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The Environmentalist Attack on Environmental Law

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THE ENVIRONMENTALIST ATTACK ON ENVIRONMENTAL LAW

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MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2013). Pp. 457. Paperback $ 45.00.

BURNS H. WESTON & DAVID BOLLIER, GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS (2014). Pp. 390. Paperback $ 34.99.

The brief period of environmental bipartisanship now seems like a mythic legend. During the thirty seven months between December 1969 and December 1972, Congress enacted the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, and the Endangered Species Act.[1] These four statutes continue to represent four of the six laws that form the federal environmental law canon.[2] Then the legislative window closed, and Congress has not enacted any new fundamental environmental laws since 1980 because members of Congress no longer agree about what new laws are needed. The unwillingness of Congress to approve sweeping climate care legislation demonstrates the sharp divide that environmental issues now present in Congress among the voters who elect it.

Environmental law now faces vocal opposition from conservative politicians and activists. Senator Mitch McConnell has called for "laws that protect Americans against the kind of regulatory overreach that too many unelected bureaucrats in Washington seem to live for these days, especially in these challenging economic times."[3] A conservative author proclaims that "the Obama Administration continues to develop an unprecedented amount of new draconian environmental regulations that will severely damage America's beleaguered industrial sector."[4] The conservative indictment specifies that environmental law ruins the economy, imposes burdensome governmental controls, and achieves little in the way of actual environmental protection.

The standard environmentalist response to such claims is to defend the efficacy of

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1. *See* Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531-1544); Clean Water Act, Pub L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1387); Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1970) (codified at 42 U.S.C. §§ 7401-7671q); NEPA, Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321-4370h).

2. *See* Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1240 (2014) (listing the six canonical federal environmental statutes).

3. 157 CONG. REC. S7588-02 (daily ed. Nov. 16, 2011) (statement of Sen. McConnell).

4. RICK TRZUPEK, HOW THE EPA'S GREEN TYRANNY IS STIFLING AMERICA 1 (2011).

environmental law. The Clean Air Act, insists EPA Administrator Gina McCarthy, is "one of our country's greatest bipartisan achievements" that has "achiev[ed] dramatically cleaner air and important public health benefits at reasonable costs."[5] The Clean Water Act, argued Representative (and now Chicago Mayor) Rahm Emanuel, "has been a tremendous success in the Great Lakes region."[6] To change such laws, they insist, would be a giant step backward, not forward.

But there is another strain of liberal thought that agrees that environmental law is hopelessly broken, albeit for entirely different reasons than those articulated by conservative politicians. Two recent books by respected scholars make that case. In *Nature's Trust: Environmental Law for a New Ecological Age*, Mary Wood, a professor at the University of Oregon School of Law, calls for "deep change [in] environmental law."[7] "Has environmental law worked?" she asks. "If the health of the planet stands as any indicator, the answer must be clearly no."[8] The best she can say is that we would "[p]robably" be worse off without environmental law.[9] She describes our existing environmental law as "a convoluted morass" that resulted from "the 1970s environmental movement," which "changed the constitutional balance of environmental power over ecology and created a monster-sized bureaucracy that grew to legalize the destruction of Nature."[10] The environmental organizations that rely on such laws are either heroic or complicit, depending on one's perspective of working within a flawed system. "[E]nvironmental law lacks ideas truly calibrated to the magnitude of the problem" so we need "a full paradigm shift" because "tweaking the law becomes a fool's errand."[11]

Burns Weston and David Bollier agree. Weston is a leading human rights scholar and emeritus professor at the University of Iowa College of Law; Bollier is a self-described "author, activist, blogger and consultant."[12] "The current governance system for environmental issues is profoundly broken," they conclude, in *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, adding that "[t]here is little question that existing regulatory systems, national and international, have failed to assure a

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5. *EPA's Greenhouse Gas Regulations and Their Effect on American Jobs: Hearing Before the Subcomm. on Energy and Power of the House Energy and Commerce Comm.*, 112th Cong. 119 (2011) (statement of Gina A. McCarthy, Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency).

6. 154 CONG. REC. H8343-01 (daily ed. Sept. 17, 2008) (statement of Rep. Emmanuel). Emmanuel elaborated that:

> [W]hen I was growing up near Lake Michigan in Chicago, we used to have dead fish on top of the water for the first 30 feet. You had to run through the sand, past all of the dead fish, jump in the water, hold your breath, and go about 30 feet past the dead fish. Then Congress at that time passed the Clean Water Act. After 30-plus years, there is no doubt when you look at all of the Great Lakes, like Lake Michigan in Chicago, the Clean Water Act has been a tremendous success in the Great Lakes region. Kids today swim all across the different lakes because of what this Congress and a President had done in the past.

Id.

7. MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE xix (2014).

8. *Id.* at 9.

9. *Id.* at 63.

10. *Id.* at 6, 51.

11. *Id.* at 13-14.

