The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law

Daniel B. Rodriguez

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INTRODUCTION

What is described in this symposium as "the ecosystem approach" is actually an amalgam of various approaches, each involving different political and legal strategies and each implicating different layers of government. Elsewhere in this volume, contributors highlight the role of the national, \(^1\) state, \(^2\) and international \(^3\) governments in pursuing...
strategies for sensible ecosystem management. My modest role is, following Daniel Tarlock in a recent, informative article on the same subject, to add some words about the role of American local governments in pursuing ecosystem strategies. This role is somewhat counter-intuitive when viewed alongside the other inter-jurisdictional strategies described by the other essayists in this special volume. Indeed, it is said to be the failure of local decisionmakers and private actors to deal with ecosystem damage and the complex dimensions of biodiversity protection that has given rise to the growing efforts to press higher levels of government toward more aggressive, comprehensive action. What, after all, do statutes such as the Endangered Species Act and the Coastal Zone Management Act represent if not a reaction to the inadequacy of local, decentralized responsibility? The story, I hope it is by now needless to say, is considerably more complex than a battle between the competing ideologies of “centralization” and “decentralization.” The future of environmental regulation is likely to be squarely in the hands of those who recognize that modern environmentalism is messy, uncertain, and basically reliant on choices made by and among interdependent institutions and levels of government. For better or worse—and I think mostly for the better—one critical level of government is local.

The role of local governments will remain essential so long as regional, state, and federal authorities must rely upon implementation mechanisms to carry out policies expressed aspirationally through statutes, regulations, and judicial decisions. To be sure, all levels of government maintain mechanisms to implement policies; and, as the modern administrative state has grown, the federal and state governments have generated revenues and personnel to deploy in the pursuit of implementing large-scale, inter-jurisdictional policy initiatives. However, many of the key regulatory choices in the environmental area are made on the ground level. Notwithstanding the diffuse issues raised by biodiversity protection, strategies for ecosystem management are no exception. Moreover, local government law and policy, I would suggest, represent a largely untapped opportunity to pursue sound regulatory strategies alongside state and federal efforts. To view local governments as merely obstacles is to miss out on opportu-


nities and options that could be, with careful thinking, sensible adjunctors to a comprehensive ecosystem management approach.

Before turning, in Part II of this essay, to some tentative suggestions about local government initiatives in ecosystem management and the role of local government law in structuring these initiatives, I want to say something in the next Part about the special institutional dilemmas faced by those pursuing ecosystem management strategies. Any efforts at regulatory innovation must continually wrestle with these dilemmas, the most essential of which is the competing traditions of centralized environmental policy to respond to externalities and tragedies of the common on the one hand and, on the other, the deeply embedded tradition of local control over land-use decisionmaking.

I

ECOSYSTEMS AND INSTITUTIONS

A. Ecosystem Management and the Traditions of Land Use Regulation

It is a commonplace to say that all layers of government—federal, state, and local—ought to pitch in to tackle interconnected environmental problems. The idea is appealingly simple: each level of government has a stake in pursuing ecosystem management. Moreover, the trans-boundary quality of ecosystems "requires transcending spatial and temporal boundaries and 'redrawing the map' according to ecological phenomena." Accordingly, ecosystem management by all levels of government is necessary to address the multilayered character of the environmental challenges. The necessity of inter-govern-


7. As Professor Breckenridge explains: Ecosystem management does not involve a rejection of all boundary-making. Rather, it demands redrawing spatial boundaries and time frames to suit the particular purposes of the ecological analysis. This task is complicated by the recognition that all ecosystems are globally interrelated while including microscopically small phenomena. Distinct but interconnected systems are seen as complexly nested in a hierarchy of scales. Ecosystem management requires selecting a relevant scale of analysis, without overlooking the interconnections with phenomena at other scales. Typically, a landscape or region-wide approach will be necessary to maintain important large-scale functions. But some goals, such as saving an endangered species peculiar to one location, also require detailed management of a small area, while other aims, such as forestalling changes in climate or weather patterns, might require a consideration of continental or global phenomena. Id. at 374-75. These interdependency principles are incorporated into the literature on biodiversity protection through discussion of "adaptive management." See, e.g., KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRON-
mental collaboration is a settled principle in the emerging literature on biodiversity protection. Indeed, to an informed outsider, an arresting feature of the literature on ecosystem management is the highlighting of inter-governmental cooperation to a degree not characteristic of mainstream, pollution control-centered environmental writing of the 1970s and 80s.

At the same time, however, it is a commonplace to regard the Federal Government as the appropriate unit of government to coordinate processes of ecosystem management. The imperative of federal leadership is a product both of the theory underlying ecosystem protection and also the realpolitik of the federal/state/local situation. The theory, which stems from the paradigmatic case of pollution control, is that centralized initiatives are necessary to overcome collective action problems, races to the bottom, and other, related self-interested behavior of smaller units of government faced with pressures to do nothing or less than nothing. The preference for more centralized, national control does not originate, of course, with modern environmentalism. James Madison described the virtues associated with an extended republic two centuries ago. Presumably, the danger of factionalism—the “passions and interests” of the people—is as serious with respect to the dilemmas of ecosystem protection and land use as with any other, zero-sum dilemma that calls for governmental intervention. The theoretical label frequently attached to this imperative of centralized control of land use decisions is the “tragedy of the com-

