

The Future Public Law of Private Ecosystems

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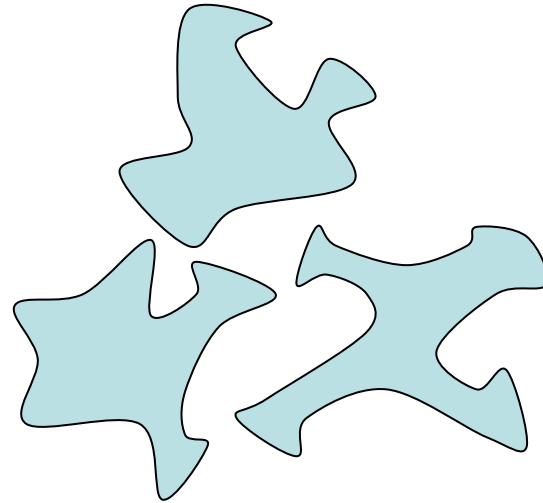
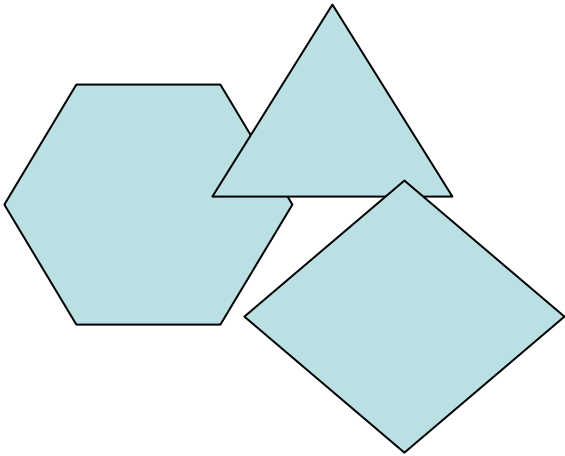
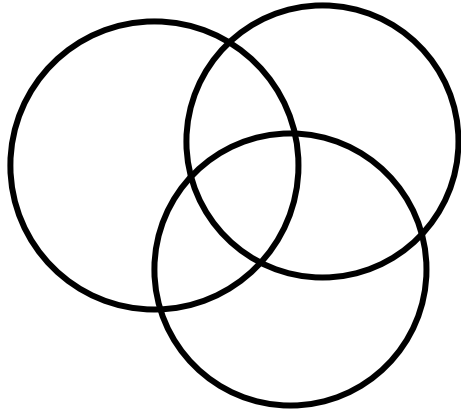
Tallahassee, Florida

(as in, *not* Gainesville, *not* the Gators)

MERGING A MANTRA, A METRIC, AND A METHOD

- MANTRA: The Endangered Species Act
- METRIC: Biodiversity
- METHOD: Ecosystem Management

HOW WELL DO THEY FIT?



PREDICTIONS FROM TEN YEARS AGO

Ease Up:

A strong federal presence in shaping our national response to biodiversity conservation clearly is needed. The present federal system for defining that policy, however, is in danger of disintegrating as a result of uncoordinated regulatory efforts and overzealous application of unbridled regulatory powers....We cannot afford, in terms of money, environmental health, and political stability, to allow federal biodiversity conservation policy for nonfederal lands to be carried out any longer by the present structure. Its myopic emphasis on regulation through coercive mechanisms will not produce meaningful biodiversity conservation without an unacceptable human-factor cost.

Versus Lay It On Thicker:

The law of diversity and ecosystem protection is at a crossroads. Looking back over our shoulders we can see that single species management has been fairly effective—in some cases wildly effective—in promoting the success of individual species and the habitats on which they depend. This approach has begun to lose its steam, however, as more species and more habitats come into view. The temptation to shed our concerns for individual species in favor of conservation on a more holistic, landscape level is strong. All the more so where single species protections require us to make specific and difficult accommodations, while landscape conservation can be assigned to the realm of planning and discretion. At bottom, species-based protection is law. Ecosystem management, as currently promoted, is politics with a strong flavor of law-avoidance.

