Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation

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ABSTRACT—There is wide agreement among conservation activists and scientists alike that loss and alteration of habitat are the leading threats to biodiversity in America. Suburbs and exurbs, though, are only beginning to acknowledge that they are the problem in the struggle to stem the tide of "sprawl" and other economic processes producing ecosystem-wide habitat degradation today. A recent resurgence in academic and activist attention to local governments in America is reconsidering them as viable solutions to this problem. But most of this dialogue is being based upon a mistaken conception of local governance. Much of the legal scholarship on local environmentalism has ignored the reality of our localism and its role in the creation of the ever-expanding built landscape in America. This paper argues that this lack of realism in the current debate about local environmental law renders it blind to the vices of local governments and some of their sham conservation measures, but also to their counterintuitive virtues and possibilities for real conservation progress. Local government's deep connection to private property entrepreneurialism is what has made it so practically powerful in resisting so many state and federal environmental initiatives. But it may well be this dimension of our localism that renders it uniquely fit to the tasks of real habitat protection and restoration in the twenty-first century.

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I. INTRODUCTION

The legal framework governing the protection of habitat in America is not aging well. Three and four decades ago, when statutes like the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), the Wilderness Act, the National Forest Management Act ("NFMA"), the National Wildlife Refuge System Administration Act, and others were enacted, they were heralded as the synthesis of a national conservation system for America's remaining wild places and wildlife.[1] Today, it is becoming clear how woefully inadequate these laws are to the tasks of modern conservation—especially when it comes to habitat—in the vast and ever-expanding built landscapes of suburban America. These statutes rely too heavily on public ownership and the ameliorative powers of judicial review (and the rationality) of administrative agencies.[2] Their "science-only" requirements, originally seen as action-forcing,[3] have been so enforceable that there is but one agency choice in federal habitat law today which is immune from legal attack by aggrieved stakeholders: delay.[4]

In short, these laws have made federal habitat conservation too costly and careful and therefore too exceptional. The agencies charged under federal law with the

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[1] *See generally* Jamison E. Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 ALABAMA L. REV. 416 (2005) (hereinafter "Colburn, *Indignity*").

[2] *See* Colburn, *Indignity*, supra note 1. Judicial review is the lynchpin of the administrative process and has been throughout the modern era of environmental and natural resources law. *Compare* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 590 (1965) ("The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statutes at hand, the statute book at large, the principles and conceptions of the "common law," and the ultimate guarantees associated with the Constitution.") *with* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) ("The administrative state became constitutionally tenable because the Court's vision of separation of powers evolved from the simple (but constraining) proposition that divided powers must not be commingled, to the more flexible (but far more complicated) proposition that power may be transferred so long as it will be adequately controlled.").

[3] *See* THOMAS A. LUND, AMERICAN WILDLIFE LAW 97-99 (1980); DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 1164-68 (2002).

[4] In Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004), the Court held that the Bureau of Land Management's refusal to implement any policy at all to control off-road vehicle usage of a "wilderness study area" was not "agency action" within the meaning of the Administrative Procedure Act and therefore not subject to judicial review as such. In Ohio Forestry Assn., Inc. v. Sierra Club, 523 U.S. 726 (1998), the Court held that a Forest Service land management plan was nonjusticiable as long as it, itself "create[s] no legal rights or obligations." Id. at 733.

protection and restoration of plant and wildlife populations are to a fault too rational, too deliberative, too sequential in operation, and too focused on putting various tracts of public lands on protective pedestals.

Biodiversity conservation turns on protecting habitat: much more, it turns out, than has usually been admitted.[5] Yet, increasingly, the analytical and legal burdens of protecting habitat under the rigors of the scientific method, together with the political realities of strategic action, budgetary scarcities, and the geography of public lands, are conspiring to make the federal law of habitat protection an incomplete means to its own ends.[6] Today's opponents of the ESA can devise no better way of further hobbling it than to subject all its major decisions to mandatory peer review.[7] Not surprisingly, across a wide spectrum of such laws, agencies' "finalization" of their habitat rules, policies, and plans has become their *reward*: the end to one conflict and the chance to tackle some other trouble they have been handed.[8]

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[5] One quantitative study evaluating 222 conservation targets suggested that the average percentages of area recommended for biology-based targets were nearly three times as much as those recommended in politically-driven proposals. *See* Leona K. Svancara *et al., Policy-driven versus Evidence-Based Conservation: A Review of Political Targets and Biological Needs*, 55 BIOSCIENCE 989 (2005).

[6] *Cf.* Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 97 (1997) ("Our current approach to biodiversity conservation—an approach generally of inaction, except for panicked, last-ditch, costs-be-damned efforts to save individual species once they have reached the brink of extinction—may prove to be the most costly of all."); Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U.L.Q. 1029, 1152 (1997) (hereinafter Doremus, "*Listing Decisions*") ("[T]he impossible legislative demand that ESA listing determinations rest solely on scientific information has produced a number of undesirable effects. It has encouraged the agencies to conceal the true bases for their decisions; led them to ignore several of the values Congress intended to protect through the ESA; caused them to miss significant opportunities to educate and inform the general public; made their decisions appear deceptively certain and objective; and ultimately undermined both political support for the protection of dwindling species and the credibility of science as a foundation for policy decisions.") A. Dan Tarlock, *A First Look at a Modern Legal Regime for a "Post-Modern" United States Army Corps of Engineers*, 52 U. KAN. L. REV. 1285, 1290 (2004) ("The Corps has not attracted much attention from administrative law scholars, but it is a classic example of the increasing futility of our insistence on hyper-rationality to control administrative discretion.").

[7] *See* J.B. Ruhl, *Prescribing the Right Dose of Peer Review for the Endangered Species Act*, 83 NEB. L. REV. 853 (2005); POMBO BILL SYNOPSIS.

[8] *See generally* Colburn, *Indignity*, supra note 1. Most wildlife and conservation biologists agree that "adaptive management" as a set of tenets embracing (1) institutional- and norm-flexibility throughout implementation, and (2) "feedback loop" learning through the continuous monitoring of implementation, is essential to successful ecosystem management. Yet mandatory peer review is not necessarily helpful to such ends and indeed may even be positively inconsistent with them. *See* ADAPTIVE ENVIRONMENTAL ASSESSMENT AND MANAGEMENT (Crawford S. Holling ed., 1978); Ronald D. Brunner & Tim W. Clark, *A Practice-Based Approach to Ecosystem Management*, 11 CONSERVATION

A fixation on species already facing oblivion to the exclusion of the rest of the ecosystem has long been the basis of a consensus criticizing the ESA's very structure.[9] Yet American culture's fascination with nature's "wild," "untrammeled," "pristine,"[10] rare, and imperiled, seems impervious to such criticism—even while humanity's total domination of earth's ecosystems becomes undeniable.[11] "The special attracts our attention far more readily than the ordinary. We need focal points. Esthetic appeal, symbolism, and rarity all provide such focal points."[12] Tragically, though, too many species and places' appeal are not special *enough* to our national political and administrative actors.[13] And too little capital is marshaled at the federal level to manage all of the threats to *viable* populations even of those it does so identify.[14]

The federal system is even more fundamentally unfit to the public end of protecting habitat, though, for it has a structural bias against habitat as a land use priority. The faults

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BIOLOGY 48 (1997); John M. Volkman, *How Do You Learn from a River? Managing Uncertainty in Species Conservation Policy*, 74 WASH. L. REV. 719, 760-62 (1999).

[9] *See* Craig R. Groves, *Candidate and Sensitive Species Programs: Lessons for Cost-Effective Conservation, in* ENDANGERED SPECIES RECOVERY: FINDING THE LESSONS, IMPROVING THE PROCESS 227 (Tim W. Clark et al. eds., 1994); Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Age of Mass Extinctions*, 22 WM. & MARY ENV. L. & POL'Y REV. 227, 278-83 (1997); Karkkainen, *Biodiversity and Land*, supra note 6, at 20; Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45 (2002);

[10] *See* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND (rev'd ed. 1973) (1967); DANIEL B. BOTKIN, NO MAN'S GARDEN: THOREAU AND NEW VISION FOR CIVILIZATION AND NATURE (2001); William Cronon, *The Trouble with Wilderness, Or Getting Back to the Wrong Nature, in* UNCOMMON GROUND: TOWARD REINVENTING NATURE 69 (William Cronon ed., 1995) (hereinafter "UNCOMMON GROUND").

[11] *See* infra notes 51-66 and accompanying text.

[12] Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325, 344 (2002) (hereinafter Doremus, "*Saving the Ordinary*"); *see also* Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333 (2002) (hereinafter Klein, "*Monumental Landscapes*") (arguing similar thesis about the longevity and successes of the Antiquities Act's notion of monument preservation). Even from an expert's perspective, "indicator species" that supposedly serve as surrogate measures of ecosystem health—artificially finite and imperfect as they necessarily are—have been indispensable to most agency habitat programs. *See* Sandy J. Andelman & William F. Fagan, *Umbrellas and Flagships: Efficient Conservation Surrogates or Expensive Mistakes?*, 97 PROCEEDINGS OF THE NAT'L ACAD. SCIENCES 5954 (2000).

[13] *See generally* JOHN TERBORGH, REQUIEM FOR NATURE (1999). There is a smaller scale at which such losses can be measured, though, and it is paradoxically at this smaller scale that losses of the sort may be more powerful politically. *See* ROBERT MICHAEL PYLE, THE THUNDER TREE: LESSONS FROM AN URBAN WILDLAND 145 (1993) (describing an "extinction of experience" wherein the loss of locally significant wildlife "endangers our experience of nature" because a "species becomes extinct without our own radius of reach").

[14] TERBORGH, supra note 13, at 187-208.

of "multiple use" statutes such as the National Forest Management Act are well known.[15] Yet this bias is most evident in the many federal laws equating the protection of *scenery* with the protection of *habitat*. The two are very different.[16] Whether it is a "wilderness,"[17] a "wild and scenic river,"[18] wildlife "refuge,"[19] or even a "roadless area"[20] as the particular, legally protected enclave, the national commitment to saving plant and wildlife habitat has skewed pronouncedly in the direction of the aesthetically

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[15] *See, e.g.*, George Cameron Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management,* 53 COLO. L. REV. 229 (1981).

[16] Our highly synthetic concepts of "wild," "natural," and "pristine," after all, are often in direct tension with the sort of land management techniques (such as prescribed burns, exotic species removal, etc.) that are increasingly necessary to the support of extant biodiversity. *See* TERBORGH, supra note 13, at 102-20. An aside is appropriate here on the intermingling of the regulation of aquatic habitat with "habitat" more generally, especially in connection with the problems of sprawl. *See, e.g.*, GOBLE & FREYFOGLE, supra note 3, at 399-410. In fact, watershed-based land use controls are becoming increasingly popular with local governments. *See* Chester L. Arnold Jr. & C. James Gibbons, *Impervious Surface Coverage: The Emergence of a Key Environmental Indicator*, 62 J. AMER. PLAN. ASS'N 243 (1996). Nonetheless, I count aquatic habitat issues as importantly different from those surrounding the protection of terrestrial wildlife and its habitat needs—due largely to the relevant legal structures. While local governments necessarily must constitute a large part of the solution to aquatic habitat loss and degradation, *see* Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 54-75 (2003) (hereinafter Adler, "*Lost Books*"), the Clean Water Act as currently structured dictates very different federal and state roles in that future from those for terrestrial habitat issues. *Cf.* Environmental Defense Center, Inc. v. EPA, 319 F.3d 398 (9th Cir. 2003) (analyzing the roles of EPA, the states, and municipalities in the management of impervious surface growth under the Clean Water Act and finding that EPA's role must be primary). Thus, this article is confined to considerations of terrestrial habitat and the needs of organisms over and above those associated with aquatic ecosystems.

[17] The Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136, established a system of wilderness preserves comprised of areas designated by act of Congress. These areas are defined "in contrast with those areas where man and his own works dominate the landscape," as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S.C. § 1131(c).

[18] The Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1284, created a system for designating and protecting (the minority of) rivers left in America that have not be significantly altered by means of channelization, damming, diverting, armoring, *etc*.

[19] The National Wildlife Refuge System, drawn together from a legally and politically fragmented history predating the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee, today consists of about 550 individuated refuges administered according to disparate policies and priorities. The Act was overhauled in 1997 in the National Wildlife Refuge System Improvement Act, Pub. L. No. 105-57, 111 Stat. 1252, placing the Fish and Wildlife Service under a new duty to prioritize wildlife habitat throughout the system and to establish long range management plans for each refuge, but only to the extent consistent with the individual establishment acts creating the particular refuges. *See* ROBERT L. FISCHMAN, THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW 163 (2003).

[20] On January 12, 2001 (after the 2000 election but before the change of administrations), the Forest Service promulgated what it called the Roadless Area Conservation Rule pursuant to the authority granted it in the Organic Act of 1897, NFMA, and the Multiple Use Sustained Yield Act of 1960. *See* U.S. Forest Service, Notice of Final Rulemaking, 66 Fed. Reg. 3,244, 3,252 (2001). The rulemaking consisted of a system-wide inventory of remote lands with few or no access roads and was purportedly intended to protect "roadless area values." The inventory was ultimately comprised of 58.5 million acres (almost 2% of the nation's land), although a common attack mounted to the finalized rule highlighted the fact that no definitive maps of these areas were created specifying their boundaries. *See, e.g.*, Kootenai Tribe of Idaho v. Veneman, 142 F. Supp.2d 1231, 1244-46 (D. Idaho 2001). The Service estimated that, of the 58.5 million acres, only about 24 million were located within "prescriptions" (plans, regulations, statutory controls, *etc*.) already prohibiting road construction. *See* U.S. Forest Service, *Background Paper on Proposed Rule to Replace the Roadless Area Conservation Rule with a State Petitioning Process for Inventoried Roadless Area Management* (July 2004), *available at* http://roadless.fs.fed.us/documents (copy on file with author).

exceptional.[21] For the last 40 years, while we have struggled through ferocious political conflicts to place a lot of public lands on highly prescriptive legal pedestals, we still find too many of our native plant and wildlife populations declining.[22] Indeed, the restrictive administration of public lands for their *scenic* values arguably amounts to a majority of American conservation policy in the Twentieth century, notwithstanding that policy's vast departures from one based in biology.[23]

Absent revolutionary reforms, the concentration of effort upon our various kinds of public lands will be of diminishing utility at best to actually sustaining extant flora and fauna populations over the medium- and long-term.[24] First of all, private control of land

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[21] *See generally* NASH, supra note 10; *see also* Doremus, *Saving the Ordinary*, supra note 12; Holly Doremus, *The Special Importance of Ordinary Places*, 23 ENVIRONS ENV. L. & POL'Y J. 3 (2000); Federico Cheever, *From Population Segregation to Species Zoning: The Evolution of Reintroduction Law Under Section 10(J) of the Endangered Species Act*, 1 WYO. L. REV. 287 (2001); Cronon, *The Trouble with Wilderness,* supra note 10, at 88 ("The myth of wilderness . . . is that we can somehow leave nature untouched by our passage. By now it should be clear that this for the most part is an illusion."). This focus on the aesthetically exceptional has been true of our species protection laws, too.

> The most fundamental problem with a biodiversity strategy focused on the special, the unique, or the extraordinary is that it inevitably defines the objects of our concern as something sharply apart from our everyday experiences and our ordinary world. It allows, even encourages us to put nature out of sight and out of mind except during those rare moments when we specifically choose to seek it out. . . . [W]e are drawn to ever greater separation through a strategy of nature zoning, dividing the world into human and natural sectors, with very little overlap.

Doremus, *Saving the Ordinary*, supra note 12, at 340; REED F. NOSS & ALLEN Y. COOPERRIDER, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY 27 (1994) (describing state species protection laws as focused on "vertebrate groups popular with the public").

[22] *See generally* Colburn, *Indignity*, supra note 1.

[23] This is perhaps the deepest legacy of Progressive conservation. *See* SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920 (1959). It has been palpable in the eleven western states and Alaska. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992). At the same time these enclaves of public land have been "preserved" they have often been wholly unmanaged and have, consequently, actually degraded as habitat. *See* Colburn, *Indignity*, supra note 1, at 33 n.156. The lack of an effective political constituency for active and adaptive habitat management has diminished agency effectiveness even where conservation has been the objective. *See* J.B. Ruhl, *A Manifesto for the Radical Middle,* 38 IDAHO L. REV. 385, 403 (2002) ("Whereas [those who view nature as resource] and preservationists have battled to "lock in" positions through fixed rules and standards and preserve every inch of incremental ground gained, an adaptive management framework is more experimentalist, relying on iterative cycles of goal determination, performance standards setting, outcome monitoring, and standard recalibration. This brand of adaptive management has evolved well beyond an idea . . . [and into] the only practical way to implement ecosystem management.").

[24] First and foremost, federal lands are overwhelmingly concentrated in particular regions, especially the Rocky Mountain West. In the 26 states east of the Mississippi, for example, all federal realty combined—including national parks, wildlife refuges, National Forest System lands, military bases, and everything else—averages *less than five percent* of the total surface area. *See* ALMANAC OF THE FIFTY STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES, 2003 EDITION 421 (Louise L. Hornor ed., 2003) (table). The Wilderness Act is often hailed as creating the most protective zoning categorization for federal realty under its umbrella. But the National Wilderness Preservation System as a whole has been criticized for being oblivious both to species diversity and habitat needs, *see* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 314 (3d ed. 1997) ("It has been said that "without wildlife wilderness is mere scenery.""), and in its selection of ecosystems to be protected. *See* NOSS &

is the norm across most of the nation and the politics (if not the economics) of public acquisitions today usually rule out all but the marginal.[25] Equally problematic, though, is the very notion of creating biodiversity patches and thinking them ecologically sufficient. Quite demonstrably, they are not.[26] Finally, because private property ownership in the American system is not limited by physical space—it is limited only by how many times estates in property can be further subdivided—there is no upper bound on the number of parties governing the spaces surrounding and separating our islands of public land.[27] Thus, as habitat becomes increasingly fragmented—beset by troubles of "inter-mixed ownership," interagency-conflict, and ignorance[28]—integrating the various pieces of a

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COOPERRIDER supra note 21, at 173-74 ("[D]esignated wilderness areas do a poor job of representing ecosystem diversity. Many are truly rocks and ice.").

[25] *See* TERBORGH, supra note 13, at 197-208.

[26] The notion of creating immense nature "preserves" for the "wild" began in nineteenth century Progressive politics. *See, e.g.,* Louise A. Halper, *'A Rich Man's Paradise': Constitutional Preservation of New York State's Adirondack Forest, a Centenary Consideration*, 19 ECOLOGY L.Q. 193 (1992). But the record reveals how such proclaimed enclaves gradually lose their species diversity, regardless of their size or managers' acumen. *See, e.g.*, William D. Newmark, *Legal and Biotic Boundaries of Western North American National Parks: A Problem of Congruence*, 33 BIO. CONSERV. 197 (1985) (describing species loss from most major national parks in the West). Indeed, conservation biologists have confirmed the many ways in which preserves of all sorts are separate from the environments surrounding them in "legal space" only. *See* T.E. Lovejoy, *et al*., *Edge and Other effects of Isolation on Amazon Forest Fragments, in* CONSERVATION BIOLOGY: THE SCIENCE OF SCARCITY AND DIVERSITY, at 257 (Michael Soulé ed., 1986) (hereinafter "SCARCITY AND DIVERSITY"); Stuart L. Pimm, *Community Stability and Structure*, *in* SCARCITY AND DIVERSITY, supra, at 309; Daniel H. Janzen, *The Eternal External Threat*, *in* SCARCITY AND DIVERSITY, supra, at 286, 287 ("Animals and plants move. While a preserve's boundaries may serve well enough to stop direct human transgressions, the boundaries per se will mean nothing to most organisms.").

[27] *See* Hannoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549, 581-602 (2001). The economic process of property subdivision has catalyzed some of the most successful "private" habitat initiatives (like land trusts and conservation easements) of the last forty years. Yet the profit to be made from such subdivision and resale constitutes a powerful motive to forego such "altruistic" options. *See, e.g.*, Kevin Krajik, *Edge Walking on the Urban Fringe*, CONSERVATION IN PRACTICE 29 (April-June 2005). The conversion of space into suburban environments is not just a function of population growth, though, as myriad examples demonstrate. Between 1970 and 1990, population in the New York metropolitan region grew by only 8% while the geography it encompassed increased by some 65%. *See* Henry L. Diamond & Patrick F. Noonan, *Healthy Land Makes Healthy Communities, in* LAND USE IN AMERICA at 1, 4 (Henry L. Diamond & Patrick F. Noonan eds., 1996). In Los Angeles, population growth over the same period was 45%, but expansion of the urban and suburban landscape was an eye-popping 300%. Id.

[28] Professor Keiter has explained the problem of "inter-mixed ownership" as a condition in which the multitude of owners of comparatively small parcels is beset by insuperable obstacles to effective coordination to the ends of conservation. *See* Robert B. Keiter, *Biodiversity Conservation and the Intermixed Ownership Problem: From Nature Reserves to Collaborative Processes*, 38 IDAHO L. REV. 301, 323 (2002) ("With habitat being the key to species survival, public and private lands must be knit together into an integrated ecological entity."). On the similar barriers to interagency cooperation even among different elements of the federal and state governments, see CRAIG W. THOMAS, BUREAUCRATIC LANDSCAPES: INTERAGENCY COOPERATION AND THE PRESERVATION OF BIODIVERSITY (2003) (hereinafter THOMAS, "BUREAUCRATIC LANDSCAPES"); Lee P. Breckenridge, *Reweaving the Landscape: The Institutional Challenges of Ecosystem Management for Lands in Private Ownership*, 19 VERMONT L. REV. 363 (1995). On the inherent contingency of most population viability analyses, see infra notes 51-63 and accompanying text.

solution from the top-down is beginning to seem highly improbable.

Quite possibly, the "ossification" and bureaucratization of the federal habitat programs—conditions that are inimical to the practice of "ecosystem management"[29]—are just what our political, administrative, and judicial institutions bring to conservation in the modern state.[30] As I have argued elsewhere, the paradox is that the more serious we become about biodiversity protection today, the less success we are having in actually protecting flora and fauna populations.[31] The more "sovereign" and dignified with statutes, bureaus, and legal procedures public conservation becomes, the less it measures up to what applied science has said effective conservation demands.[32]

Many have proposed structural reforms and some have conjectured that it must be a turn toward local government.[33] But the two dominant notions of localism today are themselves blocking the path toward a pragmatic model of local conservation. First is the notion of local government as vehicle for our democratic and participatory values.[34] In reality, this is too far from the truth about local governance in practice. It may be that some particular local governmental process turns out, improbably, to be participatory, transparent, and just. But localism is more typically factional, opaque, and self-dealing in

[29] *See* Gary K. Meffe *et al., Ecosystem Approaches to Conservation, in* PRINCIPLES OF CONSERVATION BIOLOGY 467, at 468, 481-84 (Martha J. Groom *et al.* eds., 3d. ed. 2005).
[30] *See* supra notes 1-23 and accompanying text.
[31] *See generally* Colburn, *Indignity*, supra note 1.
[32] *See* infra notes 51-60 and accompanying text..
[33] The legal and democratic authority of the municipality has been the subject of a lively scholarly debate at least since Professor Gerald Frug's seminal article, Gerald E. Frug, *The City as a Legal Concept*, 90 HARV. L. REV. 1057 (1980) (hereinafter Frug, "*City as a Legal Concept*"). But localism's role strategically has only recently occupied environmentalists. *See, e.g.,* MARK R. DOWIE, LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY (1996); Thomas W. Merrill, *The Story of* SWANCC*: Federalism and the Politics of Locally Unwanted Land Uses, in* ENVIRONMENTAL LAW STORIES 283 (Richard J. Lazarus & Oliver A Houck eds., 2005).
[34] Roderick M. Hills, *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000). Hills was reviewing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999) (hereinafter FRUG, "CITYMAKING").

nature.[35] Much of what little consensus there is about "sprawl" and the building of suburbia is how undemocratic modern land use law is and will probably remain.[36]

The other unrealistic picture of localism today is one billing it as the "devolutionary" reform of laws like those mentioned above.[37] This notion is that existing federal regulatory authorities like those in the ESA can be devolved and put in the hands of state and local governments according to "cooperative" management arrangements, region-wide land management plans, and other legal controls.[38] Such "decentralized" versions of the federal programs, the argument goes, are both more democratic and more rational as means to collective ends like the protection of biodiversity than are administrative agencies acting alone.[39] Misplaced in most of these claims is the incredible power of, and ambivalence toward conservation by, our land development markets.[40] Local land use policies, after all, have too often allowed individual localities

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[35] A skeptical subtext in the scholarly debate about local government law over the last two decades has asked to what degree liberals have worn the proverbial rose-colored glasses in envisioning the local polis. *See* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: the Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (hereinafter Williams, "*Constitutional Vulnerability*"). *See* infra notes 243 and 252 and accompanying text.

[36] *See generally* ROBERT FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS (2000); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 8-9 (2000).

[37] Accounts promoting the devolution of federal authority in biodiversity protection include Fischman & Hall-Rivera, supra note 9; Francesca Ortiz, *Candidate Conservation Agreements as a Devolutionary Response to Extinction*, 33 GEORGIA L. REV. 413 (1999); and J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 661-671 (1995).

[38] For example, ESA § 6 permits the Secretary to engage any state with an "adequate and active program for the conservation of endangered and threatened species" in a cooperative agreement that essentially delegates the Secretary's authority to the state. 16 U.S.C. § 1535(a)-(f).

[39] A number of avenues are available to the Departments of Interior and Commerce within the ESA to "delegate" their authorities to state and local officials. *See* Fischman & Hall-Rivera, supra note 9, at 132-68.

[40] *See* John Turner & Jason Rylander, *Land Use: The Forgotten Agenda, in* THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 60 (Marian R. Chertow & Daniel C. Esty eds., 1997). The terms "sprawl" and "suburb" equally characterize the many landscapes where "[l]and use is the forgotten agenda of the environmental movement." Id. at 61. But "suburbia" no longer denotes only the near-in radial development of detached homes encircling the "true" cities. It now encompasses vast and ever-expanding webs of low-density development in which humans and wildlife alike inhabit a semi-built landscape. Each of its kinds of localities is equally the object of delegations of the police power and land use authorities analyzed below. The technological and socioeconomic empowerment of landowners to live where they choose, *i.e.*, based as much or more on environmental amenities than on proximity to a workplace, *etc.*, are trends that seem likely to continue well into the foreseeable future.

to shift the costs of their own policies onto their neighbors.[41] Their maneuvers making neighboring locales compete for residents, tax revenues, and amenities are supposedly checked somehow within the cooperative federalist model.[42]

Of course, centralized objective-setting with decentralized implementation is conceivably a solution to such troubles.[43] But trying to achieve widespread cooperation by top-down mandate and professionalized expertise has been an abject failure for biodiversity and habitat conservation in practice, as I have argued at length elsewhere and summarize in Part II.[44] Extending federal law's reach to local governments, either as the agent of decentralized expertise or as the more democratic counterpart to it, is shaping up to be the major mistake of the modern conservation agenda. That argument proceeds in four parts. Parts II and III argue that the two most prevalent conceptions of local environmentalism today are actually blocking the rise of a pragmatic localist model of habitat protection and must be cleared away before real progress can be made. Part IV situates local governmental authority in its full context—a context set chiefly by the

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[41] *See* Briffault, *Localism and Regionalism*, supra note 36, at 9-10; *cf.* William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 87 (1999) ("Businesses looking to find low cost locations benefit not only from cheaper land prices on the urban periphery, but also may be able to elicit tax benefits and other financial packages from municipalities eager to attract new investment and an increased tax base.").

