

IDEAS, INCENTIVES, GIFTS, AND GOVERNANCE: TOWARD CONSERVATION STEWARDSHIP OF PRIVATE LAND, IN CULTURAL AND PSYCHOLOGICAL PERSPECTIVE

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Conserving ecological resources on private lands appears to require both (a) supportive landowners, and (b) regulatory coercion, notwithstanding, (c) that rural landowners comprise the most consistently antienvironmental demographic group in America. Neither policymakers nor legal scholars have come up with satisfying responses to this predicament.

Drawing upon sociological and psychological studies of attitudes toward land, community, and environment, and on the social psychology of group conflict, social influence, and attitudinal change, this article explicates the predicament and proposes a way out of it. The solution carries us beyond legal scholars' traditional focus on public law and administration to reach, on one side, mainline environmentalism's self-understanding and community involvements, and, on the other, new institutions for governance by landowners. (Economic incentives and gift-giving are also entailed.) The main institutional innovation is the landowner-initiated, landowner-controlled "special nature district," with limited powers of regulation,

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assessment, and property acquisition. Special nature districts would act on local interests in conservation, but would provide ecological amenities sought nationally via collective contracting with public conservation agencies.

The academic upshot is a substantial research agenda for scholars of property and environmental law. The special nature district will: (1) put to the test the burgeoning law and norms literature; (2) challenge scholars to invent models for jurisdictions fluid in their geography and competence; (3) focus attention on some heretofore peripheral issues of constitutional law; and (4) motivate empirical study of little known irrigation, drainage, grazing, zoning, and pest-control districts.

INTRODUCTION

A puzzle: Can public policy protect and restore ecological resources on private lands, if the following three propositions are true?

→ Landowners have the power to thwart or badly undermine locally unpopular conservation initiatives.

→ Holdouts (and free-riders) plague noncoercive conservation strategies.

→ Rural landowners evince less intrinsic interest in wildlife and nature, and more hostility toward environmentalism, than virtually any other cultural group in America.

These propositions comprise what I will term the private-lands predicament.

In recent years, the legal literature has started to appreciate the predicament, with several contributors acknowledging that “disgruntled landowners make poor conservationists.”¹ To the policy debate these scholars have offered their personal views on how to make conservation policy more fair and thus more palatable to landowners.² This line of scholarship turns on two unspoken premises: first, that landowners’ desire to be good conservationists is little affected by conservation policy, except as mediated by “fairness,”³ and, second, that the commentators’ sense of fairness coincides with landowner sentiments.⁴

1. David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations*, 19 HARV. ENVTL. L. REV. 303, 397 (1995); see also Neil Gunningham & Michael D. Young, *Toward Optimal Environmental Policy: The Case of Biodiversity Conservation*, 24 ECOLOGY L.Q. 243, 253–79 (1997); Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 77–80, 92–97 (1997); 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, 632–42 (1995); Evan van Hook, Note, *The Ecocommons: A Plan for Common Property Management of Ecosystems*, 11 YALE L. & POL’Y REV. 561, 571–72 (1993). These works vary in the depth with which they analyze the intuition. The most comprehensive is Gunningham & Young.

2. See *infra* Part I.D.

3. Of the works cited in *supra* note 1, only Gunningham & Young wrestle with the question of whether conservation policy can directly affect landowners’ conservation motivations. To this end they advocate awards for good stewardship and conservation policies that involve local bodies to build

The present article proceeds somewhat differently. It builds a framework for private-lands conservation policy from the ground up, from the raw material of rural landowners' attitudes toward nature and the social psychology of attitudinal change. The resulting framework reaches beyond legal scholars' traditional focus on public law and administration to encompass, on one side, mainline environmentalism's self-understanding and community involvements, and, on the other, new institutions for governance by landowners. A persistent, underlying theme is that an environmental policy less foreign to rural landowners may facilitate the "greening" of rural culture.

Ideas, incentives, gifts, and governance each define a facet of the policy framework I develop. Regarding ideas: one or more of the public faces of environmentalism—groups like the Sierra Club, the National Wildlife Federation, Defenders of Wildlife, and the Natural Resources Defense Council—ought to scrutinize the meaning of environmentalism it works to convey, and open itself to more pluralistic ways of being green. Trappers, hunters, commercial fishermen, and motorized recreationists all express a pointed appreciation of the natural world and a willingness to pay to conserve ecological abundance, though the reasons they value nature diverge from those of the paradigmatic environmentalist. These groups' ascension within the mainline environmental movement would erode the dualistic oppositions (between environmentalist and "real American"⁵) on which feed the most virulent strains of rural anti-environmentalism.

On a more local level, environmentalists can soften the bite of anti-environmental sentiment by expanding conservation incentive programs like the U.S. Fish and Wildlife Service's (FWS's) "Partners for Wildlife" program. Where, however, the conservation project challenges rural landowners' longstanding and culturally freighted practices, incentives alone may fail to crack the hardened shell of tradition. Here gifts of land, in experimental trusts, come to the fore. These may serve a double function: "buying" open-mindedness and good faith, while also providing a site for environmentalists and agriculturalists to explore together the relative merits of traditional and alternative land management techniques. Through incentives and gifts, environmentalists and wildlife agency personnel can establish personal relationships with farmers and

community and industry support, but their analysis is rather vague. Gunningham & Young, *supra* note 1, at 255–57.

4. This assumption is pervasive. None of the scholarship analyzes sociological or psychological research on landowners' attitudes. Perhaps it is no surprise, then, that much commentary falls back on pleas for inclusive "stakeholder" processes, out of which will emerge, it is hoped, consensus acclaim for something like the commentator's preferred policy. See, e.g., Karkkainen, *supra* note 1, at 101; Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 322–23 (1994).

5. I am not joking. This is a favorite theme of the anti-environmental fringe. See, e.g., THE SIERRA TIMES: AN INTERNET PUBLICATION FOR REAL AMERICANS, at <http://www.sierratimes.com> (last visited Aug. 28, 2002).

ranchers; through these relationships, attitudes should begin to change, hostilities to soften.

Incentives and gifts have limitations. Neither solves the holdout problem, and neither produces the kind of forum through which new, local norms of conservationist management are most readily established. For this we need governance, and more specifically the landowner-initiated, landowner-controlled special district. Modeled on irrigation and drainage districts, the new "nature districts" would empower local landowner supermajorities to make collective decisions about ecological stewardship. Nature districts would serve a variety of functions: clarifying landowners' expectations of one another, as regards emerging conservation issues; contracting with conservation agencies to improve habitat or restrict development; coordinating the member landowners' utilization of wildlife; changing liability rules; establishing open-space zoning regulations; and levying taxes for conservation projects. Nature districts hold the most promise where member landowners are culturally homogenous. They are risky in communities with a mix of resident and nonresident landowners, but the dangers can be mitigated.

My framework is preliminary and suggestive, not decisive. The central ambition of this article is not to spring a fully fledged program of reform, but to reorient legal scholars' and environmentalists' approach to the problem of private-lands conservation, and in doing so to frame and motivate an agenda for research centered on cultural/attitudinal change and institutions for landowner governance. To implement this research agenda, legal scholars will have to engage the disciplines of sociology, psychology, and social history, as well as the more familiar worlds of economics and political science.

Environmental historians will recognize both my interest in special districts and my cultural emphasis. Special districts have figured in ineffectual soil conservation policies dating to the Dust Bowl.⁶ The roles for special districts I envision are notably different, and more promising. Regarding culture, the view that ecologically responsive stewardship of private lands depends on landowners' shared mores and affections recurs in American environmental thought. This was Aldo Leopold's perspective.⁷ It comes across in virtually everything Wendell Berry has written.⁸ And in Eric Freyfogle, it has a dogged exponent in the legal academy.⁹

6. See *infra* Part VI.A.

7. See, e.g., ALDO LEOPOLD, *The Conservation Ethic*, in *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD* 181, 190-91 (Susan L. Flader & J. Baird Callicott eds., 1991); see also ALDO LEOPOLD, *The Farmer as Conservationist*, in *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD*, *supra*, at 255.

8. A good place to start is WENDELL BERRY, *THE UNSETTLING OF AMERICA* (3d ed. 1996). Berry's opus is assessed in Eric T. Freyfogle, *The Dilemma of Wendell Berry*, 1994 U. ILL. L. REV. 363.

9. The best introduction to Freyfogle's thought is ERIC T. FREYFOGLE, *BOUNDED PEOPLE, BOUNDLESS LANDS: ENVISIONING A NEW LAND ETHIC* (1998). These themes seem to have received somewhat more attention from legal scholars overseas. See, e.g., Farrier, *supra* note 1; Gunningham & Young, *supra* note 1. Gunningham, Young, and Farrier are Australians.

Leopold, Berry, and Freyfogle treat cultural change as largely independent of law, or else gently informed by a normativity inherent to law.¹⁰ The present article, by contrast, emphasizes law's cultural consequences, consequences due not to any inherent normativity, but rather to law's bearing on the structure and pattern of human relationships, and the polity behind particular enactments.¹¹

The article unfolds as follows. Part I elucidates the private-lands predicament, addressing first the structure of the holdout problem and certain perversities of asymmetric information that arise in the private-lands conservation setting. Part I then synthesizes the sociological and social psychological literature on environmental attitudes, with particular attention to rural landowner populations, and presents an anecdotal analysis of the politics of rural landowner advocacy. This part concludes by assessing and rejecting the leading academic proposals for a reformed private-lands policy sensitive to landowners.

Part II surveys the social psychology of groups, attitudes, and behavior. The social psychology insights I combine, in Part III, with my earlier account of rural attitudes toward land, nature, and environmentalism. From the combination, Part III develops and justifies the ideas, incentives, gifts, and governance that define my tentative strategy for reform. Part IV proceeds by example to illustrate the potential reach and breadth of the landowner-controlled special district as an instrument of conservation. Part V introduces conflict between traditionalists and newcomers in communities of rural landowners, and the attendant risk of dysfunctional, counterproductive nature districts. This part also begins to explore ways of managing that risk. I take up counterarguments and the history of soil conservation districts in Part VI. I conclude in Part VII by lining out the research agenda that follows from my analysis of the private-lands predicament.

This article can be digested in chunks, productively. Here is a guide, for the reader who prefers not to wade through yet another law

10. Leopold, for example, saw the building of cultural support for good stewardship as a basically educative, nonlegal endeavor. See, e.g., ALDO LEOPOLD, *Conservation: In Whole or In Part?*, in *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD*, *supra* note 7, at 310, 317–18 (distinguishing between law and education); and, of course, Leopold's educational masterpiece, ALDO LEOPOLD, *A SAND COUNTY ALMANAC, AND SKETCHES HERE AND THERE* (Oxford Univ. Press ed. 1987) [hereinafter LEOPOLD, ALMANAC]. Berry largely follows Leopold in this respect, though he sees a role for law in making economically feasible the life of the yeoman farmer, who is the central figure in Berry's cultural vision. See BERRY, *supra* note 8, at 218–22. Freyfogle's perspective on law and cultural support for conservation is contrasted with this article's in Part VI. See *infra* notes 407–63 and accompanying text.

11. In these respects, the present article is continuous with the scholarship of Richard Pildes, Richard McAdams, and Cass Sunstein. Pildes has highlighted the cultural upshot of law's structuring of human relationships. See, e.g., Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936, 951–54 (1991) (speculating on how the legalistic standardizing of welfare administration affects participants' attitudes toward one another and the government). Sunstein and McAdams, among others, emphasize that the nature of the polity bears on the "expressive" force of law, with local enactments being particularly consequential. See *infra* notes 138–42 and accompanying text.

review tome. Readers who need no convincing of the ways in which holdouts and free-riders hinder voluntarist conservation strategies may skip Part I.A. Those who understand how landowners can subvert conservation initiatives unpopular in their communities may pass over Part I.B. My discussions of rural environmental values and social psychology, in Parts I.C and II, will be novel for many consumers of the law review literature, but the reader eager for the upshot may skip the intervening Part I.D, which critiques the leading agendas for reforming private-lands conservation policy. Whether by slow trudge or fast forward, when the reader arrives at Parts III and IV, her reward will be new legal instruments for conservation, fresh perspectives on familiar tools like economic incentives, and examples that range from saving the ecological florescence of prairie dog towns, to protecting open lands and fire-dependent ecosystems, to restoring rivers, and to improving big game demographics and habitat.

I. THE PRIVATE-LANDS PREDICAMENT

→ Landowners have the power to thwart or badly undermine locally unpopular conservation initiatives.

→ Holdouts (and free-riders) plague noncoercive conservation strategies.

→ Rural landowners evince less intrinsic interest in wildlife and nature, and more hostility toward environmentalism, than virtually any other cultural group in America.

This part explains the predicament, and the corresponding shortcomings, of both current policy and the leading legal-academic proposals for reform. Section A begins by briefly analyzing the holdout problem, as it arises in the context of private-lands conservation. Section B explains the dependence of private-lands conservation on landowner attitudes and, thus, on landowner cultures. Section C summarizes the evidence regarding rural landowners' attitudes toward wildlife, the environment, and environmentalism. This section reviews sociological and social-psychological studies, publications from farm and ranch lobbying groups, and literature from the self-styled "wise-use" movement, which draws support from rural communities. In light of the preceding, section D inspects the most auspicious proposals for reform, and concludes that none is seaworthy.

A. *Whence Holdouts*

Land is not created equal. From an environmental perspective, some areas count more than others. This axiom of conservation biology¹²

12. Throughout this article, I will often frame private-lands conservation in terms of conservation biologists' prescriptions for ecological preservation and restoration. This is a natural place to be-

holds at all scales.¹³ Speaking at the highest level of biodiversity, some regions support a greater number of species, or a greater number of rare species, than others.¹⁴ From the vantage of a given species for which people have a pointed affinity, like grizzly bears or wild salmon, again, some lands (and waters) furnish better habitat than others.¹⁵ Lands are no more equal from the aesthete's perspective. For whatever reasons of innate affinity, cultural inheritance, or Discovery Channel or Sierra Club calendar exposure, some landscapes hook the imagination in a way that others do not.¹⁶

Private-lands conservation, then, is not simply a project of keeping acreage out of the hands of developers and stewarding it with care. Conserving land well entails a differential focus on the "right" acres, those most important to sustaining the environmental amenities that the word "nature" conjures up. Success cannot be measured, however, by tallying up the number of right acres under sensitive management, because conserving land well also means attending to the shape of the area protected.¹⁷ A corps of conservation biologists devotes itself to preserve design.¹⁸ Their language is at once evocative and to the point. They speak of "core" preserves, managed for nature alone; adjoining "buffer" zones, in which compatible economic activities coexist with species and ecological processes native to the landscape; and "linkage" corridors, through which species disperse from one preserve to another.¹⁹ The shape and

gin because environmentalists, land and wildlife agencies, and scholars of environmental law have glommed on to conservation biology. But it is just a placeholder. My central claims would not lose their force were there no gains to be had from realizing a better approximation of the conservation biologists' vision. The article retains relevance so long as human well-being can be advanced, or ethical obligations discharged, by coordinating the management of natural resources across private property boundaries so as to sustain or restore distinctive aspects of the landscape and the lives, human and otherwise, that it supports.

13. See Reed F. Noss, *Some Principles of Conservation Biology, as They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893, 905-06 (1994). Reed Noss is a prominent conservation biologist.

14. See *id.* My implicit equation of "biodiversity" and "species diversity" is a gross simplification, but it will do for present purposes. For a concise, thoughtful analysis of the meaning of biodiversity and related concepts, see J. Baird Callicott et al., *Current Normative Concepts in Conservation*, 13 CONSERVATION BIOLOGY 22 (1999).

15. Noss, *supra* note 13, at 905-06.

16. The "innate affinity" view is developed in THE BIOPHILIA HYPOTHESIS 73-197 (Stephen R. Kellert & Edward O. Wilson eds., 1993). Novelist and essayist Wallace Stegner was America's finest exponent of the "cultural inheritance" perspective. See, e.g., Wallace Stegner, *Wilderness Letter*, in THE SOUND OF MOUNTAIN WATER (1969).

17. Noss, *supra* note 13, at 900-03.

18. Almost every article in the legal literature on biodiversity conservation features a windy and densely footnoted account of the principles of preserve design. In the interest of limiting redundancy, I have restrained myself to a couple-sentence synopsis of the main ideas with citations to Reed Noss's article at *supra* note 13. The reader who wants elaboration may consult the citations in one of these sources: Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENVTL. L. REV. 1, 86-103 (1994); Karkkainen, *supra* note 1, at 10-14; A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 563-67 (1993). For an account that also references minority views in the scientific community, see Ruhl, *supra* note 1, at 567-78.

19. Noss, *supra* note 13, at 900-06.

contiguity of protected areas, and their connectivity with one another, are tremendously important.²⁰ Again, this is true whether the problem is viewed as one of preserving aggregate biological diversity, or perpetuating a species of special concern.²¹ So too is it true aesthetically.²²

The problem of holdouts follows directly from the geographically uneven distribution of the most valuable habitat, and the ambition of protecting and restoring contiguous habitat over expanses that dwarf the average private parcel.²³ Wittingly or otherwise, landowners who hold out may break up migration corridors, generate ecologically adverse “edge” effects that radiate into surrounding protected areas, or become the source of invasive species (or invasive people or pets) that wreak havoc on the preserve.²⁴

The landowner who holds out against a conservation plan may seem to occupy a weaker bargaining position than the holdout against, say, a highway or reservoir. It is not clearly so. True, the existence of a few holdouts may not render worthless a conservation plan to which the remaining landowners agree, whereas a single holdout could stop cold a proposed highway or dam.²⁵ But the holdout who refuses to go along with the highway or dam misses out on the project’s benefits (because the project will not go forward, by hypothesis), whereas the holdout against a conservation plan may free-ride on his neighbors’ efforts.²⁶ In many landscapes, the neighbors’ good deeds for nature will increase the

20. *Id.* at 901–04.

21. *Id.* at 900–03. For a more thorough look at reserve design, see GRAEME CAUGHLEY & ANNE GUNN, *CONSERVATION BIOLOGY IN THEORY AND PRACTICE* 309–40 (1996).

22. Parks are pretty and nice to have around, suburbs have their draw, but what sparks the imagination is the idea of expansive nature, an unending (or far-off ending) stretch of country where the buffalo roam and the deer and the antelope play. The force of this idea is evident to the casual observer from the way it burns through pocketbooks in the form of vacation time; rolls of film; automobile, cigarette and no end of other advertisements; and plenty of nature-themed magazines, calendars, and movies.

23. Just as the transportation planner charged with laying a highway between two major cities usually has to pick a route that crosses numerous private parcels, the conservation planner charged with protecting a linkage corridor between two major reserves usually has to pick a route across numerous private parcels (disparities in ecological condition may make her options even more limited than those of the highway planner). Just as the dam builder must (absent eminent domain) negotiate the objections of numerous landowners whom the reservoir would flood, the preserve builder must secure the cooperation of the numerous landowners who own property within the ecological “hot spot.”

24. “Holding out” often means converting land to an incompatible use, like breaking up native sod, cutting down an old forest, or developing dispersed rural housing. For recent research and citations on the ecological costs of low-density rural housing, see Jeremy D. Maestas et al., *Biodiversity and Land-Use Change in the American Mountain West*, 91 *GEOGRAPHICAL REV.* 509 (2001). For a more general analysis of preserve design and external threats, see CAUGHLEY & GUNN, *supra* note 21, at 309–40.

25. The arguments of this paragraph assume that project proponents do not have the power of eminent domain.

26. In any land assembly project, the “hard bargaining” seller (he who holds out the longest) may be said to free-ride on the “easy bargaining” sellers; their easy bargaining enables the hard bargainer to bargain hard without raising aggregate transaction costs to the point that the project becomes uneconomic. My point here is that conservation plans create an additional opportunity for free-riding—by the holdout who never capitulates.

value of the holdout's property, even if she declines to sell to the conservation planner.²⁷ Other things equal, then, the conservation holdout's claim to a reservation price²⁸ far in excess of the land's pre-conservation-plan value, can be more credible than the analogous claim of a highway or reservoir holdout.

In claiming that holdouts (and free-riders) "plague" noncoercive conservation strategies, I do not mean to suggest that private actors who lack public powers of coercion never succeed in their efforts to avoid holdouts, or that private conservation initiatives which fail to rope in all of the relevant landowners are not valuable. With cunning, secrecy, and the clever use of option contracts, real estate developers and oil and gas companies sometimes succeed in evading holdouts.²⁹ The Nature Conservancy presumably would not have amassed such fortunes from its supporters if "conservation through private action" were in the main ineffectual.³⁰ Holdouts and free-riders do hinder private conservation, however, in that they make for high—if not always prohibitive—transaction costs. Conservation through public coercion (eminent domain or the police power) saves on these transaction costs.³¹ Yet as the next section shows, these savings may be offset by losses elsewhere, if the exercise of public power is not seen locally as normative and legitimate.

B. *Landowner as Savior, Landowner as Spoiler*

Private-lands conservation depends on supportive landowners. Landowners' attitudes³² matter three times over: for monitoring the condition and use of nature, for advancing the policy goals of adaptive management and sustainable utilization, and for extricating American society from a political stalemate that allows neither constructive revision nor energetic execution of laws like the Endangered Species Act (ESA).

27. Being "close to nature" is an asset in the market for recreational and residential property. It may not be so for agricultural property.

28. A "reservation price" is the "true" price below which the owner would refuse to sell, in the absence of strategy behavior. For explanation, see the entries under "reservation price and reservation demand" and "bargaining" in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (John Eatwell et al. eds., 1987).

29. For a marvelous example, see Peter Hellman, *How They Assembled the Most Expensive Block in New York History*, NEW YORK, Feb. 25, 1974, at 31, reprinted in ROBERT C. ELLICKSON & VICKI BEEN, *LAND USE LAW: CASES AND MATERIALS* 1029 (2000).

30. "In the year 2000, 'NonProfit Times' ranked The Nature Conservancy the nation's ninth largest nonprofit; the next largest conservation organization ranked 57th." The Nature Conservancy, *Financial Summary for Fiscal Year 2000*, available at <http://nature.org/aboutus/annual/art2277.html> (last visited Sept. 10, 2002).

31. For a more systematic account of the transaction costs of conservation contracting, see Christopher S. Elmendorf, *Securing Ecological Investments on Other People's Land* (Draft Oct. 1, 2002) (on file with author).