- Houck, Minn L Rev (1997)

THE ESA: FROM TVA TO TBD

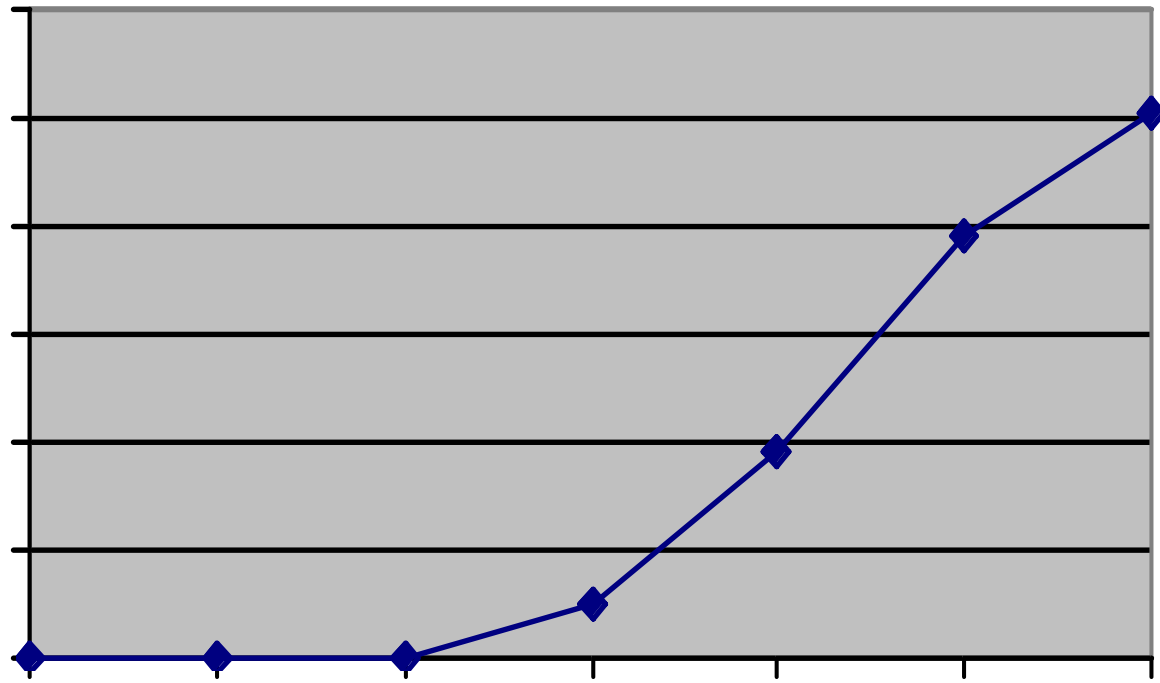
- TVA v Hill and the “at all costs” theory of the ESA had a short lifespan
- Single-species management has limited utility re invasive species, climate change, etc.
- The ESA can jolt the status quo, but can’t finish the job
- The role of Biodiversity and Ecosystem Management
- The Klamath as a case study

THE GRADUAL “PLAIN VANILLIZATION” OF THE ESA

- Amendments in 1978 adding the “God Squad” extinction exemption process.
- Amendments in 1982 adding the “incidental take” authorization provisions in section 7 and section 10.
- Repeated judicial rulings that the so-called “conservation duty” federal agencies must fulfill pursuant to section 7(a)(1) is discretionary.
- The erosion of the “best scientific data available” standard through court rulings that have rendered it little different in practical effect from the default rules applied under the Administrative Procedure Act.
- The Babbitt era administrative reforms—HCPS, safe harbors, candidate conservation agreements, and no surprises—which, while good defense against an aggressive congressional threat on the statute, considerably softened the “pit bull” bite of the section 9 take prohibition.
- The *Sweet Home* decision in 1995, which interpreted the take prohibition as limited by tort-like proximate cause principles and placed the burden of proof on the plaintiff.
- The critical habitat wars, beginning in the Babbitt era and still going strong today, which exposed the weaknesses of the critical habitat mechanism.
- Efficiency-minded reforms in the Bush Administration, such as conservation banking and joint counterpart regulations, which further transform the statute into a plain vanilla environmental permitting law.
- Concerns over the politicization of the listing and critical habitat designation processes, fueled by the Julie MacDonald IG investigation.
- 25 years of congressional inertia.