12. David Bollier, *About*, DAVID BOLLIER: NEWS AND PERSPECTIVES ON THE COMMONS, http://www.bollier.org/about (last visited Nov. 6, 2014).

clean and healthy environment overall."[13] They are frustrated "with a system of environmental laws and regulations that 'don't actually protect the environment' but, 'at best . . . , merely slow the rate of its destruction.'"[14]

Both books see dire environmental problems that the existing approach to environmental law cannot solve. The authors follow different paths when they describe the cause of those problems and the way to solve them. For Wood, federal environmental agencies are the problem, courts are the solution, and Congress is a hapless bystander. For Weston and Bollier, the state/market alliance is the problem, and the solution is decentralized governance based on informal norms. Yet each book champions a different ancient property concept as the ultimate key to reformulating environmental law. Wood's *Nature's Trust* builds on the public trust doctrine, while Weston and Bollier's *Green Governance* turns to the idea of the commons.

There is much in both books to applaud. The authors are especially effective in identifying the shortcomings in how environmental law actually operates today. But their proposed solutions are likely to fall short absent a more fundamental transformation of how we imagine the natural environment and humanity's relationship to it. The public trust doctrine and the commons have been part of the fabric of the law for centuries, yet they have failed to accomplish the environmental goals that Wood, Weston, and Bollier hope to achieve now. And if we do experience a fundamental transformation in environmental thinking, then the existing environmental laws may finally fulfill their original purposes.

THE PROBLEM

Nature's Trust and *Green Governance* posit that we are experiencing unprecedented and dangerous changes to the natural environment. Both books are at their most persuasive when they worry that environmental law fails to provide adequate attention to future generations. Yet the details of the coming environmental calamity are left largely unexplained, or perhaps more fairly, they are recorded in other studies that the authors reference. A full accounting of our current, and likely future, environmental conditions is rightly beyond the scope of both books. Still, the case for a radical recreation of environmental law would benefit from more explicit discussions of the untoward environmental consequences that we confront.

Wood, for example, asserts that "[t]he planet we inhabit seems suddenly and violently out of balance" and "the ecological challenges [are] now coming at us with horrifying speed."[15] She contends that "we face a planetary emergency in which only a narrow window of time remains to act before tipping points foreclose all feasible options."[16] Indeed, the question she seeks to answer in the book is "[h]ow will legal institutions respond to radically new environmental conditions?"[17] She largely omits an accounting of those conditions, save for such general concerns about how "[s]ociety now violates Nature's

13. BURNS H. WESTON & DAVID BOLLIER, GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS 23, 27 (2012).

14. *Id.* at 66 (quoting Mari Margil, *Stories from the Environmental Frontier*, *in* EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE (Peter Burdon ed., 2011)).

15. WOOD, *supra* note 7, at 3, 7.

16. *Id.* at 11.

17. *Id.* at 308.

laws not only at the level of species and individual ecosystems but also at the level of atmospheric function, ocean health, and biodiversity – a truly global level."[18]

Weston and Bollier lament "humankind's squandering of nonrenewable resources, its careless disregard of precious life species, and its overall contamination and degradation of delicate ecosystems."[19] They remark in passing that we are experiencing "major environmental calamities as climate change and drastic species depletions."[20] At another point they suggest that "the most serious and urgent problem of our time may well be the myriad enclosures of nature."[21] And they contend that "[a] great change in our stewardship of the Earth and the life on it is required if vast human misery is to be avoided and our global home on this planet is not to be irretrievably mutilated."[22]

Such claims are so common that they may seem like they need no substantiation, but there are two reasons why that would be a mistake. First, the relative state of the environment today compared to the environmental era of the early 1970s depends on one's perspective. Wood offers her perspective: the salmon that flourished in the Oregon watershed where she grew up, and that had been unimaginably abundant even a century before that, are now disappearing so quickly that they are listed as endangered.[23] I, by contrast, grew up in Pittsburgh when the sky was obscured with dark clouds of pollution, and only a decade after that pollution covered my father's white-starched shirt with soot every day, routinely turned the sky dark in the middle of the afternoon, and killed twenty people in the nearby town of Donora one weekend in 1948.[24] That pollution is only a memory now, and the nighttime view of Pittsburgh has been cited as one of the most beautiful sights in the country.[25] More generally, many overall trends indicate that environmental quality is improving. The EPA, for example, reports that concentrations of the most common air pollutants declined between thirty three percent and ninety two percent between 1980 and 2013.[26]

The second reason why it would be helpful to better document the claims of environmental apocalypse is that such claims have been made and proven incorrect many times before. "Unless you've been frozen in carbonite or are hopelessly gullible," Judge Alex Kozinski has written, "it must have occurred to you at some point during the last three decades that environmental activists are exaggerating just a bit when they claim that, unless we dramatically change our way of life, we'll soon see the end of civilization as we

18. *Id.* at 8.

