resistance to both public and private autocracy – playing out first in the Seattle counter-globalization protests of 1999, and in the Arab Spring, Spanish Indignados, and Occupy movements more recently – have built new sociopolitical spaces in which to reimagine human rights as a key dimension of, and pathway to, socioecological governance and justice.

We believe that a new paradigm of *commons- and rights-based ecological governance* can build on the momentum of these secular trends. The separate strands of discourse that we now designate “the State,” “the economy,” “the environment,” and “human rights,” usually in isolation from one another, beg to be reconstituted – remixed and reframed – into a new synthesis. Such a synthesis is not just a new political and policy approach to old problems, but an integrated worldview and cultural ethic. A new paradigm of ecological governance – commons- and rights-based green governance – could do just that: help reconstitute people’s relations with Nature, introduce new types of property rights, and contribute to the rise of a new Commons Sector, a confederation of commons in various realms that shares governance with the State and Market.<sup>6</sup>

The rationale for State support of individual commons and the Commons Sector is easily understood. Commons perform qualitatively different functions than do either the State or Market, generating and managing value in different and important ways. As we elaborate in Chapters 4 and 5, they have special advantages in advancing ecological sustainability. They typically limit exploitation of finite natural resources, leverage local knowledge in managing them, and honor the intrinsic value and intergenerational sanctity of natural resources. Additionally, commons foster democratic participation, temper inequality, and, by reducing overdependence on markets, help to meet basic

<sup>6</sup> As we explain in Chapters 5 and 6, *infra*, such a confederation, functioning in mutually supportive ways, could organize human energies and governance to serve different ends and check the excesses of both the State and Market. We call this the “Commons Sector,” operating alongside the Public (State) and Private (Market) sectors. Social entrepreneur/businessman Peter Barnes was an early proponent of this concept. See Peter Barnes, *Who Owns the Sky?* 125–32 (2002).

human needs – core goals of any human rights agenda. By establishing the right infrastructure of policy and support, the State could act as a constructive partner with individual commons – much as it already does with markets. For its part, the Commons Sector could elicit considerable bottom-up creativity and energy at the local or “cellular” level while fostering greater moral and social legitimacy in governance.

Our basic argument is, thus, that commons governance (i.e., governance that seeks to actualize commons principles) can do more for the well-being of ecosystems and the natural resources within them than can the State and Market alone. Sometimes the Commons Sector would complement the State and Market, and sometimes it would constructively displace them. Individually or as part of a new Commons Sector, commons or commons-styled governance, can, with proper design and support, empower commoners (the general public or distinct communities) to manage ecological systems and resources. Such decentralized governance, working within specified parameters, could assure ecological stability and sustainability better than could the regulatory State alone, and it could assure also that fundamental human rights and needs are fulfilled more reliably than by the Market alone.

Critically, commons-based governance could also help to sidestep the growth imperatives of capital- and debt-driven markets that fuel so much ecological destruction. Because commons typically function at a more appropriate scale and location than does centralized government, and therefore draw on local knowledge, participation, and innovation, they offer a more credible platform for advancing a clean, healthy, biodiverse, and sustainable environment and its attendant human rights than does the dominant neoliberal consensus.

The burden of this chapter is to outline this paradigm-shifting journey, first by clarifying the backstory of emerging trends in economics, digital technologies, and human rights. The convergence of these trends makes a new commons- rights-based framework logically compelling and its timing propitious. To these emerging trends and the new synthesis to which they point we now turn.