32. Here I use the term "attitude" as social psychologists do, to signify any evaluative response, be it to a thing in the world or a concept in the mind. See *supra* note 3.

1. *Monitoring, Administration, and Enforcement*

Ecological resources are dispersed and hard to police. Lands “pristine” are lands far-flung, and lightly habited. Rural landowners may find it difficult to monitor their property, but they have it easier than the government. More importantly, they know their own doings within the four corners of their estate, which they may hide from the government.³³ These they may try to hide from their neighbors, too, but neighbors can peer across fence lines, and neighbors pick up gossip like lint.

Asymmetries of information between landowner and government make it hard for the government (without assistance from the neighbors) to enforce certain regulatory strictures, like prohibitions against killing or harassing wildlife. Information asymmetries also create windows of opportunity for the landowner to evade regulation by preemptively destroying the ecological value of her property.³⁴ In effect, the threat of regulation destabilizes property rights and creates a “race” between the public conservation agency and the landowner to “claim” property.³⁵ This is a race the landowner wins by destroying habitat, for once her land is ecologically useless the landowner’s property rights are secure vis-à-vis the conservation agency.

The ESA illustrates the point. Critics have long claimed that the ESA encourages a “shoot, shovel, and shut-up” mentality among landowners.³⁶ If the landowner’s shooting and shoveling keeps the FWS from learning that a local population of the species exists, the landowner may avoid regulation of his land. Even if FWS knows of the population, anything the landowner does to reduce local densities of the listed species makes the locale less attractive to the agency for purposes of “recovery” planning—thereby reducing the (prospective) regulatory burden on the landowner.

Empirically, it is hard to assess the extent of illegal or preemptive habitat and species destruction. For many years this was mainly the stuff of anecdote, here and there a tale of plowed prairies or razed forests.³⁷ But recent econometric work convincingly demonstrates that landowners

33. On legal barriers to government searching of private lands for plants and animals, see Stephen Polasky & Holly Doremus, *When the Truth Hurts: Endangered Species Policy on Private Land with Imperfect Information*, 35 J. ENVTL. ECON. & MGMT. 22, 28–29 (1998).

34. This risk is recognized by Gunningham & Young, who describe it as the “first mover problem.” Gunningham & Young, *supra* note 1, at 286–87.

35. On races to claim property, see generally Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393 (1995).

36. See, e.g., Robert H. Nelson, *Shoot, Shovel, and Shut Up*, FORBES, Dec. 4, 1995, at 82; Richard L. Stroup, *Endangered Species Act: Making Species the Enemy* (1995), available at http://www.perc.org/publications/policyseries/endangered_full.html (last visited Sept. 10, 2002).

37. For review and citations to the anecdotal evidence, see Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act 4–6* (Apr. 2000), available at <http://www2.montana.edu/lueck> (unpublished manuscript).

have artificially accelerated timber harvests in apparent anticipation of FWS regulation.³⁸

Incentives clearly matter, then, but culture does too, insofar as landowner cultures bear on the landowner's sense of what she *wants* from her land, when she may honorably evade regulation with preemptive habitat destruction or illegal shooting and shoveling, and, relatedly, whether her neighbors are likely to snitch to law enforcement officers. Equally, cultural currents may prompt rural people to behave not as rational agents trying to maximize their wealth or achieve certain desired conditions on the land, but as vindictive agents of retaliation against the greens.³⁹

A fringe of the environmental movement that once labored under the banner "Earth First!"—and now calls itself the "Earth Liberation Front"—has grabbed headlines by trashing biotech research facilities and setting flame to symbols of human encroachment on nature.⁴⁰ Unfortunately for nature and her defenders, those who would retaliate (illegally) against what they perceive to be unfair or oppressive environmentalism have it easier. Again disparate monitoring costs are largely to blame. It is less costly to guard a resort or a road-grading vehicle than it is to police a vast expanse of uninhabited forest or a river hundreds of miles long. And nature, much more than industry, is prone to enduring injury. Torched alpine lodges can be rebuilt in a season; diesel engines froze-up on corn syrup can be replaced in a matter of days; survey stakes plucked and strewn can be quickly relaid. But an aged forest brought down by the arsonist's jerry can may take centuries to replace; a poisoned stream may take years or decades to recover (and then only partially, endemic species being lost forever); and there may be no recovery at all from the introduction of exotic species.⁴¹

As yet no organization has styled itself a foil to Earth First! and articulated a philosophy of extralegal retaliation, but one should not dismiss as academic the threat of anti-eco subterfuge. It is widely recognized that local opposition and illegal shootings are to blame for the failure of wolf reintroduction in Northern Michigan in the 1970s.⁴² There

38. *Id.*

39. I take up the subject of social influence in *infra* Part II.

40. *E.g.*, Al Baker, 'Eco-Terrorism' and Nary a Redwood in Sight, N.Y. TIMES, Jan. 14, 2001, at L11; John H. Cushman, Jr. with Evelyn Nieves, In Colorado Resort Fires, Culprits Defy Easy Labels, N.Y. TIMES, Oct. 24, 1998, at A11; Brad Knickerbocker, Eco-Terrorists, Too, May Soon Be on the Run: Congress Considers New Penalties Against Pro-Environment Violence out West, CHRISTIAN SCI. MONITOR, Feb. 15, 2002, at 2; Michael Petrocelli, Radical Leader Takes Fifth at Hearing on Ecoterrorism, HOUSTON CHRON., Feb. 13, 2002, at A4; Mindy Sink, Radicals Take Responsibility for Burning Oregon Timber Office, N.Y. TIMES, Jan. 11, 2001, at A19; Mike Weiss, Eco-terrorists Frustrate FBI; Sentencing of the Santa Cruz 2 Marks a Rare Victory for the Agency, S.F. CHRON., Feb. 3, 2002, at A1.

41. See Eric Biber, Note, Exploring Regulatory Options for Controlling the Introduction of Non-Indigenous Species to the United States, 18 VA. ENVTL. L.J. 375, 386–89 (1999) (discussing challenge of controlling exotic species).

42. STEPHEN R. KELLERT, THE VALUE OF LIFE: BIOLOGICAL DIVERSITY AND HUMAN SOCIETY 107 (1996) [hereinafter VALUE OF LIFE] (noting that a "post-mortem study" concluded: (1) that "hu-

have been suspicious anthropogenic fires in the national forests,⁴³ and so-called bucket biologists are held responsible for the spread of many exotic fish species.⁴⁴ There is no way of knowing how many times disgruntled partisans of motorized trail-riding—ever the object of environmentalist disapprobation—have willfully run their vehicles through fields of invasive weeds before roaring into the backcountry, spreading exotic seed deep into the mountains. Or how many horsemen, fed up with environmentalists, have willfully disregarded the sign at the trailhead that mandates certified weed-free feed for their stock. Or how many landowners have “irrationally” overinvested in administrative obstructionism or preemptive habitat destruction, or declined to participate in public programs that reward habitat improvements, simply out of spite for environmentalists.

Advancing technology may gradually reduce the information asymmetry on which trades the “shoot, shovel, and shut-up” strategy of regulatory evasion, and more aggressive forms of antienvironmental retaliation, but that is no cause for present-day complacency.

2. *Policy Goals*

The significance of landowner attitudes becomes all the greater insofar as realizing conservation goals depends not only on enforcing proscriptions against certain practices, but also on the active, cooperative participation of the landowner in conservation stewardship. Admittedly, this relation of dependence is disputed. Commentators divide into two camps over the role of private lands in the big picture of natural areas protection.⁴⁵ For one contingent, public lands take center stage; private lands matter only in “buffer zones” surrounding the core, public preserves. Buffer-zone regulations ought to exclude uses incompatible with the purpose of the preserves, but the overall scheme charges the private landowner with no affirmative responsibilities. The second camp has greater ambitions for the landowner, prescribing for private lands of ecological significance—some of which buffer public preserves, others of which count in their own right—a combination of active, adaptive, ecologically oriented management and “compatible” (“sustainable”) economic utilization. In Part I.D, I will argue that there are underappreciated social obstacles to large-scale public preserve acquisition, which make the adaptive, ecological management of private lands integral to

man-inflicted mortality” caused the wolves’ demise; and (2) that “deeply ingrained antipredator and antigovernment attitudes contributed significantly to the [reintroduction] effort’s failure”).

43. David Foster, *Concern over Arson-for-Profit Heats Up During Fire Season*, *Environment: Officials Fear Those Who Light Blazes to Create Jobs*, L.A. TIMES, Aug. 1, 1993, at A1.

44. Larry Porter, *‘Bucket Biologists’ Stir Up Problems Fishing and Hunting*, OMAHA WORLD HERALD, Oct. 23, 1994, at 10C; Colorado Division of Wildlife, *Wildlife Report* (Apr. 25, 2000), available at http://www.dar.State.co.us/cdnr_news/wildlife/200042511726.html.

45. See *infra* Part I.D, where I explain each camp’s arguments in some detail and offer citations.

the conservationists' project. For the time being, we can bracket the question of whether this is necessary while we look at what it would entail.

Ecological management is a root-and-branch project of experimentation and adaptation.⁴⁶ It entails historical and prehistorical sleuthing by anthropologists, historians, and paleoecologists to patch together a vision of how the ecosystem at issue functioned before the advent of large-scale farming, livestock ranching, forestry, fire-suppression, wetland drainage, and dam and levee building.⁴⁷ This reconstructive inquiry is inevitably uncertain, subject to continual updating and revision, and it is only the beginning of the process. With a picture of the underlying ecological processes in mind, land managers can begin to experiment with the tools at hand. They might try out intensive herd and pasture management of domestic livestock in an effort to impact the land and vegetation in ways that mimic the work of transhumant bison and Indians.⁴⁸ They might selectively log overgrown forests and experiment with controlled burns to recreate a mosaic of trees and grasses more in keeping with the condition of things before the onset of modern fire suppression.⁴⁹ They might try their luck with herbicides, biocontrols, hand-removal, or anything else that offers a sliver of hope against the onslaught of invasive species.⁵⁰ They might knock down levees to reintegrate watercourses and floodplains.⁵¹

In this hopeful vision of adaptive ecological restoration, economic utilization and ecological protection twine together.⁵² Economic activities like harvesting timber and raising livestock become land-management tools used to ecological ends, and ecological accomplishments generate new economic opportunities. The landowner who restores a stream may find it profitable to lease access to fishermen or to establish a small guest facility; the landowner who brings back wildlife may augment her income by providing opportunities to hunters; the

46. Ecologist Reed Noss maintains that he and his peers understand less today about ecological management than they thought they did a generation ago. Noss, *supra* note 13, at 908.

47. For vivid accounts of the historical, anthropological, and paleoecological studies that come into play, see, e.g., DAN FLORES, *THE NATURAL WEST* (2001).

48. Regarding the idea that intensive time-control/rotational grazing can improve the ecological health of grasslands, see DAN DAGGET, *BEYOND THE RANGELAND CONFLICT: TOWARD A WEST THAT WORKS* (1995); DENNIS H. KNIGHT, *MOUNTAINS AND PLAINS: THE ECOLOGY OF WYOMING LANDSCAPES* 79–82 (1994); ALLAN SAVORY, *HOLISTIC RESOURCE MANAGEMENT* (1988). For a skeptical review of the scientific literature, focused on the arid southwest, see Jeff Burgess, *Holistic Resource Management (HRM): Panacea or Snake Oil?*, available at <http://www.grazingactivist.org> (last visited Aug. 28, 2002).

49. See generally ROBERT J. WHELAN, *ECOLOGY OF FIRE* (1995).

50. See generally *INVASIVE SPECIES IN A CHANGING WORLD* (Harold A. Mooney & Richard J. Hobbs eds., 2000) (regarding tactics to control exotic species).

51. See generally *NEW APPROACHES TO RIVER MANAGEMENT* (A.J.M. Smits et al. eds., 2000) (addressing floodplain restoration).

52. This is part of the vision of, e.g., the United Nations's "Man and Biosphere" program. See van Hook, *supra* note 1, at 569.

landowner who restores native vegetation may turn to “wildcrafting,” harvesting indigenous plants, fruits, flowers, or fungi for the market.

It is conceivable that some semblance of these relations between land, landowner, ecologist, and market might be achieved against the landowner’s will, with coercive regulations. But a poor semblance it would be. Landowners would withhold information from government ecologists, find openings for resistance in carrying out management activities pursuant to the regulations, and push the law’s limits with “incompatible” economic activities. As possessor, as occupant, the landowner has de facto power that the law cannot eliminate, and the more delicate and management-intensive the government’s demands, the greater the landowner’s clout.⁵³

3. *Political Stasis*

The enforcement and preemptive destruction problems, and the difficulties of adaptive ecological management against landowner sentiment, might be termed pure cases of the relevance of landowner cultures to environmental outcomes. Whatever the broader political dynamic, these endow contrarian landowners with a reservoir of power against environmentalists. In the present day, landowner cultures also matter for more prosaic, contingent reasons. The offsetting legislative influence of rural landowner interests and mainline environmental organizations has resulted in a political logjam in which laws like the ESA seem both impervious to legislative revision and incapable of robust implementation.⁵⁴ The ESA’s spending authorization expired in 1992, but Congress has yet to revise or reenact the Act.⁵⁵ The law’s supporters—mainly urban, mainly Democrats—have managed to keep the Act intact, but rural voices have often squelched its execution.⁵⁶ Though property-rights advocates have not gutted the Act, at times they have triumphed in gutting the listing process. They have consistently held the FWS to starvation rations for species listings, and they won from the 104th Congress a

53. It may seem, then, that conservation policies based on regulatory coercion invariably grate against the adaptive management aspiration. I do not think this is so. The linchpin for conservation outcomes is the landowner’s will, expressed behaviorally, not (as libertarians often maintain) the policy choice between coercive regulations and voluntary, positive economic incentives. If the landowner and her neighbors value the restorative venture, they may welcome laws that grant conservation agencies extensive permitting authority over private land-use, becoming effective partners rather than shooters-and-shovelers. Conversely, if the landowner values real estate only so far as she can turn a dollar off it, she may gamely cheer positive economic incentives for ecological stewardship, but in carrying out her stewardship obligations, she will cut corners wherever she can get away with it.

54. For recent surveys of the issues, see ROLAND T. LIBBY, *ECO-WARS* (1998); Eugene Buck et al., *Endangered Species: Difficult Choices*, available at <http://cnie.org/NLE/CRS> (last visited Sept. 5, 2001).

55. Buck et al., *supra* note 54, at 1.

56. During the Clinton years, however, the executive branch did take seriously environmentalists’ counsel regarding strategies for ESA implementation. See Robert D. Thornton, *Habitat Conservation Plans: Frayed Safety Nets or Creative Partnerships?*, 16-2 NAT. RESOURCES & ENV’T 94, 95–98 (2001).

moratorium on new listings.⁵⁷ Not infrequently the FWS deems a petition for listing “warranted but precluded,” which means that the species faces dire threats, but the FWS does not have the resources, or the will, to deal with it.⁵⁸ Some estimates of the number of species lost to listing delays run into the hundreds.⁵⁹

By keeping the FWS on a shoestring budget, which limits the FWS’s ability to promulgate rules and monitor conditions on the land, property-rights advocates give a boost to landowners seeking to “perfect” their property rights through preemptive habitat destruction. Rural interests made a related score when they blocked legislation that would have created a National Biological Service, with the mission of mapping and assessing habitat conditions nationwide.⁶⁰ And while new technologies may reduce the information asymmetry between landowner and government,⁶¹ the point is moot so long as putting the monitoring technologies to use remains politically infeasible.

Cultural change—on the part of rural landowners or environmentalists—may not be the only way out of the ESA logjam, but it certainly would help.

C. *Rural Environmentalism?*

Having framed the dependence of private-lands conservation on landowner attitudes, I turn now to the evidence on environmental attitudes among the relevant populations. This section depicts rural landowners’ antienvironmentalism by triangulation. First, I look at the structure of attitudes toward wildlife across various segments of the American populace; second, I probe rural landowners’ attitudes toward land and land-use; and, third, I survey the political voices that speak on behalf of rural landowners. The specter of rural antienvironmentalism is very real, I conclude, but not necessarily unyielding.

57. See Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 350 (1997).

58. See Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 285–96 (1993).

59. Thompson, *supra* note 57, at 350; see also *id.* at 313 (noting that of the roughly 4000 species recognized by the Service as vulnerable, only 960 had been listed).

60. Kevin McCullen, *Federal Biologists in Limbo, Work Moved to Geological Survey*, DENVER ROCKY MOUNTAIN NEWS, Feb. 1, 1996, at A34. Conservatives see a chance to ease tough antipollution rules, but they risk a popular backlash. See James Gerstenzang, *GOP Clouds the Future of Environmental Protections; Regulation*, L.A. TIMES, Dec. 24, 1995, at A1.

61. Radio telemetry is one example by which biologists monitor the movement of individual animals. Thanks to Tom France, Northern Rockies Director of the National Wildlife Federation, for making this point and raising the issue of new monitoring technologies more generally.

1. Values

a. Attitudes Toward Wildlife and Nature

In the mid-1970s, the social psychologist Stephen Kellert began a life's work of studying the ways in which Americans understand and value nature.⁶² From his nationwide surveys, Kellert inferred that Americans' attitudes toward nonhuman animals can be described in terms of nine distinctive kinds of value: utilitarian, naturalistic, ecologicistic/scientific, aesthetic, symbolic, dominionistic, humanistic, moralistic, and negativistic.⁶³ Figure 1 encapsulates how Kellert uses these terms.

Kellert's many studies show that rural agriculturalists and affluent, highly educated urban residents express polar, opposing valuations of nature along most of these dimensions. College-educated people, and to a lesser degree affluent people more generally, express high naturalistic, ecologicistic, and moralistic values, and show indifference or disdain for utilitarian, dominionistic, and negativistic values.⁶⁴ "[A] highly romantic appreciation of the natural world frequently prevails among urban people," observes Kellert, "leading them to view as irrelevant and sometimes contemptible [others'] practical dependencies on mastering wild living resources."⁶⁵ Farmers and ranchers come in as the most stereotypically antienvironmental population, scoring high on utilitarianism and low on naturalistic interest.⁶⁶ In many studies they evince considerable negativism, too.⁶⁷

FIGURE 1
KELLERT'S TYPOLOGY OF BASIC VALUES⁶⁸

Value	Definition
Utilitarian	Practical and material exploitation of nature.
Naturalistic	Direct experience and exploration of nature.

(Continued on next page)

62. For an overview of his work, see VALUE OF LIFE, *supra* note 42.

63. See *id.* at 10–26, for a nontechnical overview. The foundational academic publication is Stephen R. Kellert, *Americans' Attitudes and Knowledge of Animals*, 45 TRANSACTIONS N. AM. WILDLIFE & NAT. RESOURCES CONF. 111 (1980) [hereinafter *Attitudes & Knowledge*].

64. *Id.* at 54–56. See especially fig.7, at 55, graphically depicting the remarkable inversion in values that occurs as educational attainment increases.

65. *Id.* at 59.

66. *Id.* at 57–59, 107–09. Livestock producers display by far the strongest utilitarian value orientation of any demographic group, followed a distant second by farmers, then by owners of large tracts (more than 200 acres), and then by rural people more generally. *Id.* at 58 fig.8; see also Richard P. Reading & Stephen R. Kellert, *Attitudes Toward a Proposed Reintroduction of Black-Footed Ferrets*, 7 CONSERVATION BIOLOGY 569 (1993).

67. Reading & Kellert, *supra* note 66.

68. This table is found in VALUE OF LIFE, *supra* note 42, at 38. The parentheses are not in the original; I have added them for clarification.

FIGURE 1—*Continued*

Value	Definition
Ecologicistic-Scientific	Systematic study of structure, function, and relationship in nature.
Aesthetic	Physical appeal and beauty in nature.
Symbolic	Use of nature for language and thought.
Humanistic	Strong emotional attachment and “love” for aspects of nature. (Paradigm: bonding with a pet animal.)
Moralistic	Spiritual reverence and ethical concern for nature. (Paradigm: the animal-rights gloss on the proper treatment of individuals of other species.)
Dominionistic	Mastery, physical control, dominance of nature. (Paradigm: a hunter’s enthusiasm for the kill.)
Negativistic	Fear, aversion, alienation from nature.

Strikingly, though, Kellert and his colleagues find no pervasive, positive correlation among naturalistic, moralistic, humanistic, and ecologicistic-scientific values, or among utilitarian, dominionistic, and negativistic attitudes, across many demographic groups.⁶⁹ A 1980 study found that Alaskans have exceptionally strong naturalistic *and* dominionistic values, coupled with minimal moralistic sentiments.⁷⁰ Alaskans’ dominionism and indifference to moralism coexist with a powerful desire to preserve and protect natural areas.⁷¹ Nationwide, trappers have the strongest naturalistic values of any subgroup, including members of environmental groups, and they are eager supporters of species reintroduction and habitat protection, yet they simultaneously embrace the utilitarian perspective.⁷² The values profile of commercial fishermen matches that of trappers, a profile that Kellert posits to be “characteristic of people who live close to nature but derive much of their income from exploiting and extracting wild living resources.”⁷³ Hunters are a mixed lot, with some ten to twenty percent principally naturalistic in orientation, another forty percent utilitarians out for meat, and the balance in it mainly for sport and challenge (dominionistic).⁷⁴

Kellert’s results also hint at the possibility that farmers’ and ranchers’ negativism and naturalistic disinterest are in part artifacts of the ways in which public policy has acted upon environmental sentiment, rather than something bedded at the root of America’s rural cultures. His and other studies provide a margin of support for the thesis that rural people

69. Such clustering does occur along the demographic gradient of education, but this is anomalous. *Id.*

70. *Attitudes & Knowledge*, *supra* note 63, at 119–20.

71. *Id.*

72. VALUE OF LIFE, *supra* note 42, at 78–79 (describing trappers’ support for habitat protection); *Attitudes & Knowledge*, *supra* note 63, at 118 (describing results of national survey); *id.* at 107–09 (describing results of studies of attitudes toward wolves in Michigan and Minnesota).

