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Political and Legal Obstacles to Collaborative Ecosystem Planning

Robert A. Kagan*

If a descendant of Alexis De Tocqueville had come to this conference, she probably would be struck, as De Tocqueville himself was 165 years ago, by the American penchant for active self-governance. She would have heard participants talk about various groups of Americans—government officials, environmental activists, scientists, business people—who came together, voluntarily, to engage in dialogues and engender collaborative ways of problem-solving. She would have heard about Bureau of Land Management officials who created a forum in which townspeople in the Sierra Nevada foothills developed a forest management plan for the 'Inimim Forest on federal land.' She would have heard about creative Habitat Conservation agreements between landowners and government officials in Southern California, and by a lumber company in the Pacific Northwest.

In addition, Mademoiselle De Tocqueville might have remarked upon the large number of intelligent, public-regarding participants in the conference, many of whom work day in and day out on collaborative public problem-solving, many of whom spoke earnestly and optimistically about prospects for its extension. How different this is from France, she probably would have thought, where people generally leave governing to the government. In France, and in most other countries, law schools and law students content themselves with analyzing legal codes and principles; in Berkeley, a group of engaged law students, with the encouragement of their faculty, organized a conference that was essentially about transcending the existing law, or of reshaping it to support a newer vision of environmental protection.

But before drifting too far into self-congratulation, I would direct our modern De Tocqueville's attention to the legal and institutional structure that has given rise to this incessant search for new ways of collaborating. For this is not quite the United States in which Alexis de Tocqueville was so struck by the multitude of voluntary associa-

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tions. That was a world of small government and sparse laws. Voluntary collaboration often was necessary to get any collective action under way. In contrast, our world is filled with an enormously complicated, legally-confusing array of statutes and regulations. The contemporary search for collaboration often springs from a desperate effort to hold at bay the costly and alienating delays and deadlocks that spring from litigation—litigation that in turn springs from the complexity of our legal system.

Thus the Bureau of Land Management (BLM) developed the collaborative 'Inimim Forest Management Plan because virtually every BLM plan was being held up by appeals or lawsuits. The new interagency collaborations initiated by President Clinton's Northwest Forest Plan came about only after a series of lawsuits and judicial injunctions restricted timber sales and logging throughout the extensive range of the spotted owl, reducing timber production and employment in the Pacific Northwest by almost fifty percent. In another region discussed in the conference, communities in San Diego County signed onto a collaborative conservation plan only after a spate of lawsuits, alleging threats to the California gnatcatcher, had delayed highway construction and threatened to block other development projects.

As a way of avoiding the deadlocks of litigation, collaborative ecosystem management seems analogous to plea bargaining in urban felony courts. Plea bargaining occurs largely because neither prosecutors, public defenders, nor judges want to undergo the painstakingly slow, costly, unpredictable, and unpleasant process of litigation in America's intensely adversarial system. But in another sense, that analogy is flawed. While plea bargaining has become routine, collaborative ecosystem management still has not. The examples discussed in the symposium, while not merely isolated experiments, are still far from the norm. Legalistic environmental regulation, conducted by a fragmented welter of special purpose regulatory agencies—each abiding by the detailed requirements of a special purpose statute, each looking over its shoulder for possible legal critics—remains far more common.

The plea bargaining analogy is flawed in other ways as well. Plea bargaining almost surely is inferior to a prompt, efficient system of adjudication, and may even be worse than our slow, inefficient system of adjudication. In contrast, collaborative ecosystem management

2. Id.
plans, while designed to avoid an inefficient and divisive mode of regulation, also promise positive gains, including better environmental protection and more rapid approval of environmentally tolerable development activities. Game theory analyses tell the same story: when interests and values are in conflict, cooperative solutions produce more gains to both sides than does resort to the slow, costly processes of legal coercion.