8. See sources cited supra in notes 4 and 6.
9. The case for centralized management of pollution regulation rests on the insight that local institutions lack the incentives to construct regulatory mechanisms, and, especially, “command-and-control” type mechanisms, to curtail the externalities generated by polluting activities. See, e.g., Peter Menell & Richard Stewart, Environmental Law & Policy 244-48 (1994); Richard Stewart, Pyramids of Sacrifice? Federalism Problems in State Implementation of National Environmental Policies, 86 Yale L.J. 1196 (1977). One version of this argument posits a regulatory race to the bottom among states, with states and localities relaxing their respective environmental regulations in order to compete against one another in the interstate and inter-local markets for business. See, e.g., Peter P. Swire, The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law, 14 Yale J. on Reg./Yale L. & Pol'y Rev. 67 (1996) (symposium issue); Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210 (1992). But the conclusion of the argument is even more general than that suggested by the race to the bottom insight: only central institutions such as the federal government can structure a system of regulation which adequately discourages “unclean” activities, channels individual and business activities into “cleaner” uses, and structures the incentives in a way that facilitates responsibility among private actors in the market.

mons;” that is, basically the idea that individual landowners have incentives to exploit natural resources to fulfill their own private interests at the expense of the long-term interests of the commonwealth.\footnote{See Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968). See also Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action 1-28 (1990).}

Beyond the theory lies the reality of federal/state/local coordination. As hopeful as we might be about the prospects of “bottom-up” local initiatives, the modern history of environmental regulation suggests that any real progress has taken place only where federal and state decisionmakers have pursued strategies either in tandem with local efforts or else as regulatory ushers of some sort. This does not, to be sure, indicate that local initiatives are dependent on federal leadership; but neither does it suggest that local environmental protection and federal innovation is a coincidence. The shared view among the founders of the emerging ecosystem management movement is that federal energy is essential to translate the principles of biodiversity protection into nationwide public policy.

There is more to the argument for the centrality of federal intervention than practical politics, however. There is, in the recent environmental literature, an emerging focus on an “ecological” approach to considering the issues raised by decisions concerning land regulation and its use. This focus turns our attention to a different way of thinking about the purposes of land management and regulation. Correspondingly, it invites more careful reflection on the appropriate institutions and levels of government for facilitating ecological aims. Ecological approaches emphasize that the purpose of land regulation is not merely to restrain noxious uses—nuisance law, naturally, is the paradigm—but, rather, to create a sort of public trust whereby the short and long-term use of the land will be designed deliberately to maintain and repair ecosystems. The relevant “injury” that calls for redress by government institutions is the potential and real injury to the ecosystem and to the order of nature. Whereas pollution control is designed to limit certain behavior to reduce to the extent feasible the risks of tangible physical and economic harm, the ecological approach to managing the ecosystem raises issues of how best to regulate the use of private property to ensure biodiversity. The implications of this difference in mission are captured well by Joseph Sax:

Conventional pollution laws do not challenge the traditional property system. They do not demand that adjacent land be treated as part of a river’s riparian zone nor that it be left to perform natural functions supportive of the river as a marine ecosystem. On the contrary, such laws assume that a river and its adjacent tracts of land are separate
entities and that the essential purpose of property law is to maintain their separateness. Thus, they assume development of the land and internalization of the development's effects; they are effectively "no dumping" laws, under which the land and the river are discrete entities.12

The ecological approach challenges traditional conceptions of private property and the role of government. Less certain is whether it implies a particular reunderstanding of the relative roles of national, state, and local governments in the regulation and management of private lands. It is important to see that it need not, at least as a matter of theory, imply a particular division of power. Indeed, if decisionmakers follow a more ecological approach to the regulation of private lands to address more creatively biodiversity issues, and if their aim is for the most part to take existing legal structures and institutions as they find them, then the most conspicuous locus of land-use regulation is the local government. On the other hand, there is a strong commitment in the environmental community to more centralized strategies of control, especially where externalities and interjurisdictional issues are raised. The imperatives of ecosystem management raise precisely these sorts of issues. So we confront squarely questions concerning the proper role of federal, state, and local governments in the regulation of private lands. My object is to not to replay this complicated and enduring debate. Rather, I want to highlight how some of the arguments and assertions made in connection with this debate over land-use/regulation and inter-governmental roles may shape our perspectives on ecosystem management.

Traditionally, the line between the areas in which the fed's role was considered crucial and those in which local decisionmakers reigned supreme basically traced the legal line between federally-owned, hence "public," lands and private lands. Although private never meant unregulated, the idea was that private land management would be essentially the responsibility of local authorities. This was sensible if the purposes of private land regulation were the assignment of particular land uses—the emergence of zoning as a prerogative and, later, a responsibility of local governments is critical here—and the prohibition of noxious activities that could, after all, be accomplished by local authorities such as courts, commissions, and bureaucrats. By contrast, federal restrictions on land-use have historically been regarded as mostly exceptional and interstitial.

The traditional view of local prerogatives in the regulation of private lands stems from several sources. I want to mention two. First, local governments are comparatively better situated to make particu-

lar assessments regarding the use and misuse of land in local environments. Where the principal issue at stake is whether the owner's use of land invaded on the interests and rights of his neighbors, the assignment of responsibility to local decisionmakers makes great sense. After all, the key judgments are usually empirical, resting on particular, local knowledge. And where the property issues concern the tradeoff between unencumbered use and the interests of the community in maintaining the land for the benefit of public, there is, too, a strong case for local, particularized decisionmaking. Part of the reason for this preference is the sense that local governments have more expertise in making these tradeoffs and in implementing fair, efficient land-use policy. Also critical is the belief that local decisionmakers are, in all likelihood, more accountable to private decisionmakers. This preference for local control goes hand in hand with the traditional distrust of central, and especially national, authorities. We ought to recall that, prior to the environmental movement of the 1960s, there was precious little in the way of federal intervention in state and local land-use decisions. Moreover, even where federal interventions were accepted, there remained tensions between the idea of federal land-use management of private land and the traditions of local land-use policymaking. As Eric Freyfogle writes, "[t]he new green age statutes that took over the functions of nuisance law and sic utere were largely developed at the federal level, not in state legislative chambers, which made them seem all the more distant from underlying ownership norms."13