[42] Kris Wernstedt, *Terra Firma or Terra Incognita? Western Land Use, Hazardous Waste, and the Devolution of U.S. Environmental Programs,* 40 NAT. RES. J. 157 (2000). Known conceptually as "cooperative federalism," localities are increasingly being incorporated into this thinking through a further devolutionary step "down" and the consequent widening of the subsidiarity principle. *See* Wallace E. Oates, *On Environmental Federalism*, 83 VA. L. REV. 1321, 1329 (1997). Such top-down "cooperation" is also defended as clothing legally vulnerable actors like states and municipalities with legally powerful regulatory authority from federal administrative agencies. Id. at 1326-27.

[43] *See generally* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); Joshua D. Sarnoff, *The Continuing Imperative (But Only From a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997); Nathaniel O. Keohane *et al., The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313 (1998).

[44] *See* Colburn, *Indignity*, supra note 1; *cf.* Daniel B. Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 ECOLOGY L.Q. 745, 747 (1997) (hereinafter Rodriguez, "*Legal Innovation*") ("It is a commonplace to say that all layers of government—federal, state, and local—ought to pitch in to tackle interconnected environmental problems. . . . Beyond the theory lies the reality."). Craig Thomas, in a careful empirical study of interagency cooperation—what he called the "philosopher's stone" of habitat protection and restoration—found that cooperation depended most clearly of all on "the breadth of discretion given to staff and lower-level line managers to make decisions for and contribute resources on behalf of their agencies." THOMAS, BUREAUCRATIC LANDSCAPES, supra note 28, at 273. Unfortunately, that is a management approach agencies traditionally have lacked any incentive to take. *See* Frances Westley, *Governing Design: The Management of Social Systems and Ecosystems Management, in* BARRIERS AND BRIDGES TO THE RENEWAL OF ECOSYSTEMS AND INSTITUTIONS at 391 (Lance Gunderson et al. eds., 1995).

"Federalist" structure of our Constitution, modern mass markets, and the legal status of local priorities in the administrative state. Finally, Part V considers the prospects for suburban local governance as an agent of ecosystemic habitat protection and restoration. Part V suggests that local governments possess several counterintuitive virtues that make them adaptive, capable of learning from others' mistakes, and, in their own self-interest, highly mobilized and agile all at once.

II. INSTITUTIONS AND ECOSYSTEMS: A COMING AGE OF LOCAL ENVIRONMENTAL LAW?

Twenty years ago it was path-breaking work that suggested humans and human-caused disturbance dominate earth's ecosystems.[45] Today, in environmental studies of all kinds human-dominated ecosystems, as well as the information deficits about them with which we must cope if we hope to preserve what we value in these ecosystems, are the presumption.[46] Deprived of the goal of restoring nature's mythical "balance," in short, the real challenge is to move from a general "ecological objective" to ones that can be

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[45] *See, e.g.,* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (20th Anniversary edition, 2003) (1983).

[46] *See, e.g.*, Steven R. Palumbi, *Humans as the World's Greatest Evolutionary Force*, 293 SCIENCE 1786 (2001) (describing the massive effects of human-induced climate and habitat disturbances and the ways in which wildlife species are adapting thereto); Mark Lorenzo, *Sizing Up Sprawl*, 9 WILD EARTH 72 (1999) (proposing a method of assessing and valuing "ecosystem services" in order to empower advocates of wildlands protection relative to economic analysts); William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALABAMA L. REV. 537, 538-47 (2004) (arguing that the proper metric for assessing the Clean Water Act is on its record of managing human impact on aquatic ecosystems and on that metric the act has had extremely limited success); Michael E. Soulé, *What is Conservation Biology?* 35 BIOSCIENCE 727, 733 (1985) ("Conservation biology and the conservation movement cannot reverse history and return the biosphere to its prelapsarian majesty. The momentum of the human population explosion, entrenched political and economic behavior, and withering technologies are propelling humankind in the opposite direction. It is, however, within our capacity to modify significantly the *rate* at which biotic diversity is destroyed, and small changes in rates can produce large effects over long periods of time."); *see also* DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY (1990).

While more than 700 extinctions have been documented since 1600, RICHARD PRIMACK, ESSENTIALS OF CONSERVATION BIOLOGY 166 (2002), most ecological systems display significant time lags between causes and observable effects. Moreover, whatever the cause, many extinctions simply go unobserved. *See* D. Tilman *et al.*, *Habitat Destruction and the Extinction Debt*, 371 NATURE 65 (1994); Alsea Valley Alliance v. Evans, 161 F. Supp.2d 1154 (D. Or. 2001) (acknowledging the difficulty of verifying that a "distinct population segment" of coho salmon species is dwindling in size given the inherent difficulties of detection, measurement, and analysis). A descriptive ecology of human-driven habitat disturbance at broad scales is being sketched today. *See, e.g.*, RICHARD T.T. FORMAN, LAND MOSAICS: THE ECOLOGY OF LANDSCAPES AND REGIONS (1995) (hereinafter FORMAN, "LAND MOSAICS").

achieved with actual institutions and possible rules of law. This is a doubly tall order given the instabilities in most ecosystems and our finite capacity to perceive them.[47] Preservation of biodiversity is just such an ecological objective:[48] the preservation of *all* extant species, subspecies, and populations as a public purpose is at once too immense and too indefinite.[49] Moreover, amidst the constantly shifting equilibriums of human-caused disturbances, it is clear just how hard it would be to preserve every extant population of every species in a world of so many people taking so much from the ecosystems they inhabit.[50] As a result, other, more discrete goals within that wider matrix are coming into being. And as this Part explains, the twenty-first-century struggle to protect biodiversity has become a struggle over what different human communities value in nature as much as it is one about regulatory technique.

A. Ecosystemic Habitat Protection and Restoration: Pragmatic and Unbounded

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[47] Mark T. Imperial, *Institutional Analysis and Ecosystem-Based Management: The Institutional Analysis and Development Framework*, 24 J. ENV. MGMNT. 449 (1999); NOSS & COOPERRIDER, supra note 23; CARL WALTERS, ADAPTIVE MANAGEMENT OF RENEWABLE RESOURCES (2001); PRIMACK, supra note 46. The history of ecosystemic thinking, though, has been a history of attempts to isolate sources of "stochasticity"—unpredictableness—the better to predict biophysical outcomes. However, that overarching goal is one with which modern ecologists have grown increasingly disenchanted, *see* FRANK BENJAMIN GOLLEY, A HISTORY OF THE ECOSYSTEM CONCEPT IN ECOLOGY 200-05 (1993), especially as the practice of modern ecology reveals nature's disorderliness and unpredictablitity. *See* DONALD C. WORSTER, NATURE'S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS 400-33 (2d ed. 1994).

[48] The overall importance of plant and animal diversity and the magnitude of its institutional challenges is analyzed in NOSS & COOPERRIDER, supra note 23; *see also* PRIMACK, supra note 46, at 85-157.

[49] It is too indefinite because of how little we know about what constitutes a "species" and too immense because of how much of the biotic world is perishing in our hands. *Cf.* EDWARD O. WILSON, THE DIVERSITY OF LIFE 152-57 (1992) (noting the inherent arbitrariness of biology's hierarchical classification of organisms); Doremus, *Listing Decisions,* supra note 6, at 1087-95 (noting how the choices that inhere in biology's taxonomic-structural organization of genetic and organism diversity become problematic in the legal processes of listing endangered species pursuant to the Endangered Species Act); *see* infra notes 55-58 and accompanying text.

[50] *Compare* Barton H. Thomson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127 (1999) (describing the deference of the federal government to private land owners and quoting one conservation professional as saying that "[t]he trend is to consider the need of the landowner. Because when you force it down their throats it usually backfires. People will find a way around it.") *with* BEAN & ROWLAND, supra note 23, at 278 ("In the last twenty years, we have moved from viewing ecosystems as stable, closed, and internally regulated, to a new picture of more open systems in constant flux, usually without long-term stability, and affected by a series of human and other stochastic factors. Resource conservation and ecosystem change consequently are characterized by uncertainty.").

Conservation practitioners today have reluctantly turned their attention to saving the assemblages of plant and animal species humanity has made.[51] The interconnections of native, introduced, stressed, and over-abundant flora and fauna populations (and what must be done to ensure the long-term viability of as many as possible) have driven the practice of conservation research for over two decades.[52] Observed dynamism, both in society and nature,[53] has forced the further, deeply pragmatic questions of actual implementation, *i.e.*, how to protect a *particular* population against chance environmental and genetic threats.[54] Having to answer such questions—having to conjecture on the size and range of a "viable population"[55]—has rendered this practice pragmatic in two related

[51] PRIMACK, supra note 46, at 547-637; Georgina M. Mace *et al.*, *Assessment and Management of Species at Risk, in* CONSERVATION BIOLOGY: RESEARCH PRIORITIES FOR THE NEXT DECADE 11 (Michael Soulé & Gordon H. Orians, eds. 2001) (hereinafter "RESEARCH PRIORITIES"). The localism inherent in such a biological/ecological methodology was noted over two decades ago. *See* Soulé, *What is Conservation Biology?*, supra note 47, at 728-29 (noting the uniquely immediate scales of conservation biology as compared to other branches of biological science).

[52] The demography of a particular wildlife population and its environment frame the practice of "population viability analysis" for conservation biologists. Viability of any population is finite in a long enough timeframe because, in theory, every living population eventually goes extinct. *See* Gary E. Belovsky, *Extinction Models and Mammalian Persistence, in* VIABLE POPULATIONS FOR CONSERVATION 35 (Michael Soulé ed. 1987) (hereinafter "VIABLE POPULATIONS FOR CONSERVATION"). Many conservation biologists have grown wary of forecasting what does or does not constitute some "minimum viable population," though, because of how such information has been misused in the past, either to reduce a population significantly as long as it is not below the hypothesized minimum or to ignore the plight of a stressed population because it is already too far gone. *See* NOSS & COOPERRIDER, supra note 23, at 313. For purposes of simplicity, thus, I focus exclusively on the general notion of viability.

[53] Hugh P. Possingham *et al.*, *Making Smart Conservation Decisions, in* RESEARCH PRIORITIES, supra note 52, at 225 (identifying as the central challenge in sustaining minimum viable populations the "development of active adaptive management programs on real conservation problems") Soulé, *What is Conservation Biology?*, supra note 47 (same).

[54] *See* Mark Shaffer, *Minimum Viable Populations: Coping With Uncertainty, in* VIABLE POPULATIONS FOR CONSERVATION supra note 52, at 69. Many populations of widely dispersed species ought to be protected for their significance within their local ecosystems. *See, e.g.*, John Terborgh *et al.*, *The Role of Top Carnivores in Regulating Terrestrial Ecosystems, in* CONTINENTAL CONSERVATION: SCIENTIFIC FOUNDATIONS OF REGIONAL RESERVE NETWORKS 39, (Michael E. Soulé & John Terborgh eds., 1999) (hereinafter "CONTINENTAL CONSERVATION")("[W]idespread elimination of top predators from terrestrial ecosystems the world over has disrupted the feedback process through which predators and prey mutually regulate each other's numbers.").

[55] Natural population distributions in theory create "metapopulations": sets of populations $\{n\}$ comprised of individual subpopulations $\{p^1, p^2, p^3 \ldots\}$ linked together through the *potential* for interbreeding and genetic exchange. A metapopulation's pooled genetic resources represent a much better survival potential over the long term because of genotypic and phenotypic variations and a wider distribution's capacity to insure against environmental threats to distinct subpopulations. *See* Shaffer, supra note 54, at 69, 71. Particular subpopulations can, thus, be measured in their persistence in a single locale against the larger distribution of like populations $\{p + n\}$ and thus be compared as finite in two ways: temporally and spatially. Id. at 81 (arguing that discussions of "preservation" without a definite timeframe and definite probability of survival in mind are pointless). Nonetheless, this also implies that extirpation of individual subpopulations like p can have broad-scale implications for the metapopulation. Thus, the utility of the metapopulation concept likely turns on the scales being assessed. *See* S. Harrison, *Metapopulations and Conservation, in* LARGE SCALE ECOLOGY AND CONSERVATION BIOLOGY, at 111, 112-27 (P.J. Edwards *et al.* eds., 1993).

senses: (1) it must routinely reconstruct itself as implementation reveals new information and new perspectives, and (2) it must make use of *provisional* findings of fact.[56]

Conservation biologists have found that habitat conversion and fragmentation constitute *the* major obstacle to sustaining biodiversity today.[57] Any regulatory response must adapt to fit this problem. Yet, "[w]ith the exception of public parks and [similar] state and federal lands," the "American land ethic has been thoroughly private in nature."[58] The prerogative that comes from real property ownership in our legal system has meant hyper-fragmentation, forcing conservation practitioners to focus on the achievement of *potential connectivity* of one extant habitat patch to the next.[59] Indeed,

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[56] This conception of pragmatism is taken from Pierce, Dewey, James and other turn-of-the-century philosophers. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); ROBERT WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 293-318 (1991) (describing Dewey's pragmatic theory of democracy and its ultimate reliance upon a localist conception of politics committed to the long-term benefits of experimentation with means and ends) (hereinafter, WESTBROOK, "DEWEY AND DEMOCRACY"); SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 14-16 (2003); Quite similarly, in a work of tremendous synthesis over a decade ago, Professor Kai Lee hypothesized that such pragmatism should be incorporated into the writing of rules and regulations such that their *authoritativeness* would depend upon their organizational problem-solving capacities as such. *See* KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT 53 (1993) ("A strategy for using bounded rationality to learn rapidly is *deliberate experimentation*, which isolates part of complex reality, makes simple changes in it, and watches for results. . . . Because human understanding of nature is imperfect, human interactions with nature should be experimental.") (emphasis added). Lee is one of several ecologists and organizational theorists who helped assemble a methodological approach to ecosystems now known widely as "adaptive management." It is a philosophically pragmatic method predicated upon both the structure of biological knowledge and the organizational and management realities of administration in the modern state. *See generally* Westley, *Governing Design,* supra note 44.

[57] There is wide, long-standing agreement among conservation biologists that habitat degradation and fragmentation are the leading threats to extant wildlife populations. *See* PAUL R. EHRLICH & ANNE H. EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES (1981); Brian A. Wilcox & D.G. Murphy, *Conservation Strategy: The Effects of Fragmentation on Extinction*, 125 AMER. NATURALIST 879 (1985); Edward O. Wilson, *The Biological Diversity Crisis*, 35 BIOSCIENCE 700 (1985); NOSS & COOPERRIDER, supra note 23; David S. Wilcove *et al.*, *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607 (1998); Michael Soulé & John Terborgh, *The Policy and Science of Regional Conservation, in* CONTINENTAL CONSERVATION, supra note 54, at 1, 12 ("Connectivity . . . is a sine qua non for conservation. Originally nature was connected on the scale of continents . . . ."); TERBORGH, supra note 13.

[58] WILLIAM A. SHUTKIN, THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY 55 (2000).

[59] *See generally* J. Michael Scott *et al., The Issue of Scale in Selecting and Designing Biological Reserves, in* CONTINENTAL CONSERVATION, supra note 54, at 19; Andy Dobson *et al.*, *Corridors: Reconnecting Fragmented Landscapes, in* CONTINENTAL CONSERVATION, supra note 55, at 129; NOSS & COOPERRIDER, supra note 23, at 129-77; DAVID S. WILCOVE, THE CONDOR'S SHADOW: THE LOSS AND RECOVERY OF WILDLIFE IN AMERICA 41-47 (1999); REED F. NOSS ET AL., THE SCIENCE OF CONSERVATION PLANNING: HABITAT CONSERVATION UNDER THE ENDANGERED SPECIES ACT 73-110 (1997); FORMAN, LAND MOSAICS, supra note 46; ANDREW F. BENNETT, LINKAGES IN THE LANDSCAPE: THE ROLE OF CORRIDORS AND CONNECTIVITY IN WILDLIFE CONSERVATION (2d ed. 2003). Connections between populations augment the survival prospects of all by combining the available genetic resources. *See* supra notes 55-58 and accompanying text; Gary E. Belovsky, *Extinction Models and Mammalian Persistence, in* VIABLE POPULATIONS FOR CONSERVATION supra note 52, at 35. Michael E. Gilpin & Michael E. Soulé, *Minimum Viable Populations: The*

the connectivity preserved or restored between patches has probably become the barometer of long-term viability for most flora and fauna populations and thus the single most powerful metric of conservation progress and performance.[60]

But which populations ought to command scarce resources? The goal is the *potential* for connectivity, after all, because so little is known about what constitutes *actual* connectivity for most species.[61] Even our expert federal agencies have proven unable to discern the uniquely rational answers to such questions,[62] to say nothing of the fact that they have neither the jurisdiction nor the human or budgetary capital to ensure

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Processes of Species Extinctions, *in* SCARCITY AND DIVERSITY, supra note 26, at 13, 28-34 ("[A] minimum viable population is not one which can simply maintain itself under average conditions, but one which is of sufficient size to endure the calamities of these various perturbations and do so within its particular biogeographic context.").

[60] *See generally* ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS (2003); FISCHMAN, supra note 19; NOSS & COOPERRIDER, supra note 23; THOMAS, supra note 28; Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENVTL. L. REV. 1, 98-131 (1994); Karkkainen, *Biodiversity and Land*, supra note 6.

[61] Soulé & Terborgh, *The Policy and Science of Regional Conservation*, supra note 58, at 12 ("Rarely will haphazard reassembly of habitat patches restore an ecologically viable landscape. . . . The goal is to reverse the terrible consequences of fragmentation at the habitat and landscape scale—to restore the effective exchange of individuals and materials among sites for genetic maintenance, for demographic stability, for migration, and for the sake of other ecological processes."). Connectivity in this sense has two dimensions, one structural and one behavioral. Structural connectivity is the totality of environmental features that permit or encourage emigration/immigration and the consequent exchange of individuals between distinct populations. A recent report of the World Conservation Union ("IUCN") stressed the importance to policymakers of bifurcating the analysis of potential connectivity into these two distinct components. *See* BENNETT, supra note 59, at 7-10. Whereas structural connectivity "is determined by the spatial arrangement of habitats in the landscape" and "is influenced by factors such as the continuity of suitable habitat, the extent and length of gaps, the distance to be traversed, and the presence of alternative pathways or network properties," behavioral connectivity relates to the responses of wildlife to disturbed environments, or "the scale at which a species perceives and moves within the environment, its habitat requirements . . . [and] the life stage and timing of dispersal movements." Id. at 9. Because of the behavioral component, "even though living in the same landscape, species with contrasting behavioural responses (to habitat disturbance for example) will experience differing levels of connectivity." Id.

[62] Kendi F. Davies *et al., Habitat Fragmentation: Consequences, Management, and Future Research Priorities, in* CONSERVATION BIOLOGY: RESEARCH PRIORITIES FOR THE NEXT DECADE, 81 (Michael E. Soulé & Gordon H. Orians eds., 2001). "Science cannot tell us whether a group of organisms has value to society, or what risk of extinction society should tolerate. Thus, while the scientific foundations of the ESA no doubt are sound . . . [b]ecause so little is known about so many disappearing species, the best available scientific evidence is often highly uncertain." Doremus, *Listing Decisions*, supra note 6, at 1035-36.

The administrative process has proven good at getting agencies and stakeholders alike invested in a particular bureaucratic equilibrium instead of leaving all decisions permanently open for revision through the constant involvement of the public. *See* KEITER, KEEPING FAITH WITH NATURE, supra note 60, at 219-272; SHUTKIN, supra note 58, at 189-208; CHARLES F. SABEL ET AL., BEYOND BACKYARD ENVIRONMENTALISM 6-8 (2000). Tragically, that is a structural reality particularly incompatible with what conservation biology and pragmatism more generally tell us is necessary to successful implementation. *See* Colburn, *Indignity*, supra note 1, at 491-93 (arguing that environmental impact analysis under the NEPA is beset by litigation that focuses too heavily on the rationality of some particular decision at a particular moment in time without considering larger troubles in implementation).

viability of very many populations themselves.[63] They simply cannot control for the infinitely numerous actions of land owners today producing greater and greater fragmentation throughout our vast suburban and exurban "middle landscapes."[64] In short, for the ecological objective of preserving biodiversity (and thus habitat), the task is something akin to "reweaving the landscape"[65] even while we lack the capital, know-how, and legal institutions to do so.[66]

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[63] *See generally* BRIAN CZECH & PAUL R. KRAUSMAN, THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY, AND PUBLIC POLICY 154-63 (2001) (arguing that the magnitude of cumulative effects of many small landowners and decentralized decisions is far too pervasive for the federal government to regulate); NOSS & COOPERRIDER, supra note 23, at 334-38 (arguing that habitat conversion by development is the leading threat to wildlife habitat); Hal Salwasser *et al.*, *The Role of Interagency Cooperation in Managing for Viable Population, in* VIABLE POPULATIONS FOR CONSERVATION supra note 52, at 159, 162-64 (describing the necessity of multi-agency coordination when attempting to manage grizzly bears in the Greater Yellowstone Ecosystem).

[64] Between the dichotomized "wild" (natural) and "urban" (cultural) landscapes lay our vast "middle landscape" of the two's coexistence in our suburban and exurban nation. I take the sense of this phrase from Nora Mitchell & Rolf Diamant, *Stewardship and Sustainability: Lessons from the "Middle Landscape" of Vermont, in* WILDERNESS COMES HOME: REWILDING THE NORTHEAST 213 (Christopher McGrory Klyza ed., 2001). They defined it as a place "where civilization and wilderness meet." Id. at 216 ("This middle landscape traditionally has not received great attention from the conservation community. Yet [it] provides a vital connection between remote areas of wilderness and the places where most people live and work."). Thoreau receives credit for the original notion. *See* Henry David Thoreau, *Walking, in* WALDEN AND OTHER WRITINGS at 597 (Brooks Atkinson ed., 1950); BOTKIN, NO MAN'S GARDEN, supra note 10. Quite optimistically, Mitchell and Diamant envision a "re-wilded Vermont"—places in a rural state once cultivated/developed and now being reforested—as "lands where people can build a strong association to place and a connection to nature." Mitchell & Diamant, supra, at 217. Thoreau viewed the nineteenth century forest west of Concord as the critical area of transition between wilderness and city, *see Walking*, supra, at 602, and that transitional zone as critical to our ideas about both—something environmental ethicists have recently emphasized. *Cf.* BOTKIN, NO MAN'S GARDEN, supra, at 250 ("A willingness to appreciate both civilization and nature leads to a [Thoreauvian] perspective on cities. City environments should not be dismissed as bad places that we can only attempt to make less awful. Urban life will succeed when we recognize the positive potential of urban environmental settings. Wilderness, in turn, will benefit as cities are improved as human habitat."). Of course, as our national fascination with the natural and "wild" has matured in the shadow of our sprawl, Americans have begun to attach a significant cash value to the *authentically* 'wild' fragments still remaining. *See* infra note 183 and accompanying text.

[65] Breckenridge, *Reweaving the Landscape*, supra note 28. Importantly, there is an activist strain of localism in environmental politics today that will play an increasingly important role in this mission. *See generally* JOHN CRONIN & ROBERT F. KENNEDY, JR., THE RIVERKEEPERS: TWO ACTIVISTS FIGHT TO RECLAIM OUR ENVIRONMENT AS A BASIC HUMAN RIGHT (1997).

[66] The growth of human settlement and cultivation across the nation, in short, is also the "insularization" of wildlife habitats into patches, remnant isolates of a once immense and continuous landscape, such that interbreeding and/or periodic colonization (or re-colonization) is, for many species, rendered effectively impossible. Bruce A. Wilcox, *Insular Ecology and Conservation, in* CONSERVATION BIOLOGY: AN EVOLUTIONARY-ECOLOGICAL PERSPECTIVE 95 (Michael Soulé ed. 1981) (hereafter "EVOLUTIONARY-ECOLOGICAL PERSPECTIVE") ("One of the most profound developments in the application of ecology to biological conservation has been the recognition that virtually all natural habitats or reserves are destined to resemble islands, in that they will eventually become small isolated fragments of formerly much larger continuous natural habitat."). While "dispersal" (individuals striking out in search of new habitat, prey, mates, *etc.*) has the potential to link such isolates into a unitary population (metapopulation), the actualities of dispersal can be far short of "potential," especially as we further fragment the landscape. BENNETT, supra note 59, at 67-95; RICHARD T.T. FORMAN ET AL., ROAD ECOLOGY: SCIENCE AND SOLUTIONS 151-67 (2003) (hereinafter FORMAN ET AL., "ROAD ECOLOGY").

It is striking, in this connection, how even those few bold initiatives that exist today envisioning a much better connected landscape for the future are so heavily dependent upon the private land economy—even in the Rocky Mountain West where public lands are so common. *See* DAVE FOREMAN, REWILDING NORTH AMERICA: A VISION FOR

B. Romantic Visions of Local Environmentalism?

Localism has been pushed into this breach by a few.[67] Among the heraldry of a new local environmental law, Professor John Nolon stands out. Nolon produced an avalanche of writing about a new trend, focusing on the profusion of local land use and aesthetic ordinances from municipalities across the country.[68] The corpus of plans, ordinances, and other regulatory mechanisms he and others have publicized spans an impressive spectrum of issues, from watershed protection,[69] to invasive species control,[70] to agricultural and recreational use controls,[71] to forestry practices,[72] and, of course, sub-division, aesthetic-architectural, and growth controls.[73]

Yet Nolon's descriptive work on these developments joins a broad and deep field of conflict over local governments as regulators.[74] The "devolution" of regulatory

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CONSERVATION IN THE 21ST CENTURY (2004). Even there, no feasible plan can even be envisioned without significant cooperation from private landowners. Id. at 188-90.

[67] *See* Rodriguez, supra note 45; A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 574 (1993); SHUTKIN, supra note 58; DOWIE, supra note 34; WILLIAM B. HONACHEVSKY, ECOLOGICALLY-BASED MUNICIPAL LAND USE PLANNING (1999). Several others have implicitly advocated local environmentalism through their critiques of the federal system. *See, e.g.*, Reed F. Noss, *Some Principles of Conservation Biology: As They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893 (1994).

[68] Much of this writing has taken the form of anthological collections of local ordinances, plans, and management practices. *See, e.g.*, JOHN R. NOLON, OPEN GROUND: EFFECTIVE LOCAL STRATEGIES FOR PROTECTING NATURAL RESOURCES (2003); JOHN R. NOLON, NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW (2003). Some of it has been pedagogical: Nolon recently joined as an editor of a leading land use law casebook and took the lead (one assumes) in the book's addition of a chapter on local environmental law. *See* MORTON GITELMAN ET AL., LAND USE: CASES AND MATERIALS 699-824 (6th ed. 2003). Some of it has gone in a more theoretical direction. *See, e.g.*, John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENV. L. REV. 365 (2002) (hereinafter Nolon, "*Parochialism*"); *see also* Tarlock, supra note 68; JAMES M. MCELFISH, JR., NATURE FRIENDLY ORDINANCES (2004).

[69] Included here would be local regulations of wetlands, aquifer/ground water withdrawals, stormwater runoff, floodplain development, and slope protections. *See* NOLON, OPEN GROUND, supra note 69, at 193-500; *see also* A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, 20 PACE ENVTL. L. REV. 149 (2002)

[70] MCELFISH, supra note 68, at 129-31.