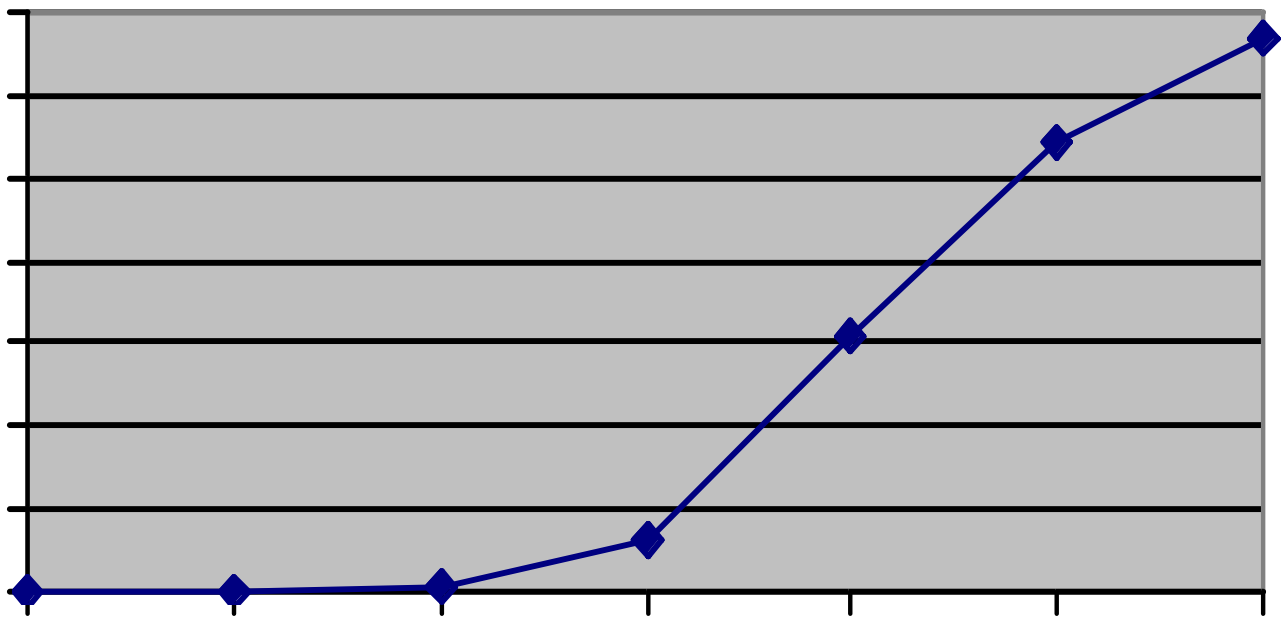
THE EMERGENCE OF BIODIVERSITY AS A POLICY METRIC

- Law actually was ahead of the science curve in one rare example—the biodiversity management provision of the National Forest Management Act of 1976.
- 1992 saw the adoption of the Convention on Biological Diversity at the international level.
- 1992 also saw publication of Bill Snape’s edited volume, *Biodiversity and the Law*, which provided a thorough account of where biodiversity had and could become part of the legal fabric.
- One judge on the D.C. Circuit suggested that impacts to biodiversity resulting from loss of the habitat of an intrastate endangered species are of such ubiquitous importance as to immunize the ESA from *Lopez*-style Commerce Clause challenges (*NAHB v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997))
- Legal scholarship grew impressively on the topic, going from *zero* articles using the phrase “biodiversity” as of 1985, to just 6 as recently as 1990, to *over 5000* articles by 2007 (albeit many references are to party names in cases).
- Biodiversity even has its own law school casebook, in its second edition, with *The Law of Biodiversity and Ecosystem Management*.