19. WESTON & BOLLIER, *supra* note 13, at xiii.

20. *Id.* at 74.

21. *Id.* at 78.

22. *Id.* at xviii (quoting Oystein Dahle, Board Chairman, Worldwatch Institute, *From Cowboy Economy to Spaceship Economy*, Remarks at Alliance for Global Sustainability Annual Meeting at Chalmers University of Technology, Goteborg, Sweden (Mar. 2004), *in* ALLIANCE FOR GLOBAL SUSTAINABILITY, PROCEEDINGS: RESEARCH PARTNERSHIP TOWARDS SUSTAINABILITY 15 (Richard St. Clair ed., 2004)).

23. *See id.* at xiii-xvi.

24. An intriguing number of environmental writers hail from the Pittsburgh area. *See, e.g.*, DEVRA DAVIS, WHEN SMOKE RAN LIKE WATER: TALES OF ENVIRONMENTAL DECEPTION AND THE BATTLE AGAINST POLLUTION (2003) (describing upbringing near Pittsburgh).

25. *See The 10 Most Beautiful Places in America*, USA TODAY (Oct. 15, 2009), http://www.usaweekend.com/article/99999999/LIVING01/91015001/The-10-Most-Beautiful-Places-America (ranking the nighttime view of Pittsburgh from Mount Washington as the number two sight).

26. *See Air Quality Trends*, EPA (Oct. 8, 2010), http://www.epa.gov/airtrends/aqtrends.html#comparison (table describing percent change in air quality).

know it."[27] Kozinski worries that "doomsday predictions proven wrong by the passage of time are quietly forgotten, denying the public the important lesson that one ought to be wary of predictive models because they often reflect, not reality, but the pre-conceptions of the model's creators."[28] Those are the wages of crying wolf.[29] Wood contends that "transgressions of Nature's laws cannot be easily, if ever, rectified."[30] Science and history teach otherwise. The entire discipline of restoration ecology presumes that natural ecosystems can be restored to a healthy condition. CERCLA—a statute that receives scant attention in both of these books—has cleaned up old hazardous waste sites and transformed them into places that are once again safe for people and wildlife.[31] Pittsburgh's air in the twenty-first century is far cleaner than it was in twentieth or late nineteenth century. After European colonists spent two and a half centuries felling 250 million acres of forests, they have regrown on a scale that has "not been seen in the Americas since the collapse of the Mayan civilization 1,200 years ago, when millions of acres of once-cultivated land in Central American were left to the jungle."[32] People live closer to more wild animals than at any time in American history.[33] The Endangered Species Act has helped to prevent species from going extinct, even though it has yet to help the populations fully recover.[34] For every tale of environmental catastrophe, there is a comparable tale of environmental recovery. We face serious, and even ominous, environmental challenges today, but environmental law, natural environmental changes, and other factors have helped us to meet some serious environmental challenges before.

THE CAUSE

Wood, Weston, and Bollier place the primary fault for our environmental problems on large corporations who despoil nature as they pursue unchecked profits.[35] There are, of course, many examples of such behavior. But the nearly exclusive focus on corporate behavior is a remnant of the 1970s. The environmental laws that both books criticize were

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27. Alex Kozinski, *Gore Wars*, 100 MICH. L REV. 1742, 1742 (2002) (reviewing BJORN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (2001)).

28 *Id.* at 1743.

29. *Cf.* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

30. WOOD, *supra* note 7, at 154.

31. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-57 (2012)).

32. *See* JIM STERBA, NATURE WARS: THE INCREDIBLE STORY OF HOW WILDLIFE COMEBACKS TURNED BACKYARDS INTO BATTLEGROUNDS (2013).

33. *Id*.

34. Since the enactment of the ESA in 1973, thirty-two species have been delisted because they have recovered, while eleven species have been delisted because they have gone extinct. *See Delisting Report*, U.S. FISH & WILDLIFE SERV., ENVIRONMENTAL CONSERVATION ONLINE SYSTEM, http://ecos.fws.gov/tess_public/pub/delistingReport.jsp (last visited Nov. 6, 2014). Over 2,000 species remain listed because they are neither recovered nor extinct. *See Summary of Listed Species Listed Populations and Recovery Plans*, U.S. FISH & WILDLIFE SERV., ENVIRONMENTAL CONSERVATION ONLINE SYSTEM, http://ecos.fws.gov/tess_public/pub/boxScore.jsp (last updated Nov. 6, 2014, 23:11:43 GMT) (reporting that 2,197 species are listed under the ESA). *See generally* John Copeland Nagle, *The Effectiveness of Biodiversity Law*, 24 J. LAND USE & ENVTL. L. 203 (2009) (evaluating the different measures of judging the success of the ESA).