73. VALUE OF LIFE, *supra* note 42, at 78–79.

74. *Id.* at 70–74.

value nature positively unless they feel imposed upon. In the late 1970s, for instance, a majority of cattle producers were found to support restricting lethal control of coyotes to “offenders,” i.e., animals known to have killed domestic stock, whereas the majority of sheep producers opposed such limitations on animal damage control.⁷⁵ More recently, a study of residents along the remote North Fork of the Flathead River, which forms the western boundary of Glacier National Park, found them favorably inclined toward natural recolonization of the area by Canadian wolves—but unwilling to compromise commercial or recreational use of the area for the beasts’ benefit.⁷⁶

Perceived threats to farm and ranch life ways, however, appear to spill over into sharply negative attitudes toward the species in question and a vexatious take on environmentalists and public conservation agencies. Typical of the literature⁷⁷ is Richard Reading and Stephen Kellert’s study of attitudes toward a proposed reintroduction of the black-footed ferret—the rarest of North American mammals—to public lands in North Central Montana.⁷⁸ Montana ranchers, particularly those near the proposed reintroduction site, exhibited pointedly negative attitudes toward ferrets and prairie dogs (ferrets’ food source); they had little naturalistic interest in the species or regard for “existence values.”⁷⁹ A slightly moderated version of the ranchers’ value structure characterized other residents of the rural reintroduction area, whereas city residents had views more in keeping with environmentalists.⁸⁰

Ranchers viewed environmentalists and federal land managers through an anxious, conspiratorial lens—a result in keeping with other studies.⁸¹ Ninety-seven percent of reintroduction-area ranchers agreed with the statement, “I believe that if black-footed ferrets are reintroduced, environmentalists will use them as an excuse to restrict ranching,” and fifty-six percent agreed (with only nineteen percent in dissent) that “[t]he main reason the federal agencies want to reintroduce the black-footed ferret is to gain more control over grazing.”⁸²

75. *Attitudes & Knowledge*, *supra* note 63, at 113. Coyotes are much more likely, however, to prey on sheep than cattle.

76. Pat Tucker & Daniel Pletscher, *Attitudes of Hunters and Residents Toward Wolves in Northwestern Montana*, 17 WILDLIFE SOC’Y BULL. 509 (1989).

77. Reading & Kellert, *supra* note 66, at 578 (noting other studies with similar results).

78. See Reading & Kellert, *supra* note 66.

79. *Id.* at 575 fig.1. There is some terminological confusion in this study, which the reader who looks up this figure should bear in mind. “Humanistic value” in Reading and Kellert’s fig.1 refers to support for the existence of the ferret and prairie dog, which is quite different from the human-pet bond said to characterize “humanistic value” in Kellert’s nationwide studies of attitudes toward nature more generally; cf. VALUE OF LIFE, *supra* note 42, at 41–43.

80. Reading & Kellert, *supra* note 66, at 575 fig.1.

81. Cf. JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK 58–59 (2000); Paul F. Starrs, *Conflict and Change on the Landscapes of the Arid West*, in THE CHANGING AMERICAN COUNTRYSIDE 271, 276 (Emery N. Castle ed., 1995) (addressing rural fear of a new “landscape vision” being imposed at the expense of rural livelihoods).

82. Reading & Kellert, *supra* note 66, at 574 tbl.4. In reality, conservationists have no reason or desire to restrict ranching on behalf of ferrets. Ferret restoration is a matter of protecting and building

Interestingly, even though ferrets, rather than prairie dogs, were seen as leading the way to governmental restrictions on ranching,⁸³ ranchers directed the brunt of their hostility toward prairie dogs.⁸⁴ For generations, Great Plains ranchers have poisoned out prairie dogs, in the belief that the species competes with livestock for forage. While the best science refutes this competition hypothesis,⁸⁵ the ranchers Reading and Kellert interviewed continue to believe otherwise.⁸⁶

b. Attitudes Toward Land and Land-Use More Generally

Ever since the environmental movement burst into public consciousness in the early 1970s, sociologists have been testing and refining the hypothesis that support for the environment and environmentalism decays with (cultural) distance from the metropolis.⁸⁷ Decisive confirmation has proved elusive. Sociologists have discovered that rural-urban variation in environmental attitudes has much to do with the particular population under study, and with the researcher's choice of a proxy for "the environment" or "environmentalism."⁸⁸ The respondent who wants safe-to-drink groundwater, for example, may have little regard for endangered species.

To a first approximation, though, popular perception is not off base: farmers and ranchers do tend to oppose environmentalism,⁸⁹ and rural Americans do incline toward libertarianism.⁹⁰ One should be cautious, however, about imputing homogeneity in these respects to rural land-

prairie dog colonies, and prairie dogs are not harmed by livestock grazing. Interview with Sterling Miller, Senior Wildlife Biologist, National Wildlife Federation, in Missoula, Mont. (Mar. 7, 2002).

83. Prairie dogs have since been proposed for listing, but at the time that Reading and Kellert carried out their survey, the idea that prairie dogs might be deemed endangered was virtually unthinkable. *Id.*

84. See Reading & Kellert, *supra* note 66, at 572-73. (To quote one rancher, "I'm not against the ferret, it's the prairie dog. I want to kill every last one.")

85. See KNIGHT, *supra* note 48, at 81-88; A.R. Collins et al., *An Economic Analysis of Black-Tailed Prairie Dog (Cynomys ludovicianus) Control*, 37 J. RANGE MGMT. 358 (1984); D.W. Uresk & D.B. Paulson, *Estimated Carrying Capacity for Cattle Competing with Prairie Dogs and Forage Utilization in Western South Dakota*, U.S. FOREST SERVICE GENERAL TECHNICAL REPORT RM-16 (1989), available at <http://www.fs.fed.us/rm/sd/carryingcap.pdf>.

86. Reading & Kellert, *supra* note 66, at 572-73, 575-76.

87. Much of the literature from the 1980s is reviewed in George D. Lowe & Thomas K. Pinhey, *Rural-Urban Differences in Environmental Concern: A Closer Look*, 61 SOC. INQUIRY 167 (1991). For contributions from the 1970s, see Ken D. Van Liere & Riley E. Dunlap, *The Social Bases of Environmental Concern: A Review of Hypotheses, Explanations, and Empirical Evidence*, 44 PUB. OPINION Q. 181 (1980).

88. Lowe & Pinhey, *supra* note 87, at 168-72; see also Kent D. Van Liere & Riley E. Dunlap, *Environmental Concern: Does It Make a Difference How It's Measured?*, 13 ENV'T & BEHAV. 651 (1981).

89. Lowe & Pinhey, *supra* note 87, at 171-72.

90. For findings to this effect, see Reading & Kellert, *supra* note 66, at 577-79; see also James A. Christenson, *Individual Versus Public Rights: Implications of Support for Landuse Planning and Control*, 9 J. ENVTL. EDUC. 50 (1978); Gary P. Green et al., *Local Dependency, Land Use Attitudes, and Economic Development: Comparisons Between Seasonal and Permanent Residents*, 61 RURAL SOC. 427 (1996).

owners. One study of Western attitudes concluded that ranchers' preferences for open space and physical isolation, and their aversion to trespass, indisposed them to large-scale energy exploration and development, whereas farmers' more business-like relation to their land made of them energy-boom supporters.⁹¹ Another researcher looked at four isolated communities in Western Colorado targeted for energy development, and found both ranchers and farmers significantly more distrustful of the energy companies, and supportive of regulation, than the average resident.⁹² Narrow economic interests may explain the second study, in that energy development jeopardized ranchers' and farmers' water rights.⁹³

The evidence suggests, however, that many agriculturalists see themselves as more than profit-maximizers. Through in-depth interviews, sociologist Gerry Walter has identified four "model" images of the successful farmer: (1) the Steward, who recognizes a moral responsibility to sustain the land's resources; (2) the Manager, who principally values analytical skill and financial success; (3) the Conservative, who aspires to preserve the farm business as such; and (4) the Agrarian, who places primacy on rural life-ways and community participation.⁹⁴ Many of the respondents' aspirations blend elements from two or more of these models.⁹⁵ Other sociologists report nontrivial populations of farmers who forego maximal financial return in favor of being their own boss, maintaining local friendships, and doing "good" work.⁹⁶ I have found only two studies in which agriculturalists gesture toward profits as something close to an exclusive or trumping motive, and even here values of land and community lurk close to the surface.⁹⁷

91. Joseph G. Jorgensen, *Native Americans and Rural Anglos: Conflicts and Cultural Responses to Energy Developments*, 43 HUM. ORG. 178 (1984).

92. Lowe & Pinhey, *supra* note 87, at 175-79.

93. *Id.* at 173-74. Relatedly, farmers and ranchers were *less* enthusiastic about zoning—for them, a pocketbook issue—than the average resident. *Id.* at 190-91. (In the communities studied by Lowe and Pinhey, the main zoning question was whether to establish large-lot agricultural zoning districts, likely to reduce the value of farm and ranch properties.)

94. Gerry Walter, *Images of Success: How Illinois Farmers Define the Successful Farmer*, 62 RURAL SOC. 48, 55-64 (1997).

95. *Id.*

96. See, e.g., Peggy F. Barlett, *Part-Time Farming: Saving the Farm or Saving the Lifestyle?*, 51 RURAL SOC. 289 (1986); C. Milton Coughenour & Louis E. Swanson, *Rewards, Values and Satisfaction with Farm Work*, 53 RURAL SOC. 442 (1988).

97. Thus John Allen and Kevin Bernhardt report that both "sustainable" and "conventional" farmers in Nebraska agree with the view that "farming should be handled as a business with the aim of earning an above average standard of living." John Allen & Kevin Bernhardt, *Farming Practices and Adherence to an Alternative-Conventional Agricultural Paradigm*, 60 RURAL SOC. 297, 306 (1995). Yet other points of overlap include the propositions that land should be "farmed so as to protect the long-term productive capacity of the land even if this means lower profits," that "farm traditions and cultures are essential for good farming," and that "healthy rural communities are essential for modern agriculture's future success." *Id.* at 306-07. Researchers in Montana found perceived profitability to be the most significant correlate of farmers' adoption of certain sustainable practices—but they also found perceived profitability to be influenced by the importance the farmer attaches to building soil

c. Summing Up

From the environmental attitude literatures I infer five take-home lessons, lessons that will inform much of the balance of this article. These are rather gross generalizations, useful as working hypotheses only. Policymakers should keep a vigilant lookout for signs that these generalizations are locally inapposite. With that caveat, here are the lessons.

First, among farmers and ranchers, utilitarian attitudes toward nature predominate.⁹⁸ The primary question is, “What can I extract from nature and put to use?”, as opposed to the highly educated urban environmentalist’s query, “How can I appreciate and enjoy discovery in nature?” Second, there is nothing inherently oppositional between the utilitarian and naturalistic perspectives: trappers, commercial fisherman, and Alaskans embrace both with equal fervor. Third, land figures into agriculturalists’ utilitarianism as more than a means to money. Sustaining independence, tradition, and community relations matter too. This works against environmentalism when, for example, the tradition relates to wiping out a species like the prairie dog; but it is also cause for hope, insofar as people who relate to land solely as a source of profit are wont to shirk in cooperative conservation ventures. Those who value community highly would seem the least likely shirkers.

Fourth, agriculturalists’ systems of belief are not ideologically pristine. Libertarian ranchers support government controls over energy development; practitioners of organic or low-input agriculture do not hesitate to agree with conventional farmers that “U.S. agriculture” is “the most successful in the world.”⁹⁹ However—this is the fifth and most important lesson—the perception that one’s life ways are threatened or under attack can engender contrarian ideologies, such that whatever the environmentalists’ value, farmers and ranchers willfully disdain. This message rings out from the studies of endangered species. It is supported more mutely by some of the work on sustainable versus conventional agriculture, which intimates that conventionalists who perceive sustainable agriculture as a threatening social movement slough off the values they once held in common with sustainable practitioners.¹⁰⁰

tilth and discovering alternatives to agrichemicals. John Saltiel et al., *Adoption of Sustainable Agricultural Practices: Diffusion, Farm Structure, and Profitability*, 59 RURAL SOC. 333, 339–43 (1994).

98. Here I use “utilitarian” as Kellert does, not as philosophers do. See *supra* Figure 1.

99. Allen & Bernhardt, *supra* note 97, at 306.

100. Curtis E. Beus & Riley E. Dunlap, *Measuring Adherence to Alternative v. Conventional Agricultural Paradigms*, 56 RURAL SOC. 432, 450–57 (1991) (finding that conventionalists tend to have a less coherent, consistent set of values regarding agriculture than those who belong to the sustainable agriculture movement, but observing that a “pure” strand of conventionalism is beginning to emerge as an oppositional social movement). But see Allen & Bernhardt, *supra* note 97, at 307 (speculating that “the fractious debate between the two camps may be coming primarily from the extremes, many of whom may be nonproducers [i.e., not farmers]”).

The literature on rural environmental values has its shortcomings. The studies I have reviewed are weak on relations between stated values and behavior. None elucidates the dynamics of values transformation, on either a social or personal level. None explores the propensity of landowners to contravene or retaliate (illegally) against environmental laws with which they disagree, or the social support for such behavior.¹⁰¹ And none tackles directly the perceived fairness or legitimacy of one or another environmental laws, or ways of making environmental law.¹⁰² Finally, the literature has little to say about rural landowners other than farmers and ranchers. Still, by connecting the literature on rural environmental attitudes with some more general results from social psychology, one can map out tentative directions for legal reform. I address the social psychology literature in Part III. First, though, let us explore how rural voices express themselves in political fora.

2. *Politics and Action*

It is useful to attend to political movements and perceptions, as well as to underlying values, in thinking about cultural transitions and the prospects for actively involving landowners in conservation stewardship. Political organization and expression matter for the obvious reason that they suggest possibilities for reform-minded coalitions. And as writers on “expressive” law remind us, politics can also influence the values that become normative within the polity.¹⁰³

Roughly speaking, the entities that purport to speak for rural landowners come in two flavors. The trade-specific umbrella organization, like the National Cattlemen’s Beef Association (representing cattle producers), the American Farm Bureau Federation (representing farmers), and the National Woodland Owners Association (representing owners of woodlots), is the milder. More pungent are the so-called wise-use groups, a medley of farmers, ranchers, loggers, miners, motorized recreation enthusiasts, and rural county officials that coalesced in the late 1980s with the common aim of “fighting back” against the mainstream environmental movement.¹⁰⁴ Libertarian organizations may also speak for property owners, but none of the libertarian groups has a distinctly rural membership and advocacy orientation, so they are not included in this overview.

101. The literature is trained on central tendencies, not the fringes where willful lawbreakers seem likely to appear.

102. This hinders evaluation of the “fairness” reforms proposed by environmental law scholars who worry about “disgruntled landowners,” though as I show in *infra* Part I.D, the existing attitudes literature does afford some analytic traction for critiquing the legal academics’ reform proposals.

103. See *infra* notes 137–42 and accompanying text.

104. Some trace the birth of “wise-use” as a movement to the conflict over old-growth logging in the Pacific Northwest. See Philip D. Brick & R. McGreggor Cawley, *Knowing the Wolf, Tending the Garden*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE 1* (Philip D. Brick & R. McGreggor Cawley eds., 1996).

a. Farm, Ranch, and Woodlot Trade Groups

The Farm Bureau, the Cattlemen's Association, and National Woodland outwardly accept many of mainline environmentalism's goals for working landscapes: healthy watersheds, habitat for wildlife and endangered species, and farm products safe to eat. They break with environmentalists mainly over means. These groups are more than passively tolerant of environmental values. They sponsor awards to celebrate successful, ecologically progressive landowners;¹⁰⁵ they hold conferences and run trainings on watershed management;¹⁰⁶ they organize and administer programs to help their membership comply with environmental laws;¹⁰⁷ and they work to color their product green.¹⁰⁸ The Cattlemen's Association proudly trumpets that ranchers produce not only livestock, but also "landscape attributes" valued by the broader, environmentally minded public, such as open spaces, "aesthetic features," and well-functioning watersheds.¹⁰⁹ Nodding to reality, the Cattlemen's Association acknowledges that poor livestock management can damage the environment, and the Association disclaims any intent to represent bad managers.¹¹⁰

With regard to federal environmental policy, the trade groups enthusiastically support programs that provide technical assistance and financial incentives for agriculturalists to satisfy the broader society's environmental goals.¹¹¹ Trade groups do favor stringent definitions of

105. For information on national and regional "Environmental Stewardship Awards," a program of the National Cattlemen's Beef Association, see <http://www.hill.beef.org/topic.asp> (last visited Nov. 5, 2002). The National Woodland Owners Association has worked to establish a third-party certification program for forests managed to "assure a balance of natural diversity and sustainable forest productivity." Nat'l Forest Serv., *Green Tag Forestry*, available at <http://www.woodlandowners.org/greentag/greentag.asp> (last visited Mar. 3, 2002).

106. On the "Watershed Heroes" (how-to conferences on watershed restoration) and "Proud Water Partners" (landowner collaboration with state and local government) programs of the American Farm Bureau, see Bob Stallman, *New Opportunities to Improve Water Quality* (Aug. 2001), available at <http://www.fb.org/views/agenda/2001/ag08-2001.html> (last visited Aug. 28, 2002).

107. See Stallman, *supra* note 106 (describing "Proud Water Partners" program of the Farm Bureau). A Farm Bureau affiliate has also taken the lead in setting up wetland mitigation banks, which help farmers comply with the Clean Water Act. See Kay Shipman, *Iowa Farm Bureau 'Banking' on Wetlands Project*, FARMWEEK, available at <http://www.fb.com/programs/waterheroes> (last visited Oct. 2001).

108. Nat'l Cattlemen's Beef Ass'n, *NCBA's Environmental Platform 1.3 (1997)*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002) ("Beef will be recognized as an environmentally friendly product . . .").

109. Nat'l Cattlemen's Beef Ass'n, *Livestock Production and Resource Stewardship 1.1 (2000)*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002).

110. *Id.* ("NCBA shall not be compelled to defend anyone in the beef cattle industry who has clearly acted to abuse grazing, water or air resources.")

111. See, e.g., Am. Farm Bureau, *Endangered Species Act Reform*, available at <http://www.fb.org/issues/backgrd> (last visited Feb. 16, 2003); Nat'l Cattlemen's Beef Ass'n, *Locally Lead [sic] Conservation Efforts 1.8 (2000)*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002); Nat'l Cattlemen's Beef Ass'n, *Sedimentation Control and Cost Sharing 2.8 2000*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002); Nat'l Cattlemen's Beef Ass'n, *Senate Farm Bill Contains Priorities for America's Cattle Producers*, available at http://www.beef.org/dsp/dsp_content.cfm?locationid=45&contentid=173&contentypeid=2 (last visited Nov. 5, 2002) ("NCBA commends the [Senate Agri-

regulatory takings,¹¹² and a highly individualistic conception of property,¹¹³ but they also advocate—if less passionately—incremental reforms that would give states and local communities more say-so in the administration of major federal statutes like the Clean Water Act and the ESA.¹¹⁴ The Cattlemen's Association takes a dim view of federal land acquisitions,¹¹⁵ but it endorses public and private acquisition of conservation easements on a voluntary basis.¹¹⁶

The trade groups' green façades may sometimes mask a brown interior, especially in the Farm Bureau's case,¹¹⁷ but the green shell gives environmentalists something to work with, regardless—the chance to cooperate on narrow matters of common interest, or to show up “greenwashing” if the trade groups will not match rhetoric with political commitments.¹¹⁸ Green façades may eventually bleed through to the interior, too, as those who participate in watershed management training and environmental award programs come to believe in the virtues of what they are doing.¹¹⁹

culture] Committee for passing a Farm Bill that provides for significant increases in conservation funding.”).

112. The Farm Bureau seems to endorse compensation for any diminution in value resulting from regulation. Am. Farm Bureau, *Property Owner Protection*, available at <http://www.fb.org/issues/keys/property.html> (last visited Feb. 16, 2003). National Woodland supports compensation when the diminution threshold exceeds fifty percent. Nat'l Woodland Owners Ass'n, *2001–2002 NWOA Position Statements*, available at <http://www.woodlandowners.org/nwoa/topten.asp> (last visited Aug. 28, 2002). The Cattlemen's Association is less specific, but supports extensive compensation and “clear guidelines” regarding when compensation is due. Nat'l Cattlemen's Beef Ass'n, *Position Paper: Property Rights (July 3, 2002)*, available at <http://hill.beef.org/view.asp?typeid=8&catid=9&topid=101&documentid=484> (last visited Nov. 5, 2002) [hereinafter *Position Paper: Property Rights*].

113. See, e.g., *Position Paper: Property Rights*, supra note 112; Nat'l Cattlemen's Beef Ass'n, *Environmental Quality Incentives Program 2.24 (2000)*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002) (defending “the individual's right of self-determination on his or her own property”).

114. See, e.g., Nat'l Cattlemen's Beef Ass'n, *Clean Water Act Reauthorization 2.25 1998*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002) (endorsing and explaining a model of “State Primacy” to guide reform of the Clean Water Act, and calling for “locally designed and applied” management of nonpoint-source pollution); Nat'l Cattlemen's Beef Ass'n, *Endangered Species Act Reauthorization 4.6 1999*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002) (encouraging “co-operative efforts managed at the state and local level as an alternative to listing” species under the Act).

115. See, e.g., Nat'l Cattlemen's Beef Ass'n, *No Net Loss of Property 3.12 1997*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002) (arguing that any new lands brought into public ownership should be offset by dispositions of equal value from the public domain).

116. See, e.g., Nat'l Cattlemen's Beef Ass'n, *Voluntary Conservation Easements 3.17 (1998)*, available at <http://hill.beef.org/policy> (last visited Nov. 5, 2002).

117. For a harsh indictment of the Farm Bureau's history, see VICKI MARKS ET AL., *AMBER WAVES OF GRAIN: HOW THE FARM BUREAU IS REAPING PROFITS AT THE EXPENSE OF AMERICA'S FAMILY FARMERS, TAXPAYERS, AND ENVIRONMENT* (2000).

118. The threat of being shown up is not idle—presumably the trade groups would not have invested in their green image unless they care about it, whether intrinsically or prudentially.