[71] MCELFISH, supra note 68; Nolon, *Parochialism*, supra note 68, at 389-97.

[72] *See* MCELFISH, supra note 68, at 184 (describing Carroll County, Maryland ordinances on surety requirements for logging); Nolon, *Parochialism*, supra note 68, at 405.

[73] *See* John R. Nolon, Golden *and Its Emanations: The Surprising Origins of Smart Growth*, 35 URB. LAW. 15 (2003).

[74] *See, e.g.*, Rachel Harvey, *Labor Law: Challenges to the Living Wage Movement: Obstacles in a Path to Economic Justice*, 14 U. FLA. J.L. & PUB. POL. 229 (2003); Thomas R. Head, III, *Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options for Southeastern States*, 6 ENVTL. LAW. 503 (1999) (hereinafter Head, "*CAFOs*"); Michael A. Woods, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L.J. 515 (2003); Shelley Ross Saxer, *"Down with Demon Drink!":*

authority and its supposed capacity to solve incorrigible problems has been a mainstay of environmental legal and policy debates for over a decade.[75] The list of federal statutes constituting the fields of pollution control and natural resources law has been called the most ambitious and far-reaching assertion of federal regulatory authority in the administrative state[76]—and that is truly saying something. Yet these laws split the atom of sovereignty between nation and state while federalism and state autonomy are *not* the

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Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas, 35 SANTA CLARA L. REV. 123 (1994); Randall E. Kromm, *Town Initiative and State Preemption in the Environmental Arena: A Massachusetts Case Study*, 22 HARV. ENVTL. L. REV. 241 (1998); Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627 (2001); Alexander Willscher, *The Justiciability of Municipal Preemption Challenges to State Law*, 67 U. CHI. L. REV. 243 (2000).

[75] *See generally* DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE (2005); Denise Scheberle, *Devolution, in* ENVIRONMENTAL GOVERNANCE RECONSIDERED: CHALLENGES, CHOICES AND OPPORTUNITIES 361 (Robert F. Durant et al eds. 2004); SHUTKIN, supra note 58; DEWITT JOHN, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES (1994). The debate has covered a broad cross-section of issues and a deep reconsideration of federal, state, and local partnering (and/or competitive) arrangements. *See, e.g.,* TOMAS M. KOONTZ, FEDERALISM IN THE FOREST: NATIONAL VERSUS STATE NATURAL RESOURCE POLICY (2002); Head, *CAFOs*, supra note 75; Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203 (1999); Cymie Payne, *Local Regulation of Natural Resources: Efficiency, Effectiveness, and Fairness of Wetlands Permitting in Massachusetts*, 28 ENVTL. L. 519 (1998) (hereinafter Payne, "*Local Wetlands Permitting*"); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U.L. REV. 1495 (1999); Kromm, supra note 75; DENISE SCHEBERLE, FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION (1997); Wallace E. Oates, *Thinking About Environmental Federalism*, 130 RESOURCES 14 (1998); Kirsten H. Engel, *State Environmental Standard-Setting: Is there a 'Race' and Is It 'To the Bottom'?*, 48 HASTINGS L.J. 271 (1997); Barry G. Rabe, *Power to the States: The Promise and Pitfalls of Decentralization, in* ENVIRONMENTAL POLICY IN THE 1990S, at 31-52 (Norman J. Vig & Michael E. Kraft eds., 3d ed. 1997); Michael C. Finnegan, *New York City's Watershed Agreement: A Lesson in Sharing Responsibility*, 14 PACE ENVTL. L. REV. 577 (1997); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE J. ON REG. & L. & POL'Y REV. 23 (1996); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE ON REG. & L. & POL'Y REV. 67 (1996); Breckenridge, *Reweaving the Landscape,* supra note 28; Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242 (1995); David L. Markell, *States as Innovators: It's time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve our Approach to Environmental Regulation*, 58 ALB. L. REV. 347 (1994); Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50 (1993); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U.L. REV. 1210, 1210 (1992) (hereinafter Revesz, "*Interstate Competition*"). Going back even further, "environmental federalism" has been fertile intellectual ground, *see, e.g.*, John C. Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How "Cooperative Federalism" Can Make State Regulatory Programs More Effective*, 19 U. MICH. J.L. REF. 9-3 (1986); Susan Bartlett Foote, *Beyond the Politics of Federalism: An Alternative Model*, 1 YALE J. ON REG. 217 (1984), since it was first plowed in what must constitute one of the most significant legal critiques of a generation. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977) (hereinafter Stewart, "*Pyramids of Sacrifice?*").

[76] Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 379-80 (2005).

same things as localism and local autonomy.[77] Probably the chief impediment for the latter, in fact, is the breadth and depth of state and federal preemption in America today. Between federal and state statutes, regulations, and guidance, local initiative in conservation is foreclosed to a stunning degree,[78] comprising an anchor that many argue is stifling innovation.[79]

Even more basically, though, it is virtually impossible today to give a general description of local governmental authority.[80] The academy is just as divided as the bench and bar over how to view the local government as an arm of the state. The seemingly general notion of "home rule" turns out, on reflection, to be a mosaic of

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[77] *Cf.* United States Term Limits v. Thornton, 514 U.S. 77, 839 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."); *see generally* Adler, *Judicial Federalism*, supra note 76 (describing the role judicial federalism has played in many federal environmental programs and predicting that the future of various federalism doctrines will only create more complexity and compromise). "The very premise of much environmental regulation is that ubiquitous ecological interconnections require broad, if not all-encompassing, federal regulation. This premise is contrary to that of a federal government of limited and enumerated powers." Id. at 380.

[78] Paul Weiland and others have skillfully detailed the ways in which federal and state law so dominate the fields of pollution control and natural resource protection. *See* Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237 (2000) (hereinafter "*Critical Analysis*"); Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467 (1999) (hereinafter "*Local Efforts*"); Paul S. Weiland, *Environmental Regulations and Local Government Institutional Capacity*, 22 PUBLIC ADMIN. Q. 176 (1998); Kromm, supra note 75. A generation ago Professor Currie labeled the Clean Air Act's preemption of state and local laws curbing automobile emissions a "disgrace" for its effects on public health (and its Detroit-based motivations). *See* David Currie, *Motor Vehicle Air Pollution: State Authority and Federal Preemption*, 68 MICH. L. REV. 1083, 1102 (1970); *see also* Stewart, *Pyramids of Sacrifice?*, supra note 75. Since then, the complexity of preemption in environmental law—whether as a result of stakeholder-generated legislation and regulation or simply the difficulty of creating rules at the federal level—has only mushroomed. *See, e.g.,* Jack W. Campbell, IV, *Regulatory Preemption in the* Garcia/Chevron *Era*, 59 U. PITT. L. REV. 805 (1988). Indeed, even where pollution control statutes expressly preserve the operation of local law, as is the case with the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, there is little security against the threat of regular challenges to state or local action by aggrieved stakeholders. *See, e.g.,* Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788 (2005); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991).

[79] Even assuming a willingness on the part of state regulators, sorting out whether and to what degree devolution of authority is legal under the mass of pertinent laws is a mammoth task with respect to virtually any local initiative. Weiland, *Local Efforts*, supra note 78, at 497-503; *cf.* Town of Wendell v. Attorney General, 476 N.E.2d 585, 589-91 (Mass. 1985) (analyzing the "particular circumstances" of a statute to determine whether the legislature evidenced a "preemptive intent"). "Combined with federal preemption of environmental law, state preemption of environmental law places significant restrictions upon local government authorities to formulate and implement environmental protection laws." Id. at 473. Moreover, there may be structural reasons that those seeking to avoid duplicative environmental controls will over-utilize the national political process in an effort to curtail diverse local regulations. *See, e.g.*, Weiland, *Critical Analysis*, supra note 78, at 243 ("Centrally set maximum standards foreclose the possibility that regulated entities will have to deal with multiple legislatures, laws, agencies, and rules."); SCHOENBROD, supra note 75, at 59-64, 124-43.

[80] *See infra* Part V.

starkly different traditions distributing state and local authority.[81] And even backers of local autonomy acknowledge its parochialism[82]: local land use law is acknowledged by virtually everyone for its role in producing post-*Brown* racial and socioeconomic segregation.[83]

Generally limited in their sovereign capacities,[84] effectively preempted from regulating in many fields altogether,[85] and *relatively* small in territory as they are,[86] local governments are often just ignored as agents of environmental progress. And, quite tellingly, our localism *is* viewed favorably from one theoretical perspective: the law and economics refrain on the personal freedom of entry/exit as optimizer of individual welfare.[87] Prominently missing both from the "new" local environmentalism story and the theory of localism as vehicle of neo-classical efficiency, though, is any critical engagement with our localism's "privatist" shortcomings.[88]

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[81] *See generally* DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK (2000); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 Minn. L. Rev. 643, 708-21 (1964) (hereinafter Sandalow, "*Home Rule*"); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 856 (1983) (hereinafter Rose, "*Planning and Dealing*"); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991)

[82] Nolon, *Parochialism*, supra note 68; *see generally* Richard Briffault, *Our Localism, Part II–Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (hereinafter "*Localism and Legal Theory*") (emphasizing the private origins and leanings of local governments); *see also* Richard Briffault, *Our Localism, Part I—The Structure of Local Government Law,* 90 COLUM. L. REV. 1 (1990) (hereafter Briffault, "*Structure of Local Government Law*") (same).

[83] *See generally* Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807 (2004).

[84] On the inherent limitations of individual local governments, see PAUL E. PETERSON, CITY LIMITS (1981).

[85] *See* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999).

[86] *See* FRUG, CITYMAKING, supra note 34. The territorial limitations of localities make for an objection to *state*-based environmental governance as well. *Cf.* Butler & Macey, supra note 76, 35-41 (discussing the "externalities" of interstate pollution transport).

[87] *See, e.g.*, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); VINCENT OSTROM ET AL., LOCAL GOVERNMENT IN THE UNITED STATES (1988); WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES (2001) (hereinafter FISCHEL, "HOMEVOTER HYPOTHESIS"); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995) (hereinafter, FISCHEL, "REGULATORY TAKINGS"). Of course, this group is for local government for precisely the reasons most progressives are so skeptical of it: the "freedom" of "like-minded" wealthy people to live together—and thus segregate themselves from others.

[88] *See* infra Section IV.A.

Local governance is not the miniature version of federal or state governance and if premised upon that misunderstanding of the local public as "sovereign," localism is surely an ecological bust. Notwithstanding all the attention to private ordering, sub-national environmental governance, and, in particular, the new local environmental law, thus, the legal structure of our conception of local autonomy (and, it follows, the legal structure of America's ever-expanding built landscapes[89]) has been left out of the debate about devolution and democratization in modern conservation. Part III explains how the defining reality of suburban and exurban local governance is private property itself.

III. "OUR LOCALISM"[90]: PROBLEMS OF SCALE AND IDENTITY

Collectivizing cities and suburbs into optimally scaled regional polities able to solve common problems like "sprawl" has been the stalled urbanist agenda for a

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[89] "Sprawl" is a convenient label for something almost everyone is against lately. *See, e.g.*, DOLORES HAYDEN, BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820-2000 (2003); MATTHEW J. LINDSTROM & HUGH BARTLING, SUBURBAN SPRAWL: CULTURE, THEORY AND POLITICS (2003); OLIVER GILHAM & ALEX S. MACLEAN, THE LIMITLESS CITY: A PRIMER ON THE SPRAWL DEBATE (2002); ANDRE DUANEY ETAL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2001); DAVID J. RUSK, INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA (1999) (hereinafter RUSK, "INSIDE GAME/OUTSIDE GAME"); JAMES HOWARD KUNTSLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MANMADE LANDSCAPES (1994); ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA (1990) (hereinafter FISHMAN, "BOURGEOIS UTOPIAS"); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985). But in the debate about its nature and causes, several good descriptive accounts of the socioeconomic environment of our localism have been written. *See* JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER (1992); JON C. TEAFORD, POST-SUBURBIA: GOVERNMENT AND POLITICS IN THE EDGE CITIES (1997) (hereinafter, TEAFORD, "POST-SUBURBIA"); *see* infra Section VI.A.

Especially when the habitat-fragmenting effects of amenities like golf courses, ski slopes, vacation homes, roads, transmission lines, cell towers, and other incidents of human society are added up, housing subdivisions or big box retailers *in themselves* can be kept in proper perspective. *See* Karkkainen, *Biodiversity and Land*, supra note 6, at 70-84; NOSS ET AL., supra note 60, at 5-9. Thus, my use of "suburb" and suburbanization ought to be understood to refer not just to the "bedroom community" on the radial edge of a metropolis, but also to "exurban" places like the "urban archipelagoes" dotting the remote forests of the West, Great Lakes, New England, and elsewhere. *See* James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENV. L. 1, 1 (2001) (hereinafter Rasband, "*Urban Archipelagoes*"); Jamie Sayen, *An Opportunity for Big Wilderness in the Northern Appalachians, in* WILDERNESS COMES HOME, supra note 65, at 124, 124-27. In this much, the East and West are becoming more alike. *See* Rasband, *Urban Archipelagoes,* supra, at 12-20. Further, and perhaps most importantly in the East, sprawl includes the "edge cities"—places marked by: five million square feet of leasable office space or more, six hundred thousand square feet of retail space or more, a history in which, thirty years ago, it was "overwhelmingly residential and rural in character," and "a local perception as a single end destination for mixed use—jobs, shopping, and entertainment." GARREAU, supra, at 425. What all of these places have in common physically are their automobile- (road) and energy-dependence and their low-density human occupancy.

[90] Briffault, *Structure of Local Government Law*, supra note 82.

generation.[91] Surprisingly, one of the causes of that stagnation has been local government's internally conflicted *identity* within our Constitution, an identity that puts it somewhere between sovereign and subject. This Part argues that these scale and identity problems have become synonymous with various threats to habitat in America's built landscapes and, thus, to viable populations for conservation over the long term.

A. A Problem of Scale

Conventional wisdom holds that municipalities are imperfect agents of the public welfare in matters like habitat protection for several reasons. First, their geography prevents effective regulation of most public problems because they are too small to "enclose" the whole problem as a sovereign. Lacking the size to regulate effectively, the argument runs, local governments are poorly fit to protecting "common pool resources" or solving similarly broad public problems.[92] Habitat conservation and restoration is no exception here. Most of the time, the habitat needs of a viable population will be much broader than any single town, county, or other municipal unit.[93] Of course, as mentioned

[91] *See* Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL'Y & L.26 (2003); MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (rev. ed. 1998); PETER CALTHORPE & WILLIAM FULTON, THE REGIONAL CITY 7 (2001).

[92] A "common pool resource" may be defined as any natural resource that is susceptible to overuse in a general access system. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 1-3 (1990) (hereinafter OSTROM, "GOVERNING THE COMMONS"). Wildlife is a prototypical common pool resource as most first year property law students learn in reading critiques of *Pierson v. Post*. *See* GOBLE & FREYFOGLE, supra note 3, at 124-25.

[93] Such "scale" issues have usually been noted with respect to states (compared to the federal government) or particular land management agencies. But the problem is much more widespread where conservation is concerned. *Cf.* SABEL ET AL., supra note 62, at 10 ("[U]nder complex and changing conditions, problems just outside the regulated zone will frequently turn out to be just as significant as those within it."); BEAN & ROWLAND, supra note 23, at 428-29 ("Rarely . . . have local governments undertaken to regulate land use for the purpose of conserving wildlife or related resources. Were they to try to do so, moreover, they would find themselves in a similar situation to that of the states with respect to migratory birds prior to enactment of the Migratory Bird Treaty Act: The positive efforts of one could be negated by the action or inaction of another."). Conservation biologists both in and out of government have long identified jurisdictional boundaries as a problem of the first magnitude. *See, e.g.*, NOSS & COOPERRIDER, supra note 23, at 328-29. More recently, though, fragmentation has been studied as a function of the multi-agency administrative state itself. *See* THOMAS, BUREAUCRATIC LANDSCAPES, supra note 28, at 67-152.

above, the reification of legal boundaries inhibiting necessary cooperation is just as much a failing of our federal habitat programs,[94] but let us put that aside here.[95] For if the knock on local government's scale has long been the foundation of a conventional wisdom, that wisdom has long had its doubters.

One consensus of Progressivism was that "spill-overs" from adjacent jurisdictions are simply too many and too significant to take local governance seriously for very many public problems like the protection of "common pool resources."[96] Following this theory, equally empowered local governments, in their diversity of means and ends, seem to contribute to each other's own powerlessness and vulnerability.[97] The critique of this conventional wisdom is that collectively efficient outcomes can be achieved by allowing the differences in priorities to be sorted by prices and property values—that is, by viewing local governments as vehicles for optimizing individuals.[98] Now, at its deepest, this is a dispute about whose welfare to maximize: the individual's or the locality's. And at that level of generality it is beyond resolution. My claim is that, viewed pragmatically,

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[94] *See* Colburn, *Indignity*, supra note 1; Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976); Robert Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1985); Robert B. Keiter, *Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region*, 60 COLO. L. REV. 923 (1989); Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management,* 65 COLO. L. REV. 293 (1994).

[95] Regionalization of local governance in response to declines of various sorts has been the defining frame of reference for scholars of the field for many years. *See, e.g.*, FRANK I. MICHELMAN & TERRANCE SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 748-969 (1970). An equal and opposite tradition venerates the boundaries of local governments as the provision of a "marketplace" in publicly funded goods and services, allowing citizens their choice of where to locate. *See, e.g.*, Tiebout, supra note 87; DENNIS C. MUELLER, PUBLIC CHOICE III 199-202 (2003) (discussing empirical studies corroborating Tiebout's hypothesis). It is this aspect of scale that has become a growing part of the legal discourse of habitat protection. *See, e.g.*, Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 207 (2002).

[96] Common pool resources must be protected because they are, generally speaking, "sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from [their] use." OSTROM. GOVERNING THE COMMONS, supra note 92, at 30. Without such protections, that is, the resources themselves would be over-exploited and prevented from functioning optimally. Id. Once viewed as an unavoidable "tragedy," collective action for the protection of such resources is certainly possible. *See* Dagan & Heller, supra note 27, at 564-81.

[97] Some frame this as the central dilemma for cities and suburbs. "Strengthening local autonomy from the states does not benefit all localities, but instead benefits those with the greatest local resources or the fewest public service needs, to the detriment of poorer places." Briffault, *Localism and Legal Theory*, supra note 82, at 355.

[98] *See* Tiebout, supra note 87, at 422 ("Spatial mobility provides the local public-goods counterpart to the private market's shopping trip."); *see also* FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87.

this has become a *problem* of scale for public ends like conservation.[99] Pollution is the prototype but habitat is very similar.[100] To put this problem simply, the geographic scale of local government is seen by many to be too small to do much about things ailing the public[101] and by many others as the key to human liberty because governmental power itself is not necessarily the means to any legitimate end.[102] Bounded municipalities, in

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[99] The problem of scale stems in some measure from the boundaries of local governments. *See* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1121 (1996) (hereafter Briffault, "*Boundary Problem*").

> Boundaries are crucial to the interwoven set of political and economic arguments for local autonomy by helping to make local governments appropriate settings for political participation, for organizing the efficient provision of public goods and services, and for community self-government. . . . Yet, boundaries can also be the Achilles' heel of local government law, subverting local autonomy even as they support its values. The problem of local government boundaries nicely mirrors a central dilemma of local autonomy: the absence of any obvious metric for determining what constitutes a proper unit for the exercise of local autonomy.

Id. at 1121. The permeability of local legal boundaries complicates the effort of any municipality within a metropolitan region to, for example, provide adequate police services. Id. at 1123-44. Their relative permanence and the human tendencies to reify such boundaries present other types of problems as in, for example, the case of public school financing. States have also been rejected on variants of this idea. Throughout the 1960s and 1970s, as modern environmental law was born, states were often characterized as being locked in a "race-to-the-bottom" for the most lax environmental controls given how incomplete their authorities and territories were and how likely it was that they would face competition for corporate taxpayers from neighboring states. Even then, though, some recognized the shakiness of the evidence for such conclusions. *See, e.g.*, Stewart, *Pyramids of Sacrifice?,* supra note 76, at 1226-29. Moreover, since then, the balance of scholarly opinion on states' scale problems has shifted significantly. *See, e.g.*, Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001) (propounding a public choice analysis of state autonomy and arguing that the prior theories gave insufficient attention to the incentives states have to regulate pollution stringently); Richard L. Revesz, *Federalism and Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996).

[100] As the description of potential connectivity above argued, preserving and maintaining a landscape that facilitates species dispersal probably necessarily entails large blocks of protected habitat in addition to "corridors," as such, depending upon the species. Thus, the emergence of barriers inhibiting dispersal within one locality can jeopardize the assemblage of species regionally, perhaps severing a small population from its larger, metapopulation. *See* BENNETT, supra note 59, at 41. Even beyond connectivity, though, "spill-overs" into protected tracts of habitat from neighboring jurisdictions constitute a major threat to preserve integrity as well. Janzen, supra note 25, at 287 (identifying various groups of "external threats" and their importance to managers). *See* supra notes 52-57 and accompanying text.

[101] This problem with the public's scale can even be thought of as a complex of related problems in the delivery of public goods and services. Spill-overs, after all, can be created or destroyed through the setting and changing of boundaries (common phenomena in local government). *Cf.* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69 (1978) (upholding extraterritorial "police jurisdiction" of city and stating that "[t]he imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders."). This is true of contract-based inter-local bargaining, too. *See* Clayton P. Gillette, *Regionalization and Interlocal Bargain*s, 76 N.Y.U. L. REV. 190 (2001) (hereinafter Gillette, "*Regionalization and Interlocal Bargains*"). Whether the scale achieved permits the accomplishment of common ends (clean water, good schools, policing, *etc*.) is a complicated question of fact, to be sure. But the scope of the territory and citizenry and the nature of the spill-over(s) involved are undoubtedly central to its answer.

[102] *Cf.* Ziegler, supra note 91, at 45-65 (describing the tension within anti-sprawl activism and its use of exclusionary zoning by showing the regional effects that such policies have); ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 106 (1970) (acknowledging that "exit" is a favored solution for individuals in the modern state/economy and then puzzling that "exit has been accorded an extraordinarily privileged position in the American tradition, but then, suddenly, it is wholly proscribed . . . from a few key situations").

other words, are either the ailment or the cure and this argument has itself assumed such proportions that it is becoming a barrier to progress in ecosystemic conservation.[103]

B. A Problem of Identity

Not surprisingly, a second and more penetrating set of objections has beset local governance—going to its very nature as government. *The* modern condition of political authority is to question the publicity of "a public": is it comprised of truly "public" rather than merely "private" motives or concerns?[104] Are the citizens of the City of New York really members of a discrete polity with some set of unique interests? Many Staten Islanders do not think so.[105] Ostensibly public objectives like the protection of

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[103] Of course, the philosophical dispute over public versus private welfare maximization cannot be addressed through empirical evidence. But the *fact* that entry/exit and boundary fluctuation are core realities of local governance is pivotal to understanding its legal and political structure and its role in this wider theoretical dispute. For, as jurisdictions grow or shrink in size, so do their revenue-raising and other collective capacities, potentially affecting their abilities to perform for their constituencies. Finally, shrinkage to a more "local" scale can also be instrumental to the distortion of public opinion because the municipal "public" may lack the hallmarks of a deliberative body thought so vital to genuinely republican government since *The Federalist*. *See* infra notes 108-10 and accompanying text.

[104] *See, e.g.,* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927) (analyzing the confluence of factors that produces truly public opinion and allows the public to be self-governing as opposed to the aggregation and trading of private preferences); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962) (analyzing different voting rules and their tendency to effect legislative outcomes and advocating unanimity requirements as the best procedure to maximize the liberty of individuals); BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM (1983) (analyzing the rise of nationalism within multi-ethnic states and the roles played by culture, language, political boundaries, and economics); JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995) (analyzing the uses of federalism and confederalism to constitute a single polity from among different ethnicities each of which have their own distinct normative systems); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996) (setting forth a discourse theory of constitutionalism and requiring minimum conditions on the fair and rational conduct of politics that must be met in the "public sphere" for a majority rightfully to control the sovereign offices of a nation state); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001) (analyzing the use of majority rule in democracies meant to persist over time and arguing that present majorities can be unrepresentative and prone to discount the welfare of future generations).

[105] "Greater New York City" comprised of the five boroughs was established in 1898 at the height of Progressivism's urban reform movement. EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898 1031-1246 (1999). And until a one-person, one-vote challenge invalidated the structure, the City's budget, land use, and other polices were governed in an arrangement that weighted equally the borough of Brooklyn's say to that of Staten Island's, notwithstanding the fact that the former had roughly seven times the population. *See* Morris v. Board of Estimate, 707 F.2d 686 (2d Cir. 1983). The ending of that borough structure precipitated the recent (yet thus far unsuccessful) push for Staten Island's secession from the City. *See* Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775 (1992) (hereinafter, Briffault, "*Metropolitan Governance*"). Municipal boundaries are a double-edged sword in that spill-overs occurring between any two or more municipalities can be both net positives and negatives, depending upon the territory or service in question. *See* Briffault, *Boundary Problem*,

biodiversity and habitat set this dilemma up directly: why is it in the common interest to protect a particular population or species?[106] Voluntarism avoids such dilemmas, always, but the command and control of the regulatory state has made them widely apparent today.[107] Unfortunately, most attempts to solve these dilemmas still begin from conventional theories of legislatures or simple-minded rejections of collective self-government.[108] A pragmatic reconstruction of localism must confront the question of

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supra note 99, at 1130-33. Beyond simple town-to-town accounting, though, Briffault found that "in contemporary metropolitan areas, the most significant externalities may not involve the impact of one particular locality on its neighbor but may instead be a consequence of the aggregate of local policies across a region." Id. at 1133.

[106] One answer is that the genetic material represented by any species is a potentially significant natural resource with the possibility of untold benefits to present and future generations. *See, e.g.*, EDWARD O. WILSON, THE DIVERSITY OF LIFE 281-310 (1992). This rationale tends to falter in many political debates, though. *See* Doremus, *Saving the Ordinary*, supra note 12. A second possible answer to the question, thus, focuses on the aesthetic beauty of the species or of the ecosystem it plays a role in maintaining. *See* WILSON, supra, at 315; *Cf.* SABEL ET AL., supra note 62, at 3-9 (describing local support that arose for the protection of a fringe-toed lizard in southern California); *see* supra note 55.