35. *See, e.g.*, WOOD, *supra* note 7, at 165 ("Aided by the government, mega-corporations seize astonishing amounts of property belonging to the citizens in common."); WESTON & BOLLIER, *supra* note 13, at 135 (objecting that "business enterprises, commonly with the blessings if not the active partnership of government, are fiercely commercializing countless resources that were once beyond the reach of technology and markets").

designed to control the environmental harms caused by industrial and business activities, and while those laws have not been fully successful, they have achieved sufficient progress that the substantial share of environmental responsibility has now shifted from businesses to individuals. That is the conclusion that Michael Vandenbergh has reached in his scholarship.[36] The precise attribution between business and individuals depends on how one characterizes environmental harm resulting from industries that manufacture goods for individual consumers. U.S. law treats it as the responsibility of the business, but China has insisted in international climate change negotiations that the pollution emitted by its factories should be credited to the developed nations that import those products for their consumers.[37] Whatever the best answer to that dilemma, it is largely overlooked by *Nature's Trust* and *Green Governance*, as both books emphasize the environmental harms caused by corporate actors.

Wood allocates much more blame to the governmental agencies that allow such environmental degradation. She accuses environmental agencies of legalizing environmental destruction instead of protecting the environment.[38] She characterizes those agencies as "a deadly force against Nature and the public itself."[39] Environmental "agencies no longer represent public environmental values or defend public interests and needs," Wood writes, "and it is necessary to debunk the myth that they do."[40] She traces the failure to "[t]he 1970s statutes [that] siphoned power from one branch of government, the judiciary, and funneled it into another, the executive."[41] Now "[t]he legislature and courts function as feeble players, providing only minimal restraints on agency power."[42] Wood's critique of an out-of-control federal environmental bureaucracy that is unaccountable to Congress and the people would find many friends among conservatives who are similarly frustrated with such agencies, albeit for entirely different reasons.

Agencies become forces for environmental harm because of two legal devices: deference and permits. Wood acknowledges that there are good reasons for some deference to agency officials, but she asserts that such discretion is misplaced because of the extent of political involvement in actual agency decision-making. Indeed, "agency discretion forms the crux of all modern environmental law. Such discretion rests on a presumption that agencies remain expert bodies that unfailingly exercise their judgment objectively, for the good of the public, and in accordance with protective statutory goals. That presumption now collides with reality."[43]

Likewise, agencies are far too liberal in issuing permits for environmentally destructive activities. Such permits are the "belly fat" of environmental law.[44] Wood argues that

36. *See, e.g.*, Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515 (2004).
37. *See* John Copeland Nagle, *How Much Should China Pollute?*, 12 VT. J. ENVTL. L. 591 (2011).
38. *See* WOOD, *supra* note 7, at 9.
39. *Id.* at 52.
40. *Id.* at 50.
41. *Id.* at 53.
42. *Id.* at 104.
43. *Id.* at 7.
44. *Id.* at 65.

Congress intended permits to be a temporary transition tool until we reached the no-pollution future anticipated by the Clean Water Act.[45] Permits legitimize the wrongful privatization of public resources, Wood complains. She does not address the numerous permits that federal agencies have issued for the development of renewable energy projects on federal lands, which raise many of the same questions but in service of an otherwise green agenda.[46]

Weston and Bollier focus on a different cause of our environmental problems. They cast their blame on free-market economics. They call for liberation "from the continuing tyranny of State-centric models of legal process."[47] This is needed because "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."[48] They elaborate:

> The State will not of its own provide the necessary leadership to save the planet. Nationally, where most environmental problems first arise, regulatory systems are captive to powerful special interests much if not most of the time. Internationally, where authority and control rests heavily on the will of coequal sovereign states, governments jealously guard their claimed territorial prerogatives. Forward-looking segments of the environmental movement and their allies are coming to this stark realization. It has become abundantly clear that the State is too indentured to Market interests and too institutionally incompetent to deal with the magnitude of so many distributed ecological problems.[49]

Moreover, "[n]either unfettered markets nor the regulatory State has been effective in abating or preventing major ecological disasters and deterioration over the past several generations."[50] That is true as far as it goes, but it does not go far enough. Weston and Bollier briefly acknowledge the even greater failures of "the alternatives of communism, socialism, or authoritarian rule,"[51] but their argument would benefit from elaborating how great those failures have been, and what that says about their proposed solution.

Congress receives little attention in both books. Wood includes a short section on "a dysfunctional and disreputable legislature."[52] Weston and Bollier regret that "industry lobbies have corrupted if not captured the legislative process."[53] But for each of the authors, Congress is not the biggest problem, and Congress is not going to be the solution, either.

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45. *Id.* at 181. *See* 33 U.S.C. § 1251(a)(1) (stating that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985"). *Contra* WOOD, *supra* note 7. Some environmental historians dismiss that goal as rhetorical posturing that Congress had no intent of ever achieving. *Id.*

46. *See* John Copeland Nagle, *Green Harms of Green Projects*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 59, 81 (2013).