Beyond the substantial normative reasons for segmenting the national and local roles in land management into distinct departments, there persists the practical political explanations of why we continue to see local governments maintaining their historic prerogatives in local land management decisions. To begin with, the continuing role of local governments in land-use regulation ensures that there are durable interest groups in the form of both property owners and local decisionmakers who have a stake in preserving existing patterns of land-use regulation and management. Even where property owners find themselves on the short end of the regulatory stick, their investment in relationships and patterns of influence in the processes of land management makes preservation of the status quo regulatory arrangements in their long-term interest. Property owners' interests in maintaining the infrastructure of modern zoning law furnishes an apt example of this. Moreover, property owners frequently depend upon local government entities, and especially cities, to act as interest

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groups to represent their collective interests in the state legislature. These strategies appear collusive, to be sure; but this collusion is necessary to protect the interests of the city "qua" city, since, after all, the power to zone and the power to tax the use and development of private property represent the essential elements of municipal power and, indeed, the basic conditions for the survival of the local government as a unit. In significant respects, the municipality/property owner relationship is one of mutual interdependence. To the extent that private property owners' and public officials' interests converge, there is a combination formed that has very strong incentives to resist relinquishing control to other, more central authorities.\textsuperscript{14}

The tensions between a collaborative, inter-institutional approach to ecosystem management and the tradition of local control over land-use decisions is not one that can be dissolved by invoking the mantra "biodiversity protection." Localist traditions are deeply embedded in both public and private law. Therefore, attempts to tackle ecosystem issues entail an accommodation of interests among different layers of government. Such accommodations require close attention to the legal and political structures and incentives that advocates of new ecosystem approaches will necessarily confront when faced with the web of political institutions that are responsible for designing and implementing regulatory policy.

\section*{B. Structures and Incentives in Institutional Innovation}

At bottom, issues concerning the federal and state governments' role in traditionally local land-use decisions cannot be resolved conceptually, but only pragmatically. The key question is not "whither federal, state, or local" but, rather, what is the proper allocation of institutional responsibilities and roles to ensure that all levels of government are contributing to sound ecosystem management strategies. In thinking about what sort of allocation is proper, it is useful to think practically about the comparative institutional competencies and in-competencies of federal, state, and local governments. The case for centralized management through federal leadership, as noted earlier, largely tracks the standard view of environmental regulation—that is, that federal control is necessary to shield state and local decisionmakers from a skewed set of incentives that would otherwise lead to races to the bottom, tragedies of the common, deadweight losses created by legislative rent-seeking, or other regulatory pathologies. However, centralized management can come in different shapes and

\textsuperscript{14} This interest convergence is, in a sense, a variation on the theme of industry "capture," described by regulatory scholars. See The Politics of Regulation 357-94 (James Q. Wilson ed., 1980).
sizes. It is worth being much more specific, therefore, about what we have in mind when we call upon the Federal Government to lead the charge toward comprehensive ecosystem management.¹⁵

The Federal Government's role, in a cooperative regulatory environment,¹⁶ should be two-fold: first, the Federal Government is responsible for fashioning legal structures to ensure that local land-use planning will not impair efforts to manage fragile ecosystems; second, and relatedly, the feds should formulate appropriate incentives for state and local governments to engage in their own, and occasionally unilateral, efforts at ecosystem management. This role is not, of course, the only one for the Federal Government, but this role supplements more direct, command-and-control strategies.

The legal structures required to ensure a system of cooperative ecosystem management are very tricky to construct. Consider the issues raised by regulatory preemption.¹⁷ What is needed is an approach to dealing with questions of regulatory preemption that simultaneously encourages local governments to create their own, innovative strategies for managing ecosystems without federal disruption, while it also ensures that localities will not escape their responsibilities, under extant federal law, to act prudently and ecologically. To be sure, the ultimate decision of how to structure preemption law to strike this balance will itself be a decision of the Federal Government; but it is worth thinking more creatively about how to carry out this object.

Creating appropriate incentives raises difficult questions. The Federal Government can pursue influence over state and local decisionmakers with a range of weapons along the spectrum from suggestion to coercion; and state decisionmakers have, with respect to intrastate localities, even more legal mechanisms at their disposal.

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¹⁵. It is important to point out that we are here talking about the regulation of nonfederal lands. The role of the federal government in managing federal lands raises a different set of political and legal issues. For a good examination of recent federal policy regarding the role of local decisionmakers in federal land policy, see Sarah E. Margolies, Local Government and Community Participation in Federal Land Management: County Land Use Plans and Community-Initiated Approaches (May 19, 1997) (draft unpublished manuscript on file with author).


The choice for less coercive techniques is frequently sensible. The device of "unfunded mandates," for example, enables the higher level of government to pass onto the level below the costs of regulatory implementation;\textsuperscript{18} moreover, seeking local input and cooperation can, in the eyes of the higher level of government, contribute to the overall efficiency of the regulatory program, at least under a certain set of conditions and assumptions. So the carrots and sticks available to federal and state decisionmakers ought to be used to allocate resources and techniques for the purpose of facilitating sound, comprehensive ecosystem management.

The issues raised in the preceding paragraphs touch upon a large, complex debate, a debate that is, for the most part, beyond the scope of my essay. But I want to note one important aspect of regulatory incentives of which any effective strategy of ecosystem management ought to take account. To an extent underappreciated in modern regulatory debates, state and local interests are frequently at cross purposes; hence, it seems peculiar, but much more sensible upon further reflection, that local governments must rely on federal support to resist the strong incentives of the state governments to curtail local initiatives. There are precious few incentives in the contemporary regulatory environment for state decisionmakers to act with the best interests of local governments at heart. To be sure, the states' control over local experimentation may be essential to protect against their own, intrastate tragedy of the commons; thus, it may be in the national interest to entrust to the states the responsibility to superintend the processes of local regulatory decisionmaking. However, there are other instances in which local efforts, including inter-local collaboration, are possible only because the states cannot legally or politically intercede in the face of federal support for local initiatives.