[107] *Cf.* Dorf & Sabel, supra note 56, at 274-83 (describing the general predicament of administrative agencies' democratic legitimacy and the failure of various reform models to resolve it); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 26-28 (2002) (arguing that one of the best justifications for expert regulation by risk assessments in pollution control is that lay people usually misunderstand the magnitude of threats expressed in terms of probability). It is a short distance from the premise that the public does not understand most regulatory choices to the premise that supposed public-regard is a convenient pretext for self-dealing. A discourse theory of democracy generally explains this predicament of the administrative state as a continuation of power-dominance within the abstract public sphere of today through the elite use of expertise and informational strategies. Such strategies, in turn, drive a hyper-differentiation of norms that insulates state officials from popular accountability and thus frees them from the "public" (while tying them to the powerful). HABERMAS, supra note 104, at 359-87; FRANK FISCHER, CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE (2000). Solving public problems as complex and multi-jurisdictional as, for example, air pollution, has entailed the use of institutions and vocabularies accessible to exceedingly few. *See* Jamison E. Colburn, *The Future of Air Pollution Control in the Corporatist State*, 34 ENV. L. RPTR. 10577, 10603 (2004) (arguing that air pollution control policy today is best described by a "corporatist" model of the state controlled by and on behalf of integrated, internally disciplined groups capable of maximizing political leverage through litigation and presidential elections) (hereinafter Colburn, "*Corporatist State*"). Finally, many participants in the *national* search for public purpose find themselves forced to accept highly constraining roles and this critique is in no way intended to impute illegitimate motives to any particular constituency. *Compare* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 224 (1967) ("The individual legislator does not act alone, but as a member of a representative body. Hence his pursuit of the public interest and response to public opinion need not always be conscious and deliberate. . . . Representation may emerge from a political system in which many individuals, both voters and legislators, are pursuing quite other goals.") *with* ROBERT J. BRULLE, AGENCY, DEMOCRACY, AND NATURE: THE U.S. ENVIRONMENTAL MOVEMENT FROM A CRITICAL THEORY PERSPECTIVE 275 (2000) ("The insider strategy involves many environmental organizations in the legal and technocratic policy process and thus requires them to develop professional staff and bureaucratic structures. This . . . contributes to the creation of an organizational structure in which members have little room for participation.").

[108] Madison diagnosed the causes of "instability" and "injustice" in parliamentary bodies as stemming not just from "faction" but also from a failure of scale. *See The Federalist No. 10*, *in* THE FEDERALIST PAPERS (Clinton Rossiter ed. 1961) ("By enlarging too much . . . you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these and too little fit to comprehend and pursue great national objects."). Madison's not-so-novel solution was to achieve a "mean," something he argued the Constitution had done. *Cf.* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 98 (1984) ("Madison's diction distinguishes local from national in a manner consistent with Montesquieu's defense of small republics. Men must be "acquainted" with the local good, but must "comprehend" the national; they can be "attached to" to the local, but "pursue" the national. A smaller sphere yields a more simply accessible, immediate public good."). Nevertheless, two centuries of practice have shed an unflattering light on his faith in such a legislature.

what a local public *is,* though, before it confronts problems of scale and regulatory technique[109] and the local "public," so often the subject of reverential generalities, is too often homogenized and inherently parochial.

At its strongest, then, this objection goes to whether local governments are suited to assuming any sort of truly public authority.[110] It questions the justice of a local majority's will to subjugate an out-voted minority at the same time it doubts the

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The Madisonian account of popular sovereignty and the ameliorative powers of an "extended sphere" in which political coalitions were to operate one against another denied the stability and justice of smaller "republics" given the likelihood and degenerative effects of "faction." *See Federalist No. 10*, supra, at 83 ("The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass with which they are placed, the more easily will they concert and execute their plans of oppression."). But the flaw of defining the ideal polity in the abstract as Madison does is that bounding the "society" to be self-governing should, in principle, be done by something other than historical accident. Yet Madison does exactly that in *The Federalist*. He hypothesized that Congress's ability to resist "parties and interests" that are incompletely representative of the wider "public" and its overall stability would flow from the states. Who could know whether or why the different colonies alone or together were of a truly balanced (or balancing) scale? *See* EPSTEIN, supra, at 59-110; ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 119-31 (1989). Of course no one could or did—leaving Madison's theory open to a rather self-refuting critique. TULLY, supra note 105; *see also* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 165-290 (1995); SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 244-307 (1993).

Moreover, as has long been the overall critique of the Madisonian legislature, a disparity of property and wealth undermines community and society among those given a vote in an economically diverse population by ensuring that some will be in a position to use their rights of participation and "voice" much more effectively than others. That basic critique has always diminished the force of Madison's defense of the representativeness of our federal system. *See generally* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990). This is not, however, to say that collective political action itself is so easily dismissed. *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

[109] One particularly common form of "identity" conflict goes to the legitimacy of local action on a particular subject matter as compared to state action thereon. *See, e.g.*, McCrory Corp. v. Fowler, 570 A.2d 834 (Md. 1990) (invalidating anti-discrimination ordinance as outside the scope of state home rule authority); City of Commerce City v. State, 40 P.3d 1273 (Colo. 2002) (rejecting challenge brought by city to state statute mandating automated vehicle identification program on grounds that home rule rights did not encompass subject matters of statewide concern); City of Atlanta v. McKinney, 454 S.E.2d 517 (Ga. 1995) (rejecting challenge to city anti-discrimination ordinance on statewide versus local concern grounds but by closely divided court). Some local conservation initiatives have provoked judicial consideration of this legal aspect of municipal authority and, often as not, a judicial rejection of municipal as opposed to state prerogative. *Compare* Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992) (invalidating local ordinance prohibiting oil and gas drilling on grounds that the matter was of state concern and preempted by state statute regulating oil and gas extraction generally) *with* Quick v. Austin, 7 S.W.3d 109 (Texas 1999) (upholding local law regulating oil well construction for purposes of protecting an aquifer against challenge that city lacked authority to protect such a natural resource).

[110] The public choice literature on the (rational) maximization of self-interest by local governments is quite voluminous. *See* MUELLER, supra note 95, at 182-204. And democratic theory and natural resources analyses generally agree with public choice scholars' skepticism of local measures. *Compare* DAHL, DEMOCRACY AND ITS CRITICS, supra note 109, at 193-209 (describing claims to local autonomy made from within modern democratic theory and concluding that it is impossible to establish the single most fair or just "unit" on the basis of principle) *with* KEITER, KEEPING FAITH WITH NATURE, supra note 60, at 299-327 (discussing "place based" ecosystem management initiatives and their reliance on collaborative bargaining, and ultimately questioning their legitimacy and their capacity to protect natural resources like wildlife habitat over the long-term).

rationality of that majority in pursuing the ends it does.[111] As a matter of fact, the land use policies American local governments have adopted have often been patently discriminatory.[112] Large lot requirements or "open space" ordinances are certainly good for snob zoning's sake. But they can sometimes be flatly inconsistent with real conservation.[113]

Thus, the two problems logically lead to asking how ought some local political collective's ends or physical dominion be defined?[114] In public choice theory[115] the framing hypothesis is that localities represent and protect their own interests first, best, and often to the detriment of the wider public. Local government studies tend to confirm the hypothesis,[116] although it is by no means uncontroversial. Local government

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[111] *See* JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 30-49 (1997); DAHL, DEMOCRACY AND ITS CRITICS, supra note 109, at 208; Pildes & Anderson, supra note 109, at 2135-40.

[112] *See* Godsil, supra note 84, at 1858-71 (describing the use of modern land use law as a means of effectuating *de facto* segregation); DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997); JAMES S. DUNCAN & NANCY G. DUNCAN, LANDSCAPES OF PRIVILEGE: THE POLITICS OF THE AESTHETIC IN AN AMERICAN SUBURB (2004); *cf.* Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775 (1998) (arguing that local government law plays a big role in the disproportionate siting of undesirable land uses in poor and African-American communities).

[113] *See* Godsil, supra note 84; FORMAN, LAND MOSAICS, supra note 46, at 452-62; MCELFISH, supra note 68, at 85-109.

[114] Most often, states are compared unfavorably to the nation through the use of this question, especially with respect to ecological objectives like biodiversity conservation. *See, e.g.*, BEAN & ROWLAND, supra note 23, at 277-81. But the question is equally apposite in comparing the relatively small locality to the state or nation.

[115] Public choice theory is the "economic study of nonmarket decision making, or simply the application of economic to political science." MUELLER, supra note 96, at 1. Its "basic behavioral postulate . . . is that man is an egoistic, rational utility maximizer," a postulate that links contemporary public choice theorists to the traditions of Hobbes, Spinoza, Hume, Madison, and Condorcet. Id. at 1-2. *Compare* BUCHANAN & TULLOCK, supra note 105, at 291 ("Almost any conceivable collective action will provide more benefits to some citizens than to others, and almost any conceivable distribution of a given cost sum will bear more heavily on some individuals and groups than on others.") *with* MASHAW, supra note 111, at 67 ("Montesquieu, Madison, and Condorcet were contemporaries. And when Madison talks of the dangers of faction or of "ambition checking ambition," he speaks a language that is the inspiration for the modern public choice approach, as James Buchanan has explicitly acknowledged."). Madison's calculating analysis of democratic politics, though, largely neglected to account for the ways in which supermajority requirements enable the rule of interested or passionate minorities. *See* DAHL, PREFACE TO DEMOCRATIC THEORY, supra note 109, at 9 ("Neither at the Constitutional Convention nor in the "Federalist Papers" is much anxiety displayed over the dangers arising from minority tyranny; by comparison, the danger of majority tyranny appears to be a source of acute fear."). It is to this domination of democratic politics by acutely interested minorities—and exclusion of diffusely interested majorities—that most contemporary public choice theorists devote their attention.

[116] *See* Been, *Exit as a Constraint*, supra note 106 (arguing that many doctrines of local government law seek to control self-interestedness of localities by encouraging real inter-local competition). The notion of collective "identity" developed here owes much to George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737 (1993), and FRUG CITYMAKING, supra note 34, at 73-112. Such questions are often asked with regard to states. *See, e.g.*, Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 390-91 (1998) ("What is the

boundaries are legally fungible[117] and yet, especially in suburbia, they often become entrenched at just the point externalities are realized.[118] Indeed, local *self*-recognition today usually takes the form of "incorporation" or "secession"—hardly evocative of democracy at all.[119]

Perhaps the most troubling aspect of our local governments' scale and identity problems—though broadly relevant in the administrative state—is that they are beginning to frame the prospects for real conservation in the twenty-first century. So-called "place-based" responses to the administrative state's failures have never been more popular, even while the need for ecosystem-wide protections is so evident. Even assuming, though (as is increasingly common), that a local majority possesses the *will* to protect habitat within its borders, what makes it an end with which this majority is properly concerned?[120] That is, even granting that a local majority wishes to preserve or restore

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nature of the polity to which a state constitution corresponds? Is the state constitution a charter reflecting the fundamental convictions of an integral unit ("the People" of the state), or does the constitution merely provide a political framework for a diverse group that happens to inhabit a particular territory?"); James A. Gardner, *The Failed Discourse of State Constitutional Law*, 90 MICH. L. REV. 761, 780-91 (1991) (questioning the legitimacy of divergent judicial interpretations of state constitutional language resembling that of the federal Constitution by drawing into doubt whether states constitute distinct political identities); James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C.L. REV. 1237 (2002) (hereinafter Gardner, "*Political Community*"). Although less common, they are now being asked of localities, too. *See* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 263 (1993).

[117] *See* Rodriguez, supra note 45, at 755 ("[L]ocal 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."). Specific requirements vary by state, but most states have relatively permissive standards for incorporation and even sometimes for secession. *See* Daniel R. Mandelker, *Standards for Municipal Incorporation on the Urban Fringe*, 36 TEX. L. REV. 271 (1958); *cf.* U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 22-23 (1993) (describing different requirements of incorporation, annexation, and secession across the fifty states).

[118] *See* infra Part IV.

[119] Teaford's careful study of the cycles of metropolitan consolidation and fragmentation highlights the practical effects of this privatism in depth throughout the formative period of modern American local government law. *See* JON C. TEAFORD, CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA (1979) (hereinafter TEAFORD, "CITY AND SUBURB").

[120] Any number of reasons—from the fact that many values are of higher priority than conservation to the practical reality of trying to regulate on a small scale—have been marshaled against its propriety. *See* TIMOTHY BEATLEY, HABITAT CONSERVATION PLANNING: ENDANGERED SPECIES AND URBAN PLANNING 200 (1994) ("It is problematic that conservation decision must be made without full and complete biological knowledge, and it is particularly troubling given the magnitude of the policy decisions based on the limited knowledge . . . and the speed with which theses decisions are to be made. A basic contradiction exists between the timeframes of developers, who want relatively

certain habitat, what makes it a legitimate end of that local majority?[121] One locality could perform superbly in protecting a tiny fraction of the habitat needed for a particular species or population and it could be extirpated all the same given the scale of the spaces involved.[122] In light of the *extent* of habitat fragmentation and disturbance,[123] the pivotal choice in conservation and restoration today is which parts of nature to try to save with scarce resources.[124] Should it be a local or the wider public that chooses? Which has the requisite authority or practical power to succeed?[125]

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quick conservation answers, and the timeframes of the scientists and wildlife biologists who may require many years of study to adequately understand the biology of even a single species."); *cf.* BEAN & ROWLAND, supra note 23, at 428 ("Vesting primary responsibility for land use regulation with local government serves many important public purposes. Effectively conserving wildlife, however, is not one of them.").

In an article written a decade ago, Professor Tarlock argued that "[b]iodiversity protection is a logical extension of the exercise of the police power to promote the general welfare." Tarlock, supra note 68, at 574. That may be true of a "police power" jurisdictionally broad enough to encompass some significant portion of a species' (or even a population's) range and habitat needs. But for a police power confined, as is often the case, to a mere few square miles, it might seem quite *arbitrary* where the habitat therein is but a tiny fraction of what is adequate for viability purposes. *Cf.* Ziegler, supra note 91, at 6065 (noting how localities' expressed ends of "smart growth" are either disingenuous or are being pursued irrationally unless and until they collaborate regionally to counteract reactions by neighboring municipalities). I regard this as a significant challenge to the *legitimacy* of habitat protection at the local level and try to meet it below in Part V.

[121] Throughout much of American history this sort of localism has been constitutionally suspect in one way or another. To the contrary, though, environmental historians have begun documenting how localist, proprietary sentiments were instrumental in facilitating rather successful private conservation ethics. *See, e.g.*, RICHARD W. JUDD, COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND (1997).

[122] In local government law, this is the all-pervasive question of capacity. *See, e.g.*, City of New Orleans v. Bd. of Commrs. of the Orleans Levee District, 640 So.2d 237 (La. 1994) (question of city jurisdiction over the levees of New Orleans when state statute constituted special purpose authority). Of course, the reverse holds as well: one locality could obstruct the achievement of connectivity among habitat fragments regionally. *See* supra note 55 and accompanying text. This is the nature of the habitat protection and restoration objective inasmuch as the geographic range of many species is necessarily much larger than the jurisdiction of any particular local, state, tribal or provincial government. Notably, localities as directed and constrained agents of a federal or state agency usually do not face this challenge. So I assume that it is only faced by those localities engaged in purely local action. A scale issue that would occasion such a locality's dilemma would be, for example, the conversion of necessary habitat or release of harmful exotic species by neighboring or other proximate jurisdictions. *See, e.g.*, NOSS & COOPERRIDER, supra note 23, at 20-55; Michael Soulé & John Terborgh, *The Policy and Science of Regional Conservation, in* CONTINENTAL CONSERVATION, supra note 54, at 1. Furthermore, what I have called the "identity" problems that could occasion the dilemma might be, for example, the total lack of expertise, organizational capacity, and capital resources to address the myriad technical and scientific obstacles confronting those who would protect an extant wildlife population in a given locale. *See* Daniel J. Simberloff *et al.*, *Regional and Continental Restoration, in* CONTINENTAL CONSERVATION, supra note 55, at 65.

[123] *See generally* NOSS & COOPERRIDER, supra note 23.

[124] *See* Michael E. Soulé, *Where Do We Go From Here?, in* VIABLE POPULATIONS FOR CONSERVATION supra note 52, at 175, 181; Simberloff *et al.*, supra note 123, at 91; Terborgh *et al.*, supra note 54, at 55 (describing the interaction of different local species, the biological pressures populations place upon each other when they are in a trophic relationship, and the common necessity of keeping large predators present if the objective is to keep other species present).

[125] This problem of identity, thus, strikes at the *coherence* of collective action itself as much as it does majority/minority concerns. It focuses attention on what the ecologist William Odum called a 'tyranny of small decisions' in public efforts at conservation. *See* William E. Odum, *Environmental Degradation and the Tyranny of*

These are the most potent questions confronting localism in the modern state. Without a coherent answer to such questions, local initiatives appear quaint, beside the point, or worse.[126] Impotence, though, is no less a critique of the federal (or most state) habitat protection programs: the multi-agency administrative state has struggled unsuccessfully to achieve jurisdictional and geographic integration to no less an extent than our fractious local governments—all while the national public remains deeply divided over its precise conservation and preservation priorities.[127]

C. Scale and Identity: The Tyranny of Small Decisions[128]

The problem of scale and the problem of local political identity are both central obstacles to the conservation and restoration of habitat in suburbia. But each has been subject to a rather warped understanding in the administrative state. 'Our Localism'[129] is comprised of numerous highly specific, interrelated legal relationships defining the legitimate authority and practical power of cities and towns relative to each other, their states, the federal government, and private parties.[130] Yet this localism is constitutive of our regulatory traditions every bit as much as "our federalism"—if not more. Indeed it has played perhaps the biggest single role in stalling the federal government and the

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Small Decisions, 32 BIOSCIENCE 728, 729 (1982) ("Much of the current confusion and distress surrounding environmental issues can be traced to decisions that were never consciously made, but simply resulted from a series of small decisions."). Individually minor actions that lead, in the aggregate, to the destruction of necessary habitat comprise the paradigmatic tyranny of small decisions.

[126] *See* BEAN & ROWLAND, supra note 23, at 429 (noting the probable ineffectiveness of local initiatives to protect wildlife); Edward H. Rubin, *Charity Begins in Washington, D.C.*, 52 BUFF. L. REV. 793 (2004) (arguing that the most instrumentally effective charitable impulse is the one manifested at the (national) ballot box).

[127] *See* Colburn, *Indignity*, supra note 1.

[128] Odum, supra note 125.

[129] *See* supra note 101.

[130] The most recent U.S. Advisory Commission on Intergovernmental Relations ("ACIR") report on the question found the conditions of local legal personality, powers, and status dauntingly complex. *See* U.S. ACIR, LOCAL GOVERNMENT AUTONOMY: NEEDS FOR STATE CONSTITUTIONAL, STATUTORY, AND JUDICIAL CLARIFICATION (1993). *See* infra notes 245-59 and accompanying text.

states from integrating ecosystemic approaches to habitat thus far.[131]

Localism thus impedes initiative at a broad, "republican" scale. Many of the harms of sprawl are certainly to the wider public (in some places to a multi-state public).[132] And most theories of regulatory federalism—especially the current Court's "dignitarian" concept of state sovereignty[133]—presume that the power to redress such harms lay with the states, if not with Congress.[134] Indeed, such state prerogatives have been the counterpoise to federal power in the evolution of modern environmental and natural resources law.[135] Yet both the federal and state governments, in their deference to "local communities," have shown themselves unwilling to redress these harms. Apparently, their constitutional limitations and competitive positions relative to each other and the market have paralyzed them with respect to the many environmental costs of sprawl.[136] Localism's potential for conservation progress is often lumped in with this negative role and ignored.

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[131] KEITER, KEEPING FAITH WITH NATURE, supra note 60, at 25 ("[T]he greatest weakness of the centralized federal governance model may be its inability to accommodate both the ecological and social diversity prevalent across the public lands, whether rooted in different ecosystem structures, economic expectations, or social traditions.").

[132] In one sense, the processes of sprawl are a typical collective action problem in that the costs and benefits of cooperation among localities of a region to reverse the process are not evenly spread and therefore there are risks involved for those choosing to "cooperate" and forego the benefits available from strategic action. *See* Buzbee, supra note 41, at 77-88. In quite a different sense, though, the pure collective action problem has yet to arise because of how deformed the incentive structures have been under our constitutional and statutory regimes bearing on this kind of localism. Id. at 60 ("Urban sprawl's causes are part social, part market-driven, and part the result of current legal structures and divisions of political authority. Sprawl's causes and effects cut across jurisdictional lines and are in part the result of institutional complexity."); *cf.* Hills, supra note 34, at 2029 ("The truth may be that political decentralization will merely make citizens more able to use politics and more willing to trust government. There is little evidence that it will also increase their benevolent toward their neighbors, the region, or the nation.").

[133] *See, e.g.*, Federal Maritime Commission v. South Carolina, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."); Printz v. United States, 521 U.S. 898, 928 (1997) ("It is no more compatible with . . . independence and autonomy that [state] officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.").

[134] The Supreme Court, even at the height of its substantive due process era, routinely acknowledged this police power of the states. *See, e.g.*, Hammer v. Daggenhart, 247 U.S. 251, 276 (1918); United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 47-105 (1998).

[135] *See generally* Stewart, *Pyramids of Sacrifice?*, supra note 76; James E. Krier, *The Irrational, National Air Quality Standards: Macro- and Micro-Mistakes*, 22 UCLA L. REV. 323 (1974); KEITER, KEEPING FAITH WITH NATURE, supra note 60, at 10-11; WILKINSON, supra note 23.

[136] Buzbee, supra note 41, at 91-128.

Moreover, all localities are not created equal. They are the product not of one overarching constitutional tradition, but of fifty traditions (fifty-one, counting the District of Columbia)—*plus* a federal overlay. As many have argued, the popular myth valorizing the New England town for its participatory self-governance valorizes something that began as a private enterprise.[137] But as Part IV explains, our prototypical municipality was "reconstituted" midway through its history into an arm of the sovereign state and, in this, has assumed a uniquely schizophrenic position in our constitutional order. At the same time, the ubiquity of "suburbia" and its profusion of municipalities have entwined conservation with our problems of scale and identity. In this process, most municipalities have been wedged into an ambiguous position somewhere between sovereign and subject,[138] all while the predicament continues to grow in significance as more and more habitats are fragmented and homogenized. Part IV argues that the shaky legal foundations of localities should be linked explicitly to our growing habitat problem.

IV. LOCAL AUTONOMY IN THE SUBURBAN NATION

Historically, the judiciary that abided the national consolidation of public health, safety, and welfare regulation was at the very same time developing the rhetoric of "local

[137] *See, e.g.,* JOHN FREDERICK MARTIN, PROFITS IN THE WILDERNESS: ENTREPRENEURSHIP AND THE FOUNDING OF NEW ENGLAND TOWNS IN THE SEVENTEENTH CENTURY (1991); STEPHEN INNES, CREATING THE COMMONWEALTH: THE ECONOMIC CULTURE OF PURITAN NEW ENGLAND (1995). More than just New England, though, the whole public/private divide has been hazy in local governance. *See* SAM BASS WARNER, JR., THE PRIVATE CITY: PHILADELPHIA IN THREE PERIODS OF ITS GROWTH (1968); HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (hereinafter Barron, "*Home Rule*").

[138] The constitutional structure of the states' "police power" has been uncertain throughout its history. *Compare* ERNST FREUND, THE POLICE POWER: PUBLIC POWER AND CONSTITUTIONAL RIGHTS (1904) *with* CHRISTOPHER TIEDEMAN, TREATISE ON THE LIMITATIONS OF POLICE POWER (1886). But it became more so following the New Deal. *See* Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

control" over real property and neighborhoods.[139] Whether "conservative" or "progressive," the vision of a green suburbia and a local public's right of self-direction toward that vision played a critical role in the making of modern local government and land use law.[140] Of course, suburbs have been, in virtually every aspect but legal form,[141] the opposite of the metropolis.[142] The prototype for property ownership in the suburbs was—and, to a degree, has remained—a "miniaturization of the great estate;" an

[139] *See* CUSHMAN, supra note 134; *see generally* Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U.L. REV. 74, 95 (1989) (hereinafter Rose "*Ancient Constitution*").

[140] *See* Been, *"Exit" as a Constraint*, supra note 106, at 528-43; Timothy Alan Fluck, Euclid v. Ambler Realty*: A Retrospective*, 52 J. AM. PLAN. ASS'N 326, 328-33 (1986); Charles M. Haar & Michael Allan Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002). Today, tracing the rise of the administrative agency as a response to Progressivism's failure to achieve its agenda through the legislative process is a multi-disciplinary enterprise. *See* CUSHMAN, supra note 134; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY at 145-67 (1992); MASHAW, supra note 112, at 4-49; MUELLER, supra note 96, at 506-34. The judicial interpretations of the home rule constitutional developments during the same timeframe, though less studied, are described in GORDON CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 171-82 (1985); Barron, *Home Rule*, supra note 137, at 2322-34; Fluck, supra. Independent of local government empowerment, though, the gradual federalization throughout the twentieth century of traditional "police power" fields as diverse as sewage treatment, *see* Andreen, *Evolution of Water Pollution Control—Part I*, supra note 232, smoke and air pollution abatement, *see* Weiland, *Local Efforts*, supra note 78; flood control, *see* Allison Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959); consumer product regulation, *see* Robert S. Adler & Richard C. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 MO. L. REV. 895 (1994), roads and transportation policy, *see* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235 (2003); waste disposal, *see* Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155 (1997), and many, many others.

[141] Briffault, *Structure of Local Government Law*, supra note 82; Briffault, *Localism and Legal Theory*, supra note 83.

[142] Briffault, *Structure of Local Government Law*, supra note 82, at 18-64; TEAFORD, CITY AND SUBURB, supra note 119; NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS (1994); TEAFORD, POST-SUBURBIA, supra note 119, at 30-36. By the mid-1920s, the Supreme Court had validated the vision of suburban autonomy. The Court reconciled municipalities' comprehensive zoning and planning with individual rights of property, liberty, and due process, setting (perhaps inadvertently) the legal conditions for a metropolitan region held together by little more than geography. *Cf.* JACKSON, supra note 89, at 20-44 (tracing the modern suburb to a transportation revolution that allowed relatively affluent, residential communities of citizens making their livelihoods in the cities to exit and emerge as independent localities outside of the city); Michael Allan Wolf, Euclid *at Threescore Years and Ten: Is This the Twilight of Environmental and Land Use Regulation*, 30 U. RICH. L. REV. 961 (1996) (hereinafter Wolf, "Euclid").

This property-based freedom of exit (and the suburban manor) predictably dominated the concept of local governance in twentieth century America, situated as the suburb has always been between wilderness and metropolis. FISHMAN, BOURGEOIS UTOPIAS, supra note 89, at 134-81; WARNER, supra note 137, at 205-14; RICE, PROGRESSIVE CITIES, supra note 160, at 9-11 (describing the impetus behind Progressive municipal reform and arguing that business experiences were more important to reformers in their efforts than "municipal precedents"); MONKKONEN, supra note 169 at 218-37. The low density of suburban population renders most forms of public transit—the prototypical urban public service—virtually impossible, leaving only the automobile and its demands for roads and all of the infrastructural choices that are driven by road-dependence. Id. at 169-81; Christopher B. Leinberger, *Metropolitan Development Trends of the Late 1990s: Social and Environmental Implications, in* LAND USE IN AMERICA, supra note 27, at 203, 209 (describing a "geometric" increase in the physical size of many metropolitan areas and the consequent "monopoly of the automobile").

"affordable pastoralism" for a middle class away from the congestion of the city.[143] Even near-in suburbs have always traded on communing with "nature" in a way that cities cannot.[144] Furthermore, American cities very early became "public" and "sovereign" in personality in ways suburbs never have been.[145] In fact, it almost looks as if this dichotomy and its implications for local legal autonomy (*i.e.*, the apparent double standards it creates for cities and suburbs[146]) were *meant* to promote the low-density, private profit-based, exclusionary development of land we call sprawl.[147]

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[143] *See* Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ("The police power [delegated to suburbs] is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where . . . the blessings of quiet seclusion and clean air make the area a sanctuary for people."); DUNCAN & DUNCAN, supra note 112, at 47; *cf.* FISHMAN, BOURGEOIS UTOPIAS, supra note 89, at 191-94 (describing the role of the housing construction industry in the process of suburbanization); JACKSON, supra note 89, at 58-60.