119. This follows from the workings of cognitive dissonance. See *infra* Part II.B.

b. “Wise-Use” Groups

The wise-use picture starkly differs. Two quotes from their leading rhetorician, Ron Arnold of the Center for the Defense of Free Enterprise, lay bare the wise-users’ beliefs and ambitions:

The environmental movement is not what you think it is. It is not about the environment, it is about power.¹²⁰

We’re going to run the environmentalists out of business.¹²¹

Whatever mainstream environmentalists support, wise-users oppose. These self-proclaimed defenders of free enterprise include ardent advocates of “protective and restrictive” public regulation to circumscribe what private land trusts may say and do,¹²² notwithstanding the fact that land trusts pursue entirely voluntary conservation strategies. The Nature Conservancy, an assiduous avoider of controversy, gets lambasted by wise-use writers for being secretive and for cooperating with government.¹²³ A few years ago, wise-use lawyer William Perry Pendley published a volume chronicling the lives and deeds of fifty “heroes,” who collectively have battled virtually every kind of pro-environment measure one can imagine.¹²⁴ Neither Pendley nor his heroes can discern a shade of gray: if the environmentalists or the government wants it, well, whatever *it* is must be bad.

Environmentalists, and their journalist and lawyer friends, tend to dismiss the wise-use movement as just another front for industry,¹²⁵ or just another historical recurrence in the cycle of Western flare-ups against federal land managers,¹²⁶ or just another disaffected source of crackpot legal theories.¹²⁷ Such dismissiveness is mistaken. The wise-use movement is clever. It has proved a master of county politics, and there

120. From the prologue to RON ARNOLD, *UNDUE INFLUENCE: WEALTHY FOUNDATIONS, GRANT-DRIVEN ENVIRONMENTAL GROUPS, AND ZEALOUS BUREAUCRATS THAT CONTROL YOUR FUTURE* (1999), quoted at <http://www.undueinfluence.com> (last visited Mar. 3, 2002). Recall that this “it’s not about the environment, it’s about power” view of environmentalism also predominated among the ranchers Reading and Kellert interviewed. See *supra* notes 81–82 and accompanying text.

121. Florence Williams, *Sagebrush Rebellion II*, in *LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT* 130, 133 (John D. Echeverria & Raymond Booth Eby eds., 1995).

122. Jay Zane Walley, *A Clear and Crucial Need for Land Trust Regulation* (Dec. 14, 2000), available at http://www.paragonpowerhouse.org/a_clear_and_crucial_need_for_land.html (last visited Sept. 24, 2002).

123. Jay Zane Walley, *The Century 21 of the Environmental Movement*, available at http://www.citizenreviewonline.org/may-2002/conservation_easements.htm (last visited Oct. 10, 2001).

124. WILLIAM PERRY PENDLEY, *IT TAKES A HERO* (1994).

125. The most prominent exposition of this view is DAVID HELVARG, *THE WAR AGAINST THE GREENS* (1994).

126. E.g., Jim Woolf, *How the West Was Won, and Won, and Won . . .*, *HIGH COUNTRY NEWS*, Oct. 16, 1995, available at <http://www.hcn.org>.

127. E.g., Andrea Hungerford, Note, “*Custom and Culture*” Ordinances: Not a Wise Move for the Wise-Use Movement, 8 *TUL. ENVTL. L.J.* 457 (1995); Patrick Austin Perry, Comment, *Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Land-Use Policy*, 30 *LOY. L.A. L. REV.* 275 (1996). But see Keiter, *supra* note 4, at 322–33 (acknowledging power of wise-use movement).

is a certain internal coherence to its critique that anyone who cares about the stewardship of private lands should ponder. Wise-use propagandists depict the mainline environmental groups as undifferentiated instruments of a secretive, foundation-directed, back-room-dealing cabal.¹²⁸ Conversely, wise-use actions have been public, transparent, and local, carried out by county commission resolutions across the nation.¹²⁹

Like other good conspiracy theorists, the wise-users can point to a few facts that tint their story with a patina of plausibility. Leaders of the national environmental groups do meet periodically to coordinate strategy, divvy up turf, and refine the party line.¹³⁰ This practice probably makes for a more ideologically homogeneous environmental movement, with the views reified as “environmentalism” inevitably those of the groups’ leaders and board members—highly educated, city-living, upper-middle-class Americans.¹³¹

The wise-use movement struts its stuff at the county level. As many as one quarter of the counties in the American West have adopted, at the wise-users’ behest, so-called county supremacy or custom and culture ordinances that, on the basis of laughable legal theories, claim title or preemptive jurisdiction to federal lands, and purport to bar the federal government from enforcing environmental laws without permission from county officials.¹³² A variation on this theme has spread eastward, with the New Hampshire and at least one county in upstate New York banning the release of “dangerous predators,” a challenge to proposed wolf reintroductions that would be led by the FWS.¹³³ Brazen county commissioners and other local officials have bulldozed illegal roads across U.S. Forest Service lands,¹³⁴ sanctioned farmers’ efforts to pry open irrigation

128. See ARNOLD, *supra* note 120. A shorter version of the argument may be found in Ron Arnold, *Overcoming Ideology*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE*, *supra* note 104, at 15; see also <http://www.undueinfluence.com> (last visited Sept. 24, 2002) (A wise-use website whose stated purpose is to “track[] the environmental movement’s money, power, and harm.”).

129. I will touch on the substance of these resolutions momentarily.

130. Interview with environmental leader (anonymous) (Dec. 20, 2000).

131. The mainline environmental groups are to varying degrees dependent on their membership for financial support, which limits the extent to which they can “shape” the content of environmentalism. But presumably lay environmentalists also look to the groups to which they belong for guidance in translating their abstract “environmentalist” affiliation into more particular values, as well as positions on questions of policy. That the environmental groups believe they serve an educational, value-shaping role is evident to anyone who reads the pages of *Sierra* magazine (the magazine of the Sierra Club), or *Audubon* (that of the Audubon Society), or *The Nature Conservancy* (that of The Nature Conservancy (TNC)). Even if the member does not self-consciously seek guidance from these magazines, if he reads them regularly he is likely to assimilate something of the ideology. The psychological bases of the assimilation will become apparent in *infra* Part II (see especially the discussions of cognitive dissonance and group polarization).

132. See Williams, *supra* note 121 (describing the movement); Hungerford, *supra* note 127 (describing legal theories); Perry, *supra* note 127 (describing legal theories).

133. Alliance for Am., *Issues and Information* (2001), available at <http://www.allianceforamerica.org/Position%20Papers%202001.htm> (last visited Aug. 29, 2002).

134. Jon Christensen, *County Commissioner Courts Bloodshed*, HIGH COUNTRY NEWS (Apr. 3, 1995), available at http://www.hcn.org/servlets/hcn.PrintableArticle?article_id=919; see also DANIEL

head gates shut down by the U.S. Bureau of Reclamation to protect endangered fish,¹³⁵ and intervened to keep the U.S. Bureau of Land Management from foreclosing on the livestock of ranchers who refuse to pay public lands grazing fees.¹³⁶

The county-centered strategy is cunning. It buttresses the wise-users' favorite opposition: wise-use is grassroots and legitimated by the people; environmentalism is distant, disingenuous, and divorced from popular mandate. However ridiculous they appear to judges, the wise-use ordinances probably bear on the shape of social norms in the counties where they are enacted. The legal-academic literature on law's purely "expressive" impact (that is, predictable consequences of law that cannot be explained in terms of the rational agent's response to penalties administered by the government) explains why this is so.

On one plausible account,¹³⁷ expressive law serves to inform people about the kinds of attitudes and behaviors that their fellow citizens esteem or disdain.¹³⁸ The argument begins with the mistaken citizen. He hopes dearly to make a favorable impression in his fellowmen's eyes. But in trying to gauge his fellows' views by observing their behavior and statements, he often misses the mark, for his fellows falsify their preferences so as to keep up images based on their priors regarding others' attitudes.¹³⁹ The mistaken citizen can better his estimates by interpreting political declarations. These less often reflect false preferences because voters cast the ballot in secret, and because politicians face strong incentives to discover what voters really believe under the veneer of conformism.¹⁴⁰ It follows that law has expressive power.

Since people tend to be especially concerned about how they are viewed by others in their community, local government—responsive to just these people—has more expressive potency than does state or na-

KEMMIS, THIS SOVEREIGN LAND 60 (2001) (describing Nye County, Nevada Commissioner Dick Carver's appearance on the cover of *Time Magazine*, his reward for bulldozing illegal road across forest service land); *id.* at 64–66 (recounting county-commissioner organized "shovel brigade" to reopen Forest Service road closed to protect endangered fish).

135. *Farmers Force open Canal in Fight with U.S. over Water*, N.Y. TIMES, Jul. 6, 2001, at A10; Brad Knickerbocker, *Fish vs. Farmers Presents Test Case for Bush*, CHRISTIAN SCI. MONITOR, Jul. 11, 2001, at 2.

136. Brad Knickerbocker, *West's Long, Hot Summer Flares Up over Land Use*, CHRISTIAN SCI. MONITOR, Aug. 9, 2001, at 2 (The local sheriffs ultimately backed down under pressure from a U.S. attorney.).

137. This is my own judgment of plausibility, not a convergence in the literature, which is young. Explaining why I think this account most plausible would carry me beyond this paper's scope, so I will leave that for another occasion.

138. The most recent, lucid, and thorough formulation is Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000), but many others have suggested the point. See, e.g., Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

139. McAdams, *supra* note 138, at 354–57. The concept of preference falsification traces to TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES* (1995).

140. McAdams, *supra* note 138, at 358–62.

tional government.¹⁴¹ Reinforcing this comparative advantage is local government's relative insusceptibility to minority-magnifying public choice failures.¹⁴² It follows, on this view, that widespread passage of legally inconsequential county ordinances gives the wise-use movement more social influence than it would otherwise have. This influence may make otherwise interested landowners reluctant to cooperate with government conservation agencies. It may also provide a measure of social support for wise-use lawbreakers.

Beyond the county ordinances, the wise-use movement erodes the stigma of (anti)environmental lawbreaking by using sheriffs and county commissioners to model and promote transgression.¹⁴³ That those sworn to uphold the law break it intimates that in the breach might be found the observance of a higher law, a conjecture the wise-users eagerly reinforce with zany, home-grown interpretations of the Constitution.¹⁴⁴ Thus, violating federal environmental law *may* bring self-regard, even honor, to the rural citizen who has deeply internalized norms of legality. Unlike the Earth First! monkey-wrencher, the wise-use retaliator does not break the law on an idiosyncratic view that certain transcendental values matter more than lawfulness. Rather, he breaks the law-on-the-books so as to defend the fundamental law.

This causal account of antienvironmental lawbreaking should be treated cautiously. No one has studied wise-use retaliation against the environment, and while a couple reports claim to document scores of acts of harassment against environmentalists and federal employees, these are the work of environmental advocates.¹⁴⁵ Regardless, the social logic of wise-use retaliation should give pause to environmentalists.

There is a final aspect to the rural politics of environmentalism worth study and reflection: the boundary that separates the wise-use movement and the trade groups appears fluid. The Alliance for America (a wise-user) solicited the Farm Bureau (a trade group) to write its position paper on farming.¹⁴⁶ The National Trappers Association authored

141. *Id.* at 372. A point of clarification: here and elsewhere, when I refer to a political expression as powerful or potent, I mean to denote not the vigor of the bombast but rather its influence on citizens' values and behavior, for which democratic or other credentials may matter as much as rhetoric.

142. The contrast between "majoritarian" local government law and "minoritarian" state and national law is a recurring theme in Carol Rose's writings. *See, e.g.,* Carol M. Rose, *Takings, Federalism, Norms*, 105 *YALE L.J.* 1121 (1996).

143. For examples, see Alexander H. Southwell, Comment, *The County Supremacy Movement: The Federalism Implication of a 1990s States' Rights Battle*, 32 *GONZ. L. REV.* 417, 486 n.490 (describing "fencing party" in Ruby Valley, Nevada, in which a state legislator joined locals in fencing off a spring on federal land and claiming it for the State, in defiance of a judge's orders); *supra* notes 134–36.

144. *See* Williams, *supra* note 121, at 133–35.

145. Jonn Lunsford, *Dangerous Territory: The Attack on Citizen Participation and the Environmental Movement* (1997); Tarso Ramos, *Extremists and the Anti-Environmental Lobby: Activities Since Oklahoma City* (1997). Both reports are available at <http://speedy.wscpdx.org/archive> (last visited Mar. 9, 2002).

146. Alliance for Am., *Farming* (2001), available at <http://www.allianceforamerica.org/Position%20Papers%202001.htm> (last visited Sept. 24, 2002).

the Alliance for America's position paper on hunting and trapping.¹⁴⁷ This is disquieting, given Kellert's findings from the 1970s and 1980s, which antedate the wise-use movement, on trappers' strong support for conservation.¹⁴⁸ The urban moralist who would restrict hunting and trapping may be driving trappers into the wise-use camp. Kellert also found that off-road vehicle enthusiasts overwhelmingly support restrictions on their pastime to protect wildlife.¹⁴⁹ Today, an association of off-road motorists stands as a pillar of the wise-use movement.¹⁵⁰

D. Policy Reconsidered

The preceding analysis of ecological vulnerabilities and rural landowners' attitudes and politics encourages fresh strategizing about private-lands conservation. To set the stage for my proposals, which follow in Part III, this section identifies characteristic shortcomings—vis-à-vis the private-lands predicament—of the main contemporary schools of thought regarding how to safeguard ecological resources found on private lands. I aim in particular to demonstrate that an understanding of landowner values can usefully inform the policy debate. In the interest of economy, I convey this point with reference to a couple leading papers rather than an exhaustive survey of the field.

Broadly speaking there are four programmatic schools regarding how best to conserve and restore private lands of ecological import.¹⁵¹ The Voluntarist School¹⁵² favors economic incentives, with each landowner free to respond to the incentives as he wishes.¹⁵³ The Hammer Harder School advocates all-cylinders-firing enforcement of the ESA, and the passage of complementary legislation like an "Endangered Ecosystems Protection Act" or a "National Ecological Land-Use Act," which would preempt local and state land-use controls.¹⁵⁴ The Public Preserve

147. Alliance for Am., *Hunting and Trapping* (2001), available at <http://www.allianceforamerica.org/Position%20Papers%202001.htm> (last visited Sept. 24, 2002).

148. VALUE OF LIFE, *supra* note 42, at 78–79.

149. *Attitudes & Knowledge*, *supra* note 63, at 113 (reporting that seventy-nine percent of off-road vehicle users favored restrictions on their activity if necessary to protect wildlife).

150. The group is the Blue Ribbon Coalition. Their website is <http://www.sharetrails.org> (last visited Mar. 4, 2002).

151. By "programmatic" school, I mean to denote a school centered on a law-and-policy agenda. On the nonprogrammatic side are those who see law and policy as epiphenomenal, with the real work being that of cultural production: the fine and performing arts, literature, and similarly imaginative endeavors. The nonprogrammatic approach is contrasted with alternatives in Eric T. Freyfogle, *Five Paths of Environmental Scholarship*, 2000 U. ILL. L. REV. 115, 119–29 [hereinafter Freyfogle, *Five Paths*].

152. The labels here are mine.

153. This is the position of the mainline agricultural trade groups, *see supra* Part I.C.a, and of "free-market environmentalists" more generally. *See* TERRY L. ANDERSON & DONALD LEAL, *FREE MARKET ENVIRONMENTALISM* (2d ed. 2001).

154. Politically, the leading "hammer" in the Hammer Harder School is the Center for Biological Diversity, which make its living bringing ESA citizen suits. Their web page is <http://www.biologicaldiversity.org/swcbd> (last visited Mar. 4, 2002). Academically, a leading example of this is Christopher A. Cole, *Species Conservation in the United States: The Ultimate Failure of the Endangered*

School wants the federal government to take ownership of an ecologically self-sustaining core of land within each landscape targeted for protection, thereby alleviating the need for intensive ecological stewardship of private lands.¹⁵⁵ The Co-Management School hopes to land upon just the right mix of public controls and economic incentives such that, miraculously, private landowner and federal conservation agency embrace one another as partners in adaptive management.¹⁵⁶ I will focus here on the Public Preserve and Co-Management approaches, because the Voluntarist and Hammer Harder Schools are badly out of line with economic and cultural realities. The Voluntarists' problem is economic: they lack a satisfying answer for holdouts. For those who would prefer to Hammer Harder, I wish a sweet hereafter, in a land free of ecological monitoring and subversion problems, with a politics dominated by environmentalists.¹⁵⁷

1. *The Public Preserve School*

Bradley Karkkainen is the most prominent in a line of commentators who advocate selling off chunks of the federal estate and using the proceeds to assemble core preserves in ecological zones that are today principally or exclusively in private ownership.¹⁵⁸ Federal land-use con-

Species Act and Other Land Use Laws, 72 B.U. L. REV. 343, 369 (1992) (proposing comprehensive "Federal Land-use Act," which would preempt all state and local controls); *see also* Judie Bloch, *Preserving Biological Diversity in the United States: The Case for Moving to an Ecosystems Approach to Protect the Nation's Biological Wealth*, 10 PACE ENVTL. L. REV. 175, 217 (1992) (advocating "Endangered Ecosystems Protection Act").

155. The most prominent example is Karkkainen, *supra* note 1. Similar proposals are advanced in several sources. *See, e.g.*, Richard J. Fink, *supra* note 18, at 105-31; Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 318-24 (1991); Edward J. Heisel, Comment, *Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future*, 25 ECOLOGY L.Q. 229 (1998).

156. The term "co-management" is used mainly in the fisheries and Indian law contexts, to refer to management regimes that entail joint decision making by fishers and public regulators, or native tribes and national governments. The term's definition is less than specific, but writers generally use it to refer to any cooperative engagement between government and resource user that is grounded in mutual dependencies that are mutually recognized. *See, e.g.*, Evelyn W. Pinkerton, *Translating Legal Rights into Co-Management Practice: Overcoming Barriers to the Exercise of Co-Management*, 51 HUMAN ORG. 330 (1992); Eric Smith, *Some Thoughts on Co-Management*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (1997).

157. Here on earth, the Hammer Harder School is, at best, useful as a threat (rather than as a source of policy solutions), insofar as its threat impels landowners to strike deals with the more moderate wing of the environmental movement. Thus, little is to be gained from analyzing the likely consequences of Hammer Harder proposals, were they to become law.

158. Karkkainen, *supra* note 1. I focus on Karkkainen's proposal here because he is the most widely renowned legal academic to take this position, and his article illustrates certain shortcomings of characteristically "legal" scholarship on cultural problems, e.g., interpreting popular upset through categories and concepts defined in the law. Note, however, that Karkkainen's recent scholarship presses beyond this kind of thinking, and calls for research to understand "what really goes on" in conservation initiatives, with special attention to the consequences of different ways of "doing collaborative conservation" on the players' attitudes and commitments. *See, e.g.*, Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002).

trols would curtail development in buffer zones of private land surrounding the preserves.¹⁵⁹ Karkkainen offers this proposal in response to the “reality” of rural landowner hostility to environmentalism.¹⁶⁰

His reality earns the scare-quotes because it is bottomed not on the subjective or historical experience of rural Americans, but rather on Karkkainen’s own interpretations of, first, the distributive unfairness of the ESA,¹⁶¹ and, second, the harm-benefit distinction of nuisance law.¹⁶² Landowners would find the federal government’s buffer-zone controls tolerable, Karkkainen supposes, because the federal role would be “cabined” to the “typical nuisance concern of preventing spillovers.”¹⁶³

Out on the land, it is doubtful that farmers, ranchers, and woodlot owners would warm to Karkkainen’s program. Many will see his nuisance justification as a lawyerly sleight of hand—the substance of buffer-zone regulations having nothing to do with the familiar substance of nuisance law, which, of course, has not been concerned with biological diversity.¹⁶⁴ The problem runs deeper yet: Karkkainen’s plan necessarily entails significant disruption and displacement of rural communities. Recall the sociologists’ recurrent finding, that land for many an agriculturalist is not just an asset, but equally the locus of social life, community, and valued local and family traditions.¹⁶⁵ Kinship and neighborhood relations anchor many farmers and ranchers to a *place*.¹⁶⁶ Designating rural landowner communities as a “preserve acquisition zones” would invite backlash, both in the political arena and out on the land.¹⁶⁷

Karkkainen’s federal lands team would need to condemn property to avoid creating Swiss-cheese preserves.¹⁶⁸ This could exacerbate the

This is a hugely important endeavor, in my view, and I hope the reader will value the present article as a contribution to the quest.

159. Karkkainen, *supra* note 1, at 97–103.

160. *Id.* at 8–10, 81–84.

161. For Karkkainen, the problem corresponds to “the animating spirit behind the Takings Clause.” *Id.* at 96. Certain landowners are “singled out” for exceptional burdens; there is no semblance of horizontal equity in the way that the ESA’s burdens fall. Karkkainen cogently explains the plausibility of this thesis in terms of well-established legal and legal-academic norms, *id.* at 92–93, 95–96, but he does not test it against the literature on rural environmental attitudes.

162. *Id.* at 98.

163. *Id.*

164. See *supra* note 90 (on libertarian attitudes among rural landowners). Here I presume that libertarian landowners, like other libertarians, favor a nuisance law built on rigid, stable conceptions of “harm.” See Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 121–27 (1995).

165. See *supra* notes 95–96 and accompanying text.

166. *Id.*; see also John J. Beggs et al., *Revisiting the Rural-Urban Contrast: Personal Networks in Nonmetropolitan and Metropolitan Settings*, 61 RURAL SOC. 306 (1996). This statistical study, which is based on a national survey and reinforces a wealth of ethnographic literature, shows that rural people have smaller, more neighbor- and kin-centered social networks, and longer lasting and more multiplex relations within those networks, than do their urban counterparts. *Id.* at 316–17.