Discussions of regulatory strategy are likely to lead into a complex debate over comparative institutional competence. The tendency to fall back upon models of centralized, federal regulation is understandable; it very much grows out of the pollution-control tradition of modern environmentalism and also out of the consideration of regulatory strategies concerning public lands. This tendency can be corrected by a more thorough, practical consideration of the roles and responsibilities of other levels of government. This may generate renewed attention to devolution, inter-institutional collaboration or, perhaps, a renewed commitment to nationalism. In any event, attentiveness to inter-institutional issues will result in a more informed consideration of regulatory strategy.

Supposing local governments have the incentives, either through federal and state encouragement or from the bottom up, to tackle critical issues of biodiversity protection, what tools are likely to be at their disposal? There is a wide web of real and potential legal authorities in contemporary American local government law with which to address some of the problems of resource use and ecosystem management. Some of these authorities require institutional and doctrinal innovations; that is, they require a change in local government law to better serve the aims of ecosystem management. At the same time, other sources of local government authority are currently serviceable. While other demands and exigencies may make these innovations undesirable, there are good reasons to consider the potential of local institutions and local government law to grapple with the needs of modern ecosystems.

A. Municipal Organization Law

Decisions that address biodiversity issues within ecosystems necessarily take the existing national and state boundaries as given. The fact of the fifty states and the national government of the United States imposes a very important condition on the pursuit of public policy. And given the intrinsically dispersed, trans-boundary nature of the ecosystem, these conditions are substantial, intractable, and frequently frustrating. By contrast, local government boundaries are fluid. Cities and special purpose governments change and reorganize. The reasons for change are complicated, but the very fact that local, intra-state boundaries are subject to reorganization represents a significant distinguishing feature of these governments when compared with the Federal Government and the fifty state governments. One consequence of this fluidity is that advocates concerned with ecosystem management must deal with not only a plethora of local decisionmaking units, but must also keep squarely in mind that the boundaries may shift underneath them. A certain regional solution,
for instance, may crumble in the face of governmental reorganization. While such reorganization is subject to centralized supervision by the state government and also by statutory and administrative guidelines, the fluidity of municipal boundary formation represents another bit of uncertainty in the relentless political struggle for policy outcomes and implementation. This uncertainty represents perhaps the single greatest set of transaction costs facing advocates of the ecosystem approach.

However, what I want to focus on in connection with municipal boundary law is not the uncertainty wrought by boundary fluidity. Instead I want to consider how the structure of boundary law might be mobilized to the advantage of ecosystem management. This fluidity of boundaries can form an obstacle to sensible ecosystem management strategies; but, in the right hands, it can also provide opportunities. Sophisticated use of existing boundary law, along with appropriate changes in the structure of current law, may augment ecosystem strategies. Uncertainty still yields significant costs, but there are advantages to be gained from a closer attention to, and use of, boundary law.

By boundary law, I mean the set of state legal rules that regulate whether and how local governments can incorporate, annex, and secede. These rules construct "the geography of community," within which fundamental issues of representation, deliberation, and policy choices are made. Ideally, municipal boundary law reflects two broad principles: self-determination and economic efficiency. The desire for self-determination drives citizens to form municipal boundaries in order to construct communities of mutual interest. These communities may be nonetheless heterogenous. Communities of mutual interest need not bear a resemblance to the communitarian vision of a local government described by contemporary commentators. Rather, the basic idea is instrumental: citizens will reform local boundaries where such reformulation improves their lot and where the new boundaries represent a more tailored, effective local government unit. Such reformulations may take dramatic forms, such as

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26. See the discussion in Burns, American Local Governments, supra note 21, at 75-80, 109-17; see also Gary J. Miller, Cities by Contract: The Politics of Municipal Incorporation 35-40 (1981).
decisions to attempt to secede from existing cities. More usually, these reformulations occur through incorporation of previously unassociated areas and the annexation of unincorporated areas into existing cities. When working properly, boundary law ought to provide an efficient mechanism for responding to citizen preferences and for ensuring that the benefits of reconstructed boundaries outweigh the costs.

The imperatives of ecosystem management introduce factors into this equation that are difficult to incorporate into the structure of boundary law. One difficulty is this: the essential vision of the full-service, self-sufficient city resists innovations that would effectively deal with ecosystem/biodiversity problems at a local level. Certain boundaries that are appropriate for communitarian and fiscal concerns may not be appropriate from the standpoint of environmental circumstances. This difficulty, however, is not insurmountable. Part of the object of legal strategists ought to be to create ways in which cities must internalize the costs of not dealing with environmental issues.

Perhaps the most conspicuous way in which municipal boundary law potentially can accommodate ecosystem approaches is by encouraging the formation of larger local government units. The mantra here is regional government; yet, the issue at stake is more basic than any particular appeal to regionalization. The ecosystem crosses artificial, legal boundaries. Thus, addressing these problems requires, if not the dissolution of these boundaries, then maybe the expansion of them to take account of more diffuse, interlocal imperatives.

There are several ecosystem management advantages associated with expanding the scope of the local government. To begin with the most obvious: larger governmental units are likely to cover a larger geographical area and, therefore, have a greater ability to address issues involving an ecosystem that would otherwise cross local boundaries. Second, and relatedly, larger units of government can deal with a


28. This is an admittedly optimistic view. Many have noted the ways in which municipal boundaries are involuntary and exclusionary. See, e.g., Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 HARV. L. REV. 1841 (1994).