[144] "Natural" and "wild" are both terms used in contradistinction to culture, urbanity, and settlement. *See* Cronon, *The Trouble With Wilderness*, supra note 10. And the very ideal type of the suburb holds out the (synthetic) notion that nature can be parcelized and rendered benevolent. Yet the ecological costs of the suburban ideal's relationships to land—for example, the lawn: a core attribute of suburban pastoralism—prove its elevation of the *scenic* over the truly natural (or biological) within the suburban land ethic. *See* F. HERBERT BORMANN ET AL., REDESIGNING THE AMERICAN LAWN: A SEARCH FOR ENVIRONMENTAL HARMONY (2d ed. 2001). This is not to say that local concerns for scenery are necessarily incompatible with real habitat conservation and restoration. *Cf.* Wal-Mart Stores inc v. Planning Bd. of the Town of North Elba, 238 A.D.2d 93 (N.Y. 1998) (affirming town's denial of permit to build large retail outlet and parking on grounds it would negatively impact scenic views of nearby Whiteface Mountain). It is, however, to distinguish a lot of what counts for local environmentalism, *see, e.g.*, Nolon, *Parochialism*, supra note 68, at 402-04 (describing ordinances protecting "scenic resources and ridgelines), from the pursuit of potential connectivity or the protection of viable populations. *Cf.* BORMANN ET AL., supra, at 81 ("A surprising amount of water for residential use goes to watering lawns. This is especially true in drier regions. . . . Growing a lawn under such adverse conditions requires virtually constant watering.").

[145] *See* TEAFORD, POST-SUBURBIA, supra note 89, at 11-12, 59-70. On New York City's legal transformation throughout the eighteenth and nineteenth centuries from a corporation exerting power through its prerogatives of ownership to an agent/extension of the sovereign legislature, see HARTOG, supra note 137.

[146] Some scholars of local government law view Dillon's rule and other general doctrines as a series of double standards, one disempowering version applying to cities and one empowering version applying to suburbs. *See, e.g.*, FRUG, CITYMAKING, supra note 34, at 54-69, 122-64. But in two massive studies of local government law, Briffault confronted the grounds of local legal authority and rejected the powerlessness thesis others attributed to Dillon.

> Local authority, according to black-letter law, is merely a delegation from the state, to be exercised by the locality as agent on behalf of the state as principal. But, sustained by legal doctrines, embraced by powerful economic and political interests and legitimated by academic theorists, local autonomy has been transformed from a principle of administration to a faith in the decentralization of responsibility for the provision of public services and the exercise of public power.

Briffault, *Localism and Legal Theory*, supra note 82, at 452. Of course, the scale of a suburb surely makes it more "local" and less "public" in the eyes of the law than a true "city" could ever be. *See* Briffault, *Structure of Local Government Law*, supra note 82; Sandalow, *Home Rule*, supra note 81, at 685-707; Libonati, *Home Rule*, supra note 238, at 59-69. It certainly renders it more local in the sense of common interests uniting its electorate as Professor Mansbridge hypothesized in her "unitary" versus "adversarial" categorization of democratic assemblies. *See* JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (rev'd ed. 1983) (1980).

[147] *See* Buzbee, supra note 41, at 63-77; Barron, *Home Rule*, supra note 137. Confronting the history of our localism is the possibility that its prototype has *always* been more like Mount Laurel than Athens. Mount Laurel was the township in New Jersey famous for its efforts to preclude any but the wealthiest homebuyers from locating into the town through the use of various zoning mechanisms. When the township first began solidifying its identity in the mid-1960s, "[t]own officials said frankly that they wanted Mount Laurel to be transformed into an "executive-type town," a place [where

Suburban and exurban local governments more resemble entrepreneurial joint tenancies than they do arms of the state. Yet in their powers to decree land use districts, to collect *ad valorem* taxes, and to provide common services,[148] they have created a system of inter-local competition driven by a right of exit (both by individuals and seceding groups). And if local government today is broadly preempted by the federal structure of our Constitution and by federal and state product and public safety, pollution control, and natural resources laws,[149] it is thereby focused even more intently on its tax base and the aesthetics of the land within its borders.[150] As a result, its common interests are less about democratic self-governance than about property values. And as a result, suburbs' land use authority—originally delegated in the hopes of creating the rationally

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g]arden apartments for the working poor were as out of place . . . as dandelions in the well-tended suburban garden." KIRP ET AL., supra note 112, at 48. The homogeneity of a citizenry able to afford living in such a town is stark, id. at 50-54, although the use of land use zoning authority to achieve various barriers to entry is quite common. *See* ORFIELD, supra note 92, at 55-73 (summarizing data); *cf.* FRUG, CITYMAKING, supra note 34, at 9 ("In my view, the fear of self-aggrandizing autonomous entities articulated by critics of decentralization—particularly collective groups of individuals like cities—is not unreasonable. Prosperous suburbs, after all, have exercised their zoning authority and other local powers in precisely the selfish way that opponents of decentralization claimed they would.").

[148] On the rise of the "dues mentality" in suburbia that views property taxes as fees for the provision of local services, see Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373 (2004).

[149] This is not to say that local governments lack initiative or regulatory authority as a general proposition. It is rather to say that local governments regulating in ways corporate-commercial interests find costly face the chilling threat of legal challenges on grounds the state or federal regulators have preempted a "field" of one sort or another. *See* Weiland, *Local Efforts*, supra note 78, at 498-99, Barron, *Home Rule*, supra note 137, at 2347-61.

[150] *Cf.* Briffault, *Structure of Local Government Law*, supra note 82, at 101-06; Rose *Ancient Constitution*, supra note 81, at 94-104 (describing the counterpart influences of Federalist and Anti-Federalist thinking in the modern legal conception of localism in the administrative state). The dominant conception of localism in the administrative state is, in short, exclusionary and real property oriented. *See* Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1852 (2003) ("The Supreme Court, it appears, has granted local boundaries a heightened status—one that tends to reflect and reinforce the suburbanite's sense of collective jurisdictional ownership."); Been, *"Exit" as a Constraint*, supra note 106, at 500. The authority to engage in planning and zoning was originally promoted along with the rationalist "city manager" and "commission" model of local government, which were in turn promoted as providing the efficient "business model" that corporate-liberal progressives idolized. *See* RICE, PROGRESSIVE CITIES, supra note 160, at 100-05. And relatively quickly it was commonplace for courts to defer to local planners both as to the ends of their land use planning and as to its most expedient means. *See, e.g.*, Bartram v. Zoning Comm'n, 68 A.2d 308 (Conn. 1949) ("How best the purposes of zoning can be accomplished in any municipality is primarily in the discretion of its zoning authority; that description is a broad one; and unless it transcends the limitations set by law its decisions are subject to review in the courts only to the extent of determining whether or not it has acted in abuse of that discretion."). But the wider result—parochialism—was somehow left out of the debate until long after zoning powers were cemented as incidents of local autonomy. *See* Haar & Wolf, supra note 140, at 2174-2203.

planned metropolis—has been an important driver of fragmentation: disparate property values, splintered publics, and fragmented ecosystems.[151]

Yet it is in their entrepreneurialism of place that suburban and exurban municipalities represent perhaps the surest source of countervailing power to an increasingly globalized mass-market economy.[152] Even if their authorities are not "inherent," suburbs are *relatively* local in democratic scale, permanently place-based, and they possess, within most state constitutions, real regulatory choices in setting their land use priorities.[153] Many are embracing conservation today. And, importantly, in doing so they face neither the juridified processes of the administrative agency nor the "deliberative roadblocks" (or partisan gridlock) of the legislature.[154] Of course, all this means that middle landscape municipalities have a unique potential to go astray, too. These circumstances effectively undermine both the devolutionary and romantic models of localism described in Part II.

The real nature of localism's ecology is considered in this Part. Section A describes the suburban public, its landscape, and the reality of that public's mixed motivations toward land. Section B argues that this localism is paradoxically a good fit, both practically and legally, to the applied science of habitat conservation today. Finally, Section C suggests ways that landscape-scale connectivity might be achievable from the

[151] Turner & Rylander, supra note 40, at 62-66; Diamond & Noonan, *in* LAND USE IN AMERICA, supra note 27, at 13-42; Ziegler, supra note 91.
[152] *Compare* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J.257, 312 (2001) (describing municipal and private use of data from the Toxic Release Inventory and how it changed multi-national corporate operating procedures) *with* SCHOENBROD, supra note 75, at 124-43 (noting the growing power of localities in opposition to EPA policies written by national and transnational economic elites).
[153] *See* Avery v. Midland County, 390 U.S. 474, 480-84 (1968) (describing the general purpose local government as one of many different authorities); *see generally* KRANE ET AL., supra note 81.
[154] *See* supra notes 3-33 and accompanying text.

ground up by commandeering the strengths of this localism instead of indulging its myths.

A. The Homevoter: Localism and Conservation in the Suburbs

The federal Constitution is studiously silent about the status of a local public.[155] Evidence suggests that localist, agrarian resistance to a then-emerging commercialism played a critical, catalyzing role for the entire Philadelphia Convention.[156] The Federalist vision of the "compound republic" certainly understood localism and factions (both "interested" and "passionate"[157]) as the root of democracy's troubles. Madison and Hamilton, drawing on a wealth of early modern political thought, argued that the control of political self-dealing could come by "extending the sphere" in which politics would operate, allowing society's many interests and locales to check each other within an aggregated legislature, and then again through a nationally elected executive, and yet a third time in a judicial process before "neutral" and life-tenured judges.[158]

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[155] *Cf.* CLARK, supra note 170, at 60 ("For all its rhetorical appeal in the United States, the concept and meaning of local autonomy remain incredibly opaque. In principle, local autonomy us desired by the left and right even though, in practice, it is often interpreted quite differently by these different groups."); Gardner, *Political Community*, supra note 116, at 1256-67 (noting the tension between one person, one vote, and the practice of municipality-based representation that predominated prior to the Warren Court). The philosopher Hannah Arendt once remarked that "the political importance of the township was never grasped by the founders," a failure she felt constituted "one of the tragic over-sights of post-revolutionary political development." HANNAH ARENDT, ON REVOLUTION 234-35 (1965) (quoting LEWIS MUMFORD, THE CITY IN HISTORY (1961)). Yet even the Progressive era debates assumed the founders expected a robust localism. *Cf.* Amasa Eaton, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 299, 303 (1916) ("No one will deny, probably, that from the very beginning all of our constitutions have been framed with a system of local government in view.").

[156] *See* DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 58-61 (1980); SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828 (1999); BANNING, supra note 108, at 104-07. Perhaps not surprisingly, the rural towns of New England were particularly hostile to the growth of commercial society at the time, uniting an agrarian revolt that would have otherwise been but a sidelight in American history. *Cf.* SZATMARY supra, at 120 ("The crisis atmosphere engendered by agrarian discontent strengthened the resolve of the nationalists and shocked some reluctant localists into an acceptance of a stronger national government, thereby uniting divergent political elements of commercial society in the country at large.").

[157] EPSTEIN, supra note 109, at 59-110; SZATMARY, supra note 156, at 92-98, 127-34; *see* supra note 110.

[158] *See The Federalist Nos. 9, 10*, *in* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 77-131 (1993). Madison's language is the most familiar. *See The Federalist No. 10, in* THE FEDERALIST PAPERS 83 (Clinton Rossiter ed. 1961) ("Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority

The Federalist bench in turn assumed a role our judiciary still plays within that synthesis: the role of disciplining municipalities for the protection of the *extra-local* public and its commercial welfare.[159] Similarly, the Progressive era movement for the reform of city governance in the last decades of the nineteenth century—which consisted in everything from the bureaucratization of city services for the public good[160] and the centralization of metropolitan administration[161] to legal-doctrinal critique—erected presumptions against inherent local sovereignty.[162] It has been that Federalist and Progressive thinking on popular sovereignty, checks and balances, liberty, and property shaping our localism ever since.[163] And, in tandem with the Warren Court's reinvention

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of the whole will have a common motive to invade the rights of other citizens."); id. at 82-83 ("[A]s each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters."); BEER, supra note 108, at 244-307; BANNING, supra note 108, at 111-91; EPSTEIN, supra note 109.

[159] JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT, 1650-1825, at 82-115 (1975); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 31-62 (1977) (hereinafter "TRANSFORMATION I"); SZATMARY, supra note 156, at 120-34; NEDELSKY, supra note 108, at 141-202. Horwitz cogently links those doctrinal developments to the transformation of American concepts of property. Id. at 31 ("As the spirit of economic development began to take hold of American society in the early years of the nineteenth century . . . the idea of property underwent a fundamental transformation—from a static agrarian conception entitling an owner to undisturbed enjoyment, to a dynamic, instrumental, and more abstract view of property that emphasized the newly paramount virtues of productive use and development."). As real property drifted away from republican political liberty and became increasingly commodified, writers like Kent "moved toward an uncoupling of property from the public sphere." ALEXANDER, supra note 157, at 130. "For Kent, as for most elite American lawyers, conflicts between existing property rights and new entrepreneurial property interests posed a basic tension between their premodern concern with security and natural order, on the one hand, and their modern desire to facilitate the release of individual energy in the marketplace, on the other." Id. at 131.

[160] *See* JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870-1900 (1984); MARTIN J. SCHIESL, THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA, 1800-1920 (1977); BRADLEY R. RICE, PROGRESSIVE CITIES: THE COMMISSION GOVERNMENT MOVEMENT IN AMERICA, 1901-1920 (1977) (hereinafter RICE, "PROGRESSIVE CITIES").

[161] Progressive politics of city government reform splintered as the twentieth century opened over much of what eventually became modern municipal corporation law. One common theme was the necessity of expertise and professionalism to the rational and efficient administration of local law and the provision of city services. The creation of "Greater New York" (and other metropolitan cities) (1898), the rise of the commission and city manager forms of government (1900s and 1910s), and the Hoover Commission's proposal of a Standard Zoning Enabling Act emphasizing comprehensive plans (1920s) all show this theme at work. *See* BURROWS & WALLACE, supra note 105, at 1230-35; Haar & Wolf, supra note 140; RICE, PROGRESSIVE CITIES, supra note 160, at 3.

[162] Williams, *Constitutional Vulnerability*, supra note 35, at 92-100; FRUG, CITYMAKING, supra note 34, at 45-48.

[163] BANNING, supra note 108, at 250-55, 357-61, 472 n.77. This is not to say that Federalism as an ideology achieved consensus either at or following the founding. *See* Rose, *Ancient Constitution,* supra note 139 at 95. Localism certainly had its proponents at the founding. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 7-14 (1987). Nevertheless, "in 1787 one perspective did triumph, and the other (or others) became submerged." NEDELSKY, supra note 108, at 171. The Federalist synthesis of liberty, property, and the separation of powers, thus, has been the matrix in which our localism has evolved. *See* supra notes 109-11 and accompanying text.

of state and local representation,[164] it has been this conflicted concept of the local public growing out of such traditions grounding American local government law (however ambivalently).[165]

Today, the Constitution's latent "Federalism"—bolstered by modern public choice theory—constantly questions the legitimate scope of local "police power."[166] Adding a Progressive critique of their lack of expertise[167] puts local governments in a corner. Of course, in the abstract, the authority of local governments to regulate land use and ownership is quite settled.[168] Most recently the Court reluctantly acknowledged that

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[164] Of course it is *not* the Federalists' conception of equality to which the Constitution now adheres. Most of the Warren Court's attack on malapportionment and other modes of disenfranchisement within our localism were as separate from Federalist ideology as they were from the laissez-faire constitutionalism promoted by Cooley, Dillon, and other early figures in modern local government law. *See* Williams, *Constitutional Vulnerability*, supra note 35, at 138-49. It was not, after all, until the 1960s that, "as a general rule, whenever a state or local government decides to select persons by popular election to perform government functions, the Equal Protection Clause of the Fourteenth Amendment require[d] that each qualified voter must be given an equal opportunity to participate in that decision. . . ." Hadley v. Junior College District, 397 U.S. 50, 56 (1970).

[165] *See generally* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999). Municipalities were virtually invisible in Federalist constitutional thought. No mention is made of local government in the text of the Constitution, an omission that has made it a puzzle ever since. Thus, while "public" corporations like municipalities were recognizably unfit for Federalism's legal protections of other corporations' "vested rights" and the like, nowhere was the inferiority of this public corporation clearer than in *Dartmouth College v. Woodward* and similar cases. *See* The Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819); Sturges v. Crowninshield, 17 U.S. 122 (1819); New Jersey v. Wilson, 11 U.S. 164 (1812). It is fair to say that this attitude was hostile toward public instrumentalities, although even in the Dartmouth College opinion the hostility was passive. Federalist doctrines of "vested rights" as a necessity of protecting commerce are well-known. Their eventual replacement with more sophisticated concepts of liberty and property in cases such as Ogden v. Saunders, 25 U.S. 213 (1827), and Charles River Bridge v. Warren Bridge Co., 36 U.S. 420 (1837), are discussed at length in SEAVOY, supra note 199, at 53-76, 237-52; KUTLER, supra note 199; ELKINS & MCKITRICK, supra note 160, at 233-44, 258-82, 701-03; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-1 (1st ed. 1978).

Though faith eventually waned in the sanctity of vested rights and other, more sophisticated concepts of private right and commerce emerged, localism continued to clash with such doctrines in controversies over real property within the bounds of particular municipal corporations. *See* HORWITZ, TRANSFORMATION I, supra note 159, at 114-39, 253-66. That is, the public/private distinction remained confused as to "public corporations" long after the famous Supreme Court opinions characterizing them as such. *See* HARTOG, supra note 137, at 195 ("[H]owever ineluctable the implications of the decision in *Dartmouth College*, and however clear New York City's identification with the public side of the public-private dichotomy, in legal theory the place of an institution like the corporation of the city of New York remained unclear.").

[166] Indeed, much of the legal debate about the administrative state is still carried on over the legitimate bounds of the police power. *See, e.g.*, Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004); Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511 (2000).

[167] On the Progressive "gospel" of efficiency of rational centralization for public goods like conservation, see HAYS, supra note 23, at 261-76; *but see* JUDD, supra note 122 (contesting the authenticity of this Progressive model of conservation and suggesting that local communities in northern New England developed strong traditions of conservation unrelated to the prescriptions of experts).

[168] Courts construed statutory delegations of land use authority to local governments quite broadly, virtually from their inception. *See, e.g.*, Lincoln Trust Co. v. Williams Bldng. Corp., 128 N.E. 209 (N.Y. 1920) (upholding the 1916 New

local governments can even take property from A and give it to B if B's use is reasonably calculated to be better for the local public as a matter of "economic development."[169] Able to authorize or proscribe the development and redevelopment of land, to legislate zones of use-types—and even, when necessary, to appropriate land for the *local* public good—local governments frame the public dimensions of twenty-first-century conservation. Yet they do so in a curiously private way:[170] their delegated "sovereignty" is almost always transmuted into the tools of amassing and defending equity in the land within their bounded spaces. Thus, the suburban initiatives publicized lately[171] are easily questioned as motivated by the economic concerns of "homevoters."[172]

York City ordinance); Brett v. Bldng. Comm'r, 145 N.E. 269 (Mass. 1924) (upholding the creation of a single family residential district); Chudonov v. Bd. of Appeals of Bloomfield, 154 A.2d 161 (Conn. 1931) (upholding the exclusion of a chicken coop from a residential district); City of Fairfax v. Parker, 44 S.E.2d 9 (Va. 1947) (upholding the levying of a burden of proof onto the applicant seeking permission for a requested use within a restricted use district); Granger v. City of Des Moines, 44 N.W.2d 399 (Iowa 1950); Pierro v. Baxendale, 118 A.2d 401 (N.J. 1955) (upholding the exclusion of motels from a residential district); Katobimar Realty Co. v. Webster, 118 A.2d 824 (N.J. 1955) (upholding the creation of an industrial use district); City of New Orleans v. La Nasa, 88 So.2d 224 (La. 1956); People ex rel. Skokie Town House Builders v. Village of Morton Grove, 157 N.E.2d 33 (Ill. 1959) (upholding the establishment of an exclusively residential district).

[169] *See* Kelo v. City of New London, 125 S.Ct. 2655 (2005).

[170] Nolon, *Parochialism*, supra note 68, at 415 (describing "documented biases and limitations" of local governments).

[171] *See* supra notes 70-74 and accompanying text.

[172] The "homevoter" is a political agent economist William Fischel describes as someone whose primary asset—the market value of their home—is intimately affected by the fiscal and regulatory choices of their local government. When the homevoter acts politically, she acts to protect her single largest investment: her home. FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87, at 7. Teaford found such motives to be one of the primary determinants in the persistent fragmentation of the metropolitan area—and the rise of suburbia—in the first place. *See* TEAFORD, CITY AND SUBURB, supra note 119, at 6-31; *see also* BURNS, supra note 142, at 116-17. Politics at the local level is certainly heavily influenced by the voter's self-regarding defense of his or her equity in land. FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87, at 163 ("Even if the homeowner does not care about local air quality, traffic, and noise from industrial development, she knows that prospective buyers of her house do care about it. If she has any say about the prospective plant's location—and she certainly does at numerous local public hearings at which the plans can be examined—she will fight the development unless its owners offer something that offsets its costs to her."). Indeed, most sophisticated analyses today take a NIMBY-style race-to-the-*top* by 'backyard environmentalists' as a more realistic assumption about local politics. SABEL ET AL., supra note 62, at 6 ("If the lesson of the first generation of backyard environmentalism was that citizens living in threatened communities, near polluting firms, or drawing on contaminated watersheds would not be overrun by distant corporate and governmental bureaucracies, the experience of the succeeding generation teaches that citizens with the new allies can fundamentally reshape regulatory systems."). But to what degree people ever engage in a truly "other-regarding" altruism in local politics is a question beyond the scope of this article. *Cf.* Gardner, *Political Community*, supra note 116, at 1267 (contemplating the possibility that a "liberal politics of self-interest . . . may simply be an unavoidable price of modern life: self-interest just may be the only realistic basis upon which political relations may be successfully conducted in the kind of immense, mass democracy characteristic of modern western society").

Self-regard is the continuation of a long tradition intertwining land investment and the American municipality.[173] That privatism is constantly being rooted out by the doctrines constituting our federal system[174] and also constantly undermining the claim that a local public is entitled to any sovereignty at all.[175] So completely has suburban local government been entwined with the real property owners within its borders, in fact, that today the most accurate predictor of its political choices are their effects on home values and the tax base.[176] In short, the control of land development and use has been the bellwether of local autonomy in the administrative state and the aesthetics of those

[173] *See* HARTOG, supra note 137; Williams, *Constitutional Vulnerability*, supra note 35; MARTIN, supra note 137.

[174] A dirty little secret is that the single most common subject of modern dormant commerce clause scrutiny—as well, perhaps, as modern preemption doctrine—are state and local environmental protections reacting to the consequences of interstate markets in consumer products, land, and natural resources. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 332 (1979); Sporhase v. Nebraska, 458 U.S. 941 (1982); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986); Wisconsin Public Intervenor v . Mortier, 501 U.S. 597 (1991); United States v. Locke, 529 U.S. 89 (2000). The landfill access and financing cases alone have kept the federal courts' dockets full with dormant commerce clause work. *See* SSC Corp. v. Town of Smithtown, 66 F.3d 502, 504 (2d Cir. 1995) ("A law professor at Harvard is said to have remarked facetiously, a generation ago, that the greatest constitutional cases had concerned the sale and distribution of milk. . . . Although the flood of milk cases has receded in recent years, it has given way to a federal docket that is just as clogged with—of all things—garbage."). Just at the Supreme Court recent experience is significant. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Chemical Waste Management, Inc. v. Hunt, 503 U.S. 334 (1992); Oregon Waste Systems, Inc. v. Oregon Dept. of Environmental Quality, 511 U.S. 93 (1994); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). "For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States." USA Recycling, Inc v. Town of Babylon, 66 F.3d 1272, 1275 (2d Cir. 1995).

[175] *Cf.* J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2270 (1997) ("The [Mt. Laurel] court did not deny that exclusionary zoning might be in the rational interests of a majority of a suburb's residents, but insisted that the "general welfare" which zoning long had been constitutionally required to advance was that of the state as a whole."). Of course, even if the local public cannot constitute a legitimate locus (or agent) of "sovereignty" traditionally conceived, it can be a self-recognizing collectivity that expresses preferences. Professor Costonis, in a path-breaking article over two decades ago, argued that aesthetic regulations of all sorts ultimately must rest on a "cultural stability rationale," that is, as a "self-defining political and cultural choice whose validity must ultimately rest on its compatibility with shared community values." John R. Costonis, *Law and Aesthetics: A Critique and Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 431 (1982). This thick conception of aesthetics may be quite instrumental to addressing the local identity problem introduced in Part II. *See* Part V.

[176] Vestiges of the entrepreneurial origins of town foundings such as poll taxes and property qualifications were struck down as violations of the Equal Protection and Due Process Clauses throughout the twentieth century. The Warren Court's one person, one vote jurisprudence, for example, evinces a deep skepticism of any notion of community representation over the representation of individuals. *See* Gardner, *Political Community*, supra note 116, at 1237, 1249-50. Yet, even in this body of doctrine the Court eventually retreated from its absolutism in favor of a "practicable" proportionality test for local elections. *See* Karcher v. Daggett, 462 U.S. 725, 730 (1983); Brown v. Thompson, 462 U.S. 835, 842-43 (1983). Indeed , the Court allowed special purpose local governments to evade such scrutiny almost entirely. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); Ball v. James, 451 U.S. 355 (1981).

choices have been their principal determinant.[177] In fact, democratic or not, this authority is often so strong in court as to trump serious competing constitutional interests.[178]

More fundamentally, though, pushing top-down "coordination" on actors who are proprietary competitors is unrealistic. That competitiveness is what makes modern conservation's overarching goal of landscape scale connectivity so infeasible for the administrative agency at the same time that it makes virtually any democratic idealism about the local public seem so naïve. Most municipalities have assumed a powerful *right* to set aesthetic norms within their boundaries and to exclude land uses they deem offensive at precisely the juncture those who are seeking to *de*centralize conservation argue municipalities can be collectivized from the top down.[179]

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[177] This has been so regardless of individual state traditions, constitutional developments, or of particulars in the delegations of sovereignty—and notwithstanding the fact that such powers are wholly unrelated to any "rational" pursuit of the public health, safety, or welfare. Only 25 years after the Court first held that local government did not "take" property or deny due process by zoning *per se*, the Court held that even purely aesthetic concerns constitute legitimate grounds for the exercise of such power by a municipality. *See* Berman v. Parker, 348 U.S. 25 (1954). State judiciaries have since widely ratified that as a principle of state law. *See, e.g.,* Echevarrieta v. City of Rancho Palos Verdes, 103 Cal Rptr.2d 165 (Ca. Ct. App. 2001); Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565 (N.M. 1982); John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 339 N.E.2d 709 (Mass. 1975); Berberian v. Housing Auth. of City of Cranston, 315 A. 747 (R.I. 1974); Housing & Redev. Auth. v. Schapiro, 210 N.W.2d 211 (Minn. 1973); State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970); United Advertising Corp. v. Borough of Metuchen, 198 A.2d 447 (N.J. 1964); Reid v. Architectural Bd. of Review, 192 N.E.2d 74 (Ohio 1963). *But see* Mayor and City Council of Baltimore v. Mano Schwartz, Inc., 299 A.2d 828 (Md. 1973); Stephen F. Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977).