#### A. THE TRAGEDY OF THE MARKET

Neoliberal economics policy merits our attention because this outlook, dedicated to the private capture of commodified value, is largely indifferent to nonmarket value except insofar as it may “blow back” to affect markets. Toxic spills become serious when they ruin someone else’s market, such as fisheries or tourism, or when a company’s negligent environmental performance spurs the public to criticize the corporate identity and brand, leading to lower sales

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and stock prices. Companies and markets, focused as they are on *exchange value*, have trouble recognizing *intrinsic value*, a fact that had a lot to do with the financial crisis of 2008 and that persists to this day.<sup>7</sup>

It is a truism in our market-oriented society that price is the best indicator of value and that the free play of the Market provides the fairest way to maximize societal wealth and efficiently allocate it. Because the Market is presumed to be more efficient and fair than government, the default strategy for managing natural resources is to privatize and marketize them. Price, moreover, is said to result from individuals, not governments or other collective institutions, freely determining what is valuable. As Margaret Thatcher famously declared, “There is no such thing as society.”<sup>8</sup> People are said to maximize their individual, rational self-interests through the price system and market exchange; the collective good then naturally manifests itself through the Invisible Hand.

Guardians of the dominant economic order – politicians, policy elites, corporate leaders, bankers, investors – concede the periodic shortcomings of this governance template as executive misjudgments, scandals, scientific failures, and other shortcomings occur. Generally, however, they aver that the prevailing neoliberal system is, if not the best achievable system, nevertheless “good enough,” particularly when compared with the alternatives of communism, socialism, or authoritarian rule.

Yet this system of market-based governance has proven catastrophic and is unsustainable in an ecological sense.<sup>9</sup> Neither unfettered markets nor the regulatory State has been effective in abating or preventing major ecological disasters and deterioration over the past several generations.<sup>10</sup> The structural

<sup>7</sup> Economic observer Yves Smith describes the fallacies of free-market theory; the embedded deceptions in “risk/return tradeoffs” used in assembling “efficient portfolios” of stocks; the investor predation caused by deregulation of financial markets; and the inevitable bubbles caused by willful miscalculations of risk. See Yves Smith, *ECONned: How Unenlightened Self Interest Undermined Democracy and Corrupted Capitalism* (2010); see also Gretchen Mortensen & Joshua Rosner, *Reckless Endangerment: How Outsized Ambition, Greed and Corruption Led to Economic Armageddon* (2011) (offering an authoritative account of the financial crisis).

<sup>8</sup> Interview by Douglas Key with Margaret Thatcher, former Prime Minister of the United Kingdom, in London, U.K. (Sept. 23, 1987), available at <http://www.margaretthatcher.org/document/106689> (accessed May 27, 2011).

<sup>9</sup> Notable critiques include Gérard Duménil & Dominique Lévy, *The Crisis of Neoliberalism* (2011); David Harvey, *A Brief History of Neoliberalism* (2005); Smith, *supra* note 7; Speth, *supra* Prologue note 18; see also Roberto Peccei, *Rethinking Growth: The Need for a New Economics*, I Cadmus, Oct. 11, 2011, at 9.

<sup>10</sup> Accord Orr, *supra* Prologue note 21; Speth, *supra* Prologue note 18; see also Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 *Envtl. Law* 43, at § III (“The Failed Paradigm of Environmental Law”) (2009). Writes Wood:

imperatives of economic growth are, in the meantime, testing the ecological limits of the planet's ecosystems, as seen most vividly in the intensifying global warming crisis. The environmental transformations now occurring on Earth are unprecedented in geological history.<sup>11</sup> The pervasive, systemic environmental harms will not be solved remedied over the long term through green technologies and similar palliatives, if only because the socioeconomic imperatives that are driving economic growth and the aggressive exploitation of nature will remain unchecked.<sup>12</sup>

To enhance the prospects for a truly viable right to environment, our challenge is to develop a worldview and governance system with a richer conception of value than that afforded by the neoliberal market narrative. The foundational idea that private property rights, technological innovation, and market activity are the inexorable engines of progress and human development needs to be reexamined and recontextualized. John Ruskin famously called the unmeasured, unintended harms caused by markets "illth."<sup>13</sup> In our times, markets are producing as much illth as wealth; the governance systems for anticipating and minimizing the creation of illth are clearly deficient.