29. This vision is, however, as Nancy Burns points out, largely chimerical. Burns, AMERICAN LOCAL GOVERNMENTS, supra note 21, at 10, Table 1.2 (describing number of municipalities providing full range of municipal services).

30. See, e.g., DAVID RUSK, CITIES WITHOUT SUBURBS 85-126 (2d ed. 1995); Briffault, Local Government, supra note 21, at 1144-71 (discussing need for regional solutions).
wider, more diffuse set of political considerations and demands. Part of these advantages stems from the capacity of larger scale, heterogeneous political institutions to engage in logrolling across a range of political issues. While much of the discussion of this cross-issue vote trading occurs among public choice scholars, James Madison described the basic idea rather well in the Tenth and Fifty-first federalist papers. Third, bigger may be better because of the greater capacity to incorporate scientific and technical expertise into sound environmental decisionmaking. Finally, larger governmental units can more effectively resist encroachments by the state government. The state government's ability to divide and conquer by rewarding certain local government units at the expense of others can be checked, at least somewhat, by the incorporation into larger, and thereby more self-sufficient and resilient units. Such efforts to create institutional checks against state encroachments are especially desirable to the extent that there are reasons to be wary of centralization at the state level.

Regionalization is no panacea, however. To begin with, there are notoriously severe political obstacles to realizing regionalization, where such strategies entail giving up local self-determination. Where states do not decree it, cities have historically proved unwilling to surrender easily control over their own issues to larger, metropolitical governments. Moreover, there are frequently no great political constituencies whose interest is to press the regional/metropolitan case. Even counties, whose salience is established in state constitutions and who are well-entrenched institutions in intrastate governance, are frequently frustrated by local factions and interests. As a guarantor of regionalization, counties have not fulfilled their promise; and as centralizing checks on local initiatives and local self-interest, counties have had little success.

In addition, there are significant costs associated with regionalization. Large, metropolitan governments cannot easily accommodate the services and goods demands of heterogenous communities. Whereas the state is governed by an amalgam of governmental institutions and individuals, each regulated by processes and upon terms and conditions delineated in the state constitution, large metropolitan gov-

34. See, e.g., CAL. CONST., art. XI, § 1(a) ("The State is divided into counties which are legal subdivisions of the State.").
35. See the discussion of the Tiebout hypothesis supra note 21.
ernments are not effectively structured by constitutional processes. City and county charters for large municipal governments seldom reflect thoughtful attention to institutional detail. For example, there is rarely anything like a system of checks and balances or separation of powers in municipal charters, even where the local government covers a very large scope. At present, there are strong reasons to be skeptical about the prospect that large-scale regional government will replace municipal governments for all general purposes.

A more promising step toward sensible ecosystem management within the structure of contemporary municipal boundary law would be to facilitate the formation of special purpose governments whose *raison d'etre* is ecosystem management. Each state provides for the creation of special purpose governments. The legal structure of these governments is primarily the product of the state's boundary law. The superintendence of these governments is carried out by many intrastate institutions, including county and state legislatures. The formation of special purpose ecosystem management entities would be appropriate where neither existing municipalities nor other salient intrastate institutions are effective at dealing with the regulatory issues at stake. What would be required in connection with contemporary local government law is an appreciation, manifest in state legislation and its interpretation and implementation, for the value of special purpose ecosystem governments. An important facet of this appreciation is the appropriation of sufficient money at the local level to carry out the functions of these special purpose apparati. Federal/state/local partnership is essential of course; however, the promise of significant local involvement will depend upon localities' willingness to furnish ample money for implementing ecosystem programs.

**B. Inter-Local Institutional Innovation**

Ecological approaches depend upon conscientious coordination among a range of public and private decisionmakers. Even where these decisions can be made at the local level, there are good reasons to favor regional, inter-local initiatives. But, as I emphasized in the previous section, there are political and normative reasons to be skeptical about regional government as a solution to ecosystem problems.

There are two major alternatives to regional government as mechanisms for addressing inter-local problems. One alternative is centralization. The idea is that the state and/or Federal Government would either command local governments to comply with pre-set

36. See Burns, American Local Governments, *supra* note 21, at 25-32 (discussing the formation of special purpose governments).

37. See discussion *infra* Part II.C.
mandates or else impose a duty to construct plans of successful implementation of federal/state policy. The relevant question, then, is what role is there for local initiatives that do not require the same quantity or quality of centralization. The other alternative is decentralization, but with the aim of developing regional initiatives through inter-local collaboration. This is not the oxymoron it seems to be. To develop this point, I want to begin by briefly distinguishing between two different senses of decentralization: constitutional/legal and political.

Legal decentralization reflects the decision on the part of higher levels of government to surrender certain powers. Of course, this surrender may be—indeed is likely to be—incomplete. "We the people" surrendered certain powers to the national government in the United States Constitution; the powers not surrendered, our system of constitutionalism makes clear, are reserved to us.\(^{38}\) Within a state constitutional system, the issue is trickier. The principle of state plenary power makes clear that local governments have only those powers accorded to them directly under the state constitution or by virtue of legislative grant.\(^ {39}\) Municipal home rule, a characteristic construct of nearly all American states, reflects an important element of legal decentralization within the state constitutional system.\(^ {40}\) The idea behind home rule is that certain decisions are properly and perhaps even exclusively made at the local level.\(^ {41}\) At the same time, the reticence of state decisionmakers, including judges, to accord complete sovereignty to localities within the domain of local affairs suggests that complete legal decentralization is disfavored.\(^ {42}\)

Political decentralization is another matter. Even supposing that localities are entitled to make their own public policy decisions free from state control—that is, these decisions have become legally decentralized—it may nonetheless be in their interest to collaborate with one another. Collaboration through inter-local compacts and agreements reflects local governments' appreciation that certain problems call for inter-local, regional solutions. State/local relationships therefore can be considerably decentralized legally, but still centralized through their own, collaborative initiatives. Nothing in a prescriptive


\(^{39}\) See Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).


theory of localism—that is, of significant legal decentralization—commands local governments to act as autonomous, solitary units of government. Indeed, choosing autonomy would seem counter-productive in an economic environment whose economies of scale and principles of comparative advantage favor consolidated, rather than independent, efforts.

