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# Relative Administrability, Conservatives, and Environmental Regulatory Reform

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## I. Introduction

Perhaps three things in life are now certain: death, taxes, and federal environmental regulation. While the nation has made great progress on a number of environmental fronts, the size and cost of the federal environmental regulatory bureaucracy have come under sharp criticism. Some argue that the federal government is doing too little and needs to do more,[1] while others frame federal environmental law as too big, too costly, too intrusive, and too restrictive. If one accepts these criticisms, then the question becomes: what is a better way?

One alternative policy approach—long available, but underutilized—is based on the straightforward governmental use of line drawing (also known as "geographic delineations"). These policies include the creation of development buffer zones as well as urban growth boundaries and density/open-space controls that may be utilized to protect air, water, biodiversity, and other resources targeted by federal environmental laws. Geographic delineation policies, for instance, prohibit certain development densities on one side of a line but not the other, allow individuals to only cut trees up to X feet from a watershed, or compel developers to integrate X acreage of open space into a commercial development.

As discussed below, these policies have very low administrative costs relative to current federal environmental statutes, which consume vast amounts of economic, human, and temporal resources. In this way, these policies have what we can call high "relative administrability." Even so, geographic delineation policies remain largely unutilized. The question is: why? One important reason is the failure of conservative policymakers and commentators to accept that prescriptive line-drawing policies actually support a number of principles valued by conservatives. In fact, geographic delineations offer great promise as policies that many, if not most, environmentalists would support but that would also provide more efficient environmental management from a conservative perspective—at least more efficient than relying predominantly on expansive federal control like we do today.

## II. Relative Administrability in Environmental Law

Despite the wealth of criticism of federal environmental law, many of the suggestions proffered to date have arguably been too polarized in form. Scholars who dislike federal governance simply want environmental regulations to be rolled back and devolved to state and local governments,[2] while scholars in favor of federal environmental governance want more of it.[3] There is a middle ground, however—geographic delineations implemented primarily through state and local government land use law, supplemented by federal laws that fill gaps. Given its long-

*This Article is adapted from* Blake Hudson, *Relative Administrability, Conservatives, and Environmental Regulatory Reform,* 68 Fla. L. Rev. 1661 (2016)*, and is reprinted with permission. Mr. Hudson presented this Article at Vanderbilt University Law School on March 12, 2018. Although written comments were not produced, the discussion included oral comments from Michael Butler, CEO of the Tennessee Wildlife Federation; Robert Martineau, Commissioner of the Tennessee Department of Environment and Conservation; and Greer Tidwell, Director of Environmental Management for Bridgestone Americas.*

1. *See* David W. Case, *The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication*, 25 Duke Envtl. L. & Pol'y F. 49, 53 (2014).

2. *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210, 1211-13 (1992).

3. *See, e.g.*, Dan L. Gildor, *Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect, and Promote the Environment*, 32 Ecology L.Q. 821, 823 (2005).

standing status as one of the first forms of environmental law in the United States, land use planning can be a powerful tool for addressing the problems that Congress attempts to remedy through environmental laws like the Clean Air Act (CAA), the Clean Water Act (CWA), and the Endangered Species Act (ESA)—but only if land use planning efforts can be holistically implemented in a coordinated manner across states.

More specifically, this Article focuses on one critique of federal environmental law arising from conservative circles—the administrability of federal government programs—and contends that geographic delineations can resolve or at least mollify much of the complexity commonly found in federal environmental law. While geographic delineations require political will and transaction costs for gathering information on where to place the lines, once the lines are delineated, they form the basis for relatively easy-to-administer policies. Not only do parties have a clear directive on what they can and cannot do, but enforcement of a line simply involves an assessment of whether the proscribed activity takes place on one side of the line or the other. In this way, perhaps the biggest advantage of lines is their utility as a proxy for many of the environmental ills that complex federal statutes seek to address.