One can analyze this problem from many perspectives, but at the most basic level the price system is inadequate as an indicator of value. Although crudely functional in indicating scarcity value, price as a numerical information signal cannot communicate situational, qualitative knowledge that may be significant to human and ecological well-being.<sup>14</sup> Price may not

"The Modern environmental administrative state is geared almost entirely to the legalization of natural resource damage. In nearly every statutory scheme, the implementing agency has the authority – or discretion – to permit the very pollution or land destruction that the statutes were designed to prevent. Rather than using their delegated authority to protect crucial resources, nearly all agencies use their statutes as tools to affirmatively sanction destruction of resources by private interests. For example, two-thirds of the greenhouse gas pollution emitted in this country is pursuant to government-issued permits." *Id.* at 55.

<sup>11</sup> McKibben, *supra* Prologue note 5; J. R. McNeill, *Something New Under the Sun: An Environmental History of the Twentieth-Century World* (2000).

<sup>12</sup> See Tadzion Mueller & Freider Otto Wolf, *Green New Deal: Dead End or Pathway Beyond Capitalism?*, 5 *Turbulence* 12, 12 (2010), available at <http://turbulence.org.uk/turbulence-5/green-new-deal/> (observing that "the point about any kind of 'green capitalism,' Green New Deal or not, is that it does not resolve th[e] antagonism" between capitalism's need for infinite growth and the planet's finite resources).

<sup>13</sup> John Ruskin, *Unto This Last: Four Essays on the First Principles of Political Economy* 105 (1862). We are grateful to Peter Barnes who brought this coinage to our attention.

<sup>14</sup> Ecological economist Joshua Farley writes: "The classic example of this phenomenon is the diamond-water paradox – diamonds contribute little to human welfare, but are very expensive, whereas water is essential to life but is generally very inexpensive." Joshua Farley, *The Role of Prices in Conserving Critical Natural Capital*, 22 *Conservation Biology* 1399 (2008). For example, industrial agriculture has promoted vast monocultures of crops in near-disregard of the local ecosystem, thanks to the generous use of synthetic fertilizers, pesticides, herbicides, and

represent actual scarcity in instances where it is applied to “natural capital” because ecosystems behave in highly complex, dynamic, and nonlinear ways that are not fully understood. Price is an inadequate guide to scarcity also because it may be applied to ecosystem structures that behave over time spans that exceed normal human perception (not to mention that of public policy institutions!) and from which people cannot be easily excluded (such as the atmosphere or oceans). “If people cannot be prevented from using a resource,” writes ecological economist Joshua Farley, “they are unlikely to pay for its use, and the market will fail to produce or preserve appropriate amounts . . . Markets systematically favor the conversion of ecosystem structure to economic production rather than its conservation for the provision of ecosystem services, even when the nonmonetary benefits of conservation outweigh the monetary benefits of conversion. Those who convert gain all the benefits of conversion but share the costs with the rest of the world.”<sup>15</sup> This might be called the “tragedy of the market.” The price of honey does not reflect the value of complex interdependencies in ecosystems that support honeybees, for example, nor do prices communicate the actual value of lower-order organisms and natural dynamics that are essential to the vitality of a fishery or forest.

Price has trouble representing notions of value that are subtle, qualitative, long-term, and complicated – precisely the attributes of natural systems. It has trouble taking account of *qualitatively different types of value on their own terms*, most notably the carrying capacity of natural systems and their inherent usage limits. Exchange value is the primary if not exclusive concern. This, in fact, is the grand narrative of conventional economics. Gross Domestic Product represents the total of all market activity, whether that activity is truly beneficial to society or not.<sup>16</sup> In terms of “the economy,” the disasters of the

genetically modified seeds, often made possible by governmental subsidy. The transformation of farming practices to suit investment objectives, however, has degraded the long-term natural abundance of ecosystems and boosted the prevalence of pests, weeds, and pathogens.

<sup>15</sup> *Id.* at 1402.