47. WESTON & BOLLIER, *supra* note 13, at xxii.

48. *Id.* at 3.

49. *Id.* at 20.

50. *Id.* at 7.

51. *Id.*

52. *Id.* at 105.

53. *Id.* at 4.

THE SOLUTION

That solution, agree *Nature's Trust* and *Green Governance*, comes not from the statutes that Congress passed in the 1970s, but rather from the English common law of property. But there is a dramatic difference between Wood's prescription and the remedy suggested by Weston and Bollier. While Wood wants courts to govern ecological decisions pursuant to the public trust doctrine, Weston and Bollier would empower local constituencies to make environmental decisions from the bottom up.

Wood champions "Nature's Trust" as a modernized version of the public trust doctrine. That "trust embodies: (1) the people's delegation of authority to their government to control and manage natural resources; and (2) the people's assertion, through a fiduciary obligation, of limits on that authority to ensure that it functions to benefit the public rather than special interests (who may have greater sway over the legislative process)."[54] The public trust doctrine that Wood imagines thus operates as a legal constraint on the ability of governmental agencies and the legislature to approve actions that would compromise the ability of ecological resources to serve current and future generations. Nature's Trust thus possesses a quasi-constitutional status that restricts contrary governmental action.[55] As Wood explains, "private use and enjoyment of trust property by individuals and corporations remains at all times subject to an antecedent encumbrance in favor of the public in order to maintain the ecological stability necessary for society to thrive."[56] The key to a successful public trust doctrine, Wood asserts, is to employ the same legal rules that govern the management of other trusts, such as the ones law students encounter in their dreaded Trusts & Estates courses. Wood outlines six substantive and five procedural duties that trustees must heed in managing Nature's Trust.[57]

Wood articulates an expansive understanding of the ecological resources protected by Nature's Trust. In general, the trust encompasses "the natural infrastructure essential to societal welfare and the public's right to use such ecological wealth."[58] Wood offers six factors for courts to consider in deciding which ecological assets are part of Nature's Trust.[59] More specifically, she cites "groundwater protection, biodiversity, climate stability, healthy forests, productive soils, and flood control" as among the concerns of the

54. WOOD, *supra* note 7, at 128.

55. *See id.* at 14 ("Long predating any statutory law, the reasoning of the public trust puts it on par with the highest liberties of citizens living in a free society."); *id.* at 129 ("When properly recognized as an attribute of sovereignty, the trust holds constitutional magnitude and achieves doctrinal supremacy over contrary laws.").

56. *Id.* at 127.

57. *See id.* at 167 (listing substantive duties to "(1) protect the *res*; (2) conserve the natural inheritance of future generations (the duty against waste); (3) maximize the societal value of natural resources; (4) restore the trust *res* where it has been damaged; (5) recover natural resource damages from third parties that have injured public trust assets; and (6) refrain from alienating (that is, privatizing) the trust except in limited circumstances"); *id.* at 189 (listing procedural duties to "(1) maintain uncompromised loyalty to the beneficiaries; (2) adequately supervise agents; (3) exercise good faith and reasonable skill in managing the assets; (4) use caution in managing the assets; and (5) furnish information to the beneficiaries regarding trust management and asset health").

58. *Id.* at 146.

59. *Id.* at 157. The six factors are "(1) public need; (2) scarcity; (3) customary and reasonable expectation; (4) unique and irreplaceable common heritage; (5) suitability for common use; and (6) ancillary function." *Id.*

trust.[60] And climate stability means "all remaining natural infrastructure" must be recognized as part of the trust *res* as well.[61] Wood insists that her proposal is "not Draconian,"[62] but it appears to require judicial approval of nearly any governmental action that affects the environment.

Nature's Trust is aspirational, for Wood concedes that it does not represent how public trust law has always actually worked. The public trust doctrine has captivated environmentalists ever since the late Joseph Sax wrote about it in 1969,[63] but it has never quite lived up to its billing. Courts have been hesitant to afford the doctrine the power that Sax and now Wood propose, while other scholars have been skeptical of the efficacy of the public trust project in environmental law.[64] Even Weston and Bollier, while otherwise supporting Wood's vision, conclude that "[p]ublic trust doctrines apply mainly to shorelines and waterfront properties, not to Nature more generally."[65] Wood offers only a back-of-the-hand response to those who question her vision of the public trust. "Such academic musings could continue endlessly," Wood writes, "but society can no longer afford them."[66] That is perhaps the most disappointing statement in a book full of academic musings, for it fails to engage the logical questions about the nature of the trust that Wood champions.