The following subsections highlight a number of geographic delineation policies. With higher relative administrability, these line-drawing policies answer the call for environmental regulatory reform—particularly from the conservative critic perspective—as well as tackle many environmental problems that currently appear intractable.

## A. *Needed Environmental Policies With High Relative Administrability*

To protect environmental resources, lines may be drawn either around specific resources to prevent their degradation (environmental buffers) or around development negatively impacting resources society wants to protect as a general matter (growth boundaries/density restrictions).

### 1. Environmental Buffers

Environmental buffers create a zone between natural resources and development activities. This subsection details several of these policies, describing their benefits and how each has high relative administrability.

#### a. Forest Riparian Buffers

Riparian buffer zones in forested watersheds provide a number of environmental benefits related to preventing nonpoint source water pollution, regulation of stream temperatures, prevention of erosion, protection of harvestable timber, reduction of downstream flooding, and water retention for groundwater filtration and recharge, among other ecosystem services.[4] Examples of riparian buffer zone policies include prescribing that no timber extraction activities take place within 35 feet of a flowing waterway, or that only 50% of the tree canopy density can be removed from the area within 35 feet of the waterway.

The environmental (and economic) benefits of moving toward a holistic use of riparian buffer zones nationally are clear.[5] In addition to the benefits outlined above, several co-benefits related to the goals of federal environmental laws are preserved. The aggregated effect of preserving forest cover along watersheds leaves climate- and pollutant-regulating forest cover in place (CAA), helps maintain habitat corridors for species (ESA), and improves water quality (CWA).[6] But unlike with federal laws, the administration of riparian buffer zones is a straightforward endeavor; once the rule is put into place, program administration is not complicated—effective enforcement can be accomplished through the use of limited human capital (a single pilot of a helicopter), technology (a drone; the use of satellite data and GPS coordinates), and straightforward communication (mailing violators notice of a fine).[7]

#### b. Agricultural Riparian Buffers

Agricultural buffer zones capture many of the same environmental benefits as forest riparian buffers but are largely aimed at ameliorating problems unique to agricultural production—namely, the use of fertilizers and other nutrients for agricultural crops. Agricultural buffer zones are particularly needed considering that nonpoint source water pollution is the number one threat to the nation's waterways, and agriculture is a leading contributor.[8] Moreover, the federal government does not regulate most types of agricultural pollution under the CWA, and states in turn are doing very little, if anything, to address this problem.

Consider a farmer's use of a nutrient-greedy alfalfa buffer around the perimeter of an agricultural field,[9] dramatically

4. *See* Constance L. McDermott et al., Global Environmental Forest Policies 15 (2010).
5. *See* Phyllis Bongard & Gary Wyatt, Benefits of Riparian Forest Buffers (2010), http://www.extension.umn.edu/environment/agroforestry/riparian-forest-buffers-series/benefits-of-riparian-forest-buffers/doc/riparian-benefits.pdf; Julia C. Klapproth & James E. Johnson, Understanding the Science Behind Riparian Forest Buffers: Effects on Water Quality (2009), http://pubs.ext.vt.edu/420/420-151/420-151.html.
6. *See* Bongard & Wyatt, *supra* note 5; Klapproth & Johnson, s*upra* note 5.
7. *See* David James, *The Fourth Amendment, Future Methods of Environmental Enforcement, and Warrantless Inspections*, 33 Rev. Litig. 183, 203-04, 204 n.86 (2014); U.S. Forest Serv., *Unmanned Aircraft Systems*, U.S.D.A., https://www.fs.fed.us/science-technology/fire/unmanned-aircraft-systems.
8. *See* U.S. Envtl. Protection Agency, Nonpoint Source Pollution: The Nation's Largest Water Quality Problem (1996), https://nepis.epa.gov/Exe/ZyPDF.cgi/20004PZG.PDF?Dockey=20004PZG.PDF; Jonathan Cannon, *A Bargain for Clean Water*, 17 N.Y.U. Envtl. L.J. 608, 616 (2008) ("Unregulated nonpoint source pollution is solely responsible for failure of 30 to 50 percent of U.S. waterbodies to meet water quality standards and is a contributing factor in an even larger percentage."); *Nonpoint Source: Agriculture*, U.S. Envtl. Protection Agency, https://www.epa.gov/polluted-runoff-nonpoint-source-pollution/nonpoint-source-agriculture.
9. *See* John D. Sutter, *Minnesota Farmer Battles Gulf "Dead Zone,"* CNN (Mar. 3, 2018, 3:47 PM), http://www.cnn.com/2010/TECH/innovation/08/30/gulf.dead.zone.minnesota.farm/index.html.