THE EMERGENCE OF ECOSYSTEM MANAGEMENT AS A POLICY METHOD

- The 1993 Northwest Forest Plan was/is a large-scale an ecosystem management program
- FWS adopted an ecosystem management policy for ESA implementation in 1994
- EPA issued its “Edgewater Consensus” the same year, calling for a more “place-driven” approach to implementing pollution control statutes.
- Legal scholarship has also exploded on ecosystem management. No articles had mentioned the term by 1980, and only 14 had by 1990, yet by 2007 *over 1300* articles referenced the term.
- And it also has its own law school casebook, in its second edition, with *The Law of Biodiversity and Ecosystem Management*.



EXPLORE ALL NOOKS AND CRANNIES OF THE ESA

- As the Babbitt era reforms suggested, the ESA is remarkably flexible and gives the agencies a lot of room under *Chevron* to move the circles.
- There is probably more room in the statute, particularly for programs using market-based instruments, to squeeze out more uses of biodiversity and ecosystem management principles.
- For example, conservation banking has some promise, as does the emerging concept of “recovery crediting.” Some form of performance track program—e.g., rewarding “beyond compliance” with expedited permitting—could also prove effective.

STATE AND LOCAL GOVERNMENTS CAN DRAW MORE CIRCLES

- The ESA could be better integrated with other state and local programs that can and do use biodiversity and ecosystem management principles.
- An example is Florida's Rural Land Stewardship Act, which rewards landowners who set aside natural areas, including listed species habitat, with transferable development rights.