167. For examples, see *infra* note 174.

168. For fragmented, Swiss-cheese preserves to be ecologically useful, the private land “holes” would have to be intensively managed to ecological ends, yet the motivation behind Karkkainen’s proposal was to alleviate private landowners of this responsibility.

backlash, and its political feasibility is doubtful in any event. Two generations ago, the federal government used eminent domain freely to assemble parks and forests, particularly in the Southeast.¹⁶⁹ This history lingers still in bitter memories and wise-use lore.¹⁷⁰ Modern Congresses have annually appropriated hundreds of millions of dollars for land acquisition,¹⁷¹ but they have authorized eminent domain for conservation only in narrow circumstances, and then with plenty of handles for landowners to challenge agency condemnation decisions.¹⁷² Where long-standing authorization for eminent domain exists, federal agencies rarely make use of it.¹⁷³

Whether because of the politics of displacement or the politics of eminent domain, federal agencies often find it politically treacherous to do anything that forebodes a concentrated, local expansion of federal land ownership in rural communities,¹⁷⁴ unless the public project estab-

169. I know of no comprehensive overview of the use of eminent domain in this era. For discussions of particular projects, see Dan Pierce, *The Barbarism of the Huns: Family and Community Removal in the Establishment of Great Smokey Mountain National Park*, 57 TENN. HIST. Q. 62 (1998); Gene Wilhelm, Jr., *Shenandoah Resettlements*, 14 PIONEER AM. 15 (1982) (discussing fate of 465 mountain families forced from their home sites by the establishment of Shenandoah National Park in 1935); Margaret Lynn Brown, *Smokey Mountains Story: Human Values and Environmental Transformation in a Southern Bioregion, 1900–1950* (1995) (unpublished Ph.D. dissertation, University of Kentucky) (on file with Yale University Library) (regarding displacement of small farmers during creation of Great Smokey Mountains National Park); Anne Virginia Mitchell, *Parkway Politics: Class, Culture, and Tourism in the Blue Ridge* (1997) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with Yale University Library) (regarding displacement associated with the U.S. Park Service's creation of national scenic byway linking Great Smokey Mountain and Shenandoah National Parks).

170. This theme recurs in PENDLEY, *supra* note 124.

171. Average annual appropriations from the Land and Water Conservation Fund, the major federal funding source for land acquisitions, averaged \$150–\$350 million over the last twenty years. Jeffrey Zinn, *Land and Water Conservation Fund: Current Status and Issues*, at 2, available at <http://www.cnie.org/nle/crsreports/public/pub-1.pdf> (Jan. 28, 2002).

172. For example, the National Wild and Scenic Rivers Act allows eminent domain only if: (a) less than half of the streamside land is in public ownership; and (b) no zoning ordinance protects river values. Jackie Diedrich et al., *Wild and Scenic Rivers and the Use of Eminent Domain*, at 2, available at <http://www.nps.gov/rivers/publications/eminent-domain.pdf> (Nov. 1998).

The proposed Conservation and Reinvestment Act (CARA), which would increase and secure federal funding for land acquisition, would allow only willing-buyer/willing-seller transactions. Jeffrey Zinn & M. Lynne Corn, *Conservation and Reinvestment Act (CARA) (H.R. 701) and a Related Initiative in the 106th Congress*, at 16, available at <http://www.cnie.org/nle/crsreports/natural/nrgen-28.pdf> (Jan. 17, 2001).

173. FWS acquisition authority, for instance, dates to the 1929 Migratory Bird Treaty Act, and includes eminent domain, but condemnation is “very rarely used.” Ross W. Gorte & Pamela Baldwin, *Federal Land Ownership: Constitutional Authority; the History of Acquisition, Disposal, and Retention; and Current Acquisition and Disposal Authorities*, at 12, available at <http://www.ncseonline.org/nle/crsreports/risk/rsk-50.cfm> (Apr. 7, 1999). Eminent domain was never common and “has almost ceased to be used after the early 1980s” under the Wild and Scenic Rivers Act. Diedrich et al., *supra* note 172, at 1. The U.S. Forest Service lists the seller's desire that the land be in public ownership as one of the Service's primary considerations in deciding which lands to propose to Congress for purchase with LWCF funds. USDA, *The Land and Water Conservation Fund*, available at <http://www.fs.fed.us/land/staff/LWCF> (last visited Sept. 24, 2002).

174. See Gorte & Baldwin, *supra* note 173. For an illustrative case study, see *infra* notes 178–80 and accompanying text. For another case study, see Jeanne Porges Thompson, *Stehekin, Washington:*

lishes or enhances park and recreation lands used by locals.¹⁷⁵ Anxiety about federal land acquisition for conservation cuts so deeply that it has killed or hamstrung federal programs for which no land acquisition was ever planned, programs aimed at assisting voluntary, bottom-up stewardship initiatives in locally nominated landscapes.¹⁷⁶ People in the selected communities apparently feel that federal attention today portends “preserve status” down the road.¹⁷⁷

The Platte River in Nebraska offers a telling case study. In the early 1970s, the FWS made known its intention to establish a National Wildlife Refuge along the Platte to benefit the endangered whooping crane. The effort failed; indeed it “proved so disastrous that the FWS was almost literally run out of the area.”¹⁷⁸ Thirty years later, a researcher discovered among the landowners “continuing strong resentment and fear of the agency’s regulatory and condemnation powers.”¹⁷⁹ Conservation interests have managed to acquire some land along the river, but only through settling an ESA citizen suit. Notably, the settlement fixed the amount set aside for land acquisition and other conservation measures, ruled out condemnation, and gave agricultural interests considerable say over the funds’ expenditure.¹⁸⁰ The moral? After the surf of landowner sentiment comes crashing down on a Public Preserve undertaking, only two choices remain for conservationists: either walk away, or try to fashion from the wreckage an institution for co-management.

An Analysis of National Park Service Land Acquisition and Management 25 Years After Establishment of the Lake Chelan National Recreation Area, 9 J. ENVTL. L. & LITIG. 215 (1994).

175. It is instructive that the Trust for Public Land, which assists with many federal land acquisitions, lists the following as its aims: “[C]reat[ing] urban parks, gardens, greenways, and riverways; build[ing] livable communities by setting aside open space in the path of growth; conserv[ing] land for watershed protection, scenic beauty, and close-to-home recreation; [and] safeguard[ing] the character of communities by preserving historic landmarks and landscapes.” The Trust for Public Land, *About TPL*, at <http://www.tpl.org> (last visited Aug. 29, 2002).

176. This has been the too frequent fate of candidate landscapes under Clinton’s American Heritage River Initiative, which provides a federally subsidized expert to connect communities along designated (locally nominated) rivers with grant money and technical information on river restoration. See, e.g., J.T. Thomas & Greg Hanscom, *River Heritage Plan Sent Downstream*, HIGH COUNTRY NEWS, Mar. 30, 1998, available at <http://www.hcn.org> (last visited Sept. 2, 2002). Alan Kesselheim, *An Opportunity Lost to Politics*, HIGH COUNTRY NEWS, Mar. 27, 2000, available at <http://www.hcn.org> (last visited Sept. 2, 2002).

177. The familiar acronym “NIMBY,” attitudinally descriptive of suburban homeowners faced with the prospect of a landfill or other noxious facility (“not in my backyard”), deserves a rural counterpart, “NBIMBY,” short for “No Biospheres in My Backyard.”

178. SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 39–40 (2001).

179. *Id.* at 40. (None of the respondents indicated that FWS regulation of private lands surrounding a preserve would be just fine, thanks, because it would “relate to the typical nuisance concern of preventing spillovers.”)

180. *Id.* at 41–42, 51.

2. *The Co-Management School*

David Farrier has the distinction of being the first legal scholar to sketch out a program of government-landowner co-management of rare species and their habitat.¹⁸¹ He would have the FWS proceed with strict negative regulations to prevent ecologically harmful uses, and then offer voluntary “stewardship payments” (covering labor and materials) to encourage active, adaptive ecological management.¹⁸² Like Karkkainen, Farrier attends to the problem of fairness, and like Karkkainen, he anchors his analysis to intuition rather than evidence of landowner attitudes and culture. Farrier’s fairness rule has three parts: (i) do not pay compensation for any negative regulation, unless (ii) the negative regulation curtails an existing use, in which case (iii) pay the landowner for the value of the foregone use, less the value of the “externality” that that use imposes on society at large.¹⁸³ Farrier’s externality concept includes lost biological diversity, whether internal or external to the property in question. Put differently, his concept of fairness begins with the premise that society as a whole has a collective property right to biological diversity, wherever found.¹⁸⁴ This premise has the scantest of footholds in rural landowner communities.¹⁸⁵ Some landowners may sign up for stewardship payments but it is hard to imagine them being anything but disgruntled by the overall scheme, which in purporting to “protect” existing uses inverts what rural landowners believe to be the baseline allocation of entitlements. (Farrier’s plan may also be criticized for not dealing with the problem of holdouts against intensive management plans, though oner-

181. Farrier, *supra* note 1, at 389–405. J.B. Ruhl’s contribution to the endangered species literature, reveals an implicit hope for something similar, but Ruhl focuses on legal reforms that would give the states greater leeway in managing biological diversity, not on what the states would or should do with their newfound freedom. Ruhl, *supra* note 1. Evan van Hook also gestures in this direction, suggesting that nearby landowners be given an economic stake in core preserves, but van Hook does not propose to formalize a landowner role in preserve governance. van Hook, *supra* note 1. Finally, Karkkainen’s recent writings on “collaborative ecosystem governance” detail the benefits of involving landowners and various units of government in ecological management. See Karkkainen, *supra* note 1. Karkkainen’s work in this area is preliminary, and focuses on multistakeholder processes rather than the binary arrangements typical of co-management. On the latter, see *supra* note 158.

Gunningham & Young may also be read as co-management advocates, given their emphasis on local participation and buy-in. Gunningham & Young, *supra* note 1, at 255–57 (discussing “motivational instruments”); *id.* at 282–85 (discussing mix of top-down and bottom-up processes). They do not advance a “program” as such, however. *Id.* Instead they argue, without much illustration, that different policy instruments should be conjoined to meet particular biodiversity conservation challenges. *Id.*

182. Farrier, *supra* note 1, at 397–400.

183. *Id.* at 397–99.

184. Gunningham and Young implicitly embrace this view, too. See *supra* note 1, at 294–96 (arguing against ongoing compensation payments for land-use restrictions, which the authors fear would create an expectation that biodiversity belongs to the landowner, rather than society as a whole). Gunningham and Young do endorse “transitional” compensation payments, however. *Id.*

185. See *supra* note 90 (describing libertarian attitudes among rural landowners).

ous negative land-use restrictions could diminish the credibility of some holdouts' threats).¹⁸⁶

Whatever the flaws of Farrier's plan, some form of co-management does seem the main hope for conservation stewardship of private lands, given the difficulties attendant to large-scale public preserve acquisition. Institutions designed for this purpose are more likely to succeed if they take into account landowners' values, and the processes of attitudinal and cultural change. To these we now turn. Part II reviews what the social psychology literature can teach us about attitudes and group conflict, and part III derives an agenda for private-lands conservation policy.

II. OF GROUPS, ATTITUDES, AND BEHAVIOR

The academic literature is lacking in studies that statistically document positive changes in the normative valence of nature conservation in rural communities.¹⁸⁷ The nearest approximation is case study reportage on place-based "consensus" or "collaborative" stakeholder groups.¹⁸⁸ Some students of environmental problem solving believe that inclusive, informally structured roundtables of affected interests can work their way to consensus solutions, and in doing so transform participants who had been hostile to environmentalism into enthusiastic supporters of the consensus plan.¹⁸⁹ Even the most optimistic of these scholars, however, describe landowner "mistrust" of public conservation agencies and environmentalists as a principal stumbling block.¹⁹⁰

Though young, the collaborative conservation movement is burgeoning. The yield in case studies already numbers more than two hundred.¹⁹¹ One could try to mine these studies now for insight into attitudinal change, but the ore is of poor quality—the groups are nascent, the reports impressionistic, and the domain narrow. While the careful student of consensus groups might comment on the processes and settings

186. For instance, regulation that strictly limits subdivision and homebuilding renders noncredible the holdout who would justify his high (claimed) reservation price by threatening to break ground on a "sanctuary in nature" housing development. In other respects, however, the holdout may still be able to free-ride on his neighbors' conservation efforts. See *supra* Part I.A. As examples, consider the holdout against a weed-control plan, who benefits from his neighbors' efforts to reduce the spread of noxious, invasive species, or the holdout against a wildlife habitat improvement plan, who benefits from the healthier, more abundant wildlife populations that result from his neighbors' investments in habitat.

187. *Supra* Part I.C.

188. For recent overviews, see *ACROSS THE GREAT DIVIDE* (Philip Brick et al. eds., 2001); WONDOLLECK & YAFFEE, *supra* note 81. In the law review literature, see Stephen M. Nickelsburg, Note, *Mere Volunteers? The Promise and Limits of Community-Based Environmental Protection*, 84 VA. L. REV. 1371 (1998); Douglas S. Kenney, *Arguing About Consensus* (2000), available at <http://www.Colorado.edu/Law/NRLC> (last visited Jan. 15, 2001). Of these pieces, Kenney's is both the most succinct and the most thorough.

189. See generally WONDOLLECK & YAFFEE, *supra* note 81; Kenney, *supra* note 188 (providing a more dispassionate treatment, and presenting the arguments of skeptics).

190. WONDOLLECK & YAFFEE, *supra* note 81, at 55–59.

191. *Id.* at 20.

most hospitable to attitudinal change via such groups, she cannot say much about the comparative efficacy of other kinds of social initiatives.¹⁹²

Generic theories of social change—the province of social psychology—provide a more encompassing perspective. Social psychology contributes thrice to our quest: first, with an account of attitudes (values)¹⁹³ and their resistance or propensity to change; second, with an account of social influence; and third, with an account of intergroup conflict, including feedbacks to individuals' attitudes.

Social psychologists' descriptive work is fascinating, but the accompanying theory is often dubitable. Fashions have come and gone within the discipline, and the received wisdom today tends to favor midrange theories that seek to illustrate or explain only limited aspects of the forces at play in attitude formation and social interaction.¹⁹⁴ Concepts (e.g., "reference group," "self-concept") are often defined with respect to the subject's mental state, which makes observation problematic. External validity recurs as a concern, given social psychologists' predilection for laboratory experiments with college students.¹⁹⁵ It is safest, then, to take the social psychology principles I discuss as merely suggestive—while recognizing that they are the best heuristics to be had.

A. *Social Psychology's Vision of the Person*

Three propositions anchor social psychologists' understanding of human behavior. First, people are thought to embody a broad range of group-related goals. We structure our relations with one another so as to satisfy desires for self-affirmation, social bonding, and self-evaluation.¹⁹⁶ Second, from an external perspective, the individual's evaluative responses to her environment may appear somewhat unstable, because subtle differences in "framing," or in the subject's state of mind, bear on how she interprets the situation and connects it to her values, beliefs, and

192. I do not mean to disparage the usefulness of the case studies of collaborative conservation. They are hugely suggestive, and I refer to them later in discussing my proposals for reform.

193. Social psychologists use the term "attitude" to refer to any evaluative response, favorable or otherwise, to any object or concept that "is discriminated or held in mind by the individual." Alice H. Eagly & Shelly Chaiken, *Attitude Structure and Function*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 269, 269 (Daniel T. Gilbert et al. eds., 4th ed. 1998). "Values," then, can be defined as comparatively abstract attitudes, ones linked to concepts rather than particular things or circumstances. Social psychologists usually use the term "value" to refer to core aspects of self-concept. *See id.* at 289.

Throughout this paper I will draw heavily on the *Handbook of Social Psychology*. The *Handbook* consists of some thirty literature reviews that cover the breadth of the discipline. It is the standard professional reference for academic social psychologists.

194. *See generally* Shelley E. Taylor, *The Social Being in Social Psychology*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 58 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

195. *Id.* at 81–82; *cf.* Tatiana Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973, 986–88 (2000) (contending that social psychology theories have at best "modest" predictive power, given the complexities of "real world" social situations that the subject may variously construe).

196. Taylor, *supra* note 194, at 76.

goals.¹⁹⁷ Third, the individual possesses a hierarchy of values and beliefs¹⁹⁸ whose relationships with one another remain open to reassessment.¹⁹⁹ Lower-level items come and go. Atop the hierarchy concepts are relatively stable—in their identity, at least, but not always in their meaning.

As for meanings, high-level values can be quite general and thus somewhat plastic. Take self-concept, for example. People stake their sense of self-worth on certain views of themselves: “I am generous, I am an adept analytic thinker, I am the carrier of the family legacy and tradition, I am devoted to the environment, I am a devout Christian.” Such thoughts give meaning and structure to one’s life, and are not easily relinquished. But what they demand of new choice situations may be open to quite varied interpretation.²⁰⁰

B. *Social Psychology: Attitudes and Beliefs*

The durability of attitudes and beliefs depends on how they were formed and what roles they play. Other things equal, views hatched from experience are far more persistent than those acquired from secondary sources.²⁰¹ Their vividness imparts a staying power that would dismay the statistician. Views whose formation involves intense thought also tend to stick around.²⁰² Finally, linkages to core self-concepts make views resistant to change.²⁰³

People often work to maintain certain relations among their attitudes. This was first formulated as “balance theory,” which holds that in multiperson relationships, subjects adjust their attitudes toward one an-

197. For example, the response to a given opportunity can vary, depending on whether at the moment of decision the subject happens to be thinking of himself as an individual or as a member of a social group. See Marilyn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 193, at 554, 560 (reviewing results on “private” versus “collective” cognitions). Likewise, one person’s reaction to another may depend on whether the other is seen as an individual or as a member of a group. *Id.* at 579–80 (discussing “de-categorization” as a way of reducing inter-group tensions); *cf.* Taylor, *supra* note 194, at 58 (“The second point of consensus [among social psychologists] is that the individual actively construes social situations. We do not respond to environments as they are but as we interpret them to be.”).

198. A “belief” for social psychologists is a cognition or thought associated with an attitude. Beliefs pertain to causation and relationship, not evaluation. See Eagly & Chaiken, *supra* note 193, at 271.

199. *Id.* at 288–89, 310. This openness to revision, to reassessing the relationship among one’s attitudes, may be contrasted with the economist’s usual assumption that the individual’s choice (“utility”) function yields a complete and stable (as well as transitive) preference ordering over all possible states of the world.

200. *Cf.* Rostain, *supra* note 195, at 986–87 (regarding variability in how subjects construe social situations).

201. See Eagly & Chaiken, *supra* note 193, at 279–81 (regarding “direct experience with the attitude object”); Richard E. Petty & Duane T. Wegener, *Attitude Change: Multiple Roles for Persuasion Variables*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 193, at 323, 332–33 (comparing self-generated attitude change with attitude change based on mere exposure).

202. Petty & Wegener, *supra* note 201, at 366–67.

203. Eagly & Chaiken, *supra* note 193, at 289.

other and an object until they “balance.”²⁰⁴ Balance for subject A is said to obtain when A dislikes B and disagrees with B’s evaluation of the object, or when A likes B and agrees with B’s evaluation of the object. Theorists of cognitive dissonance extended balance theory intrapersonally and predicted the attitudinal adjustment.²⁰⁵ They maintain that when the subject discovers himself behaving inconsistently with one of his values, he reinterprets or drops the value so as to bring mind and behavior into line. Balance theory and cognitive dissonance have fallen into disfavor as the universal theories of attitude structure and change that their proponents once made them out to be,²⁰⁶ but legions of studies demonstrate that the phenomena are pervasive among Americans, if not the only forces at play.²⁰⁷ Psychologists have found the subjective experience of inconsistency to generate attitude change more dependably (1) when, in the case of cognitive dissonance, the dissonant situation is freely entered; (2) when, in the case of interpersonal balance, the values at stake relate to core self-concepts;²⁰⁸ and, in both cases (3) when, the other person is similar to the subject (a peer).²⁰⁹

Attitudes bias information processing. That people discredit information that challenges their attitudes and beliefs has been clearly demonstrated in widely varied contexts, from television viewers’ judgments of who performed better in a presidential debate, to political partisans’ views of media bias, to students’ views on whether a given set of studies supports or refutes the deterrence value of capital punishment or the safety of nuclear technology, to students’ evaluations of children’s performance on reading aptitude tests.²¹⁰ Remarkably, the subject presented with neutral information in evaluate-the-studies experiments ends up more deeply convinced of his priors than he was when the experiment began.²¹¹

C. *Social Psychology: Social Influence*

The core of social psychology is the study of influence. Two strands wind through the literature, one focused on peer or reference group ef-

204. On the history of balance theory and the evidence for and against it, see *id.* at 281–84.

205. On cognitive dissonance (theory and evidence), see Petty & Wegener, *supra* note 201, at 335–37.

206. Taylor, *supra* note 194, at 69–70.

207. Petty & Wegener, *supra* note 201, at 337.

208. Given the usual durability of self-concepts, imbalance with respect to a core self-concept is more likely to generate attitude change about the other person than to cause the subject to discard her self-concept.

209. On free choice, cognitive dissonance and the relevance of core self-concepts, see Petty & Wegener, *supra* note 201, at 336. And for studies suggestive of role of interpersonal similarity in balance theory, see *id.* at 348–49.

210. See Eagly & Chaiken, *supra* note 193, at 294; Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 26–29 (1998).

211. Rabin, *supra* note 210. This is consistent with the finding that high-intensity thought strengthens attitudes. See Petty & Wegener, *supra* note 201, at 366–67.

fects,²¹² the other on compliance with requests or commands that issue across a greater social distance.

1. *Reference Group Influence*

Reference group influence occurs through what social psychologists term “injunctive” and “behavioral” (or “descriptive”) norms, the former being norms with normative content, that is, norms that specify what the well-socialized member of the group ought to do, and the latter being nothing more than predominant or otherwise salient patterns of behavior. Descriptive norms have informational rather than normative content. In a world of costly information, playing copycat can be an efficacious means to one’s ends,²¹³ even a means to discovering one’s ends. Logically and empirically, descriptive norms carry the most weight when subjects encounter novel situations and can identify a reference group composed of people like them.²¹⁴ Descriptive and injunctive norms are ideal types. Behavioral regularities often have both descriptive and injunctive content.

Reference group behavior and perceived patterns of approval are pervasively influential, having been documented in dozens of settings.²¹⁵ Reference group influence is partly a matter of numbers, but the wealthy, powerful, and high-status have disproportionate pull.²¹⁶ Conformity to injunctive norms correlates positively with group cohesion and interdependence, and the strength of the subject’s identification with the group.²¹⁷ Conformity also increases to the extent that other group mem-

212. Social psychologists seem to use the terms “peer” and “reference group” interchangeably, to refer to a social grouping or class with which the subject identifies in some respect. See Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 193, at 151.