reducing nutrient runoff into adjacent watersheds. This is a simple line-drawing exercise. The aggregated effects of farmers planting such buffers around their farms or leaving other types of buffer strips (such as forested buffer strips) to reduce the number of nutrients entering waterways would have a profound effect on watersheds.[10] Once the size and scope of agricultural buffer zones are established, as with forest riparian buffers, implementation again requires little human or economic capital to implement.

### c. Future Coastline Buffers

Geographic delineations can also be a useful way to adapt to impending changes on the coast wrought by climate change, particularly sea-level rise. Over the last century, rapid development of the coast has replaced much of the natural capital—such as coastal wetlands[11]—that previously protected coastal populations from the increasing threat of sea-level rise. But when an adequate buffer is in place, the overland flow of storm surge can be slowed down by or stored in healthy marshes and forests.[12] Consequently, buffers will be increasingly important in the future, especially as sea levels rise at an accelerated rate.[13]

Creating coastal buffer zones through line drawing is a climate change adaptation policy, seeking "to adjust the built and social environment to minimize the negative outcomes of now-unavoidable climate change."[14] Adaptation in the coastal zone includes reining in human development to, first, remove the populace from lands likely to be lost and, second, provide more natural land to act as a buffer between rising seas and future human habitations that have moved farther inland. Geographic delineations in the coastal zone would foster both types of adaptation policies. In particular, preventing the development of *new* settlements in areas either likely to be lost or needed in the future to buffer settlements farther inland is a relatively cheap and practical approach to adapting to coastal land loss.[15]

### d. Flood Zone Prohibitions

The National Flood Insurance Program (NFIP)[16] subsidizes the insurance of property owners who live in high-risk areas—primarily in designated "100-year" floodplains.[17] The program has no doubt resulted in a great deal of economic gain, as it has allowed development to expand into areas where it would likely have been economically infeasible. But at what cost? While the program predicates eligibility on some level of local land use planning to mitigate flood risk,[18] it has exacerbated development in high-risk areas. Moreover, the development of floodplains removes natural resources that would otherwise act as buffers to protect social systems and that are crucial to water quality, species habitat, carbon sequestration processes, and overall ecosystem functionality.[19] An additional problem is how the lines for flood zones are currently drawn, which may or may not be supported by the best available data and science.[20]

Nonetheless, harnessing geographic delineations can assist in better land use planning going forward—planning that both better preserves natural capital in high-risk areas like floodplains and helps society adjust to looming new threats like sea-level rise. More specifically, better line drawing can assist in pinpointing evolving flood risk in floodplains, providing better certainty for what remains of NFIP over time. Line drawing can also be used to prohibit development in previously undeveloped (but risky) areas or in areas where development has already been destroyed by disaster events. In addition to greater administrative simplicity, these line-drawing exercises also reduce taxpayer expenditures on the front end through the reduction of subsidized insurance rates and on the back end through fewer disaster relief expenditures.