Likewise, Wood wishes there were a federal version of the public trust doctrine, but she is untroubled by a recent case in which the Supreme Court "casually referred to the trust as a 'state law' doctrine."[67] The courts that have considered this issue since then have treated the Court's opinion as anything but casual. The D.C. Circuit, for example, recently held that the Supreme Court's decision "categorically rejected any federal constitutional foundation for that [public trust] doctrine, without qualification or reservation."[68]

As it happens, the D.C. Circuit was deciding one of the cases that was inspired by Wood's theory. As she explains in her book, Wood supports atmospheric trust litigation designed to employ the public trust doctrine to respond to climate change.[69] Such actions have been filed in agencies and courts throughout the United States and the world. So far, they have met with mixed success.[70] Perhaps a better example of the future of Nature's

60. *Id.* at 146.

61. *Id.* at 156.

62. *Id.* at 172.

63. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1969).

64. *See, e.g.*, James Huffman, *A Fish Out of Water: The Public Trust in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989); James Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professor Sax, Wilkinson, Dunning, and Johnson*, 63 DEN. U.L. REV. 565, 574-76 (1986).

65. WESTON & BOLLIER, *supra* note 13, at 27.

66. WOOD, *supra* note 7, at 132.

67. *Id.* at 133 (citing PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1235 (2012)).

68. Alec L. ex rel. Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014). *See also* United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cnty., Cal., 683 F.3d 1030, 1038 (9th Cir. 2012) (relying on *PPL Montana* in holding that "the contours of [the public trust doctrine] are determined by the states, not by the United States Constitution").

69. *See* WOOD, *supra* note 7, at 220-29 (section describing atmospheric trust litigation); *See also Legal Action*, OUR CHILDREN'S TRUST, http://ourchildrenstrust.org/Legal (last visited Nov. 6, 2014) (website describing that litigation).

70. *Compare* WOOD, *supra* note 7, at 153 (describing cases in New Mexico and Texas that have survived motions to dismiss) *with id.* at 228 (noting that state agencies and trial courts had dismissed other cases).

Trust comes from Pennsylvania, where the state supreme court held that the state's constitutional right to a clean environment includes public trust responsibilities quite similar to those advocated by Wood.[71]

The most dramatic change that would be worked by Nature's Trust is the transfer of environmental authority from executive agencies to the courts. "In the face of looming environmental calamities to which the political branches have not responded," Wood writes, "the judiciary's ability to modernize the public trust could prove crucial to the welfare of future generations."[72] She would give judges "a monumentally new task—devising legal rules that address the collapse of ecology."[73] That, it is fair to say, would be an unprecedented judicial assignment. Yet Wood also insists that she seeks to restore—not reinvent—the place of the courts in environmental law. "History awaits courageous and extraordinary judges who will revive the judiciary's role in environmental law."[74] Wood neglects to identify the presumed heyday of judicial environmentalism, and her historical claim contradicts the received wisdom that the federal environmental statutes of the 1970s were necessary precisely because the judicial resolution of existing common law actions was woefully inadequate to stem the mounting environmental crisis. And, if we were able to locate the missing "courageous and extraordinary judges" whom Wood hypothesizes, it is altogether possible that they would be able to ensure that the existing environmental statutes arrest the environmental destruction that Wood and so many others fear. The two doctrines that earn Wood's greatest scorn—deference to administrative agencies and the lavish issuance of permits—could be resolved by the modification of the judicially-created *Chevron* rule and by increased judicial scrutiny of agency permit decisions.[75] Surely courageous and extraordinary judges could do that.

Weston and Bollier join Wood in her call for the expansion and strengthening of the public trust doctrine,[76] but their real attention lies elsewhere. The "green governance" that they champion relies on "the new/old paradigm of the commons and an enlarged understanding of human rights."[77] They describe the commons as "a governance system for using and protecting all the creations of nature and society that we inherit jointly and freely, and hold in trust for future generations," which "consists of non-State resources controlled and managed by a defined community of commoners, directly or by delegation of authority."[78] They add that "the State may act as a trustee for a commons or formally facilitate specific commons, much as the State chartering of corporations facilitates Market activity. A commons, however, generally operates independent of State control and need not be State sanctioned to be effective or functional."[79] The management regime established by the commons:

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71. *See* Robinson Twp., Washington Cnty. v. Pennsylvania, 83 A.3d 901, 957 (Pa. 2013).

72. WOOD, *supra* note 7, at 145.

73. *Id.* at 148.

74. *Id.* at 255.

75. For a very recent example of the latter, *see* Arizona v. City of Tucson, 761 F.3d 1005, 1008 (9th Cir. 2014) (faulting a district court for affording a state's cleanup plan too much deference in a CERCLA case).

76. *See* WESTON & BOLLIER, *supra* note 13, at 241.

77. *Id.* at xix.

78. Put differently, "[a] commons is primarily about the self-determined norms, practices, and traditions that commoners themselves devise for nurturing and protecting their shared resources. In this acute sense, it is to be distinguished from a *common-pool resource* (CPR)." *Id.* at 125.

79. *Id.* at 124.