[178] The freedom of speech's yielding in the face of local ordinances controlling billboards for aesthetic purposes are pivotal affirmations of local power over aesthetics, as are the prongs of the Court's analyses of obscenity bowing to "community" standards of decency. In Metromedia, Inc v. City of San Diego, 453 U.S. 490 (1981), a plurality of the Court invalidated portions of San Diego's ordinance on grounds that it differentiated billboards according to content, but the Court has gone out of its way to affirm the legitimacy of the aesthetic purpose itself. *See, e.g.*, Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808-827 (1984); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding ordinance effectively excluding adult theatres from city limits); Miller v. California, 413 U.S. 15, 36 (1973) (incorporating inquiry into whether the "average person applying contemporary community standards" would find the speech "prurient" as part of the definition of "obscenity" as unprotected speech); *cf.* Schad *et al*. v. Borough of Mt. Ephraim, 452 U.S. 61, 88 (1981) (Burger, C.J., dissenting) (arguing the Court should defer to "local expressions of choice" in zoning nude dancing out of town). Finally, it is critical to note that Justice Brennan's opinion in the landmark regulatory takings case Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), directly linked the local protection of aesthetics as a legitimate public purpose to concerns for the "quality of life." Id. at 108.

[179] Interestingly, the Supreme Court early on struggled with ordinances erecting *neighborhood*-consent requirements for permission to build or develop. *See* Eubank v. City of Richmond, 226 U.S. 137 (1912) (invalidating ordinance conditioning permit to build upon the obtaining of the consent of petitioning neighbors); Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) (upholding ordinance prohibiting building of billboards on residential blocks unless the owners of a majority of property on the block consented); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (invalidating ordinance conditioning the building of a philanthropic house for the aged poor on the obtaining of consent from the neighborhood). But the Court soon enough made its peace with the right of an

Yet there is a hidden potential here for real conservation that we would do well to understand and find a way to tap. Rejecting the restoration of nature's mythical "balance" as some uniquely fixed priority,[180] conservation biology today has embraced an ethic of conservation—protecting what we value in ecosystems[181]—just when the municipalities of our vast and expanding "middle landscape" have been entrenched in their role as custodians of local land use aesthetics.[182] If premiums continue to attach to suburban properties abutting forest preserves, lakes, riparian corridors, and other habitat-based amenities (and there is no reason to believe they will not),[183] the "homevoter" might actually be made an instrument of conservation, given the right inducements.

Virtually all suburbs and exurbs share at least three attributes: (1) they need not enclose a whole public problem to regulate; (2) they need not address a problem's root causes like a sovereign, rational actor; and (3) they are always seeking ways to brand and market themselves as better than their neighbors. Section B explores the potential that

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incorporated municipality to exercise such power, and the Court has since showed itself quite deferential to a local public controlling the rights of property usage—as long as that local public is one legally constituted as a municipality. *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1978) (critiquing Eastlake, Roberge, Eubank, and Cusack from a public-choice perspective and denying neighborhood-veto statutes of the sort are valid exercises of local power).

[180] The central importance of disturbance regimes to most ecosystems of North America today, as mentioned above, deprives managers of the goal of maintaining some "natural balance." But simulating disturbances and protecting against invasive species or other trophic web changing events in our commercial society is a matter of some (local) labor. *See* G. Motzkin & D. Foster, *Insights for Ecology and Conservation, in* FORESTS IN TIME: THE ENVIRONMENTAL CONSEQUENCES OF 1,000 YEARS OF CHANGE IN NEW ENGLAND 367, 373 (David R. Foster and John D. Aber eds., 2004) ("One of the paradoxes of New England's history of intensive land use is that it has created landscapes that are often attractive to us and harbor plants and animals that we value but that depend on continued human disturbance for their perpetuation.").

[181] *See* supra notes 45-50 and accompanying text.

[182] *See* supra notes 48-66 and 139-51 and accompanying text.

[183] One study of the values of privately owned property within New York's Adirondack Forest Preserve found that being adjacent to preserve land increased the property value by some 17.5%. *See* David H. Vrooman, *An Empirical Analysis of Determinants of Land Values in the Adirondack Park*, 37 AM. J. ECON. & SOC. 165, 173 (1978). As this research has grown in sophistication it has become clearer which sorts of amenities property buyers will capitalize. *See* Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1 (2003) (reviewing literature). Among them, preservation of habitat and recreation opportunities associated with habitat are ascending the list. *Cf.* Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 199-202 (1999) (describing the growing economic and political power of preservationist policies); Jennifer Price, *Looking for Nature at the Mall: A Field Guide to the Nature Company, in* UNCOMMON GROUND, supra note 9, at 186, 197-202 (describing the commodity values of nature, physically and conceptually, and how suburbia is willing to pay for a connection to nature) (hereinafter Price, "*Looking for Nature at the Mall*").

these three core attributes of suburbs and exurbs represent in a future with more and more of our "middle landscape."

B. Habitat Patchiness, Suburban Real Estate Markets, and Homevoters

If municipalities are today *expected* to take self-regarding actions and to be checked in court as such, the doctrines asked to do this work are in desperate need of updating. Under the federal constitution, dormant commerce clause and other forms of judicial checking of localist tendencies are supposedly meant to protect the national market and individual citizens as its participants.[184] Local *self*-regard is exactly what disqualifies the municipality as agent of the Madisonian (or, for that matter, Progressive) republic and exactly what sustains wide skepticism of the local even as the administrative state founders.[185] Too many suburban localities today literally define themselves by their exclusionary ethos—what has been called their evolving compromise "between polis and firm."[186] Equal protection and due process challenges to local zoning law have long been

[184] *See* Rose, *Planning and Dealing*, supra note 81, at 893-910; Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395 (1998); TRIBE, supra note 165, at § 6-6. On the capacity of takings doctrine to check these tendencies, see Been, *"Exit" as a Constraint*, supra note __. And on the utility of contemporary Fourteenth Amendment doctrines in checking such tendencies, see Barron, *Cooley's City*, supra note 165, at 599-610.

[185] *See* Colburn, *Corporatist State*, supra note 108, at 10596-10602.

[186] Briffault, *Localism and Legal Theory*, supra note 82, at 392-99; Schragger, supra note 150. Local taxes and the basket of goods and services delivered by local governments are somewhat flexible, producing what Tiebout argued amounts to a *market* in local governance. Tiebout, supra note 87, at 420 ("Every resident who moves to the suburbs to find better schools, more parks, and so forth, is reacting, in part, against the pattern the city has to offer."). But it is its noncentralized structure that dooms "devolution" from the start. For example, to better manage "sprawl," at least thirteen states have legislated state-wide "growth management" controls, all of which incorporate significant room for "local autonomy." *See* Linda Breggin & Susan George, *Planning for Biodiversity: Sources of Authority in State Land Use Laws*, 22 VA. ENVTL. L.J. 81, 91 (2003) (describing statutes from California, Delaware, Florida, Georgia, Hawai'i, Maine, Maryland, New Jersey, Oregon, Rhode Island, Tennessee, Vermont, and Washington). Many state agencies play an increasingly direct role in local zoning and planning practices. Ed Bolen *et al., Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-N.W.J. ENVTL. L. & POL'Y 145, 148-49 (2002). Yet each of these states still remain very deferential toward their localities' overall preferences and processes in land use—leaving all participants locked in a process regardless of its overall performance. Breggin & George, supra, at 92 ("In most cases, the state has taken a more active role in land use planning, either by planning directly at the state level or by providing clear direction and goals to localities to use in their land use planning efforts. Nevertheless, localities in states with growth management laws typically continue to have primary responsibility for land use planning but their planning tends to be subject to more specific state goals, requirements, or guidance than under traditional land use planning enabling

aimed at this ethic to little avail.[187] The typical municipality is still unworthy of the sovereignty of the wider public.[188] But this locally meaningful drive to be better than the neighbors is gradually encompassing the restoration and preservation of a better natural environment, as the new local environmental law story vividly illustrates.[189] How ecosystem goods and services can be capitalized into modern real estate markets, thus, measures the prospects for localism's ecology better than any other single metric[190] and it is beginning to seem that no single, overarching goal captures the diversity of such goods and services better than habitat connectivity—or *potential* connectivity.[191]

1. Capitalizing Habitat in Suburban Real Estate Markets. So many people have learned how the standard practices of low-density development cause such pronounced road-dependence, degrading aesthetics, and low overall landscape integrity that there is today a potent "anti-sprawl" movement.[192] Such conditions so clearly threaten overall quality of life—and the market value of many real property investments—that, in turn, their continued creation is coming under increasing local scrutiny.[193] Conversely, the premium that preserved "open space" affixes to adjacent properties and the scarcity of

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laws."). And if regionalization by top-down management must tame local tendencies to compete with those around them, too few regulators have noticed. Most suburbs that possess it jealously protect their own sense of the "natural" or of a "wilderness" aesthetic independent of (even as opposed to) those around them. *See generally* DUNCAN & DUNCAN, supra note 112.

[187] *See* M. DAVID GELFAND, FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT 279-312 (1984).

[188] American Federalism and Progressivism both viewed the local public with suspicion (though at different historical moments and for different reasons). Both sought to sew their visions into the law. *Compare* TRIBE, supra note 165, at § 6-3 ("The Madisonian interpretation [also held by Marshall] was premised on the widely-held belief that the Articles of Confederation had failed in large part because . . . state governments had been too responsive to local economic interests, with the result that interstate economic competition was conducted more through political processes than through the marketplace.") *with* Haar & Wolf, supra note 140, at 2176 ("Progressive jurisprudence evolved in the hands of judges who . . . were eager to draw lessons and insights from the common law, as well as a special agility with new, superseding sources of legal authority originating in the legislative chamber.").

[189] *See* supra notes 67-76 and accompanying text.

[190] *See* James Salzman, *Creating Markets for Ecosystem Services: Notes from the Field*, 80 N.Y.U.L. REV. 870 (2005).

[191] FORMAN, LAND MOSAICS, supra note 46, at 449-56; BENNETT, supra note 59, at 13-36; DAN L. PERLMAN & JEFFREY C. MILDER, PRACTICAL ECOLOGY FOR PLANNERS, DEVELOPERS AND CITIZENS 114-18 (2005).

[192] *See* Barron, *Home Rule*, supra note 137; Parris N. Glendenning, *Smart Politics*, ENV. FOR. 21 (Jan./Feb.2004) (describing the political coalitions built in Maryland in combating sprawl).

[193] TEAFORD, POST-SUBURBIA, supra note 89, at 180-82 (describing "homevoter" opposition to further subdivision and growth on Long Island, Orange County, and St. Louis); MCELFISH, supra note 69, at 149-50 (tying the popularity of natural resource zoning to quality-of-life concerns).

certain wildlife species that already makes them big business[194] are both becoming real incentives for local government attention to sprawl. And there is no reason to doubt that suburbia's affinity for "nature" and the "wild" will continue to grow as a political force while it deepens in sophistication.

Just as variations in local taxes and services were capitalized into real estate markets throughout the post-war boom,[195] then, so too might the market value of a *genuine* connection to (and respect for) nature be incorporated into real estate values.[196] The principal challenge is in collectivizing competitors to create habitat-based, landscape-scale organizations, however loosely federated they will be. To that, it bears recognizing that outright habitat conversion is not the only, nor even necessarily the worst, threat to habitat in many places.[197] Invasive species,[198] the loss of natural checks

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[194] *See, e.g.*, Parenteau, supra note 9, at 235-38 & n.61 (citing data that visitation to Yellowstone increased 10 percent after the reintroduction of wolves and data from the World Bank that "eco-tourism" accounts for $2 trillion in global GDP); Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 272 (1991) (reporting estimate that some 60 million Americans engage in bird watching). The better question, thus, is whether the short-term profit of a present owner outweighs the long-term welfare of the municipality in which the land sits. For the "existence value" suburbia attaches to extant wildlife populations and their habitat, while certainly variable across different communities and different species, is real and has been so throughout suburbia's co-evolution with our modern concept of "wilderness." *Cf.* Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1322 n.27 (8th Cir. 1974) ("Existence value refers to that feeling some people have just knowing that somewhere there remains a true wilderness untouched by human hands, such as the feeling of loss people might feel upon the extinction of the whooping crane even though they had never seen one").

[195] FISCHEL, REGULATORY TAKINGS, supra note 87, at 253-88; FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87, at 4-71; Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUDS. 205, 209 (1975) (arguing that local governments' zoning power has allowed them to manage the kinds of trade-offs Tiebout first argued they were capable of offering). Indeed, the economist William Fischel has forcefully argued that suburbs are actually best thought of as being in a "race-to-the-top" when it comes to protecting local environmental amenities. *See* FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87, at 162-77; FISCHEL, REGULATORY TAKINGS, supra note 87, at 269 ("[T]he phenomenon of capitalization makes it reasonable to suppose that future generations will be taken into account. The notion that voters care only about present cash benefits and not future costs is confuted by the fact that future costs and benefits affect the present value of their major asset, their homes.").

[196] Research has shown that cost structures in suburban development can adapt to habitat mitigation quite readily, as long as it is directly linked to the development itself and not some generalized, rent-seeking pretext of existing residents. *See* BEATLEY, supra note 120, at 212-13.

[197] For example, because of how roads have been designed and built in the past, many lack basic wildlife passage mitigations of any kind. Yet needed capital for retrofitting these roads will often be unavailable, leaving a bad design in place well after its defects have become apparent. FORMAN ET AL., ROAD ECOLOGY, supra note 66, at 139-67. No single solution exists because different species and environments call for different mitigation techniques, not all of which are well understood. But the needed capital for retrofitting often comes when road *upgrades* are made. Id. at 166 ("Prior to upgrading a two-lane highway to a four-lane divided interstate highway (I-75), 5 [Florida] panthers of a total population of roughly 50 were killed by vehicles annually. Ten years after the construction of underpasses and bridge replacements designed to allow panthers to cross the I-75 highway, panther road –kills were reduced sharply and

on various organisms or ecological processes,[199] and the many ways overall habitat connectivity is reduced are all of mounting significance as well. While at its broadest ecosystemic habitat protection and restoration are necessarily larger than any single population or habitat patch, our political culture has shown it needs "focal points"[200] and particular species in particular places provide them.

Thus, starting with populations and particular habitats and promoting the inter-local cooperation and bargaining necessary to attain a scale needed for broader issues as they arise—without at the same time losing the strengths of small-scale, self-interested, place-based action—might provide solutions to both of our problems: scale and identity.[201] Local protection of habitat keyed to locally meaningful populations of flora and fauna has proven its political and legal traction.[202] Moreover, its comparatively small scale and the distributed decision-making of peer-to-peer cooperation ensure that no one

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successful movements across the highway increased.") (citations omitted); *see also* PERLMAN & MILDER, supra note 191, at 151-68.

[198] This is particularly true of the sprawled metropolis. *Cf.* Ortiz, supra note 37, at 170-71 ("Human preferences for non-native species and for pets . . . forces local species to compete for food and habitat with non-native species that have no natural predators in the locale. Sometimes the native species lose. In addition, domestic dogs and cats profoundly impact ecosystems by becoming non-natural predators of area wildlife."). A good deal more scholarly attention is being paid lately to the nature of invasive species and the legal issues they present. *See, e.g.*, HARMFUL INVASIVE SPECIES: LEGAL RESPONSES (Marc L. Miller & Robert N. Fabian eds. 2004). Executive Order 13,112 is the only federal law or directive governing the spread of all harmful invasive species *per se*. Yet all it did was create an inter-agency "Invasive Species Council" charged with drafting a very general "National Invasive Species Management Plan." Executive Order 13,112, 64 Fed. Reg. 6183 (1999). The plan itself has had little direct impact thus far, although it has alerted disparate elements of the federal government to the issues, initiating the process of a federal response. *See* Marc L. Miller, *NIS, WTO, SPS, WIR: Does the WTO Substantially Limit the Ability of Countries to Regulate Harmful Nonindigenous Species?*, 17 EMORY INT'L L. REV. 1059, 1065-70 (2003). Some of the most intractable problems associated with the spread of harmful invasive species are tied to the inadvertence of most the behavior that leads to their transport and release. *See* id. at 1060-64.

[199] *See* Brian Miller *et al., The Importance of Large Carnivores to Healthy Ecosystems*, 18 ENDANGERED SPECIES UPDATE 202 (2001); Terborgh *et al.*, supra note 54. Prototypical "sprawl" of the sort Rasband describes in the rural west, *see* Rasband, *Urban Archipelagoes*, supra note 90, at 13-19, of course, can have a directly negative implication for large-bodied mammals (especially large predators), given their range requirements. *See, e.g.,* Scott *et al.*, supra note 60, at 29 ("Average home range size during the breeding season for a male cougar is 29,300 hectares. . . .").

[200] *See* supra notes 9-11 and accompanying text.

[201] Inter-local cooperation for habitat, after all, is not so far removed from the planning and land use regulation that communities have done for many years. "A reservoir capable of holding the once-in-50-year flood may be grossly inadequate for the once-in-100-year flood. What level of variation and catastrophe to anticipate in determining viable population sizes is very much an open question, but it is crucial to view the population in this way." Shaffer, supra note 54, at 11.

[202] *See* SCHOENBROD, supra note 75; JOHN, CIVIC ENVIRONMENTALISM, supra note 75; Nolon, *Parochialism*, supra note 68.

participant's being bogged down by the uncertainties of ecology or stakeholder conflict will derail a whole enterprise.[203] Commandeering the practical power and social and geographic proximity to the human behaviors that must be better managed, all while keeping the adaptiveness and incrementalism necessary to address a changing matrix of threats to habitat today, would be the fullest utility of any such enterprise.[204]

Local government fits the public role in conservation as we have come to understand it, then, only so long as individual local governments can effectively partner with others in better pursuing landscape connectivity. Partnerships of *self*-interest, after all, are inherently flexible[205] and presumptively open to adjustment as new facts are found.[206] Local governments' legal capacity to promote necessary landscape work, to encourage development in some areas and discourage it elsewhere,[207] to manage the

[203] This distinguishes inter-local cooperation from much of what has gone wrong in the administrative state's wildlife habitat programs. *See* Colburn, *Indignity*, supra note 1, at 455-65.

[204] *Compare* Breckenridge, *Reweaving the Landscape*, supra note 28, at 421 ("Advances in the understanding of biological diversity and ecosystem functions have led to a search for new forms of collective decision-making that can transcend existing jurisdictional boundaries, adapt flexibly to new information, and integrate human economic needs with fundamental ecosystem constraints.") *with* KEITER, KEEPING FAITH WITH NATURE, supra note 60, at 325-26 ("Even with all the relevant scientific data, our commitment to ecological conservation on public lands will require a corresponding political commitment, which will inevitably reflect our collective values. If we can manage to conjoin people and place through a communal ecological perspective then we may begin to comprehend fully the array of species, resources, and communities that depend on our policy decisions and managerial judgments."). Some of what has been called the new local environmental law nods in such directions. *See, e.g.*, MCELFISH, supra note 68, at 13-14. However, none of its publicists to my knowledge link its basic utility to such conditions.

[205] Speed and simplicity of decision-making, after all, are the signature strengths of those motivated by self-concern and an ability to quickly react to new information has been one thing missing from administrative agency habitat programs. *Cf.* NOSS & COOPERRIDER, supra note 23, at 298-307 (describing organizational breakdowns in monitoring programs carried out by public agencies not directly interested in the success or failure of the population); Westley, supra note 44, at 401-05 (describing the design of a "changeful organization" and the need to give organizational superiors a direct interest in the successful gathering of accurate information from the field as operations are implemented); *cf.* Salwasser *et al.*, supra note 63, at 162-64 (describing the multi-agency arrangement that evolved to manage grizzly bears in Greater Yellowstone Ecosystem and noting how many years it took to coordinate the federal agencies into a workable cooperative arrangement given each of the standard operating procedures).

[206] *See* Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 525-29 (2004). Federal and state regulatory agencies have a role to play in such a bootstrapping model, but it is chiefly to stop facilitating (or even mandating) further fractures among competing localities and to instead supply needed capital or expert analyses wherever they will aid inter-local cooperation. *See* Ziegler, supra note 91, at 35-37; Oliver A. Pollard, III, *Smart Growth and Sustainable Transportation: Can We Get There From Here?*, 29 FORDHAM URB. L.J. 1529, 1532-35 (2002) (arguing that state and federal agencies incentivize haphazard construction of important infrastructure, encouraging haphazard development of housing).

[207] OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 416 (2d ed. 2001) ("[D]elegations to municipal governments of the power to zone are today found, to varying extents, in all states.").

growth of impervious surfaces and protect isolated wetlands and forest patches,[208] to assemble land either through fee/easement acquisitions or regulatory exactions,[209] and their authority to inculcate through local schools a normative respect for nature, all combine to make them potent mechanisms for the real of work of restoring and protecting what this article has called potential connectivity.[210] The multi-dimensionality of preserving or restoring potential connectivity is where the noncentralized, proprietary structure of our localism is key and why subordinating it to more "sovereign" agencies ignores its most pragmatic virtues.[211]

2. Becoming Public: Pushing Inter-local Cooperation. Instead of imposing habitat protection and restoration under the aegis of centralized expertise, it could be done one "patch"[212]—one *locally* special remnant of nature—at a time by combining the economic incentives driving local government decision-making with gradual and subtle changes in the legal doctrines checking those exercises of discretion. If conservation is

[208] *See* Adler, *Lost Books*, supra note 16, at 75; Payne, *Local Wetlands Permitting*, supra note 75, at 540-46.
[209] *See* BEATLEY, supra note 120.
[210] Of course, the use of the law for purposes of connectivity or viable populations will not always be by the local government itself. Conflict is, to be sure, the single constant in conservation today. *See* LEE, supra note 56, at 88-91. It will just as often be a subset of citizens within the local government pressing the legal conflict for the ends of conservation. *See, e.g.*, Whidbey Environmental Action Network v. Island County, 93 P.3d 885, 893-95 (Wash. App. Div. 2004) (ad hoc environmental group successfully challenging grant of development permits by county for lack of sufficient riparian buffer zones). But in our system of inter-mixed ownership, local land use autonomy, and an incapacitating administrative process that prevents experts from delivering the comprehensive rationality their superior knowledge promises, the landscape-scale ambition of reconnecting fragmented habitat patches arguably *must* begin from a bottom-up, proprietary approach. The advantages of its incrementalism consist in the freedom to revisit past judgments on a rolling basis, *cf.* Westley, *Governing Design*, supra note 44, at 421-27, and combine with the *possibility* of political community at the only scale where it is still imaginable. *See* Gardner, *Political Community*, supra note 116.
[211] Regardless of whether county, city, town, township, or other unit is at issue, municipalities and special purpose local governments are possessed of the regulatory authority over the development and cultivation of land, the siting of roads and other infrastructure, and the provision of water, sewer, and other services—authorities that are absolutely necessary to the protection or restoration of anything as complex as "potential connectivity" across a landscape or region. *See* Breckenridge, *Reweaving the Landscape*, supra note 28; Rodriguez, supra note 45; BEATLEY, supra note 120, at 194-206. And if "community" will remain a weak force at the local level no matter what, *see* Gardner, *Political Community*, supra note 116, at 1261-64, the protection of equity in land is and will continue to be a strong force. *See* FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87, at 260-89.
[212] *See* supra note 61 and accompanying text.

predisposed to focus on the aesthetically "special,"[213] and continued urbanization is homogenizing the nation into an increasingly uniform "middle landscape" (disturbed) habitat, there is a surprising symmetry between homevoters' incentives to protect locally significant nature and the means at their disposal. Stewarding a local wildlife population or habitat can have real payoffs in property values at the same time it fulfills more meaningful needs.[214]

Actively shaping the roles in any municipal-level approach to protecting habitat would begin from the premise that there exists a spectrum of judicial challenges to local regulatory capacity[215] and that a majority of these include some form of means/ends scrutiny.[216] As has been recognized throughout, probably the greatest risks inherent in

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[213] *See* Doremus, *Saving the Ordinary*, supra note 12. Given its atomized legal structure, suburbia's preoccupation with exceptional *scenery*—and not the viability of local biota per se—is much less of an institutional failing than the administrative state's: *locally* significant parts of nature are much more common today than *nationally* significant parts. Yet as locally significant remnants of nature or habitat patches become threatened, inter-local bargains face a real risk of non-cooperation. Legal challenges to local governments on grounds they have ignored the wider municipality's welfare in favor of a particular developer are becoming more common and more commonly successful in habitat conservation questions, though. *See, e.g.*, Greater Yellowstone Coalition, Inc. v. Board of County Commrs. Of Gallatin County, 25 P.3d 168 (Mt. 2001). Of course, localities always have the option of simply working around the non-cooperator, isolating such municipalities and insularizing *them*, for the weakness of small scale can also be a counterintuitive strength. The economically-minded in real estate development would certainly have an incentive to do so if their permission to subdivide and build turned on their ability to deliver extra-local commitments of whatever sort in consideration. *See* Rose, *Planning and Dealing*, supra note 81, at 900-910; OSTROM, GOVERNING THE COMMONS, supra note 92 at ___182-213.

[214] *Compare* Barton H. Thompson, Jr., *Conservation Options: Toward a Greater Private Role*, 21 VA. ENV. L.J. 245, 253 (1998) ("Although no empirical study has been conducted, the bulk of the benefits from most land conservation may not constitute public goods. . . . If governments did not furnish parks, public beaches, and other public commons, some private landowners would find it economically profitable to provide access to open space and beaches in return for user fees . . . . Other landowners will choose to preserve portions of their land because they personally enjoy the view or ecosystem services provided by the land.") *with* Christopher S. Elmendorf, *Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423 (proposing the creation of "special nature districts" with limited regulatory authority that would act in step with local attitudes toward land and biodiversity as a solution to the problems of intermixed ownership and fragmented regulatory authority). A common objection that localities lack the expertise to engage in so scientifically complex an endeavor lacks the force it once had. For not even the federal government has shown it has all the expertise needed in-house; expertise itself has been commodified in our open-source, networked society. Thus, if FWS, EPA, the Forest Service or any other federal agency has lacked the know-how it has needed for a particular deliverable, they simply contractually engage them or mine the tremendous universe of technical research that most professionals now make widely available. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 638-43 (2000).

[215] *See* supra notes 174 and 184.

[216] It is perhaps an oversimplification to lump together challenges to exercises of local police power on Due Process, Equal Protection, Commerce Clause, or Privileges and Immunities Clause grounds with so-called "Dillon's rule" scrutiny and like state-law doctrines. There surely are differences, not least in the nature of the judicial personnel as between federal and state courts. Functionally, though, the familial resemblance is clear. Each works, at least in part,

our localism stem from the very real local tendencies to fence out those thought "undesirable."[217] And, as we have recognized, the potential exists for "local environmental law" to be a convenient pretense for such a tendency.[218] Thus, ensuring that local laws *actually* enhance potential connectivity and/or the viability of extant flora and fauna—that they pursue effective conservation and/or restoration and not just the rent-seeking of snob zoning—is a task particularly suited to adjudication.[219]

Furthermore, such bottom-up, overtly aesthetic conservation has proven the most politically durable.[220] Once a local public has capitalized a cost into the value of its real

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to "flush out" unconstitutional or otherwise illegal ends that have been papered over with a pretense of valid regulatory purpose. *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980) (arguing that this is the nature of any legal test challenging the classifications used by legislation).

[217] *See* BURNS, supra note 142, at 35-37, 83-86; KIRP ET AL., supra note 112; Ford, supra note 1369-1400. Of course, overt or intentional use of suspect classifications to exclude is *per se* illegal. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960); Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994).