## 2. Growth Boundaries/Density Restrictions

Probably the most politically controversial types of geographic delineations described in this piece are urban growth boundaries and other development-density requirements (referred to collectively as "growth boundaries"). While each of the buffers described above is linked to a particular resource (forests, agricultural lands, water, coasts), growth boundaries protect the environment outside of a boundary without reference to any particular resource and are applicable to all types of development and land uses.[21]

Growth boundaries might be seen as a more holistic policy than mere buffers. Most importantly, growth boundaries are not aimed at treating the symptoms of human development activities—the pollution and resource-scarcity problems at which most federal environmental laws are

10. *Id.*
11. *NOAA Analysis Reveals Significant Land Cover Changes in U.S. Coastal Regions,* Nat'l Oceanic & Atmospheric Admin. (Aug. 18, 2014), http://www.noaanews.noaa.gov/stories2014/20140818_landcover.html.
12. Coastal La. Ecosystem Assessment & Restoration, Reducing Flood Damage in Coastal Louisiana: Communities, Culture & Commerce 2 (2006), http://ian.umces.edu/pdfs/ian_newsletter_13.pdf.
13. Josh Eagle, Coastal Law 27 (2011); U.S. Climate Change Sci. Program, Subcomm. on Glob. Change Research, Coastal Sensitivity to Sea-Level Rise: A Focus on the Mid-Atlantic Region 177 (2009), https://downloads.globalchange.gov/sap/sap4-1/sap4-1-final-report-all.pdf.
14. Elisabeth M. Hamin & Nicole Gurran, *Urban Form and Climate Change: Balancing Adaptation and Mitigation in the U.S. and Australia*, 33 Habitat Int'l 238, 238 (2009).
15. Gordon McGranahan et al., *The Rising Tide: Assessing the Risks of Climate Change and Human Settlements in Low Elevation Coastal Zones*, 19 Env't & Urbanization 17, 21 (2007).
16. 42 U.S.C. §§ 4001-4129 (2012).
17. Laurel Adams, *Government-Subsidized Flood Insurance Premiums Are About Half of Full-Risk Price*, Pub. Integrity, https://www.publicintegrity.org/2011/06/23/5006/government-subsidized-flood-insurance-premiums-are-about-half-full-risk-price.
18. Patricia E. Salkin, *The Quiet Revolution and Land Use*, 45 J. Marshall L. Rev. 253, 274 (2012).
19. *Functions and Values of Wetlands*, Wash. St. Dep't Ecology, https://ecology.wa.gov/Water-Shorelines/Wetlands/Education-training/Functions-values-of-wetlands.
20. Michael Keller et al., *Outdated and Unreliable: FEMA's Faulty Flood Maps Put Homeowners at Risk*, Bloomberg, https://www.bloomberg.com/graphics/2017-fema-faulty-flood-maps/.
21. *See* Ecotrust, *Reliable Prosperity*, YouTube (Jan. 8, 2010), https://www.youtube.com/watch?v=9qZ_HRobCEA.

aimed—but instead attack the *drivers* of these problems, which ultimately result from the replacement of the natural environment with the human-built environment. In this way, growth boundaries act as a precautionary proxy, internalizing externalities by forcing a more efficient use of developed space so that natural resources are impacted as little as possible.

Interestingly, urban growth boundaries have perhaps the highest potential to achieve the greatest environmental gain at the lowest overall administrative cost to the U.S. citizenry. Undoubtedly, growth boundaries present high upfront costs—both political costs due to interest group pressures and transaction costs as governments determine where the boundaries should be placed. They also present distributional costs, as the price of housing inside a boundary may increase (though this is arguably a consequence of their sparse implementation across jurisdictions "competing" for citizens). But once in place, markets can work freely within or without the boundary and according to its strictures, and the environmental benefits are integrated into the system without the need to reference specific environmental targets.

Growth boundaries may include urban limit lines, which effectively draw lines around a municipality and require reduced development densities outside each line. But the types of lines need not be limited to urban limit lines. Lines may be incorporated into individual projects to adjust density to better integrate environmental resources and services into development. Building big box retailers *up* on fifty acres, with parking underneath, while setting aside another fifty acres for green space, provides an example.[22] These are fairly simple requirements to place upon development. Once developers integrate lines, those buffers are fixed and need little continued administration.