The task, then, is to encourage these inter-local agreements and initiatives. One important element of this strategy is the development of appropriate inter-local regulatory institutions. In traditional state and local government law, the choice is between legal centralization and decentralization. If the state chooses the latter by, say, a super-strong home rule arrangement, then the decisions about whether to pursue inter-local strategies are made by the smallest, legally salient unit of government. That will usually be either the county or the city. And even where cities set out to coordinate with one another, coordination is dependent on the commitment of the city to keep to this arrangement. There are, of course, massive incentives to defect when the agreement ceases to be in the interest of any particular governmental unit. This is not a point about malevolent political decisionmakers; rather, these incentives reflect the basic preferences of citizens to act in accord with their own self-interest.43

If localities are going to cooperate with one another on a basis of mutual agreements, enforceable against localities, the choice is between one or another more centralized structure. We need to consider how inter-local institutions—smaller than the state, but larger than the individual localities—can perform these functions.

The model I have in mind bears resemblance to the modern regulatory agency.44 An intrastate agency responsible for implementing ecosystem policies can augment local strategies. The advantage of this agency over more purely centralized institutions—the state and the Federal Government—stems from the capacity of the agency to act, relatively speaking, apart from the same set of incentives that operate in state and federal legislatures and in the courts.45 The point is not that the modern regulatory agency is apolitical; rather, the idea is that a sensibly structured and supervised agency can become insulated from at least some of the more directly self-interested, rent-seeking behavior of elected politicians.46

44. See James M. Landis, The Administrative Process (1938).
45. Id. at 30-38, 46.
Making this inter-local agency as immune as possible from noxious external influences entails a significant reconsideration of the standard model of the regulatory agency. The principal differences center around two related themes: representation and accountability. The traditional idea of the regulatory agency supposes that there is great value in regulatory independence. The further removed the agency is from politics, the better from the standpoint of sound public policy. Of course, the separation of politics from administration is seriously incomplete, even as an ideal. 47 Administrative agencies are properly under the control both of political decisionmakers and of citizens through mechanisms of administrative procedure. The system of notice-and-comment rulemaking, for example, is designed in part to ensure a certain type of accountability through public participation. 48 Such participation serves both to improve the quality of administrative decisions—this might be said to be its "objective" function—as well as the political legitimacy of the institution. 49

Yet, public participation is seriously limited with regard to administrative agencies and their performance. Accountability is regarded as a double-edged sword. To preserve the advantages of expert decisionmaking, agency accountability is at least once removed from democratic constraints. So, agency officials do not, ordinarily, stand for election; instead, the democratic check is retained through elected public officials such as the President or the Governor.

The idea of inter-local institutions along the lines sketched above ought to borrow from the ideal of the modern regulatory agency. But, in other respects, the model ought to reflect the needs particular to localities and strategies of inter-local ecosystem management. Inter-local institutions ought to be accountable to local citizens. This accountability should be different from what we expect of other regulatory agencies in that our inter-local agency may utilize periodic elections, ratification procedures, and other democratic techniques. Therefore, this accountability will be different in both quantitative and qualitative ways than what we expect of other regulatory agencies. These features are essential for two different reasons. First, accountability serves the aim of ensuring that localities are attentive to local concerns and interests. The agency relationship is properly more direct than with respect to either state legislature or state administrative agencies. Much attention is paid in mainstream environmentalist writ-


ing to the role of public participation; statutes such as the Endangered Species Act and the Coastal Zone Management Act create webs of local citizen input and, in that sense, they promote the idea that citizen participation is salutary and perhaps even necessary. The creation of inter-local institutions modeled along the lines of the modern regulatory agency preserves desirable participation while, at the same time, encouraging the deployment of expertise and sound management principles.

The second reason is entirely practical: there is clear political value in structuring inter-local institutions in a way that ensures some accountability. While local decisionmakers and citizens may be willing, with the proper reasons, to cede certain prerogatives to state administrative agencies, the inter-local institutions I have in mind would become involved in resource preservation decisions of the sort that challenge the idea of local land-use decisionmaking. Securing some amount of special accountability, therefore, seems politically prudent, besides being essential to facilitate democratic values.

I will not sketch out in any more detail, in this essay, what sort of inter-local institutions would be desirable. Such details are, of course, essential, and I hope that I and others will have more things to say about these proposals in the future. For now, let me just add a bit of flesh to this description by explaining what sorts of things these institutions would do. One function would be to provide a structure for implementing conservation plans already underway, either because of the grass roots initiatives of local groups or because of state or federal law. The set of proposals of the Quincy Library Group concerning preservation of national forests is one example of promising local initiatives designed to deal at the local level with ecosystem management. Coordinating such efforts within the scheme of an inter-local regulatory institution modeled along the lines of a modern regulatory agency would be a fruitful step toward structuring incentives and opportunities to carry out initiatives of a similar sort.