[218] *See* supra notes 91-103 and accompanying text.

[219] Even under deferential standards of review, the adjudicative testing of local government's rationales for land use choices can reveal improper motives or ill-conceived means. *See, e.g.*, Greater Yellowstone Coalition, Inc. v. Board of County Commissioners of Gallatin County, 25 P.3d 168 (Mont. 2001) (county approval of development in corridor area traversed by grizzly population invalidated for insufficiently considering impact on grizzlies and alternatives to development as proposed). Such deferential review invariably permits development and land use that may be habitat-destructive, to be sure. *See, e.g.*, Florida Wildlife Fed'n v. Collier County, 819 So.2d 200 (Fla. Ct. App. 2002) (in suit by local environmental organizations seeking more habitat-protective planning measures by country and state agency, court defers to government's reading of pertinent statutes that allow various forms of growth in areas allegedly used by Florida panther). Of course, in this much, municipalities are similar to agencies in their delegated authority and their relationship to the adjudicative testing of their fidelity to law. *Cf.* JAFFE, supra note 2, at 327 ("[W]ithin a determined context there may be a sense of contradiction sufficient to create social distress; and it is one of the grand roles of our constitutional courts to detect such contradictions and to affirm the capacity of our society to integrate its purposes. The statute under which agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself.").

Thus, as practice reveals information deficits and habitat-protective measures are drawn into question, state court judges and other adjudicators are in a unique position to notice. *See, e.g.*, Lewis v. Dept. of Natural Resources, 833 A.2d 563, 573-77, 595-96 (Md. 2003) (invalidating local critical area regulation as applied for, among other things, failing to take account of site-specific information brought forward by landowner).

[220] *See* WILLIAM R. JORDAN III, THE SUNFLOWER FOREST: ECOLOGICAL RESTORATION AND THE NEW COMMUNION WITH NATURE (2003); BILL BIRCHARD, NATURE'S KEEPERS: THE REMARKABLE STORY OF HOW THE NATURE CONSERVANCY BECAME THE LARGEST ENVIRONMENTAL ORGANIZATION IN THE WORLD 108-13 (2005) (describing TNC strategies for enacting major public spending for lands acquisition and the decision to play to sympathies other than "biodiversity"). As for the legitimacy of this kind of regulation by resort to local "police powers," the 1970s debate over local ordinances on aesthetics and historic preservation is exemplary. Costonis argued that a "community's decision to preserve is not preordained but is a self-defining political and cultural choice whose validity must ultimately rest on its compatibility with shared community values." Costonis, supra note 175, at 431 (emphasis omitted). He rejected the idea that some set of objective canons of beauty might be enforced by the courts, id. at 432, rightly in my view. But he nevertheless took seriously the involvement of the courts in the testing of the rationales offered by local aesthetes for the restrictions they enact. Id. at 434-58. The selection of species in a wildlife-focused local conservation plan—and thus the matrix of habitat requirements that locality will promote—is most certainly a kind of "anchor that keeps communities together and reestablishes pride and economic vitality." Id. at 460 (quoting a 1981 policy of the Department of Interior on historic preservation). Whether the choices any particular locality makes are ecologically

property, its members are literally invested in the successful achievement of the ends from which that cost stems[221]—whatever the structural defects of the "public sphere" by which it communicates. This market dimension of a habitat-based approach to local conservation gives it a popular foundation most administrative agencies lack.[222] At the same time, the incrementalism of building networks from the bottom up will keep at least some high-stakes judgments provisional and relatively small in scale, exactly as conservation biology would have them.[223]

C. Suburban Habitat Conservation and Restoration: Pragmatic and Unbounded

Individual localities with local priorities may not be adjuncts of our rationalist, compound republic synthesized piecemeal from the traditions of Federalism and

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sound is another matter, and one that will bear further investigation of case study. As Fennell argued, "[c]apitalization . . . is a double-edged sword. It translates human preferences into home values, regardless of whether those preferences are worthy or base." Lee Anne Fennel, *Homes Rule*, 112 YALE L.J. 617, 649 (2002). In short, adjudicative testing of this aesthetics-based model of habitat protection and restoration is a necessary adjunct to localism's ecology, as is discussed in Section C.

[221] *Cf.* FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87, at 80-99 (describing the influence an real property investment has on local voters' propensity to participate in local politics); Jon C. Sonstelie & Paul R. Portney, *Profit Maximizing Communities and the Theory of Local Public Expenditures*, 5 J. URB. ECON. 263 (1978) (arguing that communities strive to maximize property values over the long- and short-term, whether through expansion or local expenditures, but that they are, for a variety of reasons, unlikely to achieve their optimums because of the variations in investment in any particular locality at any particular time). Interestingly, Jordan attributes the widespread neglect of CCC-planted forests and other manipulated sites throughout the late twentieth century partly to the fact that the agency's employees were "nonresidents of project areas and therefore lacked a close association with the projects." JORDAN, supra note 220, at 176. This made it that much easier for "society to lose interest in the old CCC sites and to neglect or exploit them." Id.

[222] *See* Colburn, *"Democratic Experimentalism,"* supra note 190, at 351-55, 383-89; *see* supra note 107.

[223] *Cf.* SABEL ET AL., supra note 62, at 40-46 (describing a variety of federal mechanisms that might achieve a locality-by-locality approach); Gillette, *Regionalization and Interlocal Bargains*, supra note 102, at 263-69 (describing various alternatives to formal contractual obligations and arguing that "regionalization" is more likely to be achieved by such soft arrangements). Local, entrepreneurial pursuit of public objectives does not mean the wholesale exclusion of civil society. Fish and game departments can be a rich source of expertise and information—*much the same as* university environmental studies departments, private nonprofits studying habitat issues, land trusts, and other members of the conservation community. An example of a private firm doing such work, Keeping Track,™ is a Vermont nonprofit that provides a networking service for those towns, businesses, citizens, and agencies looking to inventory and track local wildlife populations. Since 1994, this firm has worked to educate citizens about the presence of wildlife and to cultivate a concern for its habitat. Mitchell & Diamant, supra note 64, at 222-24. Wildlife observations by trained volunteers are entered into town databases that are then shared regionally in the effort to achieve or protect connectivity at a landscape scale. Id. at 223. By 2004, it had linked over ninety communities in this fashion (across Vermont, New Hampshire, Maine, Quebec, Massachusetts, New York and Connecticut, and had branched out to Pennsylvania, Arizona, and California). Id. The organization's web site makes the example it has set widely accessible. *See* http://keepingtrack.org/article/view/3648/1/390.

Progressivism.[224] But the more we are learning about reweaving a landscape, the more we are finding that a diversity of experiments is probably more important than that any one of them succeed.[225] Local governance, though, is inherently tied to property investment and entrepreneurship.[226] And if our suburbs and exurbs truly are entrepreneurs of place, then the public problem of sustaining extant flora and fauna populations seems surprisingly congruent with the legal structure of the municipality in our suburbanized localism: the scarcer nature becomes, the more willing its "consumers" will be to pay for it as an amenity capitalized within their property values.[227] Yet to do so effectively, they will have to cooperate with others.

1. Piecing Together A Whole: A Role for the Judiciary. Most of what must be done in pursuit of the common purpose of protecting and restoring habitat is necessarily focused either at a relatively small scale or at a truly immense one.[228] Thus, given (1) the

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[224] *See* supra Part IV. The political left's skepticism of localities today traces to the Warren Court's one person-one vote revolution as much as Progressivism's faith in expertise. But conservatives seem more interested in the Federalist traditions and are often skeptical of any arm of the state as an obstacle to *individual* welfare maximization. *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655, 2677 (2005) (Thomas, J., dissenting) (quoting Blackstone for the original meaning of the Takings Clause and criticizing the majority of the Court for allowing a compensated taking for "public use" that resulted in land being taken from one person and deeded to another).

[225] One public/private hybrid organization today working from the ground up, called "Beginning with Habitat," pools local professional talents of several kinds with state and private data and GIS capabilities to evaluate various habitats and local breeding populations of native flora and fauna. *See* http://www.beginningwithhabitat.org. The University of Maine's Cooperative Fish and Wildlife Research Unit initiated it, but it has since evolved to include municipalities, Maine's Department of Inland Fisheries and Wildlife, and the U.S. Fish and Wildlife Service. Similar hybrids have emerged in New York's Hudson Valley, *see* Krajik, supra note 26, at 32, and elsewhere. *See* infra note 264.

[226] This must be made to work for conservation, especially if the strain of activist localism mentioned above, *see* supra note 66, turns its attention toward the incorporation of new towns, townships, or villages where a group of residents seek better protections for nature than their existing locality provides. *See* Rodriguez, supra note 45. The first right of suburbia is still much the same as it was even prior to the founding: the right of exit. *Cf.* NANCY ROSENBLUM, MEMBERSHIP AND MORALS 140 (1998) ("Local governments are "frequently created and defended . . . to insulate one set of local people or interests from the regulatory authority and population of another local government"") (internal citations omitted); TEAFORD, CITY AND SUBURB, supra note 119; MONKKONEN, supra note 169, at 141-43; Briffault, *Structure of Local Government Law*, supra note 82, at 72-85 (describing law of incorporation, annexation, and secession and noting its deference to local preferences); BURNS, supra note 142.

[227] Nolon, *Parochialism*, supra note 68, at 380. This stems ultimately from the perversity of the suburban land ethic itself: the atomized experiencing of "nature," one parcel at a time. *See generally* Breckenridge, *Reweaving the Landscape*, supra note 28. It is beyond the power of the judicial system to change this ethic, though, at least directly.

[228] *Compare* Ortiz, supra note 37, at 190 ("Maintaining plants and trees will also provide food (in the form of fruits, nuts, and insects attracted by the vegetation) and sanctuary for birds, bats, and other small wildlife. This in turn can have a beneficial impact on species populations and diversity and may contribute to sustenance of larger wildlife.") *with* FOREMAN, supra note 66 (setting out a vision of habitat protection at a continental scale and arguing that only that comprehensive an approach can even possibly succeed). Buffers along riparian zones of no more than thirty meters

inherent contingency of our knowledge of disturbed ecosystems, (2) the irreducibly political task of agreeing to the ecological objectives to pursue with scarce resources, and (3) the rather "private" motives of most American municipalities, a somewhat complex jurisprudence to support this approach is beginning to come into focus. A practicable means-ends judicial scrutiny able to "smoke out" illicit motives[229] without ossifying implementation would be the ideal in the abstract.[230] In any particular legal challenge to local land use policies or other exercises of the police power, courts must inevitably scrutinize the instrumentalism of the municipality.[231] That scrutiny should be assiduous

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have been linked to important habitat-ameliorative mechanisms, as have roadside vegetation management regimes. *See* BENNETT, supra note 59, at 97-122; FORMAN ET AL., ROAD ECOLOGY, supra note 66, at 75-138, 319-50. But the cost of managing roads as immense as the federal interstate highway system has meant that state and federal administrative agency attention to such minor matters has often as not resulted in practices like the spread of kudzu (*Pueraria thunbergiana*), a fast-growing but highly destructive vine, planted to mitigate road-side erosion (which it does) without regard for its wider impacts on local vegetation (which are significant). *See* id. at 79.

[229] An explanation of federal anti-discrimination norms and doctrine that casts judicial scrutiny in these terms was given by Justice O'Connor in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J., for the plurality); *see also* Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003).

[230] *Compare* Sandalow, *Home Rule*, supra note 81, at 708-14 (linking skepticism of localism to the "protection of basic values") *with* Barron, *Home Rule*, supra note 137, at 2340 ("In a range of policy areas, analysts have begun to recognize that effective, generalizable policy solutions often are best revealed through consideration of broad problems within a local context. Working out a problem in a more localized setting can expose potential solutions that more abstract consideration of the problem would not identify."). Over two decades ago, in a major synthesis critiquing the democratic legitimacy and justice of local land use planning in practice, Carol Rose argued that "[h]owever much or little local governments may structurally resemble the *Federalist* legislature in general, they are very unlikely to be restrained by the *Federalist* safeguards in making the specific piecemeal land decisions. In making these decisions—which involve only a few interested parties meeting only on single issues, [local] legislatures are restrained neither by a coalition-building process that assures the fairness of the decisions, nor by a clash of interests that gives time for sober consideration." Rose, *Planning and Dealing*, supra note 81, at 856.

Rose's ultimate solution was a new test of legitimacy for municipal decision-making based directly on the "dealing character" of land use planning as it is actually practiced. Id. at 857. The piecemeal nature of most local land use decisions—whether as part of a "steady leak" of variances from "comprehensive plans" or as public referenda on particular zoning/planning decisions—undermined the notion that comprehensive plans so vaunted within the model of standardized zoning practice were actually having any rationalizing effect. Id. at 857-82. Rose's solution was a test keyed directly to the property values at stake and the susceptibility of the controversy in question to some form of local government-sponsored mediation, id. at 883-900, backed up, of course, by the fairness safety-net of the right of "exit" from the subject municipality. Id. at 900-01. Rose argued such a test would validate the municipality seeking a pocket park or subway entrance from the developer asked to "mitigate his building's effect on sunlight and traffic conditions," id. at 908, so long as the developer had been "forewarned that such a quid pro quo may be asked if planning studies or impact analyses had shown that the community has studied its sunlight and traffic congestion conditions and thus signaled its concern with the subject, and if its planning studies have identified benefits that might be part of a negotiated package." Id. "It is precisely because exit is relatively available at local governmental levels that predictability can test fairness. While predictability makes exit possible, the likelihood of exit acts as a check on local bodies: they will want to act reasonably so that potential developers will not decide that any investment in their community is simply too costly." Id. It is this sort of judicial management of local environmental regulation that may be its best catalyst for genuine conservation progress in the future.

[231] Challenges may be brought against local government police power on a number of state and federal constitutional grounds and a myriad of state statutory and common law grounds. *See* KRANE ET AL., supra note 81, at *Appendix:*

enough to disentangle the legitimate aesthetic goals and adaptive management of local proprietorship from the well-known tendencies of municipalities toward discrimination and pretended "public" purposes.[232]

Embracing local conservation's link to real property values might be no more than a path to judicial deference unless the next steps are taken. Faith in the market and respect for accrued equity in land explains local *power* more than any other variable, no matter the specific doctrinal question.[233] However, just because it is in suburban local

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Home Rule Across the Fifty States; RUSK, INSIDE GAME/OUTSIDE GAME, supra note 89; REYNOLDS, supra note 207, at §§ 27-34, 37-44, 49-53, 141-45, 151-60. Of course, the "scope of review" of any one of these challenges will vary with the precise legal doctrines to some degree. But deference is the norm and discriminatory motive is the most common target. *See, e.g.*, Board of County Commrs. of Routt County v. O'Dell, 920 P.2d 48, 50-51 (Colo. 1996); MORE.

[232] "Dillon's rule" and other forms of such scrutiny are already plentiful in local government law. Barron, *Home Rule*, supra note 137. But it is surprising how symmetrical such scrutiny could become with what conservation biologists have argued must happen for public conservation to improve as a means to its own ends. *Cf*. Soulé, *What is Conservation Biology?*, supra note 47, at 728. For the near-universal demand in the administrative process for provable rationality is, in an important sense, *incompatible* with the achievement of potential connectivity through adaptive management, patch-by-patch, population-by-population. Localities choosing local flora and fauna and habitats to protect and restore, of course, need not act only on such provable rationality as a justification for their choices. They need only articulate a preference for the aesthetics of a local landscape with such "natural" characteristics over one without them. This kind of preference-based justification for local lawmaking, often on an abuse of discretion standard, is well-established in most states' land use and zoning enabling laws, as well as many states' positive law of "home rule." *See, e.g.*, State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217 (Wis. 1955); Reid v. Architectural Bd. of Review of City of Cleveland Heights, 192 N.E.2d 74 (Ohio 1963); Piscitelli v. Twp. Comm., 248 A.2d 274 (N.J.L. Div. 1968); Figarsky v. Historic Dist. Comm'n, 368 A.2d 163 (Conn. 1976); State v. Miller, 416 A.2d 821 (N.J. 1980); Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565 (N.M. 1982); Coscan Washington, Inc. v. Maryland-National Capital Park & Planning Com., 590 A.2d 1080 (Md. App. 1991); Breneric Assocs. v. City of Del Mar, 81 Cal. Rptr.2d 324 (Cal. App. 1998); Rolling Pines Ltd. partnership v. City of Little Rock, 40 S.W.3d 828 (Ark. App. 2001); Transylvania County v. Moody, 565 S.E.2d 720 (N.C. App. 2002).

Police power and zoning controls for historic preservation are another, similar source of authority for restrictions on new construction as well as affirmative duties of maintenance and care following or cognate to construction. *See* Heithaus v. Planning & Zoning Comm'n, 779 A.2d 750 (Conn. 2001); Farash Corp. v. City of Rochester, 713 N.Y.S.2d 423 (App. Div. 2000); Van Horn v. Town of Castine, 167 F.Supp.2d 103 (D. Mass. 2001); Berberian v. Housing Authority of the City of Cranston, 315 A.2d 747 (R.I. 1974). Tellingly, where municipalities stand the greatest chance of reversal of ordinances based upon aesthetics today may be those initiatives derived from or in some way subordinate to state or federal initiatives! *See, e.g.*, Subdivision Servs. Co. v. Zoning Hearing Bd., 784 A.2d 850 (Pa. Commw. 2001) (reversing municipality in its denial of permit to erect billboard on grounds denial was inconsistent with state's Highway Beautification Act regulations). Thus, it is very possible that the more independent the local initiative, the *less* likely it is to be rolled back or otherwise frustrated by the legal process.

[233] *Compare* Duncanson v. Bd. Supervisors of Danville Twp., 551 N.W.2d 248, 251-52 (Minn. App. 1996) (upholding moratorium on development of feedlot because legitimate concerns were raised where effects of the feedlot "were simply unknown" and town was justified in preventing unregulated, unplanned development) *with* Construction Industry Assn. of Sonoma County v. City of Petaluma, 522 F.2d 897, 908 (9th Cir. 1975) (upholding plan with tight restrictions on development in deference to city's expressed desire to "preserve its small town character"). In short, their scale (making them inherently incremental) and their legal foundations (making them inherently self-interested) are the strengths to be commandeered from localities, not their connections to community or democracy. Of course, there is no necessary distinction between community and the guarding of property values. FISCHEL, REGULATORY TAKINGS, supra note 87, at 285-88. Yet reification of local boundaries for the purpose of protecting property values accepts a notion of political community that is deeply contradictory of most normative conceptions of democracy. *Compare* Schragger, supra note 150, at 1847-48 ("[A]ttention to local boundaries is a product of the political economy

governments' nature to be self-regarding does not mean exclusionary motives should be allowed to constitute their *identity*. Adjudication might be able to foster solutions to the challenges of scale these collectives face without denying their independent identities. Thus, viewing particular conservation or restoration actions as being a function of a competitive market and local aesthetic preferences—preferences that define a locale's relationship to its land—could render the legal processes of our localism more instrumental to the wider public good. Distributing the costs and benefits[234] of sustaining a common pool resource like extant habitat is necessarily an iterative process[235] and probably best thought of as a judicially managed one where our localism is concerned.[236]

Developers and municipal officials choosing where and how to locate new construction or what to do to enhance the amenities of existing housing stock have

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of privatized local government. If one believes that one has "paid" for a particular service by buying entry into a jurisdiction, then any distribution across jurisdictional lines raises the specter that one is not getting what one has paid for.") *with* MANSBRIDGE, supra note 146, at 26 ("No group of people, however small, ever has completely identical [political] interests."); *cf.* Hills, supra note 34, at 2011 ("Community building, sadly, might be critically related to the building of walls.").

[234] Especially as active, affirmative manipulation of the landscape becomes increasingly necessary—as habitat *restoration* becomes the principal task in achieving potential connectivity—those with the capital to invest are quickly becoming the indispensable party in population viability work. *See* Simberloff *et al.*, supra note 123, at 73-78 (describing the needs of active management, including the control of the abiotic disturbance regime, reintroduction of native species, controlling exotic species and other management techniques to restore connectivity); James A. MacMahon & Karen D. Holl, *Ecological Restoration: A Key to Conservation Biology's Future, in* RESEARCH PRIORITIES supra note 52, at 245, 247 (same); FORMAN ET AL., ROAD ECOLOGY, supra note 66, at 380-81 (noting the dramatic increase in state and local attention to mitigating the fragmenting effects of roads when the Federal Highway Administration began earmarking federal subsidies for that purpose).

[235] Tellingly, one of Tiebout's examples of rational inter-local cooperation was Dutch elm disease, an invasive fungus that eliminated much of a beloved species of tree from North America beginning in the 1930s. *Cf.* Tiebout, supra note 87, at 423 ("In cases in which the external economies and diseconomies are of sufficient importance, some form of integration may be indicated."). Mechanisms that internalize the benefits of habitat expenditures to those localities making them and/or excluding those that do not would incentivize cooperation. *Cf.* Stephen M. Meyer, *End of the Wild*, 29 BOSTON REV. 20, 22 (2004) ("[F]or sustainable development to have an impact on conservation it must be tied directly to local demand, where the costs of overexploitation are borne by those who benefit from it."); OSTROM, GOVERNING THE COMMONS, supra note 93, at 2-28 (describing the consequences of individuals' opportunity to behave strategically and free-ride on the cooperation of others protecting common pool resources). Property value premiums might be used to do so. *See* FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87.

[236] *Compare* Frug, *City as a Legal Concept*, supra note 34, at 1074-80 (describing the role of legal concepts in the definition of city character) *with* Briffault, *The Structure of Local Government Law*, supra note 82 (describing the "structure of local government law" by reference to the major precedents of the twentieth century on school finance and exclusionary zoning, local government formation, and local autonomy as recognized in federal constitutional law).

growing fiscal incentives to pay careful attention to habitat.[237] But they should start having judicially crafted incentives to recognize the limited horizons of their own efforts and, therefore, the necessity of extra-local cooperation. Specifying that duty is inherently contextual and not properly ascribed to any particular municipality in the abstract. But the most likely market rewards for conservative or restorative choices by these actors are the price premiums that attach to development that is not the same old homogenizing sprawl[238] and the most ready fiscal/legal rewards are those stemming from judicial deference to properly justified exercises of regulatory power.[239]

Judicial policing of self-regarding motives by factions and locales is inherent in our constitutional system[240] and this is where courts fit into a pragmatic localist model.[241]

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[237] *See generally* Charles P. Lord *et al.*, *Natural Cities, Urban Ecology, and the Restoration of Urban Ecosystems*, 21 VA. ENVTL. L.J. 317, 329-31 (2003); Rutherford H. Platt, *Toward Ecological Cities: Adapting to the 21st Century Metropolis*, 46 ENVIRONMENT 11, 23-26 (2004); James A. Kushner, *Smart Growth: Urban Growth Management and Land Use Regulation Law in America*, 32 URB. LAW. 211, 229-30 (2000); PERLMAN & MILDER, supra note 191.

[238] So far as I was able to detect, no court has yet, in scrutinizing a local habitat-based initiative, suggested that its validity or scope ought to turn on that locality's efforts to engage extra-local cooperation. On the other hand, several state courts have surmised (whether from the submissions of parties or otherwise) that extra-local action is a necessity to the effective pursuit of the conservation ends articulated in some challenged initiative. *See, e.g.*, Long Island Pine Barrens Society, Inc. v. Planning Bd. Brookhaven et al., 606 N.E.2d 1373 (N.Y. 1992) (in challenge to multiple town approvals of development in sensitive pine barrens ecosystem court recognizes that "the facts in this case demonstrate the need for centralized planning by a single regional agency"); Wisconsin's Environmental Decade, Inc. v. Dept. of Natural Resources, 271 N.W.2d 69 (Wis. 1978) (local ordinance prohibiting state-licensed use of herbicide within city limits was invalid use of police power because it was "implicit" that pesticide regulation was under the jurisdiction of the state); Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66 (Mass. 2000) (holding that though town may have authority to regulate the construction of piers on public trust lands, it did not have authority to further the "public interest" by regulating use of such lands generally as this was power reserved to the state).

[239] Pragmatically, given the technical richness and scientific uncertainty inherent in such judicial endeavors, there is perhaps no better measurement of efficacy under the circumstances than the municipality's efforts to enlist those beyond its borders. Judicial scrutiny gently incentivizing inter-local cooperation to the end of landscape connectivity, that is, could be a pragmatic balancing of many competing values without degenerating into judicial imperialism.

[240] *Cf. The Federalist No. 10, in* THE FEDERALIST PAPERS 78 (Clinton Rossiter ed., 1961) ("Liberty is to faction what air is to fire, an aliment without which it instantly expires. . . . But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society.").

[241] *See, e.g.,* Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. L. REV. 183 (1997); MICHELMAN & SANDALOW, supra note 95, at 8-26; RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 81-148 (6th ed. 2004); BAKER & GILLETTE, supra note 207, at 83-135; *see generally* ORFIELD, supra note 92; Rose, *Ancient Constitution*, supra note 197. Professor Nolon's paradigmatic local environmental law, the "surprising origin of smart growth" in the Town of Ramapo's infrastructure concurrency requirements, was upheld against a challenge to its validity on a finding that it was *not* an effort to flatly prohibit others from building within the town. *See* Golden v. Town of Ramapo, 285 N.E. 2d 291, 301 (N.Y. 1972); Nolon, Golden *and Its Emanations*, supra note 73, at 24. New York's courts and others have shown themselves willing and able to scrutinize local land use measures of that sort, both as to the validity of the local ordinance, *see, e.g.*, Medical Services, Inc. v. City of Savage, 487 N.W.2d 263 (Minn. App. 1992); Rancourt v. Town of Barnstead, 523 A.2d 55 (N.H. 1986); Board of County

Instead of old-line "Federalism" keyed to the welfare of the wider commercial public or old-line Progressivism dismissive of non-expert regulation altogether, judicial scrutiny might be updated to incentivize inter-local bargaining and the pooling of efforts to preserve or restore connectivity of a landscape. At its best, such scrutiny could catalyze regional cooperation in ways that differentiate snobbery from genuine plans to "reweave the landscape."[242] Large lot zoning or aquifer protection ordinances, after all, can sometimes be no more than a good pretext for fencing people out—at the same time they are actually contrary to wider, habitat-protective goals.[243] Even on a deferential review, real judicial scrutiny of articulated habitat concerns and the means used is legitimate and can reveal prejudice masquerading as "environmentalist" activism.[244]

Comm'rs v. Condor, 927 P.2d 1339 (Colo. 1996); City of Boca Raton v. Boca Villas Corp., 371 So.2d 154 (Fla. App. 1979), and as to the possible takings and other constitutional claims therein. *See, e.g.*, Charles v. Diamond, 360 N.E.2d 1295 (N.Y. 1977).

[242] Inter-local cooperation has been touted as a means to regional ends by Nolon among others. *See, e.g.*, John R. Nolon, *Grassroots Regionalism Through Intermunicipal Land Use Compacts*, 73 ST. JOHN'S L. REV. 1011 (1999); Nolon, Golden *and Its Emanations*, supra note 73, at 63-64; MCELFISH, supra note 69, at 26-28; Breckenridge, *Reweaving the Landscape*, supra note 28, at 406-416.