<sup>16</sup> Clifford Cobb et al., *If the GDP Is Up, Why Is America So Down?*, Atlantic Monthly, Oct. 1995, at 59, available at <http://www.theatlantic.com/past/politics/ecbig/gdp.htm> (accessed May 23, 2011). In recent years, a growing recognition of the inadequacies of GNP as an index of “progress” has stimulated such initiatives as Bhutan’s Gross National Happiness (GNH) Index, *Centre for Bhutan Studies*, available at <http://www.grossnationalhappiness.com> (accessed July 22, 2011); the German Bundestag Commission on “Growth, Prosperity, Quality of Life,” *German Bundestag*, available at <http://bundestag.de/bundestag/ausschuesse17/gremien/enquete/wachstum/index.jsp> (accessed May 23, 2012); and French President Nicolas Sarkozy’s Commission on the Measurement of Economic Performance and Social Progress. *Comm’n on the Measurement of Econ. Performance and Soc. Progress*, available at <http://www.stiglitz-sen-fitoussi.fr/en/index.htm> (accessed May 23, 2012). For details, see Eyal Press, *Beyond GDP*, The Nation, May 2, 2011, at 24–6.

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Gulf of Mexico oil spill and the Fukushima nuclear disaster may actually turn out to be “good” because they end up stimulating economic activity.

Conversely, anything that does not have a price and exists “outside” the market is regarded as without value. In copyright law, for example, anything in the public domain is seen by copyright lawyers as essentially worthless. If a work in the public domain were so valuable, it would have a price, after all.<sup>17</sup> To imperial nations, lands occupied by natives traditionally have been seen as *res nullius* – ownerless spaces that remain barren until the alchemy of the Market and “development” create value.<sup>18</sup> By this same reasoning, an ecological resource such as the earth’s atmosphere, wetlands in their original state, and even human and nonhuman genes (i.e., without assigned property rights or market price) are regarded as “not valuable” or “free for the taking.”<sup>19</sup>

It should not be surprising, then, that normal Market activity frequently rides roughshod over ecological values. The resulting harm usually is presumed to be modest or tolerable, or at least not the direct concern of business. Indeed, economists consider the unintended by-products of Market activity to be “externalities,” as if they were a peripheral concern or afterthought. In truth, it is easy to overlook externalities because they tend to be diffused among many people and large geographic areas and to lurk on the frontiers of scientific knowledge.

Externalities are marginalized, as well, because there is a cultural consensus that the mission of government is, in any case, to promote development through constant economic growth. Conscientious and aggressive government efforts to minimize externalities are seen as interfering with this goal.<sup>20</sup> Nature,

<sup>17</sup> See David Bollier, *Viral Spiral: How the Commoners Built a Digital Republic of Their Own* 42–68 (2009) (Ch. 2: “The Discovery of the Public Domain”); see also David Lange, *Recognizing the Public Domain*, L. & Contemp. Probs. 44 (1981).

<sup>18</sup> See, e.g., John Locke, *Second Treatise of Government*, reprinted in *The Selected Political Writings of John Locke* 32 (Paul E. Sigmund ed., 2005) (“[L]et [man] plant in some inland, vacant places of America, we shall find that the possessions he could make himself, upon the measures we have given, would not . . . prejudice the rest of mankind.”).

<sup>19</sup> The lack of formal property rights, and the failure to recognize customary lands as commons, is a major reason why “people’s common lands are frequently deemed to be unowned or unownable, vacant, or unutilized, and therefore available for reallocation,” writes Liz Alden Wily, a specialist in land tenure policies and author of the report. Liz Alden Wily, *Int’l Land Coalition, The Tragedy of Public Lands: The Fate of the Commons Under Global Commercial Pressure*, at viii (2011). Wiley also notes: “While all 8.54 billion hectares of commons around the world may be presumed to be the property of rural communities under customary norms, this is not endorsed in national statutory laws.” *Id.* at vii.

<sup>20</sup> See, e.g., Milton Friedman & Rose Friedman, *Free to Choose* 54–55 (1980) (“Wherever the state undertakes to control in detail the economic activities of its citizens, wherever, that is, detailed central economic planning reigns, there ordinary citizens are in political fetters, have a low standard of living, and have little power to control their own destiny.”). Keeping externalities to some minimally acceptable level is necessary also to assure trust and stability in markets