But if that is so, Mademoiselle de Tocqueville might ask, why is collaborative ecosystem management the exception, instead of the norm? If she were a student of comparative environmental regulation, she might point out that in countries such as the Netherlands, Germany, and Canada, land-use regulation—including efforts to prevent urban sprawl, protect wildlife, and subject new projects to scientifically-based environmental analysis—is conducted through planning processes that generally entail a great deal of consultation with interested groups, and rarely involve extended litigation and judicial intervention. In the United States, however, governmental efforts to promote cooperative balancing of environmental and economic goals—such as the federal Outer Continental Shelf Lands Act, the National Forest Management Act, and the Northwest Power Act—often have resulted in still more litigation. So why, Mlle. De Tocqueville might ask, is collaborative ecosystem management so hard to achieve in the U.S.?

It is worth thinking about how to answer her, not in order to throw cold water on hopes for extending collaborative ecosystem management, but to recognize as clearly as possible the sources of resistance. These sources, in my view, lie in the fragmented political structure of the United States, and in a political culture that includes a large dose of distrust of government, both on the political left and on the political right.

Consider first the fragmentation of land-use governance. Among economically advanced democracies, historian Kenneth Jackson points out, "Only in America are schools, police and fire protection and other services financed largely by local taxes" rather than by higher levels of government. Moreover, more than most economically advanced nations, the U.S. devolves more power over primary

land-use decisions to these revenue-hungry local governments. Not surprisingly, the U.S. is one of the developed world's leaders in ecosystem-devouring urban sprawl. Outside of a handful of cases, such as coastal zone commissions and the Tahoe Basin Commission, any efforts to move primary land-use authority to a state or regional level, where more comprehensive planning can take place, are doomed by the resistance of local political units. From that perspective, the Natural Communities Conservation Programs⁸ look like efforts to use the deadlock threatened by an Endangered Species Act listing to construct, on an ad hoc basis, what normal American politics rejects—regional zoning or planning boards.

A second obstacle to collaboration is the fragmentation of power so characteristic of American government. In the United States, political scientists regularly remind us, power is unsystematically divided between national and state governments, political parties are non-cohesive, and there has been high incidence (at least in recent decades) of politically divided government at both the national and state level. Such political fragmentation produces governmental and legislative processes that are unusually penetrable by interest groups and advocacy organizations, each seeking to make sure that regulatory policy will not be unduly influenced by their political opponents. Hence, American environmental legislation is implemented through many different agencies, national, state and local. Hence, American environmental laws often restrict agency discretion by mandating detailed scientific analyses, deadlines for action, formal participation by business and advocacy groups, and judicial review. Hence, many American environmental laws invite private litigation to enforce environmental standards and hold agencies accountable.⁹

That kind of legislation and fragmentation of governmental authority means that collaborative agreements will often be fragile. Any interest group that dislikes an agreement can exit the process or do an end-run to the courts, invoking some legal argument to hold up the plan and gain concessions. This can occur even if the legal merits of the case are uncertain, for in the complex American legal landscape, legal certainty is hard to come by. True, leaders blessed with good will, vision, energy, and a great deal of political skill sometimes can bring all relevant parties to the table and forge an agreement. But in a system in which defection to the courts is almost always possible, even

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the most skillful political leader must also be lucky. Any system that relies so heavily on a high level of political skill and good will is bound to be disappointed more often than not. Hence, hopes for broadening the range and incidence of collaborative ecosystem planning would be aided immensely by changes in those statutes that encourage reliance on adversarial legalism as a mode of enforcement. Such changes, however, will not be easy to come by in the current political climate.

A third political obstacle is lack of consensus about who shall pay for major advances in ecosystem management. A traditional characteristic of the American political system is the tendency to rely on private enterprise to provide collective goods. More than other countries, the United States relies on private enterprise to provide health care, pensions, insurance, transportation, mass communications, and so on. Americans like to keep taxes down and obtain public benefits on the cheap, so to speak. That also applies to environmental benefits. When governments attempt to compel private property holders or business enterprises to conserve habitat and provide other ecosystem protections, in ways that cost them a lot of money, it should not be surprising to encounter a great deal of resistance and political and legal conflict. Until we systematically confront and develop a measure of agreement on the weighty issues of how those costs should fairly be allocated, collaborative strategies, it seems to me, will be somewhat unstable.