[243] By itself, a large lot requirement only assures that more space will be fragmented in ownership and development to accommodate the demand for land. Ziegler, supra note 91, at 62; PERLMAN & MILDER, supra note 191, at 116; Wolf, Euclid, supra note 142, at 985-89. Whether the quality of the space under such controls is indeed feasibly maintained as habitat will be a species-by-species question and this is not to deny that relatively small spaces can be important. *Cf.* Phillip G. deMaynadier and Malcolm L. Hunter, Jr., *The Relationship Between Forest Management and Amphibian Ecology: A Review of the North American Literature*, 3 ENV. REV. 230, 251 (1995) (predicting that microhabitats may support viable populations of amphibians). But just as critical in new construction is the careful management of local vegetation during construction as well as its continued propagation. JORDAN, supra note 220, at 10-27. Builders are learning as much. *See* PERLMAN & MILDER, supra note 191, at 234-37. In Town of Beloit v. County of Rock, 657 N.W.2d 344 (Wis. 2003), a town that chose to develop some of its lands itself, in part because it was confident its development would preserve sensitive area wetlands and the necessary connectivity the parcels supported (and that other development in the area might not), was upheld over a challenge to the town's authority to do so. Id. at 353-57. Choosing the right "in-fill" development opportunities, of course, depends heavily on accurately forecasting local and regional real estate markets. In the Beloit case, the "town ultimately determined that it was its duty to ensure that an ecologically fragile area was properly developed, and the best way to accomplish this goal was to carry out the development itself." Id. at 350.

Nevertheless, large mammals and, in particular, carnivores and their wide geographic habitat needs, have the potential to render *any* isolated local conservation efforts—and especially large lot zoning in the absence of inter-local and inter-governmental partnerships—meaningless or worse. *See* Miller *et al.*, supra note 199; Terborgh *et al.*, supra note 54, at 54-58; supra notes 53-56 and accompanying text. The overarching objective of potential connectivity at the landscape and sub-regional scales—at least with respect to challenging species of this sort—thus, will be realized (or not) at a simultaneously broad and small scale. *See* Jamison E. Colburn, *Predator Conservation and Restoration in New England: A Case Study in Localism's Ecology* (2005) (manuscript on file with author).

[244] For example, in the historic case, Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984), where an Illinois town had prohibited the possession of operable handguns within its borders, the scrutiny the court applied to the measure was described as "rational basis scrutiny." Id. at 278. Yet the Illinois Supreme Court nonetheless took the opportunity to consider the ordinance as a means to Morton Grove's avowed "legitimate governmental interest," id.,

With the right assistance,[245] habitat-based, bottom-up conservation and restoration initiatives have strong advantages. Without the bureaucratic routines that come with high-stakes, "science only" agency decision-making at the broad scale, local governments are freer to experiment, improvise, and adapt.[246] And depending on the geography and the range of the species or population(s) at issue, inter-local partnering could actually internalize the benefits of habitat protection, *i.e.,* the presence of the "wild" nature in a continuous network of patches and corridors.[247]

2. Pragmatic Incrementalism: Place- and Population-Based. Local habitat protection and restoration bears little resemblance to the rationalistic processes of the federal law of habitat. While both must cope with ignorance and human-disturbed ecosystems, only one operates through the slow and costly findings of "detailed statements,"[248] the adversarial selection of (artificially bounded) "indicators" of

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that is, the reduction of the risk of death or injury from guns within the borders of the town. Id. When an objection was raised that the law made an exception for security guards and that the exemption tended to undermine the law's effectiveness as to such an interest, the court answered the objection carefully but quite persuasively. Id. ("The village trustees could validly have believed that security guards as a group were likely to exercise greater responsibility in using their weapons than citizens generally. . . .").

[245] Judicial doctrines structuring scrutiny of local conservation around the need for inter-local cooperation and the prevalence of illegitimate motives in suburban regulatory actions could incentivize cooperation by "flushing out" any pretenses and revealing sham conservation for what it is. *See* Kathryn A. Foster, *Regional Impulses*, 19 J. URB. AFF. 375, 398 (1997) ("Mutual benefit, not altruism, governs regional outcomes. . . . [B]argaining parties, strong and weak alike, must be made no worse off by new regional outcomes or such outcomes will not occur."). Of course this whole model relies in largest measure on the "private" propensity to conserve or preserve land and habitat. I believe the empirical data supports this reliance, though. For example, according to the Land Trust Alliance, between 1998 and 2003,conservation easements held by some 1,500 land trusts nationwide spiked from 7,392 to 17,847—increasing the area protected from 1.385 million acres to 5.067 million acres. *See* http://www.lta.org/aboutlt/census.shtml.

[246] For species such as amphibians, managed forestry practices even at scales as small as a stand of trees can be decisive to a local population's persistence throughout harvesting and other activity. Uncompacted soil, coarse and deep leafy and woody debris litter left on the forest floor, and patches of canopy shade, for example, were identified by deMaynadier and Hunter as critical. DeMaynadier & Hunter, supra note 243, at 251. Thus, judicial rejections of small scale efforts *per se*—often rooted in skepticism of the local government *as sovereign*, *see, e.g.*, Avalonbay Communities, Inc. v. Wilton Inland Wetlands Comm., 832 A.2d 1 (Conn. 2003)—are misplaced. Skepticism demanding some kind of proof that the measure was adopted with legitimate economic or aesthetic interests in mind (and not naked prejudice), though, *see, e.g.*, Caspersen v. Town of Lyme, 661 A.2d 759, 763-64 (N.H. 1995), is importantly different.

[247] Marketing such a "natural communities conservation plan" has already begun in California and there is no reason to presume that other places cannot improve upon its successes. *See* Douglas P. Wheeler, *Ecosystem Management: An Organizing Principle for Land Use, in* LAND USE IN AMERICA supra note 27, at 155.

[248] 42 U.S.C. § 4332(2)(c).

ecological health,[249] or with a fixation upon species already facing oblivion. But if the failures of comprehensive rationality are well known in attempts to achieve anything as complex as community or ecological health,[250] the potential of this bottom-up alternative is still unrealized. The role impact players must fulfill in this passive architecture is to foster the communication within real estate markets that will promote capitalization of habitat-based conservation and restoration.[251]

Even with economic competitiveness motivating the measures we see today on environmental amenities like open-space landscapes, slope and ridge integrity, aquifers and the like,[252] it is still possible to envision a future where these competitors collaborate

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[249] Andelman & Fagan, supra note 12, at 5957.

[250] *Cf*. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961) (describing the failures of urban planners to achieve their optimally zoned community); KEITER, KEEPING FAITH WITH NATURE, supra note 60, at 19-22.

[251] *See* Dewitt John, *Civic Environmentalism*, *in* ENVIRONMENTAL GOVERNANCE RECONSIDERED: CHALLENGES, CHOICES AND OPPORTUNITIES 219, 230-34 (Robert F. Durant *et al*. eds., 2004). Effective communication and education about landscape-scale connectivity faces the traditional dilemma of environmental politics: the more sophisticated the understanding of an ecosystem becomes, the less easily it is communicated widely. *See* BRULLE, supra note 108, at 278. Nonetheless, planning and conservation professionals have available to them today a wealth of literature on the importance of connectivity. FORMAN, LAND MOSAICS, supra note 46, at 155-57; FORMAN ET AL., ROAD ECOLOGY, supra note 66, at 129-30; HONACHEVSKY, supra note 68, at 81-84; NOSS ET AL., supra note 60, at 176-80; MCELFISH, supra note 69, at 7-19 BEATLEY, supra note 120, at 196-217. Indeed, finding workable solutions to habitat problems at the local level which are then communicated regionally, may, in reality, be easier than doing so through the announce-and-defend organizational culture of most administrative agencies. *See* Eileen Gay Jones, *Risky Assessments: Uncertainties in Science and the Human Dimensions of Environmental Decisionmaking*, 22 WM & MARY ENV. L & POL'Y REV. 1, 14-28 (1997) (discussing uses of "public comment" in which agencies announce predetermined conclusions after taking comments merely as a way to prepare their defenses); Craig W. Thomas, *Habitat Conservation Planning, in* DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, at 144, 153-56 (Archon Fung & Erik Olin Wright eds., 2003) (critiquing the habitat conservation planning program of the Fish & Wildlife Service for its tight control of "public participation" and the agency's propensity to exclude all but the most intensely interested stakeholders). But it is undoubtedly a role that acutely interested activists must play at the local level if a mutually sustaining relationship is to arise between small scale and individual involvement. *See* CRONIN & KENNEDY, supra note 66, at 263-79.

[252] That kind of competition characterizes suburbs in their search for residents: they are what they are, in large measure, because of what and who is around them but not *in* them. DUNCAN & DUNCAN, supra note 112, 135-48 (describing the aesthetic fascination with "wilderness" and one suburb's effort to outdo its neighbors by affirmatively cultivating a sense of the wild within its open spaces); TEAFORD, POST-SUBURBIA, supra note 89, at 181-82. Of course, the protection of steep slopes *might* be motivated by a concern for erosion and loss of productive soils. *See, e.g.*, NOLON, OPEN GROUND, supra note 69, at 358-62. On the other hand, one of the towns Nolon publicizes for its exemplary slope protection ordinance (Penfield, New York), Nolon, *Parochialism*, supra note 68, at 400, was actually famously the subject of challenges to its exclusionary zoning practices in the 1970s. *See* Warth v. Seldin, 422 U.S. 490 (1975). Because "[i]t is really up to local governments to seek out sources of good information" and to integrate the available data into "comprehensive plans, zoning ordinances, subdivision ordinances, and a host of specific environmental and infrastructure controls and capital improvement plans," MCELFISH, supra note 68, at 149, there is plenty of slack for any such mechanism to serve ends other than concern for local flora or fauna. The slope regulation or large lot requirement might, after all, be motivated by a desire to constrain the supply of developable land. Duncan and Duncan, in an incisive critique of the environmental ethic of the Town of Bedford in Westchester County forty miles north of New York City, marshal impressive evidence suggesting that "[a] seemingly innocent appreciation of landscapes and

to accomplish common ends. But successfully harnessing this proprietary power of suburban local government may turn on biological diversity being viewed as a form of local and regional *earnings*.[253] Pragmatism has no quarrel with the incentivization of locality-by-locality cooperation to secure such earnings because that joint enterprise is unbounded.[254] Quite *unlike* the bureaucratic agencies superintending our paradoxically disjointed state and federal habitat programs, though, local governments set their goals *ad hoc*: they strike bargains as quasi-corporate agents whose principals are self-interested and proximate.[255] So to expect any aspect of local governance to be rational or comprehensive from its inception is a category mistake and state and federal courts hearing challenges to local initiatives are under well-hewn rules of deference.[256]

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desire to protect local history and nature can act as subtle but highly effective mechanisms of exclusion and reaffirmation of class identity." DUNCAN & DUNCAN, supra note 112, at 4. Their Bedford bears a suspicious similarity to Mount Laurel and many other suburbs and exurbs. *See* KIRP ET AL., supra note 112.

[253] The strengths conservation practice draws from such a decomposed version of itself in the "middle landscape" come in at least two forms. First, it sheds the politically naïve hopes that potential connectivity can be achieved by amassing enough exceptional enclaves to be set upon highly prescriptive federal designations (like those of the Wilderness Act or the ESA). *See* supra notes 21-26 accompanying text. Second, because any particular initiative is of such a diminished scale and is *ad hoc* by nature, participants are less often repeat players and have less incentive and fewer opportunities to behave strategically and rely upon legal process or judicially imposed relief to manipulate the other stakeholders. *Cf.* Dorf & Sabel, supra note 56, at 348-56. With less incentive to resort to litigation, participants logically stand more to gain through real engagement on a continuing basis. *See also* Bradley C. Karkkainen, *Toward Ecologically Sustainable Democracy?, in* DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, at 208, 213 (Archon Fung & Erik Olin Wright eds., 2003).

[254] No matter how successful a single land management agency or state is in efforts to protect habitat, the legal boundaries confining it constitute an artificial limitation of its horizons. *See* supra note 59 and accompanying text.

[255] *See* MANSBRIDGE, supra note 146. As I have argued elsewhere, the capital that can be generated from such trades between owners—capital that can fund the sort of active biophysical manipulation of landscapes necessary to improving potential connectivity—is becoming pivotal to continued progress. Bargains among actors with a diversity of available means and ends can do just this. *See* Jamison E. Colburn, *Trading Spaces: Habitat Mitigation "Banking" Under Fish & Wildlife Service Guidelines*, 20 NAT. RES. & ENV. 33 (Summer 2005).

[256] Thus, in Rancho Lobo, LTD. v. DeVargas, 303 F.3d 1195 (10th Cir. 2002), a local forest practices ordinance required compliance with measures that had been left "recommended" by a similar state statute. The court had no problem affirming the validity of the ordinance as a "mere complement" to the state statute and not something to be preempted thereby. Id. at 1201-07. *See also* Droste v. Board of County Commissioners of Pitkin County, 85 P.3d 585 (Colo.App. 2003) (in deferential review of county permit denial court upholds local determination that building plan was incompatible with wildlife habitat values); Florida Wildlife Federation v. Collier County, 819 So.2d 200 (Fla. Ct. App. 2002) (deferential review of local ordinance establishing interim measures for the protection of Florida panthers). Interestingly, localities in several states already have experience answering development pressures with concern for the protection of corridors for future transportation solutions. *See, e.g.*, Batch v. Town of Chapel Hill, 387 N.E.2d 655 (N.C. 1990) (upholding town's rejection of subdivision plan on grounds developer failed to reserve land needed for future roads planned within the town).

In this pragmatic reorientation of the two problems of local conservation, the choices of what to target with scarce management resources are, given their character and scope, acknowledged for being both deeply aesthetic[257] and importantly self-defining.[258] But if real professional and judicial scrutiny provokes localities making these choices to act in ways that actually enhance the viability of local flora and fauna populations, it ought to be more collaboration than attack.[259] For, if the modern problem with the local polis is at base one of motive,[260] the sunshine that attends a duty to explain and justify an intention to others is a powerful disinfectant.

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[257] Even the ESA, ostensibly the most general and science-based species protection law, has focused on "only the most extraordinarily special . . . species with significant public appeal or tenacious human advocates," thanks largely to the "gauntlet of the ESA's listing process." Doremus, *Saving the Ordinary*, supra note 12, at 330.

[258] Judicial scrutiny of an avowedly aesthetic purpose is neither inappropriate nor wholly unfamiliar in local governance. Costonis marshaled impressive evidence that courts had evolved in their review of aesthetics ordinances, eventually requiring confirmation of community-expression and generality in several different legal contexts. Costonis, supra note 175, at 381-86. What Costonis argued aesthetic regulations by local communities amounted to in their best form were "socially homeostatic devices," that is, levers on the "pace and character of environmental change in a manner that precludes or mitigates damage to their identity, a constancy no less critical to social stability than biological constants are to the human body's physiological equilibrium." Id. at 420. It is this kind of respect for local aesthetics that the judiciary has shown and which the form of scrutiny proposed here assumes.

[259] In Caspersen v. Town of Lyme, 661 A.2d 759 (N.H. 1995), a forestry zoning district was challenged for, among other things, erecting an exclusionary barrier to low-income people (a 50 acre minimum lot size was one of the restrictions). Id. at 761. Even the challengers conceded "that the ordinance was passed for legitimate purposes, including to encourage forestry and timber harvesting . . . ." Id. at 763. Thus, the gist of the challenge was that the selected means—lot size—was not rationally related to the articulated ends. The trial court heard testimony from the town's expert, however, that the selected minimum lot size was rationally related to the economic viability of "forestry enterprises," and found that the evidence supported the town's finding. Id. at 764. The means/ends engineering that could be fostered if this kind of judicial scrutiny was practiced more widely, especially where there is reason to believe means and ends have become confused, is precisely what pragmatism demands. *See* WESTBROOK, DEWEY AND DEMOCRACY, supra note 222, at 310-18 (describing the modern condition of establishing truly public ends as a politics of knowledge wherein "effective and organized inquiry" is released to experiment with means and ends and produce place-based communities). Suburbs are famous for their snobbery. *See* DUNCAN & DUNCAN, supra note 112, at 99 ("Bedford's residents are great supporters of wetlands when they are fighting potential development, but when not wearing their anti-development hats, they appear somewhat less interested."). And it is just this brand of scenery-as-nature that fails conservation biology. *See* Colburn, *Indignity*, supra note 1, at 448-55. But courts—including courts scrutinizing land use ordinances—have proven themselves capable of recognizing sham justifications, often fashioning legal doctrine piecemeal in order to debunk the delusional or dishonest. *See, e.g.*, Morris County Land Improvement Co. v. Twp. of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963) (invalidating open space ordinance as an effort to fence out development and as a regulatory taking); Bonnie Briar Syndicate Inc. v. Town of Mamaroneck, 721 N.E.2d 971 (N.Y. 1999) (deferring to town's creation of "recreational" district restricting subdivision on grounds that it situated within an overall, long-term plan to manage growth); Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976) (requiring that growth-phasing ordinances serve a "regional" conception of the public welfare); Rancourt v. Town of Barnstead, 523 A.2d 55 (N.H. 1986) (reversing town's denial of permission to subdivide on grounds that its estimates of projected market growth it used as a benchmark were lacking "solid, scientific, statistical basis"). The problem is defining and properly confining such judicial scrutiny, though, given the potential for strategic uses thereof by acutely interested stakeholders. *See* Dorf & Sabel, supra note 56, at 356-62.

[260] *See* supra notes 108-13 and accompanying text. *Cf.* DEWEY, PUBLIC AND ITS PROBLEMS, supra note 104, at 138 ("Persons have their own business to attend to, and "business" has its own precise and specialized meaning. Politics

V. CONCLUSION: THE PROSPECTS FOR LOCALISM'S ECOLOGY

As our national fascination with the "special"[261] and the "wild"[262] show, our suburban nation takes a distinct and pronounced interest in the existence of and occasional interaction with "wilderness" and "wildlife." Unfortunately, though, the existing theoretical picture of "local environmental law" obscures more than it reveals by portraying local conservation as a devolved version of modern regulation or as democracy-in-action. For if truly "wild" spaces and species are becoming increasingly rare,[263] the relevance of local concern for nature consists chiefly in its sway with homevoters.[264] It is their perceptions that matter most in suburbia, both politically and biologically: house sparrows, squirrels, skunks, and other commensals of suburban

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thus tends to become just another "business": the especial concern of bosses and managers of the machine."). Affirmatively unjust or illegitimate motives are also an incipient feature of land use regulations. But they are often inchoate and implicit enough to lie beneath otherwise legitimate local sentiments and preferences. *See* Ziegler, supra note 91, at 55 n.120 ("Today, the increasingly popular notion of "smart growth" is ambiguous enough to embrace some of our worst impulses and to avoid any sober assessment of the costs sprawl imposes on others and the natural environment."). Expressly exclusionary attitudes toward incoming residents are virtually *per se* illegal and are easily invalidated in court. *See, e.g.*, Construction Industry Assn. of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir.), *cert. denied*, 424 U.S. 934 (1975). The much more difficult questions come in the form of tacit discrimination. *See, e.g.,* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (listing a set of factors for courts to use in testing whether a discriminatory motive existed for any particular zoning ordinance with an exclusionary or discrimination impact); Golden v. Planning Board of Ramapo, 285 N.E.2d 291 (N.Y. 1972) (upholding a series of restrictions on subdivision and development by finding that they were not outright prohibitions). But courts have shown themselves increasingly alert to such possibilities within local environmental law. *See* Caspersen v. Town of Lyme, 661 A.2d 759 (N.H. 1995) (upholding a fifty acre minimum lot size requirement as a legitimate means for preserving a "forestry district"); MORE.

[261] *See* supra notes 10-13 and accompanying text.

[262] *See* NASH, supra note 10; Doremus, *Saving the Ordinary*, supra note 12.

[263] *See* TERBORGH, supra note 13; Cronon, *The Trouble With Wilderness,* supra note 10, at 69; Doremus, *Saving the Ordinary*, supra note 12.

[264] Bateson and Smith connect the fact that "[w]ildlife viewing is now the number one outdoor activity in the United States," with the more than 1200 local and regional land trusts nationwide that had, as of 1998, helped to protect about 4.7 million acres of land—"an area larger than the states of Connecticut and Rhode Island combined." Emily Bateson & Nancy Smith, *Making It Happen: Protecting Wilderness on the Ground, in* WILDERNESS COMES HOME, supra note 65, at 182, 193. This movement is perhaps the clearest evidence that significant private capital is being attracted to protect locally significant habitat, *see generally* MIKE MCQUEEN & ED MCMAHON, LAND CONSERVATION FINANCING (2003) (describing the conservation funding community and its localist political strategies), something that is also becoming clear at the polls election after election. "As development accelerated over the last two decades, federal aid to states to acquire parks and open space evaporated. But the dramatic rise in grassroots support for open space stunned even seasoned conservationists. From 1998 to 2002, voters in states and localities across the U.S. approved 670 referenda, devoting more than $25 billion to parks and open space." Id. at 12. Furthermore, at the same time capital has flowed the technology available for grassroots land conservation has flourished. "[G]eographic information systems have enabled ecologists and planners to envision growth scenarios and estimate their effects not just on society's so-called gray infrastructure—the road, utility and water systems that are essential to modern life—but the green infrastructure, an interconnected network of greenspace that conserves natural ecosystem values and functions while providing associated benefits to people." Id. at 17.

society are neither "amenities" worth capitalizing in property values nor the creatures being jeopardized today by our sprawl.[265]

In this light, then, suburbia as a whole is not the enemy, as so many think.[266] Dispatch is the signature strength of those motivated by self-interest[267] and, if anything, municipalities that succeed in their competitive environment by keeping residents and attracting new ones have shown themselves to be highly skillful bargainers[268] and highly adaptive, pragmatic stewards of local aesthetics.[269] What theorists of local conservation should be developing are the notional distinctions differentiating illegitimate perversions of local authority from the genuine, aesthetically-driven and adaptively managed conservation initiative. Such distinctions would be instrumental in the now on-going process of leveraging suburban land use policies away from simple scenery and toward a

[265] Various predators, songbirds, and ungulates like moose, though, seem to be. The constructivist view of local self-interest in wildlife habitat, then, is that the more localized the wildlife population is, the more valuable it grows to its suburban communities. *Cf.* DAVID DOBBS & RICHARD OBER, THE NORTHERN FOREST 36-57 (1996) (describing intense efforts by lakeshore homeowners' association to preserve waterfowl populations around Lake Umbagog, New Hampshire and linking the enthusiasm to the meaningfulness as well as economic benefits of the waterfowl).

[266] *See* DOWIE, supra note 34. Intra- and inter-corporate networks are vastly superior to bureaucracies in their ability to think independently and in parallel, to recognize surprises, to pool information without bottlenecking, and at learning-by-doing. *Compare* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 278 (1999) ("[A] public corporation is a team of people who enter into a complex agreement to work together for their mutual gain. . . . They enter into this mutual agreement in an effort to reduce wasteful shirking and rent-seeking by relegating to the internal hierarchy the right to determine the division of duties and resources in this joint enterprise. They thus agree not to specific terms or outcomes . . . but to participation in a process of internal goal setting and dispute resolution.") *with* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) (arguing that American corporate law is designed to "maximiz[e] the value of corporate enterprises to investors" and "minimiz[e] the sum of the transaction and agency costs of contracting"). This has the effect of making them adaptive by nature. Dorf & Sabel, supra note 56, at 323-36.

[267] NOSS & COOPERRIDER, supra note 23, at 298-307 (describing organizational breakdowns in monitoring programs carried out by public agencies not directly interested in the success or failure of the population); Westley, *Governing Design*, supra note 44, at 401-05 (describing the design of a "changeful organization" and the need to give superiors a direct interest in the successful gathering of accurate information from the field as operations are implemented); *cf.* Salwasser *et al.*, supra note 63 (describing the friction that inheres in creating multi-agency arrangements to manage species with large area habitat needs).

[268] The one thing the entrepreneurial municipality has proven perfectly adapted to doing is bargaining, both with other municipalities and with businesses and individuals seeking permission to go forward with development activities. *See* Rose, *Planning and Dealing*, supra note 81, at 879-87; Rodriguez, supra note 45, at 751-52.

[269] FISCHEL, HOMEVOTER HYPOTHESIS, supra note 87. Capable of swift, improvisational action initiated in response to stimuli from their environments, suburban local governments are a lot like their fully private counterparts. Rodriguez, supra note 45, at 761.

gradually more complex sense of ownership of place.[270] If it sounds fanciful, imagine the price premium that will attach to homes in such places as plant and wildlife diversity continue to shrink.[271]

It has been said that America has a big problem in how it sees its built environments.[272] If the environmental community's deepest ambition is the creation of a more biocentric American society, then the reckoning with how incompletely the administrative state can pursue that end is approaching. Its structural shortcomings are framed by comparing the dignity it assigns to its own processes as opposed to that it assigns ordinary citizens and ordinary nature. Another prospective future is in local governments as shrewd borrowers of skills and human capital from ordinary people, each other, nonprofits, and academia. A future for local government law that facilitates such performance opens up a wealth of ecological possibilities in our localism, combining the advantages of voluntarism with the superiority of networks and self-interest over centralized expert administration. As Dewey argued (paraphrasing Emerson), "[w]e lie . .

[270] "Associational harmony, not visual beauty, is what community groups primarily seek from aesthetic regulation, and standards of aesthetic formalism cannot be authoritatively rendered as objective, ontologically based "laws.". . . [T]hese standards are derived—or should be derived—from a profile of the characteristics of the existing resource that have generated the associational bonds between it and its constituencies." Costonis, supra note 175, at 424-25 (citations omitted). To expect that such an aesthetic could arise through noncentralized interactions between suburbanites and the market is no more improbable than the rise of the American lawn as a dominant aesthetic tradition. *Cf.* BORMANN ET AL., supra note 144, at 49 (suggesting that the carefully tended lawn "developed from a marriage of many forces: the long history of our love of the lawn coupled with technological advancements that made modern agriculture possible, agricultural corporations searching for new outlets for their products, and skilled marketers fighting for market shares"). The truth is, some judicial encounters with "local environmental law" evidence a much more sophisticated approach to its context than others. In Town of Westport v. Connecticut Siting Council, 797 A.2d 655 (Conn. Super. 2001), a state board charged with the siting of cell towers was met by a town's challenge that its chosen site was prejudicial to the town and environmentally harmful. The reviewing court weighed the evidence but ultimately rejected the town's challenge, chiefly because the town's proposed alternative site presented equal or worse environmental impacts and its only apparent virtue was that it was farther from the town's view. Id. at 666-70. Not all judicial encounters with such controversies have been as careful to scrutinize claims about environmental impacts, true. *See, e.g.*, Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891, 894-95 (Mass. 1972) (in challenge to the creation of a local "flood plain district" where argument was made that the prime purpose of the locality was to prevent development of any kind court rejected challenge flatly concluding that "[t]he validity of this by-law does not hinge upon the motives of its supporters"). But the mixed motives of a local polis demand it.

[271] *See* PERLMAN & MILDER, supra note 191 at 202-03.

[272] "[T]o the extent that we live an urban-industrial civilization but at the same time pretend to ourselves that our real home is in the wilderness, to just the extent we give ourselves permission to evade responsibility for the lives we actually lead. We inhabit civilization while holding some part of ourselves—what we imagine to be the most precious part—aloof from its entanglements." Cronon, *The Trouble with Wilderness, s*upra note 10, at 81.

. in the lap of an immense intelligence. But that intelligence is dormant and its communications are broken, inarticulate and faint until it possesses the local community as its medium."[273]

[273] DEWEY, THE PUBLIC AND ITS PROBLEMS, supra note 104, at 219.