> [E]schews individual property rights and State control. It relies instead on common property arrangements that tend to be self-organized and enforced in complex and sometimes idiosyncratic ways (which distinguish it from communism, a top-down, State-directed mode of governance whose historical record has been unimpressive). A commons is generally governed by what we call Vernacular Law, the "unofficial" norms, institutions, and procedures that a peer community devises to manage its resources on its own, and typically democratically. State law and action may set the parameters within which Vernacular Law operates, but the State does not directly control how a given commons is organized and managed.[80]

Most environmental scholars think of the commons, if at all, as tragic.[81] That is what Garrett Hardin taught us. But Weston and Bollier insist that Hardin was not describing a commons at all. Rather, Hardin posited "an open-access regime or free-for-all."[82] By contrast, "[a] commons has boundaries, rules, social norms, and sanctions against free-riders. A commons requires that there be a community willing to act as a steward of a resource."[83] Hardin omitted those features, yet his "misrepresentation of actual commons stuck in the public mind and became an article of faith thanks to economists and conservative pundits who saw the story as a useful way to affirm their anthropocentric ethics and economic beliefs. So, for the past two generations the Commons has been widely regarded as a failed paradigm."[84] Moreover, Weston and Bollier also object that "Hardin's tragedy parable sees individual selfishness as limitless and cooperation as illogical and unsustainable. In the episteme of modern law, the idea that there might be an integrated, organic community that preexists the individual and might actually influence individual predilections and desires makes little sense."[85]

Weston and Bollier propose to use "vernacular law" to govern the commons. They characterize vernacular law as arising from "the informal, unofficial zones of society" and possessing "a source of moral legitimacy and power in its own right."[86] Vernacular law is a form of a custom that "vest[s] property rights in groups that are indefinite and informal yet nevertheless capable of self-management."[87] They expect vernacular law to "safeguard[] common-pool resources or ecosystems while providing for an equitable distribution of the fruits borne of them."[88]

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80. *Id.* at 125.

81. *See* Brady v. Fed. Energy Regulatory Comm'n, 416 F.3d 1, 11 (D.C. Cir. 2005) (Williams, J., concurring) ("Two generations have now grown up with Garrett Hardin's famous article, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), exploring the risk of over-exploitation when many people have unlimited access to a resource."). Carol Rose is the notable exception. *See* Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

82. WESTON & BOLLIER, *supra* note 13, at 147.

83. *Id.*

84. *Id.*

85. *Id.* at 176.

86. *Id.* at 104.

87. *Id.* at 110.

88. *Id.* at 111.

The emphasis on cultural norms includes a defense of subsidiarity. Weston and Bollier understand subsidiarity to mean "that governance should occur at the lowest, most decentralized level possible in order to be locally adaptive; one-size-fits-all governance structures tend to be less effective, less flexible, and more coercive."[89] They insist that "[v]ital collaboration and innovation can emerge only if the governed at the most distributed scales are accorded basic rights of autonomy, human dignity, and intelligent agency. . . . Governance is not simply a matter of political leaders, lawyers, and experts imposing their supposedly superior knowledge and will."[90] This emphasis on subsidiarity is already incorporated into various aspects of environmental law, especially in the European Union.[91]

But the local members of the commons may not appreciate the environmental goals that Weston and Bollier envision. Imagine a rancher—let's call him Cliven Bundy—who has grazed his livestock on public lands for several decades. Bundy and his friends have a distinct view of their vernacular law that governs the commons: the land is there for them to use as they please. The possibility, perhaps remote, that their livestock could harm an endangered critter such as the desert tortoise is of little concern to them. So, when the federal Bureau of Land Management (BLM) seeks to impose its state-mandated, formal law regulating how Bundy uses the land, the local vernacular law is violated. And, as Weston and Bollier remind us, "[r]evolutions often occur precisely because State Law refuses to make necessary accommodations with Vernacular Law."[92] That is not the scenario that Weston and Bollier have in mind, but local desires to use the environment to serve economic goals often collide with federal environmental protections. As Bruce Huber has recently explained, users of public lands often insist that they have a right, rooted in their experience, to continue their uses notwithstanding the commands of the formal law.[93] Vernacular law is not always environmentally benign.

Besides the commons, human rights form the second central theme for environmental progress for Weston and Bollier. They favor a rights-based approach because it "is not merely a regulatory prohibition that can be changed or discarded at will. A rights-based approach to ecological governance can enhance the status of the environmental interests of human beings and other living things when balanced against competing objectives, granting such interests formal legal and political legitimacy."[94] But there are difficulties with relying on a rights-based approach to adjudicate disputes about how to use and manage the environment. As J.B. Ruhl has explained:

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89. *Id.* at 153.

90. *Id.* at 116. They add that "[a] key point of subsidiarity in commons-based governance is to unleash latent cooperative energies by assuring that the resulting benefits are internally shared in equitable ways – not simply captured by privileged outsiders or moneyed interests." *Id.* at 221.