To be sure, current urban growth boundary policies are not without their critics or their flaws.[23] Ultimately, however, utilizing growth boundary policies to protect resources like the nation's forests and wetlands from urban sprawl furthers air quality gains, regulates climate through carbon sequestration, and reduces energy consumption, all goals of the CAA. Guarding these resources from the negative effects of development also protects biodiversity (ESA) and water quality (CWA).

## III. A Conservative Vision of Environmental Regulatory Reform—Balancing Principles

Conservative critics calling for regulatory reform have claimed to support the ends of environmental protection, but are critical of federal bureaucracy as the means of achieving that protection.[24] As a result, the arguments put forth in this Article assume that conservative critics are not wholesale opposed to regulatory controls, but rather prefer state and local governments to be the locus of any prescriptive environmental policy making.[25]

Section III.B below argues that the geographic delineations described in this Article are largely consistent with the general preferences of conservatives most relevant to environmental policymaking, though to varying extents. Before turning to that analysis, however, section III.A details how certain institutional and political impediments have caused conservatives to overlook geographic delineations at the state and local level as policies consistent with their political philosophy.

### A. *Impediments*

The impediments to conservatives supporting geographic delineations include federalism and prevailing legal conceptions of private property rights. Though it is important to provide context for these roadblocks, keep in mind that this Article is focused primarily on the administrability of environmental policies and the relative advantages of line-based policies. It thus leaves out a thorough assessment of the political feasibility of enacting these policies—in fact, the Article is attempting to lay a foundation of argumentation that would assist in making these policies more politically palpable. Still, elements of politics are nonetheless relevant and so will be discussed in a narrow context below.

#### 1. Property Theory and Regulatory Takings Doctrine

American property law has been influenced by the labor theory of property perhaps more than any other theory. The labor theory effectively justifies property ownership by awarding property rights to members of society that cultivate or make economically productive use of land.[26] Significantly, this account drives the jurisprudential development of legal concepts like the regulatory takings doctrine, which has come to effectively equate a regulation restricting the development of land beyond a certain threshold with the physical appropriation of that land.[27] However, the idea of limiting development or cultivation of land outside certain boundaries is often seen as antithetical to this theory.

What is lost in the predominant views of property theory and regulatory takings is that sometimes the most productive use of land for society as a whole is to leave it in its natural state. Preservation of a stable society—one that flourishes

22. *See* Patricia E. Salkin, *Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 Vt. J. Envtl. L. 48, 55 (2005).
23. *See generally* L. Anders Sandberg et al., The Oak Ridges Moraine Battles (2013); Peter A. Walker & Patrick T. Hurley, Planning Paradise (2011).
24. *See* Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Envtl. L. & Pol'y F. 253, 254-55 (2013).
25. *Id.* at 280. These critics may reject prescriptive regulation altogether, believing markets are more suitable and adaptable to providing environmental benefits.
26. Paul Goldstein & Barton H. Thompson, Jr., Property Law: Ownership, Use, and Conservation, 22-23 (2006).
27. Peter Gerhart, Property Law and Social Morality 262-65 (2014).

within a stable environment—should be a core principle of conservative thought, as should preserving option values for the future. Social conservatives argue for the consideration of future generations in many social debates, such as abortion, so how much more so should they care about future generations impacted by today's resource use?

Nonetheless, in some circles being "conservative" has morphed into merely "conserving one's personal financial resources." Consider the complicity of state and local governments in attempting to capture short-term economic gains (i.e., an increased tax base), despite long-term human and economic costs, because they fail to engage in more responsible, environmentally conscious land use planning. This is nothing if not a shortsighted concern over capturing short-term economic benefits and economic return from individual property ownership at the expense of long-term environmental and economic well-being.