C. Local Fiscal Initiatives

There are many examples of federal/state/local cooperation in the environmental area. But for the most part, these instances of cooperation involve the employment of local institutions to carry out federal or state mandates. The U.S. Supreme Court has expressed its concern with federal efforts to conscript state and local political institutions in the service of federal aims. Yet, both federal and state governments

50. For an overview of this and other efforts, see Timothy P. Duane, Community Participation in Ecosystem Management, in this issue.

remain for the most part free to use local institutions as the means for implementing ecosystem policy.

The challenge, though, will be to see whether local governments develop their own strategies for ecosystem management. And perhaps the key to tackling this challenge through local innovations will be the financial choices available to local decisionmakers. By contrast, the Federal Government has had available to it the revenue of the federal treasury to use in developing its regulatory strategies. The states have been able to avail themselves both of their own revenues and also some funds distributed to them by the feds. Such revenue-sharing, while undependable, alleviates at least some of the fiscal burdens on states. However, localities are in a much more difficult position.

Careful fiscal planning requires attention to the cost-effectiveness of different regulatory mechanisms. Naturally, ecosystem management through regulations on private property represent the most obvious source of "low-cost" ecosystem management. The costs are borne, in this case, by the property owners; the localities face merely the administrative costs of these regulatory devices. But such fiscally-driven choices are considerably complicated by various factors. To begin with, there are federal and state restrictions on the power of localities to implement ecosystem management through property restrictions. The growing saliency of "takings" jurisprudence represents one set of constraints;\textsuperscript{52} relatedly, the constitutional limitations on localities' powers to impose impact fees and linkage of certain types circumscribes local choices.\textsuperscript{53} Moreover, property owners can pass on, to a considerable extent, the costs of local land-use regulations.

The generation of revenue for use by local governments in pursuing ecosystem management must come from the same sources of revenue upon which localities have traditionally depended: general taxes, including income, sales, and property taxes, user fees, special assessments, and municipal bonds.\textsuperscript{54} Expectations about localities' revenue-raising capacities are the product of many factors; the imperative of ecosystem management merely injects other important factors into the equation.

There are, however, a couple of fiscal innovations that might bear fruit. One is some form of inter-local revenue sharing. To the extent that ecosystem problems are inter-local problems, localities might consider ways of contributing resources to one another in the effort to

\textsuperscript{52} See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); see also, Tarlock, Protection of Biodiversity, supra note 4, 60 U. Chi. L. REV. at 586-98.

\textsuperscript{53} See Dolan v. City of Tigard, 5U.S. 374 (1994); Tarlock, supra note 4, at 598-602.

\textsuperscript{54} See generally CLAYTON GILLETTE, LOCAL GOVERNMENT LAW 511-696 (1994).
deal with inter-local problems comprehensively. Some forms of inter-local cooperation have been tried for limited purposes, usually for infrastructural uses, such as transportation. Revenue sharing is often enabled by the collection of monies through user fees and the like. Localities make a claim on some part of the proceeds of these collaborative operations. In the main, the special purpose authorities fund substantial parts of their own activities. The situation with respect to ecosystem management is more problematic, though, since there is not necessarily a good to be sold or a service to be provided. Ecosystem interests represent quintessentially public goods, after all, and it is difficult to muster up the money for these programs without collecting some sort of general tax. Where revenue is generated through this method, what are the incentives for revenue sharing?

It is here that a more centralized institution—namely, the federal and state governments—must step in. The key to successful inter-local revenue sharing lies in creating financial incentives through the tax system. Providing favorable tax treatment for revenue shared among localities for the purpose of ecosystem management represents, of course, a tax expenditure of considerable magnitude. The commitment on the part of the federal and state legislatures to subsidize such revenue sharing must grow out of the collective sense that decentralized, locally initiated ecosystem management is in the national interest. If such a national interest is to develop and flourish, however, reconstructing a part of the federal and state tax laws to facilitate local fiscal initiatives would be a good place to start.

A second fiscal innovation concerns the special benefit assessment. The special assessment is a mechanism whereby localities can raise revenue for the purpose of improving the assessed property. The legal rules that govern the imposition of such assessments and the uses to which fees can differ from state to state. In general, the state courts are wary of permitting localities to finance local goods and services through the liberal collection and use of these fees. Otherwise, certain property owners would be bearing significant and inequitable burdens without receiving benefits coextensive with their

contribution. Special assessments are, by definition, not general taxes; therefore, courts can be expected to restrict their use.58

The collection of assessment fees for ecosystem management, however, raises special issues. Ecosystem management is, as has been pointed out, an economic, as well as a social, imperative. The message of the biodiversity literature is that we must take steps to preserve natural ecologies.59 Such preservation is, among other things, necessary to ensure economic competitiveness in a global environment. Nonetheless, the use of special assessment fees to meet the demands of ecosystem management is appropriate only insofar as decisionmakers can make the case that property owners will benefit specially from preservation efforts.60 Where property owners to which the fees are attached abut, or are within, the areas that contain ecosystems, the case is easier to make.

D. Rethinking Preemption Doctrine

Many local innovations can be carried out without express state authorization. State law, for the most part, accords substantial authority to localities to act pursuant to the general welfare. At the same time, so long as states retain the power to preempt local initiatives by statute, local prerogatives are conditional and unreliable. In the area of environmental regulation, state legislatures have made substantial use of preemption doctrine to circumscribe local initiatives.61

Preemption doctrine is designed to ensure that matters of statewide concern are addressed by state decisionmakers. Where state and local law clearly conflict, local law will ordinarily succumb to state control; few doubt the right of the state to replace local environmental regulation with more centralized, statewide initiatives. More serious difficulties arise, however, where the preemption is implied. So-called field preemption represents the idea that certain matters ought to be off-limits to localities altogether.62 The only level of government that ought to address the problem, if at all, is the state government. Im-

58. California’s recently enacted Proposition 218, now codified in the California Constitution, Article XIII C and D, reflects a very substantial effort to curtail the use of special assessments to pursue local public policies. See League of California Cities (Sacramento), Proposition 218 Implementation Guide (1997). Time will tell whether and to what extent California’s fiscal policies will have ripple effects across the nation.