213. For economists’ demonstration of the point, see H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumer Demand*, 64 Q.J. ECON. 183 (1950) and, more recently, Sushil Biikhchandani et al., *Learning from the Behavior of Others*, 12 J. ECON. PERSP. 151 (1998)

214. Cialdini & Trost, *supra* note 212, at 157.

215. Social psychologists have documented the effect for behaviors as varied as littering, drug use, suicide, play in laboratory common-property experiments, extra-dyadic sex, helping out at the scene of an accident, political affiliating by college students, binge eating among sorority sisters, charitable donations, HIV-risk taking in gay communities and among heterosexual college students, and the returning of lost wallets. *Id.* at 155–60. Documented peer influence also bears on tax evasion, clothing and entertainment choices, and the likelihood that farmers will adopt sustainable agriculture practices. On tax compliance, see Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 340–44 (2001). For cites to studies on fashion in clothes and entertainment, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352–53 (1997). Regarding agricultural practices, see Shtiel et al., *supra* note 97, at 343 (finding that farmers’ perception of whether neighbors have adopted sustainable practices has a significant direct influence on the farmers’ decision to adopt such practices, and indirect influence through perceived profitability and attitudes toward alternative agriculture).

216. Cialdini & Trost, *supra* note 212, at 155.

217. Regarding cohesion, one study found that men in a “well organized” gay community were significantly more likely to take HIV precautions than men in a more ragged gay community. *Id.* Regarding strength of identification, another study found New Yorkers significantly more likely to return a lost wallet “primed” with a handwritten note indicative of a prior finder’s intent to return the wallet,

bers can observe the subject's behavior.²¹⁸ And subjects who have not staked out positions on a matter prior to encountering signals from the group are more likely to abide by the group norm.²¹⁹

2. *Compliance*

Compliance with an external request or demand is increasingly likely insofar as the subject likes the requester or perceives that others comply.²²⁰ Less intuitive results obtain with respect to perceptions of reciprocity, fairness, and deprivation. Reciprocity first: the requester who opens with a gift is far more likely to see his request fulfilled.²²¹ His generosity elicits a reciprocal sense of obligation. Researchers now use this insight in conducting mail surveys. Enclosing a check for some small amount of money, an anticipatory thank-you for the subject's time, greatly increases response rates. Not everyone responds, but few nonrespondents cash the check.²²² Regarding fairness, Tom Tyler has amassed considerable survey evidence for the proposition that perceived fairness, both procedural and substantive, has a greater bearing on compliance with the law than does the expected penalty for lawbreaking.²²³ Results on deprivation, labeled as "psychological resistance theory," also seem tied to perceptions of fairness. Shoppers, for instance, were found more likely to sign a petition in support of federal price controls when told that federal officials opposed distribution of the petition.²²⁴ This informational tidbit transformed the petition into a vehicle for slapping back at the government, independent of the shopper's take on the merits of price controls.

The social psychology results on compliance cohere with work in experimental game theory by economists and public choice scholars. Laboratory subjects prove consistently more cooperative in games that frame public-regarding moves as beneficent contributions to group welfare, as against games that cast these moves as alleviating some harm that the subject had been causing to the group.²²⁵ The positive frame arguably conduces to interpreting a generous opening move as gift, and the players swirl off into a cycle of virtuosity, good deed matching good deed.

if the grammar of the note suggested the writer was a native English speaker (the other half of the wallets were primed with a note that appeared to be written by an immigrant). *Id.* at 158–59.

218. *Id.* at 163.

219. *Id.* at 163–64.

220. *Id.* at 171–72, 174–75.

221. *Id.* at 175–77.

222. *Id.* at 175–76.

223. TOM TYLER, WHY PEOPLE OBEY THE LAW (1990). Note, however, that Tyler's studies rely on self-reports of compliance. There is a real risk here of so-called self-presentation bias, wherein the respondent dissembles to better himself in the eyes of the interviewer.

224. Cialdini & Trost, *supra* note 212, at 173.

225. The results are reviewed in James Andreoni, *Warm-Glow Versus Cold-Prickle: The Effects of Positive and Negative Framing on Cooperation in Experiments*, 110 Q. J. ECON. 1 (1995).

There exist repeat-play prisoners' dilemmas where cooperation can be habit-forming for rational, self-interested agents,²²⁶ but the experiments demonstrate something more, that rational self-interest is not always the dominant motive force at play in social dilemmas. Recent findings from the U.S., Europe, Asia, and Africa show that many players match good deed with good and bad deed with bad, whether or not it be rational *sensu* rational choice theory, even when reciprocation comes at a substantial personal cost.²²⁷ Paradoxically, some studies further indicate that pairs or small groups of people, given the choice of using law or other formal sanctions to reduce incentives to free-ride, may do better to decline formalism in favor of mutual gift-giving or mutual forbearance, even in one-shot games.²²⁸ That people have an inchoate feel for the stress of legalistic sanctions on cooperation in small groups is evident from experiments in which players can enact collective sanctioning rules.²²⁹ Players look askance at such measures; they begin with voluntarism and cajolery, and only adopt a sanctioning regime if cooperation breaks down.²³⁰

D. Social Psychology: Intergroup Relations

How do group affiliations form and shift? What consequences does group identity have for relations between members of different groups? Social psychologists find that groups take root in perceptions of a shared or common fate.²³¹ A "shared fate" exists when outcomes are interde-

226. For proofs and discussion, see Paul Seabright, *Is Co-Operation Habit Forming?*, in THE ENVIRONMENT AND EMERGING DEVELOPMENT ISSUES 283 (Partha Dasgupta & Karl-Göran Müller eds., 1997).

227. For reviews of the economics and political science literatures, see Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14(3) J. ECON. PERSP. 159 (2000); Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14(3) J. ECON. PERSP. 137 (2000). In some of the games that Ostrom discusses, the stakes amounted to three months of the participants' income. Fehr & Gächter, *supra*, at 161–62. For psychologists' results to the same effect, see Dean G. Pruitt, *Social Conflict*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 193, at 470, 474–76.

228. The most dramatic demonstration comes from labor-market games, structured as follows. There are twelve principals and twelve agents, and ten rounds of one-shot play. Principals may choose complete or incomplete contracts. Complete contracts specify the desired effort level and a fine for failure to perform to that level; incomplete contracts specify desired effort and leave the principal with the option to "commit" (verbally) to paying a bonus for extra effort. Most players choose incomplete contracts, and they fare much better than those who choose complete contracts. This result holds when bonuses rather than fines are used in the complete contract. See Fehr & Gächter, *supra* note 227, at 176–78. Several other studies show that the introduction of material incentives can "crowd out" moral motivations that previously sustained cooperation based on reciprocal generosity of forbearance. See generally *id.*; Kahan, *supra* note 215. For an example suggesting the power of informal solutions to environmental problems, see Juan Camilo Cardenas et al., *Local Environmental Control and Institutional Crowding Out*, 28 WORLD DEV. 1719 (2000). Note that in this study, unlike the labor market games, the incentive was imposed from outside the community, and it was less than optimal. Still, according to rational choice theory, a too-weak incentive is better than no incentive at all.

229. Pruitt, *supra* note 227, at 476–77.

230. *Id.*

231. Brewer & Brown, *supra* note 197, at 563.

pendent, a “common fate” when outcomes are parallel.²³² Group identification and intergroup tension rise hand in hand when groups compete with one another for resources,²³³ and conflict is more likely when groups reject each other’s central values.²³⁴

Groups fulfill some obvious human needs, but they are notorious among social psychologists for any number of pathologies. Groups polarize their members’ attitudes. That is, if a group forms among people whose views or beliefs about a given issue deviate in the same direction from the societal average, their attitudes will gravitate further toward the extreme.²³⁵ Polarization is greater to the extent that the matter at issue is one of values and judgment (rather than “fact”), and to the extent that members can observe one another’s views.²³⁶ Group leaders tend to express attitudes more polar than the group average.²³⁷

Intergroup conflicts are much more likely to escalate than interindividual conflicts;²³⁸ and interindividual conflicts grow more vulnerable to escalation the more the parties view each other as members of opposing groups, rather than as individuals.²³⁹ Group conflicts also breed “group attribution bias,” the skewed interpretation of ambiguous information regarding whether a particular outcome was intended by the other group, or resulted from some independent cause or accident of nature.²⁴⁰ Happy events get chalked up to happenstance, disasters to malicious intent.

Social psychologists have proffered some suggestions for dampening intergroup conflicts, though the literature is equivocal. Forming new, intersecting groups is said to be the most promising solution, one which draws support from numerous anthropological studies of feuding, and from laboratory experiments.²⁴¹ But the constituents of groups are people, not tinker-toys, and people do not always lend themselves to “reassembly” in intersecting group formations. Some psychologists, building on balance theory, do report success with strategies that bring members of the groups together to work, as individuals, on cooperative projects, in

232. *Id.*

233. *Id.* at 566–67.

234. Pruitt, *supra* note 227, at 487. This result obtains from studies of individuals, but it seems likely to generalize to groups.

235. Brewer & Brown, *supra* note 197, at 555–56; John M. Levine & Richard L. Moreland, *Small Groups*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 193, at 415, 439. For a lucid survey-for-laypeople of the very robust psychology literature on group polarization, see CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 13–47 (2001).

236. Levine & Moreland, *supra* note 235, at 439.

237. *Id.* at 431.

238. Pruitt, *supra* note 227, at 489 (reviewing findings that groups escalate further in response to “persistent annoyance” than do individuals; groups become more aggressive when the other party is punitive/insulting; groups prefer threats to promises; groups react more harshly to norm violations; and groups defect more often in prisoners’ dilemmas games).

239. *Id.* at 487.

240. Brewer & Brown, *supra* note 197, at 560–61.

241. *Id.* at 582–83. In lab experiments, the subject shows reduced evaluative bias (prejudice) when she shares at least one category membership with the target of her evaluation. *Id.*

settings that distract attention from group membership.²⁴² Other studies find that the resultant good feelings stay localized to individuals, rather than spilling over to the group,²⁴³ the corresponding recommendation is that the cooperative project take place in a setting that highlights group identities.²⁴⁴ If cooperation succeeds, the good feelings are more likely to attach to the group—but so too the bad feelings, if the cooperative venture breaks down.²⁴⁵

III. CHANGING ATTITUDES, SAVING LANDS

Social psychology makes sense of ranchers' attitudes toward black-footed ferret reintroduction,²⁴⁶ and of the emergence of the wise-use movement more generally. All the ingredients for escalating conflict between environmentalists and rural landowners are in place. There is competition for resources and control of land. There are long-term economic trends and threats of regulation that yield a sense of common fate among commodity producers. The regulatory danger also conduces to a sense of deprivation. There is an absence of personal relations across the divide, and of intersecting group identities. There are sharp differences in the kinds of value attached to nature—it requires no great leap of imagination for the rural agriculturalist to experience the urban environmentalist as wholly rejecting core rural values. Wise-use organizations benefit from conveying this impression, and their propagandists surely feed on the ways in which selective information processing makes of a grain of truth, the whole truth. Ultimately, polarized group conflict transforms different values into oppositional norms, such that there is pleasure or social reward to be had simply in foiling whatever the other group wants to do.

How then do we get out of this mess? With the resources now at hand—appreciations of the private-lands predicament, of the structure of attitudes toward nature, of the politics of rural advocacy, and of some central themes in social psychology—one can begin to discern several complementary paths of reform. The first (ideas) involves the self-understanding and public image of mainline environmental groups. The second (incentives) entails a large-scale expansion of stewardship subsidy programs. The third (gifts) involves the donation of land by environmentalists to experimental community trusts. The fourth (governance) modifies local government law so that landowners can band together into special districts and jointly regulate their use and management of natural habitats. The order in which I present these strategies corresponds, roughly, to what I deem their comparative importance, with special dis-

242. *Id.* at 579–80.

243. *Id.*

244. *Id.* at 581–82

245. *Id.*

246. *See supra* notes 77–86 and accompanying text.

tricts being the most important, and mainline environmentalism's self-understanding the least. That said, the usefulness of any one strategy depends on whether the others are adopted. The reforms cohere, and reinforce one another.

Bear in mind that these reforms take root in social science I have characterized as merely suggestive.²⁴⁷ The reforms amount to promising models for experimentation, but they promise nothing more.

A. *Ideas: Green Cabal? Green Pluralism*

Hunters, motorized recreationists, commercial fishermen, and especially trappers should all have a home in the mainline environmental movement. Each contingent values natural habitat and will pay to conserve it.²⁴⁸ Each is culturally rural.²⁴⁹ Each values nature somewhat differently, and very differently from the highly educated, big-city environmentalist. That is the point. An environmental ideology that embraces plural, and rural, valuations of nature is an ideology that unsettles wise-use oppositions. And an environmental group that bridges hunters, trappers, four-wheelers, and urban aesthetes and naturalists is, in the lexicon of social psychology, an intersecting group—the best medicine for intergroup conflict.²⁵⁰

The plural greens should strive for some token collaborative accomplishment with the mainline agricultural trade groups; cosponsor a watershed workshop, or an environmental stewardship award; join forces on a bill that locates a new source of funding for conservation management incentives; broadcast the accord to rural America with public service ads in farm and ranch journals; and sponsor a commodity report on Ag Radio. Any small accomplishment in this respect can work against the social meaning that the wise-use movement wants to establish for knee-jerk antienvironmentalism, i.e., that opposition as such signifies fealty to rural America.

Not all of the major environmental groups can welcome into their folds the hunting, trapping, motoring, and market-fishing newcomers. The market for charitable donations would not allow it, for (I presume) no small number of affluent urban environmentalists will support only those groups that hew to the donor's ideological line. Yet it is also my sense that many donors and foundations look to the environmental groups they support for guidance on better, more refined interpretations of that slippery concept with which the supporter so closely identifies: "environmentalism." A prudential argument for green pluralism should resonate within this segment of the donor community, especially among

247. See *supra* note 64 and accompanying text.

248. See *supra* notes 68–86 and accompanying text.

249. Trappers, hunters, and commercial fishermen tend to live in the sticks.

250. See *supra* note 241 and accompanying text.

donors wooed by green groups that fancy themselves pragmatic.²⁵¹ These groups must take the lead. If in embracing green pluralism they get into occasional public spats with the rest of the mainline greens, so much the better. Open disagreement over policies and goals cuts against the wise-users' cabal thesis.

A little bit of public infighting, a few celebratory "Support A Trapper, Save the Earth—Wear Fur!" Earth Day posters, an on-the-side collaboration with mainline agriculture groups—these achievements, standing alone, may not change much.²⁵² Group attribution biases and the general resistance of beliefs to nonexperiential evidence will work against the meaning that environmental pluralists hope to convey. The bit players in local dramas may contribute more than the national advocacy groups to landowner perceptions of environmentalism. Green pluralists' communicative efforts will, however, ease the way for rural landowners to reconceptualize how environmentalism fits with the deep structure of their beliefs, when and if more personal, experiential happenings give them reason to do so. And, reciprocally, the incentives, gifts, and institutions of governance to which I turn next can help to make green pluralism more intelligible and attractive to rural landowner and urban environmentalist alike.

B. Incentives, Gifts: Forming New Social Relations

With the exception of The Nature Conservancy, the mainline environmental groups have a weak presence in the field, and even The Nature Conservancy's involvement with landowners has been limited, traditionally, to consummating real estate transactions.²⁵³ As a result, there are few ongoing contacts between environmental groups and locally influential landowners, and this absence of social relations smoothes the way for the wise-use movement. Credit the insight to balance theory: if environmentalist and rural landowner came to like one another through an ongoing, shared endeavor they both evaluate positively, softening re-interpretations of the harshest oppositions in their worldviews would

251. The leading candidates, then, are the National Wildlife Federation (which already has a substantial base of hunter-supporters through its state affiliates), Environmental Defense, and The Nature Conservancy. For more on these groups pragmatic ambitions, see their respective web pages: <http://www.nwf.org>, <http://www.environmentaldefense.org>, and <http://www.nature.org>.

252. Norm changes, however, are often subject to discontinuities and positive feedbacks. See Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1589–90 (2000); Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 959–64 (1997).

253. Recently, though, the Conservancy has broadened its community involvements. See THE NATURE CONSERVANCY, *DESIGNING A GEOGRAPHY OF HOPE: A PRACTITIONER'S HANDBOOK FOR ECOREGIONAL CONSERVATION PLANNING* (2d ed. 2000), available at <http://www.conserveonline.org/2000/11/b/COH2-v2;internal/&actions=buildframes.action> (last visited Mar. 9, 2002).

likely follow.²⁵⁴ To this the green ideologue may react in horror, but not so the environmental pluralist, who welcomes diversity within environmentalist thought.

Told to reach out to landowners, the environmentalist's instinct may be to track down owners of the most critical habitat with the goal of working out a management plan, or to seek out the most sympathetic landowners. These strategic intuitions reflect impeccable (conventional) economics. If you want to protect biological diversity, the argument goes, begin with the lands most productive of biological diversity, and strike your first deals with the landowners willing to sell low (conservation-minded landowners are the likely low bidders, because they receive nonpecuniary benefits from the deal). Then, if you want more sellers, raise your price.

Social psychology suggests a different strategy. Of course the field representative should target areas of ecological significance, but within these locales she would do better to make contact with the most respected landowners or, if local gradients of esteem elude the outsider, the most objectively typical landowners. If respected or typical landowners collaborate with the environmentalist, others are likely to follow.²⁵⁵ As for the object of collaboration, the environmentalist should beware landowner attitudes that seem likely to have been acquired through extensive thought or direct experience, and those bound up with core self-concepts.²⁵⁶ She is better off starting with the ordinaries of game management,²⁵⁷ or "new" issues like open-space,²⁵⁸ rather than critical habitat for endangered species.²⁵⁹ The chosen issue should have obvious use value and a connection to rural heritage, these being primary in most rural landowners' valuation of nature.²⁶⁰ The landowner's participation should be induced with carrots rather than sticks, as the "free

254. See *supra* notes 242–45 and accompanying text (discussing balance theory). Compare the results on compliance, *supra* note 220 and accompanying text, with depolarizing group conflict, *supra* Part II.D.

I assume in this part that social contact between environmental field representatives (acting in dealmaker capacities) and rural landowners would result in "liking" relationships. Bearing in mind: (1) the baseline (villainous stereotypes propagated via adversarial rhetoric); and (2) dealmakers' incentives to get along, this assumption seems reasonable.

255. Descriptive and injunctive norms both come into play. See *supra* Part II.C.1.

256. See *supra* notes 201–03 and accompanying text. This is not to deny the possibility or even the eventual likelihood of revised interpretations to core self-concept, only to recognize that they are difficult to predict and (for the outsider) probably dangerous to target. See *supra* notes 198–99 and accompanying text.

257. This is so because rural landowners are often hunters.

258. The advantages of starting with new issues follows from the fact that social influence is greatest when the subject has not formed views on the matter at issue prior to encountering signals from the group. See *supra* note 219 and accompanying text.

259. Regarding which (thanks to controversy) the landowner is more likely to have established views based on intense thought and, possibly, the "experience" of protest.

260. Recall Kellert's findings on the primacy of use-value and the rural landowner's attitudes toward nature. And recall the sociological studies that point to tradition and social relations as important motivations for farmers. VALUE OF LIFE, *supra* note 42.

choice” frame makes cognitive dissonance an ally of environmentalists²⁶¹ and avoids a deprivation backlash. Positive financial incentives also imbue ecological resources with a new use value.²⁶² When the environmentalist appeals to the landowner’s core values—tradition, use, etc.—she challenges wise-use oppositions, and it is here, on the personal, experiential level, that the challenge is likely to connect. With personal rapports established, cognitive dissonance starting to work, and social meanings changing, the environmentalist is finally positioned to negotiate protections for biological diversity. The price probably will be lower and the level of compliance higher than if the environmentalist had made biodiversity the main object of her offers from the beginning.²⁶³

Case studies of stakeholder collaboration to solve place-based environmental problems offer preliminary reinforcement for this strategy. Julia Wondolleck and Steven Yaffee, leading authorities on such enterprises, report that informal socializing helps to build rapport among initially wary participants,²⁶⁴ and that an initial small success on an uncontroversial front can help the group to succeed in matters fraught with controversy.²⁶⁵ Farmers and ranchers, loggers and miners may all start out rather disdainful of the environmentalists’ objective, but the surprise discovery of a common interest, the good fortune of an initial small success, and the resulting acclaim from high places sparks enthusiasm for further environmental improvements, particularly if highly respected landowners get behind the collaborative effort.²⁶⁶ In the most hopeful cases a kind of prideful experimentalism sets in; commodity producers identify with the collaborative effort and open themselves to new ways of doing business on behalf of nature.²⁶⁷

261. Recall that cognitive dissonance is more likely to realign values with (induced) behavior if the behavior—here, managing the land for outcomes favored by environmentalists—is freely chosen. See *supra* note 209 and accompanying text.

262. It should attenuate resource conflict, which undergirds intergroup conflict. See *supra* note 233 and accompanying text.

263. It may interest the reader to notice the similarities between the narrative I have just given and the recurring thesis (among political theorists) on the moderating, socializing, even “civilizing” consequences of market relationships. Cf. Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LIT. 1463 (1982).

264. WONDOLLECK & YAFFEE, *supra* note 81, at 161–62.

265. *Id.* at 186–87. But keep in mind the limits of these case studies. The collaboratives are young, their successes nascent. Cf. Kenney, *supra* note 188, at 35–40 (arguing that the evidence is too meager to conclude that the social “bridging” within collaborative groups consistently translates into on-the-ground ecological improvements). Whether the early successes are just an instance of the “Hawthorne Effect” is an open question (the “Hawthorne Effect” is organizational psychology’s version of the placebo effect). Cf. Cary P. Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 436–37 (2001) (explaining how the Hawthorne Effect undercuts seemingly impressive “participant satisfaction” findings in studies of negotiated rule-making).

266. On the role of public acclaim of holding collaboration groups together (and focusing them on environmental goals), see WONDOLLECK & YAFFEE, *supra* note 81, at 116–17. Regarding the opinion leaders among landowners, see *id.* at 185–86.