This is a political dimension of the property theory impediment that exacerbates and impedes the use of geographic delineations to achieve many other goals that are in the wheelhouse of conservative thought. But given the high economic costs of degraded ecosystems, the expanding federal regulatory bureaucracy aimed at checking that degradation, and the reduced wealth of future generations if that degradation is not checked,[28] many conservatives seem to be grasping at conventional wisdom that does not match the foundations of conservative ideology.

### 2. Federalism

Federalism is another impediment to the adoption of geographic delineations at the state and local level. Land use regulation of the kind required for line drawing has long been considered a state and local government regulatory role. This poses a complication—states remain reluctant to use more robust geographic delineation policies and the federal government may maintain (or perceive that it maintains) little to no legal authority to require them do so (or to set such standards itself). While some local governments may be reluctant to use growth-boundary and other land use policies, others may be impeded by state government preemption—another wrinkle arising out of federalism.[29]

Consequently, any successful environmental reform efforts must not only overcome federalism complications, but must also balance the relative advantages provided by local, state, and federal governance. Because the states are the locus of regulatory authority over land use,[30] from an environmental-outcome perspective, states should not only allow local governments to curb urban sprawl but should actually mandate sprawl controls. Even though local governments have historically controlled land use, in the environmental context this authority should shift back to the states for "extralocal" issues like environmental protection.[31]

Accordingly, this Article argues it is time that states provide some very basic mandates to local governments to preserve the land base itself and associated natural resources. These mandates would be that local governments must use lines to achieve a certain degree of protection—there would still be autonomy and control at the local level about where to put the lines and how development proceeds on the correct side of the line. States can no longer use federalism as an excuse to do nothing, but must harness the benefits of federalism to significantly displace the federal government's role in environmental protection if they want to truly reduce the federal bureaucracy of which conservatives are so critical.

## B. *Conservative Principles and Geographic Delineations*

One conservative critic of federal environmental law has noted that while conservatives have increasingly opposed the current structure of environmental law, they offer few alternatives for protecting the environment.[32] So here is an alternative plan: be more stringent with land use planning at the state and local level, and the need for federal intervention will be lessened. With that plan in mind, the below subsections highlight nine general principles of conservatism and assess whether and how each is consistent with the use of geographic delineations as a means of environmental reform. These principles are informed by and supplement the five strands of conservative philosophy influencing conservative environmental policymaking, as outlined by Prof. Barton H. "Buzz" Thompson, Jr.[33]

### 1. State and Local Policymaking Over Federal Policymaking

Geographic delineations exercised by state and local governments are most obviously consistent with this principle of conservatism. State and local governments already maintain clear constitutional authority to engage in this type of policymaking, and they have long maintained the regulatory tools necessary to achieve geographic delineation policies, primarily through zoning. All that remains is forging the political will to do so, for which the active participation of conservative policy makers is crucial. Conservative commentators should support geographic delineations as a legitimate means of environmental regulatory

28. Studies have demonstrated that when the costs associated with the loss of natural resources are actually taken into account, nations may sacrifice up to half of their future income to achieve current rates of economic growth. David Hunter et al., International Environmental Law and Policy 132-33 (4th ed. 2011).
29. *See* Blake Hudson & Jonathan Rosenbloom, *Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change*, 64 Hastings L.J. 1273, 1308-12 (2013).
30. Salkin, *supra* note 18, at 257.
31. *See* Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 Minn. L. Rev. 231, 257 (2008).
32. Adler, *supra* note 24, at 258.
33. *See* Barton H. Thompson, Jr., *Conservative Environmental Thought: The Bush Administration and Environmental Policy*, 32 Ecology L.Q. 307, 312 (2005).

reform because they preserve the principle of state and local governance as the preferred locus of policymaking.