BULK UP THE SCIENCE

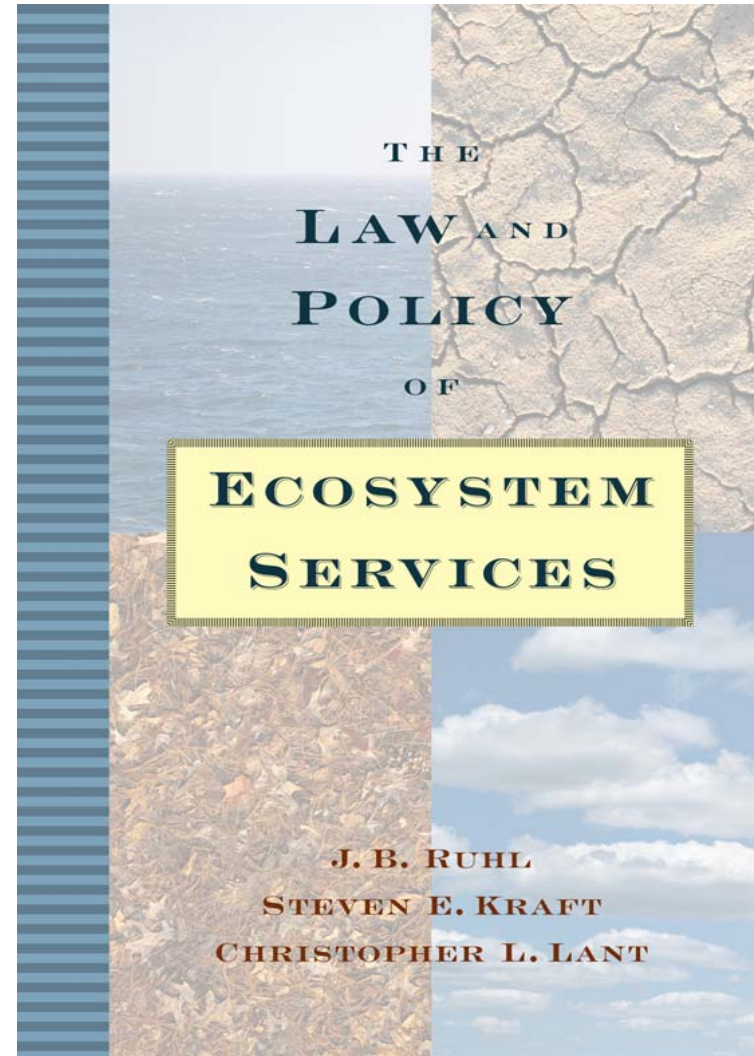
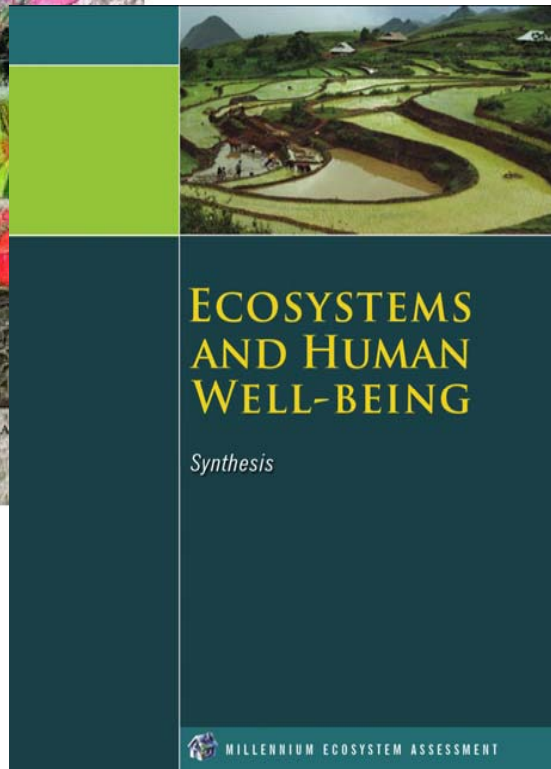
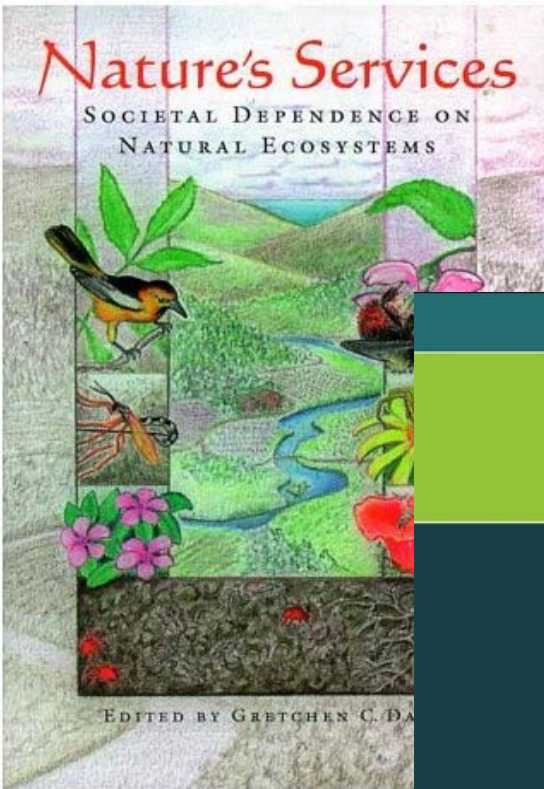
- The species-specific focus of the ESA does not preclude using an ecosystem-based approach to questions of take, jeopardy, and recovery.
- The problem is that the science of the ESA is not sufficiently developed to *require* taking an ecosystem-based approach.
- Further advances in the science of complex systems in application to ecosystems, and of the role of biodiversity in ecosystem resilience, will increase the overlap between the ESA, ecosystem management, and biodiversity.

LOOK ELSEWHERE

- Ultimately, the ESA can only operate where listed species roam, and thus can only carry biodiversity and ecosystem management that far.
- But other concepts and programs may integrate well with them.

IN PARTICULAR...

ECOSYSTEM SERVICES



RESILIENCE THEORY