267. *Id.* at 103 (quoting gold miner who had come to identify with the collaborative group’s Habitat Conservation Plan); *id.* at 137 (quoting rancher-participant in the Fish and Wildlife Service’s Part-

Promising incentive programs are already in place, like the FWS's Partners for Wildlife initiative.²⁶⁸ Environmentalists should put expansion of these programs atop their legislative agenda. They should also back legislation that would have the Natural Resource Conservation Service (NRCS), a branch of the U.S. Department of Agriculture and the main repository for stewardship incentive programs,²⁶⁹ administer its incentives jointly with the FWS. Why? Because a larger proportion of Department of Agriculture field staffers presumably come from farm and ranch families.²⁷⁰ The relationships that form between NRCS staff and landowners, not being "cross cultural," would be less productive of depolarizing attitudinal change than relationships between FWS personnel and the landowners.²⁷¹ (Some bureaucratic redundancy in the incentive programs may be desirable, however, in that outreach by NRCS staff might get a hearing from farmers and ranchers who would turn a stiff lip to the FWS).²⁷²

The toughest landscapes for environmentalists to conserve will be those where endangered species are, transparently, the environmentalists' only concern, and where the reason for endangerment is a practice of resource management ensconced in local custom and tradition. The Great Plains' prairie dogs communities offer a case in point. Prairie dogs are a keystone species—the swift fox, the burrowing owl, the mountain plover, the ferruginous hawk, the golden eagle, the horned lark, the deer mouse, the grasshopper mouse, and, of course, the black-footed ferret, are all sustained by prairie dog towns.²⁷³ Generations of rancher-led poisoning and shooting campaigns, aided recently by the plague, have re-

ners for Wildlife Program); *id.* at 147 (regarding allegiance through participation in stream monitoring); *id.* at 170–71 (illustrating farmers' newfound interest in endangered falcon, following their participation in release of reintroduced birds on nearby wildlife refuge); *id.* at 190 (proposing that innovation itself has symbolic powers to motivate).

268. See generally FWS, *Partners for Wildlife*, at <http://ceres.ca.gov/wetlands/introduction/partners.html> (last visited Sept. 10, 2002). Promising case studies of Partners for Wildlife initiatives are profiled in STEVEN L. YAFFEE ET AL., *ECOSYSTEM MANAGEMENT IN THE UNITED STATES* (1996).

269. For a rundown on NRCS programs, visit the web page <http://www.nrcs.usda.gov/NRCSProg.html> (last visited Sept. 10, 2002).

270. I know of no comparative studies on the background of NRCS and USFWS employees, but I have had professional dealings with a number of NRCS employees, many of whom grew up on the family farm or ranch.

271. Cf. *supra* Part II.D on group conflict. A second reason for giving the lead role to FWS is that the professional commitments of its conservation biologists and wildlife managers make it less susceptible to "capture" by agricultural interests. Capture has been a problem with conservation incentive programs administered by the Department of Agriculture in the past. See *infra* Part VI.A.

272. This follows from balance theory, insofar as the farmer identifies the NRCS employee as a fellow member (by family heritage or professional commitment) of the agricultural community. Because of this identification, the NRCS employee has a better shot than the FWS employee at opening the farmer's mind to a particular conservation practice, but relations with the FWS employee would be comparatively more productive of general attitudinal change toward biodiversity conservation and those who advocate for it.

273. Natasha B. Kotliar et al., *A Critical Review of Assumptions About the Prairie Dog as a Keystone Species*, 24 ENVTL. MGMT. 177, 181–85 (1999).

duced prairie dogs to roughly one to six percent of their historic range.²⁷⁴ Ranchers think this just as well. They are proud of their eradication efforts, and convinced that prairie dogs compete with livestock for forage. Scientific studies to the contrary fall on unlistening ears.²⁷⁵

Social psychology offers no algorithm for transforming attitudes deeply entrenched in culture and experience. It offers hope, though, for an all-out effort by environmentalists that would: (1) erode the material base of group conflict between environmentalists and Plains ranchers; (2) elicit the sense of reciprocal obligation through gift-giving; and (3) establish new bases of experiential knowledge within the rancher community. Here then is a prescription for the greens. Buy up a few ranches that feature a mix of vibrant dog towns and dog-free pastures. Transfer these to a charitable trust whose articles of incorporation mandate a board of directors composed of environmentalists, local ranchers, agricultural extension agents, and FWS personnel.²⁷⁶ In a gesture of equal partnership and mutual acceptance, split the income from the trust between a social institution special to the ranchers, like the local rodeo, 4-H program, or community school, and a fund for voluntary habitat improvement projects within an ecologically and culturally defined jurisdiction of nearby ranches.²⁷⁷ Impose two conditions on grazer lessees: first, that they own ranch property within the jurisdiction, and, second, that they join in the design, administration, and publicizing of an ongoing monitoring project (on gift lands) regarding the impact of prairie dogs on livestock weight gain, health, forage utilization, and the like. The trust, then, serves both as gift and avenue to new experiential knowledge.

To abate resource conflict, the environmentalists might offer to assume the risk of an ESA listing of the prairie dog or its dependents, selling (“for a peppercorn”) contingent put options of long duration.²⁷⁸ *Pro-*

274. U.S. Fish & Wildlife Serv., *12-Month Administrative Finding, Black-Tailed Prairie Dog*, § 2.4.3, available at <http://www.r6.fws.gov/btprairiedog/12month2000> (last modified May 11, 2001).

275. For a more extensive discussion of these points, see *supra* text accompanying notes 77–86.

276. On charitable conservation trusts, see generally FAIRFAX & GUENZLER, *supra* note 178. The trust I propose here would deviate from one of Fairfax and Guenzler’s design principles—that conservation trusts ought to have narrowly defined, single-mission purposes. *Id.* at 204. Mine would have the joint purpose of conserving prairie dogs, building knowledge about prairie dogs, building ties between environmentalists and ranchers, and earning income for local social institutions. Fairfax and Guenzler specifically caution against trusts that combine “social” and environmental purposes. See, for instance, their analysis of the North Dakota Wetlands Trust. *Id.* at 115–33. I disagree with Fairfax and Guenzler on this point, and will lay out my argument in a forthcoming article.

277. A self-conscious effort by environmentalists to support ranchers’ social institutions would undermine the conflict-escalating notion that environmentalists “wholly reject” the ranchers’ core values.

278. For the environmentalists, this is probably a low-risk guarantee, given: (1) the data that refute the prairie dog/livestock competition hypothesis, see *supra* note 85; and (2) the potential for commercializing recreational shooting of prairie dogs. (The growing market for prairie dog hunting is illustrated, quite literally, in *Prairie Dog Digest*, a new “how to, where to” guide for enthusiasts. See <http://www.prairiedogs.com> (last visited Sept. 10, 2002). The main (but remote) risk for the green guarantor may be the possible development, as yet unforeseen, of farming practices that make it profitable to convert grazing land into farmland, a conversion that the ESA might forbid. In other landscapes, where the opportunity cost of habitat protection is higher, the guarantor strategy may be fi-

vided that one or more listed species exists within the jurisdiction, the contract would read, you (the rancher) at the moment of your choosing may sell any or all of your property to us (the environmental group) at a price determined by a third-party appraiser, said price to reflect the value of comparable land free of prairie dogs, plus any identifiable risk premium attributable to the ESA.²⁷⁹ Such a contractual arrangement would give the ranchers a (weak) incentive to protect listed species lest they lose the right to exercise the option, while giving environmentalists an incentive to facilitate economic utilization of endangered species so as to keep land values from declining.²⁸⁰

The shared contingency of the ranchers' option contracts gives the ranchers a (thin) shared fate, which conduces to group identity formation.²⁸¹ This bodes well for local environmental attitudes, because the strengthened local identity probably competes with a broader (and less green) "rancher" or "wise-use" identity. The local peer group offers social reinforcement for whatever positive feelings about the environmental group that the trust experience elicits within the rancher.²⁸²

Incentives and gifts should soften antienvironmentalist hostilities. It is an open question whether their impact will radiate beyond ideology to foster, among rural landowners, intrinsic interest in and regard for nature. I would submit that there are two necessary conditions for a person to develop naturalistic interest and concern for nature.²⁸³ First, the subject must have firsthand experience of discovery in nature, be it aesthetic, scientific, emotional, or otherwise.²⁸⁴ Second, the subject must be psychologically open to the idea that naturalistic interest and regard for nature are goods of high order. Policies that erode rural antienvironmentalism and celebrate the landowner's ecological accomplishments help to realize the psychological condition. Incentives and gifts that invite the

nancially infeasible. Listing guarantees must be carefully framed, to avoid raising unrealistic expectations in other landscapes.

279. The risk premium reflects the fact that an ESA listing may depress the price of comparable land bereft of prairie dogs, if there are nontrivial odds that prairie dogs will recolonize that land.

280. Because this ESA currently proscribes any intentional "takes" of listed species, even if locally sustainable, the contractual guarantees might even change the politics of ESA reform. *See* 16 U.S.C. § 1532 (2000).

281. *See supra* notes 231–32 and accompanying text.

282. Of course, it is also possible that the ranchers' increased mutual dependence will produce conflict, and that this conflict will prevent a unified and constructive local identity from forming. Because the ranchers' shared fate is thin (the value of the option modest), however, I think it most unlikely that the option contracts will rend the community.

283. *Cf.* THE BIOPHILIA HYPOTHESIS, *supra* note 16; STEPHEN R. KELLERT, KINSHIP TO MASTERY: BIOPHILIA IN HUMAN EVOLUTION AND DEVELOPMENT (1997). The biophilia hypothesis posits an innate human interest in affiliating with nature. If so, developing an affinity for nature entails only the unlogging of psychological or circumstantial blockages.

284. This refrain recurs in American environmental thought. *See infra* notes 461–62 and accompanying text.

landowner's participation in conservation stewardship help to realize the experiential condition. The outlook is hopeful.²⁸⁵

C. Governance: New Lawmakers for Nature

The solutions discussed so far have a pair of shortcomings. For one, they do not solve the problem with which this article began, that of holdouts. So long as private-lands conservation proceeds contractually, one landowner at a time, it will always be vulnerable to holdouts, but for the exceptional case where social pressures are so acute that landowners experience themselves as having little choice but to join in the conservation plan. Social pressures are at the root of the second shortcoming. While the tactics I have proposed constructively ambiguate²⁸⁶ the local meanings of both wise-use vitriol and environmental cooperation, they do not clearly reveal a shared understanding of how the well-socialized, community-minded farmer or rancher ought to behave, vis-à-vis environmentalists, public wildlife officials, and the land. Private, cooperative conservation agreements are expressively feeble, compared to the wise-users' county supremacy and antipredator ordinances and their operative, sheriff and county commissioner orchestrated lawbreakings. Private conservation agreements may not be of public record. They may not be featured in the press. And they lack majoritarian signification.

The balance of this article begins to develop an historically and culturally rooted solution to the holdout and expressive shortcomings of voluntary conservation agreements. The proposed solution is an updating of the agricultural special district.

285. At least where ecological gains are visible on the landowner's property. If the benefits accrue only downstream, the landowner's experience of them is probably attenuated.

286. The concept of "ambiguation" was introduced to the legal literature by Lawrence Lessig, who uses it to describe a law or other social action that has the effect of adding a new and different meaning to a particular action, and thereby making it practical for the actor to deny the meaning that would otherwise be ascribed to his act. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968-72 (1995).

1. *The Special District Model*²⁸⁷

American farmers and ranchers have long benefited from landowner-initiated and landowner-controlled special districts, which furnish irrigation water, drain swampy lands, control pests, even seed the clouds.²⁸⁸ There are thousands, maybe tens of thousands, of such districts across the country.²⁸⁹

A prototypical special district enabling act begins by specifying a purpose for which landowners may create special districts, such as irrigation. It then establishes a petition process by which districts come into existence. District proponents are required to collect the signatures of a

287. I am not the first legal scholar to envision a role for special districts in solving environmental problems, but the present article is the first to tie the special district to attitudinal change and the sociocultural problematics of conservation stewardship in rural communities. The district varieties I conceptualize and categorize in *infra* Part IV are also new to the literature. The balance of this footnote briefly annotates the existing literature on special districts and conservation.

One strand in the literature looks at the existing landscape of special district institutions and asks, what should be done to make them greener? See John H. Davidson, *Using Special Water Districts to Control Nonpoint Sources of Water Pollution*, 65 CHL.-KENT L. REV. 503 (1989) (arguing that drainage and irrigation districts can and should be envisioned not just as mutual-benefit associations, but also as point sources (discharge pipes) of water pollution, and regulated as such under the Clean Water Act); Larry C. Frarey et al., *Conservation Districts as the Foundation for Watershed-Based Programs to Prevent and Abate Polluted Agricultural Runoff*, 18 HAMLIN L. REV. 151, 163–66 (1994) (explaining and endorsing a new water pollution law in Texas that instructs the state conservation agency and local conservation districts to jointly: (1) identify “target watersheds” that suffer from agricultural pollution whereby, (2) develop recommended conservation standards, and (3) bring enforcement actions against egregious polluters); Deborah Moore & Zach Wiley, *Water in the American West: Institutional Evolution and Environmental Restoration in the 21st Century*, 62 U. COLO. L. REV. 775, 821 (1991) (proposing that water districts be “greened” with statutory mandates for environmentalist representation on their boards).

A second strand in the literature looks to new special districts as an answer to the “boundary problem.” It is a truism that environmental problems do not respect political boundaries. But with special districts, society can create new boundaries that make ecological sense, or so the argument goes. Articles in this vein include Geoffrey Heal et al., *Protecting Natural Capital Through Ecosystem Service Districts*, 20 STAN. ENVTL. L.J. 333 (2001) (proposing a network of ecosystem service districts, which would monitor and produce “optimal” stocks of natural capital) and Daniel B. Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 ECOLOGY L.Q. 745 (1997) (arguing for regional conservation governance, at a geographic level intermediate between the county and the state, via new special district institutions that resemble regulatory agencies but are accountable to the region’s voters). Scholars of urban law have put forth special district solutions to another border problem—what to do when existing political jurisdictions are too large, relative to the scale of an issue. See Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998) (proposing special assessment districts to finance block-level amenities in old residential neighborhoods).

A third “strand”—if a lone note can be deemed a strand—also envisions a new set of institutions, but turns the focus from geography to the interests of the polity. Special districts, with their limited constitutional exemption from the one-person/one-vote requirement, might be designed so as to entrench environmentally sympathetic interests and disfranchise others. See Michael Grynberg, Note, *Silver Lining or Double Edged Sword? Equipopulation Exemptions and Environmental Protection*, 17 VA. ENVTL. L.J. 553, 577–90 (1998).

288. JOHN C. BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES 21–23 (1957).

289. As of the late 1970s, there were more than 900 irrigation and water conservation districts alone, and more than 25,000 special districts in total (not including school districts), though the second figure includes many urban and suburban districts. John D. Leshy, *Irrigation Districts in a Changing West—An Overview*, 1982 ARIZ. ST. L.J. 345, 347 n.10–11.

certain number or fraction of the landowners in the district they propose, whereupon the petition is heard by a county judge or county commissioners.²⁹⁰ The presiding officials make a finding as to whether the district serves the public interest, and then hear objections from any landowners who want to be excluded on the ground that they would receive no benefits from the district.²⁹¹ After revising the proposed boundaries to exclude unbenefited landowners, the officials order the district created or, depending on the statute, hold a vote of the affected landowners. Some enabling acts give one vote to each landowner; others weigh votes by acreage or assessed property value.²⁹² Many enabling acts condition special district creation on supermajoritarian rather than simple majoritarian assent from the affected landowners.²⁹³

Some special district statutes instruct the county court or commissioners to appoint the district directors. Others have the district landowners elect directors.²⁹⁴ Directors administer the district project, levy assessments, and issue bonds. Their discretion in distributing the costs of the district among member landowners may be sharply constrained by statute or by the courts.²⁹⁵

Agricultural special districts commonly exercise powers of taxation and eminent domain; much less often do they employ the police power. Still, police-power districts are not without precedent.²⁹⁶ For example, liability for livestock trespass has been an object of special district regulation.²⁹⁷ And in rare cases, landowner-controlled special districts wield planning and zoning authority comparable to that of a city or county.²⁹⁸ Also, some otherwise ordinary special districts carry out their work under the guise of the police power.²⁹⁹ A police-power justification traditionally exempted these districts from certain lines of constitutional chal-

290. JOHN A. FAIRLIE & CHARLES M. KNEIER, COUNTY GOVERNMENT AND ADMINISTRATION 482-85 (1930).

291. This is a constitutional requirement in many states. See, e.g., *Summerville v. N. Platte Valley Weather Control Dist.*, 101 N.W.3d 748 (Neb. 1960).

292. A study of irrigation districts found that seventy percent of the Western states provide at least the option of weighted voting to their irrigation districts, and that about half of the extant districts use weighted voting, and that the trend is toward more districts using weighted voting. Tim De Young, *Governing Special Districts: The Conflict Between Voting Rights and Property Privileges*, 1982 ARIZ. ST. L.J. 419, 423-27.

293. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE PROBLEM OF SPECIAL DISTRICTS IN AMERICAN GOVERNMENT 70 (1964).

294. FAIRLIE & KNEIER, *supra* note 290, at 482-85.

295. In a critical early holding on irrigation districts, for instance, the U.S. Supreme Court indicated that the "fairness" of the enabling act's requirement that assessments issue in proportion to delivered water was central to the act's constitutionality. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

296. WM. HERBERT PAGE & PAUL JONES, TAXATION BY LOCAL AND SPECIAL ASSESSMENTS §§ 5, 93 (1909).

297. *Ricca v. Bojorquez*, 473 P.2d 812 (Ariz. Ct. App. 1970), *Merritt v. No Fence Dist. No. 2 of Jefferson County*, 172 S.W.2d 684 (Ark. 1943).

298. The Reedy Creek Improvement District, established by Florida for Walt Disney World, has such powers. 1967 Fla. Laws chs. 67-764.

299. PAGE & JONES, *supra* note 296, §§ 5, 93.

lenge.³⁰⁰ Assessments for draining and filling wetlands and channelizing rivers have been so justified.³⁰¹

As a way out of the private-lands predicament, landowner-controlled special districts (“special nature districts”) have several virtues. They can discipline holdouts; they jibe with the political rhetoric of the mainline agricultural trade groups; and they are uniquely positioned to change the normative valence of ecological stewardship and government cooperation in rural landowner communities. Also, they powerfully establish a shared fate among member landowners.³⁰²

For purposes of these arguments, let me stipulate a few features of the nature district: (1) that its existence depends on dual-supermajority support from the member landowners (a straight-up vote or petition, and one weighted by acreage or assessed value);³⁰³ (2) that its ordinances take effect subject to referenda approval by the member landowners, again on a dual-supermajority basis;³⁰⁴ and (3) that it is governed by elected rather than appointed commissioners. Nonlandowners would not have the right to vote in special districts elections.

2. *Disciplining Holdouts*

Eminent domain and the police power are the familiar solutions to severe holdout problems. But against the grain of landowner sentiment, eminent domain and the police power work poorly for conservation holdouts.³⁰⁵ This problem should be infrequent in nature districts, whose existence (as stipulated) requires supermajority support from the affected landowners, and whose governing body answers to them. To subvert eminent domain or the police power as exercised by a nature district would not be to strike a blow for “custom and culture” against distant environmentalists or bumbling bureaucrats, but to reject one’s own community. Neighbors would be watching, chattering, and dropping

300. *Id.* § 5. The basic idea (in nineteenth century terms) is that police power special districts discharge an obligation of the landowners, and as such the unbenefited landowner has no constitutional right to be excluded from a police power district. I will take up the constitutional law of special districts in a forthcoming paper, with particular attention to certain perplexing and as-yet-inchoate aspects of the law that the use of special districts for nature conservation implicates.

301. *Id.* § 97.

302. Recall the role of shared fate in forging group identity. *See supra* notes 231–32, 281–82 and accompanying text.

303. This means not only that a dual supermajority is needed to create the district in the first place, but that a single “superminority” can eliminate the district (say, by petition) at a subsequent date. That is, if sixty-percent approval (by head and by acreage) were needed to create the district, forty-percent disapproval (by head *or* by acreage), at a later date, would terminate it.

304. Conversely, regulatory “disenactments”—the removal or retracting of regulatory or fiscal impositions—would require only minority support. That is, if the supermajority threshold to enact an ordinance were sixty percent, an ordinance would be removed by any vote in excess of forty percent. This will undoubtedly create some nettlesome legal questions, e.g., does amendment *X* constitute new legislation or a disenactment?, but it is probably necessary to avoid legal obsolescence (and the costs of eliminating obsolescent districts and starting over from scratch).

305. *See supra* Parts I.B, I.D.1.

hints to prosecutors. Deviants might try to outflank their neighbors, destroying habitat preemptively, but nature districts greatly reduce the window of opportunity for such mischief, relative to federal or state regulation. Information asymmetries are likely to be less acute, and neighbors who learn of preemptive habitat destruction are positioned to respond quickly, with special district regulations. Interest-group lobbies, line-item budgets, and competing priorities that constrain administrative agencies like the FWS do not equally box in the neighbors.

Notice the role of supermajority choice in establishing the meaning of the dissenter's subversion or foot dragging. If nature districts were to come into existence and impose restrictions with simple majority support, the dissenter could plausibly contend that his vision for the community is basically the equal of the (scant) majority's.³⁰⁶ But the dissenter who pushes back against a 60:40 or 2:1 majority unquestionably bucks the tide.

3. *Identity Secession?*

Nature districts inevitably will highlight fissures and rough spots on the plane of community, areas of contention that had been conveniently obscure when the spotlight was aimed at a distant and partly fictitious environmental foe. Economically or subjectively, some landowners will stand to benefit from the district more than others. Newly apparent or newly relevant visions of individual rights and community welfare may grate against each other. Some landowners will identify with nascent factions, and it is conceivable that for those most aggrieved, the community as picked out by district boundaries may cease to matter as a reference group.

Conceivable, yes, but implausible, so long as the landowners encircled by the nature district boundary identified with one another as neighbors and peers in the predistrict days.³⁰⁷ (Which is likely to be true so long as the district is fairly small and compact, consisting perhaps of several dozen to several hundred properties.)³⁰⁸ In the hinterlands, breaking local ties is costly.³⁰⁹ Rural people really do have smaller, more neighbor- and kin-centered social networks, and longer lasting and more multiplex relations within those networks, than do urban people.³¹⁰ The

306. Not that this ought to justify illegal subversion, but the range of subversionary tactics is great, and it might be thought to justify certain forms of resistance.

307. A recognition that may derive from topography, shared property or production activities (an agricultural co-op, say, or communal brandings and roundups, or a common irrigation ditch), a common place of worship, a common school, or a common town or market center, among other things.

308. I hazard these numbers based on my anecdotal knowledge of landowner-initiated zoning districts in Montana.

309. Cf. *supra* notes 95-97 and accompanying text (describing rural landowners' willingness to forego maximal financial return (on their land) to maintain local relationships and practices).