### 2. Smaller Government Over Larger Government

Geographic delineation policies implemented by local governments are administered by government regulators that are individually smaller in form, closer to the people whom they govern, and less self-perpetuating and administratively complex. While some may consider the prescriptive nature of policies and the restrictions they place on individual freedom as the metrics by which we should measure "large" versus "small" government, another perspective is that the democratic process manifests more readily through having smaller-scale governments engage in policymaking within smaller regions. It also may be that most people consider the burdensomeness of policy administration when they think of "large" versus "small" government. Governments implementing geographic delineations are "smaller" in the sense that the administrative complexities of the policies they implement are reduced. If "large" government is measured, rather, by its intrusiveness into the behavior of regulated entities, then state and local geographic delineation policies are also not as large as federal policies. Local governments would not be dictating which activities take place and how, only where they may take place. The rest is up to the parties operating under the regulatory regime.

### 3. Lower Taxes Over Higher Taxes

Geographic delineations do not extract money directly from property owners or the general populace. A rebuttal to this argument might be that the practical effect is the same when, for example, an urban growth boundary causes the value of property outside the line to drop. Yet property investments are speculative endeavors in the first instance. A holistic use of geographic delineations will provide certainty in the market from the point at which the geographic delineation is established and into the future. Limiting speculative values not currently part of a property owner's cash flow is different entirely from extracting funds from their bank account to implement costly policies.

Geographic delineations also more fairly place the cost of avoiding harm on those most likely to be doing the harm. If Alabama maintains poor land use policies, which cause the state to have more species on the federal endangered species list than almost any other state,[34] why should federal taxpayers in Oregon have to foot the bill to address Alabama species' survival?

### 4. Clear, Simple Rules Over Complex Rules and Regulatory Discretion

Geographic delineations provide clear and simple rules that create certainty for regulated entities as well as stability in the markets that conservatives want to foster. Once a line is placed, the market can work without interference. Contrast these clear rules with the great degree of discretion afforded federal regulatory agencies in implementing often ambiguous statutory language.

Obviously, there remains a degree of flexibility in establishing geographic delineations. What was once an appropriate place to draw a boundary may no longer be so at some point in the future. And exceptions may be needed regarding particular projects of special interest to society. Thus, the land is not locked up forever, but once the boundary is set it is a far clearer and simpler policy under which to operate than being subject to agency discretion in developing and implementing complex regulations that, in their own right, do not arise out of clear legislative directives or provide clear and straightforward mandates.

### 5. Conservation for the Utility It Provides to Humans Over Conservation for Its Own Sake

Generally speaking, it seems likely that conservatives for whom the environment is *not* at the forefront of their minds are more likely to be utilitarian in their view of why resources should be protected. The stereotypical conservative cares about the environment for what it can do for her. But the growing field of ecosystem services[35] makes clear that even if one takes this utilitarian perspective, more stringent conservation approaches are needed—in particular, geographic delineations that keep vast swaths of the landscape intact. For example, biodiversity provides utility to humans in the form of medication.[36] If a conservative does not care about a species for the species' sake, perhaps they would be more inclined to take precautionary measures to protect habitat to protect the species that may be studied in the future and yield a cure for cancer. The mere option value of reserving the right to discover such species should be appealing to someone identifying with virtually any strand of conservatism. Similarly, the utility of preserving a wetland rather than paving it and building a detention pond that must be constructed and maintained with taxpayer expenditures should appeal to conservative values.

### 6. Legislative Process Over Executive Process

Many of the critiques of federal environmental law are in part concerned about a perceived lack of democratic

34. Russell McLendon, *Which U.S. States Have the Most Endangered Species?*, Mother Nature Network (Sept. 21, 2015, 11:50 AM), http://www.mnn.com/earth-matters/wilderness-resources/blogs/which-us-states-have-the-most-endangered-species#ixzz3j8fLuMii.