60. See, e.g., Knox v. City of Orland, 841 P.2d 144 (Cal. 1992) (discussing requirement that assessment be tied to special benefit to assessed property); City of Seattle v. Rogers Clothing for Men, 787 P.2d 39 (Wash. 1990) (same).

61. See, e.g., IT Corp. v. Solano County Board of Supervisors, 820 P.2d 1023 (Cal. 1991); Northern States Power Co. v. City of Granite Falls, 463 N.W.2d 541 (Minn. 1991); Envirosafe Services of Idaho, Inc. v. County of Owyhee, 735 P.2d 998 (Idaho 1987).

plied preemption is an entirely judge-made doctrine.\textsuperscript{63} It is not compelled by state constitutionalism in any obvious sense. After all, the issue is not whether the state government is supreme in cases of conflict; that issue is settled in favor of the state by the doctrine of express preemption. Nor is it compelled by a coherent political theory of state/local relations.\textsuperscript{64} Determining which fields require centralized regulation is a pragmatic, empirical, and ad hoc judgment. It is unlikely to be settled by resort to general principles of implied preemption that grow out of cases in which state courts have considered different statutes and fact patterns.

Where the issue is ecosystem management, the case for field preemption is not strong. I have already discussed the reasons why various elements of an ecosystem approach can and ought to be carried out by local governments through innovative institutional and legal mechanisms. That ecosystem issues raise matters of statewide concern need not mean these same issues are not simultaneously matters of local concern. State and local law can co-exist, at least where there is no square conflict. To accept this insight, however, requires that we rethink considerably the doctrine of implied preemption. Such a rethinking will likely reveal this conclusion: courts should not find that state legislation implicitly precludes local ordinances; where local ordinances must give way, the court must be satisfied that there is a direct conflict—that is, that it is impossible for individuals and institutions to comply with both sets of legal requirements simultaneously.

E. Recapitulation

I said at the outset of this Article that my aim is not to sketch out a comprehensive picture of a locally-based strategy of ecosystem management, but rather to suggest the desirability of such an effort and speculate about what local government law has to say on the subject. These speculations have yielded, however, at least a few skeletal suggestions. Let me describe them again:

- **Limited regional government initiatives.** These initiatives would be carried out with appropriate caution in light of the serious political obstacles and normative concerns that arise in connection with proposals to draw together municipal governments into regional entities.
- **Facilitate the creation of special purpose, ecosystem-management related governments.** These governments would possess the authority, the capacities, and the incentive to develop ecosystem management

\textsuperscript{63} See, e.g., Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534 (Cal. 1993).

\textsuperscript{64} See generally the discussion in Gardbaum, \textit{supra} note 17, discussing similar issues in national/state relations.
strategies. Ideally, these governments would be "sunsetted" to address potential accountability problems. They would also be required to develop standards to ensure that they are carrying out their proper functions.

- **Inter-local institutions structured in ways similar to state regulatory commissions.** The charter of these entities would be limited; at the same time, they would possess powers of lawmaking and dispute-resolution to address certain ecosystem problems. Existing federal and state agencies would be encouraged to rely upon these inter-local institutions to carry out relevant federal/state mandates. However, the principal role of these institutions would be to implement locally generated policy. It would be important to construct appropriate mechanisms to ensure accountability and fiscal responsibility.

- **Inter-local revenue sharing.** Revenues would be raised to implement locally generated policies. These revenues would need to be kept separate, as much as legally and politically possible, from those resources necessary to implement federal/state mandates. These revenues would represent the means to implement locally generated policies. The incentives for revenue sharing must come from state and federal initiatives, especially in connection with the tax system.

- **Creative use of special assessments.** Fees would be raised through the imposition of special assessments on property owners whose interests are especially implicated by ecosystem conditions and who would, to the satisfaction of law, benefit from the services financed through these assessments.

- **Repeal of the doctrine of implied preemption.** At least with respect to ecosystem management, the doctrine of field preemption limits local creativity and thus stifles innovations that would redound to the benefit of more than just those in the local area. If implied preemption were retained, courts ought to be more sensitive, in cases in which preemption claims are raised, to the dimensions of the state/local relationship and to the imperatives of collaborative ecosystem strategies.

More serious consideration of these ideas must for now remain incomplete. I at least hope to have triggered additional thought about the role of local government law in confronting ecosystem management.

**CONCLUSION**

The role of local governmental units in tackling issues of biodiversity protection will always be limited. After all, it is the nature of the externalities—that is, the fundamentally trans-local quality of
ecosystem management—that requires coordinated, centralized efforts. Nonetheless, as Dan Tarlock has indicated in an earlier article describing various mechanisms for local government initiatives in biodiversity protection65 and as I have indicated here, there is an important role to be played by local governments nonetheless. The key to facilitating this role is to create the appropriate set of political incentives and legal structures to enable local governments to engage these regulatory issues.

Much of the writing on ecosystem approaches stresses the interdependency of natural resources and ecosystems. We are told to keep in mind that environmental problems and solutions are not separable, but rather are synergistic. Therefore, regulatory strategies that fail to take into account the science of ecosystems and the exigencies of biodiversity protection will be doomed to fail. Relatedly, regulatory efforts that fail to take into account the interrelated nature of governmental institutions and layers of governments in the American political and legal system will also run aground. There is an ecosystem-like quality to governmental behavior in our regulatory environment. My aim here has been to bring into the picture one neglected part of this regulatory "ecosystem"—American local governments.

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65. See Tarlock, Biodiversity supra note 4.