91. *See* Pamela van der Goot, *Subsidiarity and European Environmental Law*, ASSER INSTITUTE: CENTRE FOR INTERNATIONAL & EUROPEAN LAW, http://www.asser.nl/upload/eel-webroot/www/documents/Dossiers/SubsidiarityDossier.pdf (last visited Nov. 6, 2014); Ryan Stoa, *Subsidiarity in Principle: Decentralization of Water Resources Management*, 10 UTRECHT L. REV. 31, 31-45 (2014).

92. WESTON & BOLLIER, *supra* note 13, at 109.

93. *See* Bruce R. Huber, *The Durability of Private Claims to Property*, 102 GEO. L.J. 991, 991-1043 (2014). For another example, *see* JOHN COPELAND NAGLE, LAW'S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE 140-43 (2010) (reviewing the claims of North Dakota ranchers to land that is now part of the national grasslands).

94. WESTON & BOLLIER, *supra* note 13, at 88-89.

> [E]nvironmental policy, like economic policy, education policy, welfare policy, and most of social policy in general, is defined by hard choices and complicated, multidimensional problems. The reason the Environmental Protection Agency has over ten thousand pages of rules is because that's how many it takes to tackle the problem. To think that environmental policy can be summed up in two sentences thus seems naïve, if not ludicrous.[95]

Weston and Bollier admit that the law has not been as accepting of environmental rights as they would like, especially in the U.S. They conclude that "there does exist today a human right to a clean and healthy environment as part of our legal as well as moral inheritance, but . . . however robust in particular applications, it is limited in its juridical recognition and jurisdictional reach."[96] With a more depressing spin, they acknowledge:

> [A] simple but profound truth: 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 never will be a human right to environment widely recognized and honored across the globe in any formal/official sense, least of all an autonomous one.[97]

They are pleased with constitutional provisions that guarantee environmental rights, citing examples ranging from Pennsylvania to Ecuador to the proposed Universal Declaration of the Rights of Mother Earth.[98] They wrote before the Pennsylvania Supreme Court's expansive interpretation of the state's constitutional environmental rights provision, which they would presumably wholeheartedly applaud, for they also champion "localism and municipal law as a vehicle for protecting commons."[99]

Weston and Bollier see something "potentially transformative" in "the alter-globalization movement instigated by the Seattle protests, the Occupy movement, the Arab Spring, the Spanish Indignados, and the many other popular protests."[100] Again, though, they ignore the largest protest and the one that is most focused on environmental issues. The Tea Party has a clear vision for environmental law, and it is not the one held by Weston and Bollier. Senator Rand Paul, for example, believes that there is a constitutional right—rooted in the Ninth Amendment—to use one's property as one likes.[101] He would vindicate

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95. J.B. Ruhl, *Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 281 (1999). *See also* John Copeland Nagle, *A Right to Clean Water*, *in* CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION 339, 339-43 (John Witte Jr. & Frank S. Alexander eds., 2011) (questioning the efficacy of a right to clean water as a means of ensuring access to clean water supplies).

96. WESTON & BOLLIER, *supra* note 13, at 29.

97. *Id.* at 48-49.

98. *Id.* at 49, 55, 61.

99. *Id.* at 233.

100. *Id.* at 22.

101. *See* Rand Paul, *Defense of Environment and Property Act of 2012*, RAND PAUL: UNITED STATES

that right in part by the enactment of a private property rights act, which would restrict federal authority to regulate wetlands and mandate compensation to individuals who cannot use their property because of federal wetlands regulations.[102] Those are environmental rights, too, but they are not the rights that Weston and Bollier promote.

CONCLUSION

There is much in *Nature's Trust* and in *Green Governance* to inform the evolving project of environmental law. That includes an intriguing role for employing public trust doctrine, the vernacular law of the commons, and environmental rights as part of the corpus of environmental law. But neither approach is likely to be any more successful than the body of environmental statutes that we have so painstakingly nurtured for nearly half a century. To focus on one legal doctrine is to engage in a quixotic search for the ideal form of environmental protection.

Weston and Bollier come closer to the mark when they write that "[t]he formidable task ahead . . . is somehow to develop ways of seeing, thinking, and acting that enable us to recalibrate humankind's relationship to Nature."[103] We recalibrated that relationship when we began creating national parks, when states enacted "smoke laws" in the early twentieth century, and when we enacted the federal environmental statutes that still govern us today. That recalibration is an ongoing project that must now account for both the effects of a changing climate and the need to develop areas that remain in desperate poverty. There are a lot of ways to do that, not just the two proposed in these books. We just need to do it.

SENATOR, http://www.paul.senate.gov/?p=defense_of_environment_and_property_act_of_2012 (last visited Nov. 6, 2014) ("[T]he constitutional right of landowners to do what they please with their own property.").

102. *See* Defense of Environment and Property Act of 2013, S. 890, 113th Cong. (2013).

103. WESTON & BOLLIER, *supra* note 13, at 79.