35. James Rasband et al., Natural Resources Law and Policy 336 (2d ed. 2009).

36. Anthony Artuso et al., Biodiversity and Human Health 3-4 (Francesca Grifo & Joshua Rosenthal eds., 1997).

process when unelected federal agency officials mandate environmental regulations. Even though they are implementing a federal statute, those statutes are all too often ambiguous and give the agency a great deal of discretion. In contrast, local land use regulations are as close as you can get to citizens regulating themselves through direct legislative means. Certainly, there is executive administration at the local level as well as the risk of capture by regulated entities. But overall, state and local authority may provide a more precise representation of democracy that tends to raise less skepticism among conservatives. While state and local governments may—very democratically—choose to do nothing, the question is how to provide an alternative to the arguably less democratic federal administrative bureaucracy. Local land use policy implementing geographic delineations is the best alternative for conservatives, and they would be wise not to allow the perfect to be the enemy of the good.

### 7. Markets Over Regulatory Prescriptions

At first blush it may seem that geographic delineations are not consistent with this principle of conservatism, because geographic delineations are clearly a form of prescriptive regulation. But geographic delineations merely create a boundary, making clear what activities can or cannot take place on particular sides of the line. Within those bounds the market may work freely as long as it takes into account the basic and straightforward requirements of the policy. This is very different from prescriptive regulation arising out of complex federal dictates that delve into the regulated entity's affairs, which can have a much more restrictive effect on the actor's participation within the market.

### 8. Compensation for Restraints on Property Rights Over the Provision of Uncompensated Public Benefits

This principle of conservatism—embodied by regulatory takings law—is at odds with the use of geographic delineation policies. And yet, even under current regulatory takings doctrine, one would be hard-pressed to succeed on a takings claim for restrictions on the consumption of natural resources on one's property because such restrictions generally leave property with other economic value and allow it to be utilized for other purposes. Nonetheless, the notion that property owners should be compensated for such restrictions makes geographic delineation policies politically difficult to implement. Even so, uncompensated restrictions on private property actually occur quite frequently, and even the staunchest property rights advocate must admit that the question really becomes where to draw the line. Nuisance law provides an example, where uncompensated restrictions arise to avoid harm to the broader public. The same may be said about land use restrictions designed to forestall the harm that habitat fragmentation foists on the public and on future generations.

### 9. Cost-Benefit Analysis Over Precautionary Rulemaking

This principle of conservatism may also seem at odds with the use of geographic delineations. Boundaries are clearly aimed at taking a precautionary approach to the drivers of environmental problems. Cost-benefit analysis, on the other hand, seeks to place hard numbers on the economic burdens resulting from a regulation relative to its economic benefits. But a major flaw of cost-benefit analysis is that the short-term economic costs of forgoing development activities are readily calculable, while the aggregated costs of forgoing protection of particular isolated natural resources over time are largely unquantifiable. It is not surprising, then, that a traditional form of cost-benefit analysis will most often lead to a decision to develop a particular parcel of land. But this is the very reason the ESA, for example, has grown unwieldy, complex, and costly. Though some economic benefit undoubtedly occurred from development activities that took place, the cost of remedying the environmental harms that later emerge through federal legislation may be far greater. For this reason, conservatives would be wise to preserve the option value of future generations, so that those generations can utilize resources to the same extent that we utilize them today.

## IV. Conclusion

This Article puts forth three primary propositions: there is great purchase to calls for federal environmental regulatory reform; geographic delineation policies have a high degree of relative administrability when compared to federal environmental laws, which answers the call from critics for a means of protecting the environment at less cost and with less centralized bureaucracy; and geographic delineation policies at the state and local level are quite consistent with a number of important conservative principles.

If society is to achieve meaningful environmental regulatory reform, we need members of all political ideologies to get on board. Using geographic delineations at the state and local level more efficiently attacks the drivers of the problems that federal environmental statutes seek to address and therefore secures for conservatives a number of principles they value. If state and local governments (and conservative policymakers) do not fill this role, then they have no grounds to argue against federal intervention seeking to remedy the environmental ills that they are facilitating. Society will need to enlist the support of conservatives in addressing continued environmental degradation if it is to conserve for future generations the robust environmental systems that laid a foundation for today's wealth, prosperity, and societal well-being.