310. Beggs et al., *supra* note 166.

odds of widespread “identity secession” from small nature districts appear remote.

4. *The Political Scene*

Recall that the mainline farm and ranch groups outwardly support environmentalists’ desire for ecologically productive lands and waters.³¹¹ They break with environmentalists over means, favoring individual choice, stringent definitions of regulatory takings, and locally tailored management. They support incremental reforms that move decision making from the federal government to the state and local level. Special nature districts fit the emphasis on locally tailored solutions, while challenging the voluntarist principle. Yet they frame the challenge with analogies that farmers and ranchers can recognize. Of course conservation initiatives must reckon with holdouts, just as irrigation, drainage, and pest control projects do. It is a familiar problem, one for which agriculturalists can claim with pride their own solution: the landowner-controlled special district.

5. *The Expressive Kicker*

Nature district enactments will have more expressive power than the run-of-the-mill county supremacy ordinance. Parts of the explanation I have just alluded to: the different meanings of dissent against supermajority and simple-majority processes, and the social upshot of tailoring special district boundaries to fit the geographic contours of real, live, subjectively experienced communities, rather than the nominal community defined by extant jurisdictions like counties.

Of equal importance, the special district’s voice is that of the landowners, and fellow landowners presumably comprise a more significant reference group (for the landowner) than does the county polity as a whole. With respect to “descriptive norms”—cues to effective action in a world of imperfect information—the similarly positioned (i.e., fellow landowners) are the normatively influential.³¹² As for “injunctive norms,” landowners probably care more about how they are viewed within their social and vocational class, i.e., by their fellow landowners, than about how they are seen by county residents at large.

In some cases reference group influence is mainly a matter of numbers; in others, high-status opinion leaders make all the difference.³¹³ Insofar as influence correlates with landownership or wealth,³¹⁴ a supermajority vote weighed by acreage amounts to a status-weighted expression.

311. See *supra* Part I.C.2.a.

312. See *supra* Part II.C.1.

313. See *supra* note 216.

314. Which social psychologists not surprisingly have found to be true (regarding wealth). *Id.*

The unweighed vote amounts to a pure numbers expression. A nature district with dual-supermajority support possesses both sources of normative power.

A skeptic might remind this writer, however, that on what I earlier called a plausible expressive account of law-and-norms, law helps “the mistaken citizen” to better understand views that secretly predominate within the polity.³¹⁵ The anonymous ballot and the politicians’ incentives help to uncover the true sentiments that lie beneath widely falsified preferences, and social change results.³¹⁶ Yet members of a tight-knit community would seem to have little to gain from falsifying their preferences on matters of policy. They have “thick” reputations, based on much information. The landowner known as upstanding and concerned for the community’s welfare would not seem likely to suffer disrepute for simply voicing and explaining her belief that an established norm is counterproductive, provided that she does not have an obvious conflict of interest (i.e., stand to realize disproportionate personal benefits from the norm change), and that she continues to obey the extant norm, unless others (a majority?) in the community come around to her view. Indeed, this kind of criticism should redound to the community’s welfare over the long haul. Presumably, then, the well-functioning community fosters or at least tolerates it.³¹⁷ Regardless, secrets are hard to keep in small communities. Everyone knows each other’s business, including who cooperates with conservation agencies and how.³¹⁸ It follows that the nature district is likely to *reflect* community norms, without adding to or transforming them. The nature district’s expressive power is a redundancy.

This argument elides certain distinctive features of “nature norms.” Norms differ in kind, and law’s likely relevance to nature norms turns on certain qualities that distinguish them from, for example, the livestock trespass norms that Ellickson documented in Shasta County. Let me introduce three ways in which nature districts seem likely to influence nature norms however rare be preference falsification on questions of policy within tight-knit communities. Nature districts plausibly modulate norms (1) by counteracting landowners’ cognitive errors in identifying the extent of support for nature norms, (2) by helping landowners to choose and give specificity to the content of such norms, and (3) by eroding common but untenable assumptions about the relationship among different sets of values.

315. See *supra* notes 138–41 and accompanying text (discussing theory of Richard McAdams).

316. *Id.*

317. This would seem a corollary of Ellickson’s efficient norms hypothesis. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW* 170–81 (1991). McAdams’s account of how inefficient norms persist relaxes Ellickson’s “tight knit community” assumption and develops a reputational argument (against an implicit backdrop of “thin” reputations). See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 396–97, 420–24 (1997) (discussing underprovision of norm criticism due to esteem sanctions).

318. The “publicness” of enactments, then, gives them no expressive advantage over private conservation agreements.

The Shasta County norm is simple and stable, the object of near-universal approbation.³¹⁹ Norms regarding ecological stewardship would seem altogether different. Nature norms will be disputed, for they may challenge all kinds of assumptions: about relations between environmentalists and agriculturalists, about the virtues of certain longstanding management practices, and about the separation of private matters from those properly of neighborhood concern. Landowners will vary in the degree to which they publicize their views, and the gossip mill may not prove entirely trustworthy. Ascertaining the intensity and distribution of views, then, will entail interpreting evidence—which the opinionated tend to do in a biased manner that reinforces their opinions.³²⁰ This tendency may be worsened to the extent that the like-minded associate disproportionately with one another (as balance theory predicts), with the result that they know little of others' views. Evidence here fits theory: the tendency (among Americans) for overestimating the representativeness of one's views is so pervasive that psychologists have given it a name, the "false consensus effect."³²¹ An election that lays bare the extent of support for a contested nature norm would provide a useful reality check. True, the meaning of the election results would be open to interpretation and dispute, but surely the election would narrow the field of plausible misbelief.

Nature districts may also bear on nature norms by lowering the cost of identifying, communicating, and updating norms. They have a norm-coordination function. The districts' utility in this respect follows from the pressure for complexity and dynamism in nature norms. Dynamism in nature norms is likely because what is good for the neighborhood will vary with national and state environmental politics and policy, the role of nature in the neighbors' self-concepts, and the ongoing lessons of adaptive management.³²² Pressure for complexity follows from the complexity of good stewardship,³²³ an undertaking far more nuanced than that of guesstimating how much of your neighbors' feed your trespassing bull consumed last week.³²⁴ Where "right action" is complicated and dynamic, it is hard to translate into functional norms unless there exists a

319. See ELLICKSON, *supra* note 317, at 52–64 (regarding livestock trespass norms); *id.* at 82 (comparing collision law and trespass norms, and discussing ranchers' predilection for "black-and-white" rules); *cf. id.* at 25 (discussing overriding commonality between "traditionalists" and "modernists" in Shasta County).

320. See *supra* text accompanying notes 210–11.

321. See Cialdini & Trost, *supra* note 212, at 160; Taylor, *supra* note 194, at 78.

322. I am assuming that a quasi-utilitarian conception of the good of the community is at least an important influence on (if not determinative of) norms in tight-knit communities, in keeping with Elickson's welfare-maximizing norms hypothesis. See ELLICKSON, *supra* note 317, at 170–74.

323. Note that this does not necessarily make for complex norms, because complex substance may be overlain with simple procedural norms, e.g., "cooperate with the Fish and Wildlife Service." Still, the complexity of conservation stewardship will invariably figure into certain forms of social recognition, e.g., awards for exemplary ecological performance.

324. This is the kind of "mental accounting" that Shasta County landowners require of one another. ELLICKSON, *supra* note 317, at 55–56.

common, norm-defining agency through which people can coordinate their understandings and identify noncompliers.³²⁵ The task suits nature districts, which, like administrative agencies, can develop technical expertise, but which also will be closely accountable to their constituents, who themselves will be peers.

A third way in which nature districts may alter members' norms³²⁶ is by revealing tensions and inducing choice between values and beliefs that otherwise seem compatible. Imagine a community of rural landowners who embrace the social ordering principles of wealth maximization and pure-strain libertarianism, and who assume, first, that the principles are fully compatible with one another, and second, that environmentalism threatens both. At the behest of environmentalists, the state legislature enacts a law authorizing rural landowners to form nature districts and enter collective conservation contracts (binding all member landowners) with the state fish and game agency.³²⁷ A crack opens up: the community must decide, collectively, whether it values the gain (wealth) from the contract more than the loss (in libertarian purity) from supermajoritarian self-governance. And a crevasse begins to drift in: satisfying environmentalists can benefit the community. In Lawrence Lessig's terminology, the enabling act colors the meaning of environmentalism by "tying" it to a new set of associations.³²⁸ Notice that when one community establishes a nature district, other communities will catch sight of the opening crack and drifting-in crevasse. Meanings can migrate.

It is worth asking, finally, whether preference falsification on questions of policy really seems so incongruous in small, tight-knit communities.³²⁹ If everyone shares the same end-state vision, then the norm entrepreneur who challenges a tradition threatens no one,³³⁰ he merely indicates a better road to travel. However, the "fissures and rough spots" that nature districts illuminate may emerge from end-state disagreement. Drawing on my earlier investigation of attitudes toward land and land-use, one can foresee rural landowner dissensus over libertarian versus welfarist conceptions of the good; over conceptions of welfare bottomed on wealth versus conceptions of welfare in which tradition and community stand front-and-center; and on the question of whether natu-

325. Cf. Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* (Dennis Patterson ed., 1996). Coleman and Leiter argue that law's weak normativity follows from its necessary role as a focal solution to coordination games. *Id.* at 253–55.

326. Here I use the word "norm" in its broader sense, not to denote a commonly abided rule but rather to stand for ideals.

327. For a sense of what these contracts might look like, see *infra* Part IV.

328. Lessig, *supra* note 286, at 1009–12.

329. In this regard, it should be noted that, contra Ellickson's efficient norms hypothesis, organizational psychologists have found that strong intragroup ties make dissenters reluctant to speak up, with the result being objectively worse decisions. See generally LEE ROY BEACH, *THE PSYCHOLOGY OF DECISION MAKING IN ORGANIZATIONS* (1997); Levine & Moreland, *supra* note 235, at 437–40.

330. Strictly speaking this may not be true—there may be winners and losers in the transition. But the important point is, the losers will not have much social support for their position, and as such they do not much threaten the norm entrepreneur.

ral areas matter for quality of life, as many hunters and trappers clearly believe.³³¹ Pointed normative disagreement among consociates who regard one another highly is often discomfiting. Social psychology (balance theory) and lay intuitions converge on this point. Preference falsification may help rural landowners to keep psychological unease from spilling over into open conflict, which would worsen the unease. In this setting, secret-ballot nature districts could help to bring hidden desire into public view.³³²

IV. NATURE DISTRICTS: POWERS, PURPOSES, AND SERVICES

The workings of nature districts are readily envisioned by example. This part illustrates the possibilities by way of the desert mountains of southern Arizona and New Mexico, degraded rivers East and West, and the problematics of big game management in ranch country. My brush strokes are quick—operational details comprise a project for another paper.

A. *Ecological Management on a Landscape Scale: The Malpai Group*

Along the Arizona-New Mexico border, hard by Mexico, all the stars align just right for private-lands conservation. This is Malpai country, more than a million acres of desert grasslands and broken mountains, home to one of the greatest concentrations of rare species found anywhere in the continental United States.³³³ Land ownership maps of the Malpai region resemble jigsaw puzzles, unassembled. New Mexico has pieces of turf here and there. Other chunks sport the colors of the U.S. Bureau of Land Management, or the U.S. Forest Service. Arizona lays claim to a few stretches. And intermingled throughout are the holdings of the private landowners, who claim about half of the total in fee and lease the balance for grazing.

A few years ago, The Nature Conservancy bought the 325,000-acre Gray Ranch, which it intended to convey to the FWS for operation as a national wildlife refuge.³³⁴ Neighboring ranchers objected.³³⁵ It was their good fortune that one of the nearby landowners, respected locally and by

331. For evidence that these questions are alive in rural communities, see *supra* Part I.C.1.

332. Of course, one might think that the desire for social peace may be so strong that nature district members would falsify their preferences on secret ballots, too. But this is to stretch the concept of preference falsification too far. With secret ballots, the voter need fear no *personal* retaliation. If she cares more for social peace than for the goods that collective action might achieve, her preference is perfectly intelligible, not false. It is best to reserve the term “preference falsification” for situations in which policy decisions aimed at realizing the expressed preference would be less welfare productive than other feasible policies (aimed at the true preference, were it known).

333. My coverage of the Malpai story recaps Kelly Cash, *Malpai Borderlands: The Searchers for Common Ground*, in *ACROSS THE GREAT DIVIDE* (Philip Brick et al. eds., 2001).

334. *Id.* at 113–15.

335. *Id.*

the Conservancy, happened to be heir to the Anheuser-Busch fortune. He struck a deal with the Conservancy, creating a charitable foundation to hold the Gray Ranch,³³⁶ and helped the Conservancy and area ranchers get to know one another.³³⁷ The ranchers and the Conservancy turned out to have some similar goals, goals for which they needed each other: to hold at bay the subdivisions sweeping down from Tucson, and to reintroduce fire to the grasslands (which necessitated the public agencies' cooperation, which the Conservancy was well positioned to secure).³³⁸ There were further strokes of good fortune, antidotes to polarization. It turned out that one respected local rancher had been working with herpetologists for years to conserve one of the world's last populations of the Chiricahua leopard frog, and that another, though five generations deep into the community, was the son of an English professor and had married a microbiologist.³³⁹ Malpai was a land of intersecting groups, not a pocket of rural hostility to the fearful, unknown urban environmentalist.

Malpai's successes are legion and widely reported.³⁴⁰ Fire is back, the Conservancy having played go-between with the public agencies; swarming ecologists monitor just about everything; livestock management is evolving; and ranchers have bartered conservation easements on some 30,000 acres in return for grazing rights to the Gray Ranch.³⁴¹ Less often heralded are the holdouts. Even Malpai, blessed with good fortune, must reckon with holdouts. A few ranchers want nothing to do with the environmentalists or conservation stewardship.³⁴² By selling to developers they could badly disrupt the emerging management regimes. Subdivisions and fire would not mix, the population influx probably would hurt jaguar recovery, and the community would lose the desolate expanses it cherishes. With nature districts, the Malpai Group could keep the dissenters from undermining everyone else's work. The possibilities are wide open. Imagine what the Malpai Group might accomplish through one of the following districts, or some combination thereof:

- *“Open-fire” (default rule) district.* This district would absolve landowners of liability for bona-fide stewardship fires, intentionally set, that leap property lines and damage other property in the district. De-

336. To my knowledge, the Conservancy's use of the Gray Ranch is the only real-world transaction that remotely resembles my “gift in trust” proposal for prairie dog conservation. See *supra* text accompanying notes 276–81.

337. Cash, *supra* note 333, at 116–18.

338. *Id.* at 116–17.

339. *Id.*

340. Jake Page, *Ranchers Form a ‘Radical Center’ to Protect Wide-Open Spaces*, 28 SMITHSONIAN 50 (1997); Richard Benke, *Ranch Hands, Unlikely Cowboy Helps Vast Environmental Experiment Succeed*, CHI. TRIB., May 26, 1996, at C5; Verlyn Klinkenborg, *Crossing Borders: A Group of Innovative Ranchers Have Banded Together to Preserve a Million Acres of New Mexico and Arizona*, AUDUBON, Sept. 19, 1995, at 34; William K. Stevens, *Ranchers Ride to the Defense of Mountaintop ‘Sky Islands’*, N.Y. TIMES, Sept. 24, 1996, at C1.

341. Cash, *supra* note 333, at 120.

342. Nickelsburg, *supra* note 188, at 1405.

velopers beware. It would represent a modern, post-Smokey-the-Bear updating of the “no-fence” or “open-range” districts of yore, which alleviated member landowners of responsibility for fencing in their livestock.

- *Open-space zoning district.* If Malpai ranchers were to choose for their community a minimum lot size of, say, one square mile, few developers would come knocking. This may sound fanciful, but elsewhere in the West (in Montana) state law authorizes landowners in rural, unzoned areas to establish zoning districts in self-defined jurisdictions by supermajority petition of the affected landowners.³⁴³ In Jefferson County, Montana, a group of agriculturalists picked 640 acres (one square mile) as their minimum lot size.³⁴⁴

- *Subdivision “time-out” district.* This district would establish a “notice” period (say, up to twelve months) for property owners who intend to subdivide land. Just as the sixty-day notice that federal environmental statutes demand of citizen plaintiffs gives the Justice Department a chance to intervene in citizen suits, a notice period for subdivision would give the neighboring ranchers, the Anheuser-Busch heirs, and the environmental groups a window to negotiate before the land gets chopped up. The time-out district might not provide the peace of mind of a very-large-lot zoning district, but it would not entail much financial sacrifice either.

- *Open-space “backstop” district.* The district here conceived combines time-out powers with eminent domain. Notified of a pending subdivision, the district would be positioned to condemn the landowner’s development rights—insofar as the district could secure donations from members or outside conservation groups.³⁴⁵

- *Transfer-tax/ecological improvement district.* This district might also be authorized to levy special assessments, or impact fees on new development. Enabling legislation would cap the tax rate. The tax would discourage the sale of land, stabilizing the community,³⁴⁶ while also furnishing a pool of money for purchasing development rights and making

343. MONT. CODE ANN. § 76-2-101 (2001).

344. Marga Lincoln, *Ranchers Use Zoning to Protect Land, Way of Life*, AERO SUN TIMES, Summer 1998, at 1.

345. Notice that a variant of this district might make practical the kind of “Public Preserve” undertakings I questioned in Part I.D.1. To recap, the Public Preserve School would run into difficulties by virtue of: (1) displacing communities of rural landowners; (2) regulating contrary to local understanding of property rights; and (3) raising the historically charged specter of eminent domain for conservation. If nature districts were to serve as intermediaries between public conservation agencies and private landowners, these problems would fade. The landowners through their nature district could negotiate the terms under which eminent domain would take place, the target ratio of public and private property (important for sustaining a community of landowners), and compensation for buffer-zone regulations.

346. A stable community is often thought necessary or at least conducive to successful resource-user self-governance. See, e.g., Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 261–62 (1992) (discussing restraints on alienation). Continuity of social ties is also a central predicate of Ellickson’s efficient norms hypothesis. See ELLICKSON, *supra* note 317, at 170–81.

other conservation investments.³⁴⁷ The district might be authorized to levy general property taxes, special assessments, or impact fees instead of real estate transfer taxes, but these instruments are not likely to prove as popular among long-time ranchers.³⁴⁸

B. Rivers, Floods, and Runoff

In the East, rivers flood too often.³⁴⁹ In the West, they flood not often enough.³⁵⁰ East and West, runoff from streamside agriculture and silviculture threatens aquatic life.³⁵¹ East and West, riverine and riparian biota suffers for rivers' separation from their floodplains.³⁵² Special districts bear no small measure of the blame.

Starting in the nineteenth century, Eastern and Midwestern farmers banded into special drainage districts to finance ditches and drains, which hurried the flow of water off their fields, out of wetlands, and into streams.³⁵³ Downstream riparians formed special levee districts to channelize the ever-rising rush.³⁵⁴ The federal government was an assiduous aider and abetter, subsidizing levees and insuring riparians against flood damage.³⁵⁵

347. The real estate transfer tax is familiar to conservationists. In Arizona and Washington, it has offered a way out of brutal development controversies. Limited resort developments were allowed to proceed in sensitive landscapes, subject to deed restrictions on the housing units that dedicate a fixed percentage of the sale price of the unit (and subsequent resales) to a conservation trust fund. See generally The Sonoran Inst., *Integrating Conservation in Land Development* (1996), available at <http://www.sonoran.org/library/cso.html>.

348. The constraint on the general property tax lies in the willingness and ability of land-rich, cash-poor ranchers to empty their pockets for conservation. The constraint on the special assessment lies in the difficulty of identifying a corresponding special benefit. And the constraint on exactions reflects two facts: first, that the district does not provide "services" as such to new homeowners; second, that it would be hard to quantify the harm that new development does to the surrounding lands. Cf. *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (setting forth "rough proportionality" test for the constitutionality of exactions).

349. The problems are illustrated in FREYFOGLE, *supra* note 9, at 151–70.

350. See, e.g., *Study Finds Dilemma with Missouri River*, N.Y. TIMES, Jan. 10, 2002, at A23; see also Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems*, 40 ARIZ. L. REV. 197, 207–13 (1998); Nat'l Research Council, *The Missouri River Ecosystem: Exploring the Prospects for Recovery*, available at http://www.nap.edu/catalog/10277.html?onpi_newsdoc010902 (last visited Sept. 17, 2002) ("The Missouri River's ecosystem will suffer irreversible damage without a return to more a more natural ebb and flow, but that could cause flooding and entail moving entire communities.")

351. For a primer on runoff (nonpoint-source) pollution, see USEPA, *Nonpoint Source Pollution: The Nation's Largest Water Quality Problem (EPA841-F-96-004A)*, available at <http://www.epa.gov/OWOW/NPS/factspoint1.htm> (last visited Sept. 17, 2002).

352. The loss of aquatic life due to channelizing and otherwise altering the natural flow of rivers is chronicled in Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. L. 973, 987–91 (1995).

353. The historical development of drainage districts is sketched in WATERS AND WATER RIGHTS § 59.04a (Robert E. Beck ed., 1991). An informal survey of the nineteenth-century law digests shows that most of the special district cases pertained to drainage, with irrigation becoming significant only toward the end of the century.

354. These are also well represented in the nineteenth-century digests.

355. See generally Adler, *supra* note 352, at 1013–35.

Springtime snowmelt in the mountains used to send tremendous early season torrents down Western rivers. The spring rip surged into floodplains, leaving behind slow moving backwaters that served native fish as rearing grounds, and fine silt deposits that cottonwoods need to germinate.³⁵⁶ High spring flows scoured the sediment from river-bottom cobbles, too, making them suitable for spawning fish.³⁵⁷ The twentieth century's binge of dam building—financed largely by the feds, but carried out in close cooperation with special irrigation districts³⁵⁸—corked the seasonal floods and imperiled aquatic and riparian ecosystems across the West.³⁵⁹ In the free-flowing rivers that remain, lax permitting by the Army Corps of Engineers³⁶⁰ and weak floodplain protections under local law have created a sort of prisoner's dilemma for riparians.³⁶¹ The Corps liberally hands out permission for landowners to protect their property against flooding with levees and riprap; each landowner who does so increases the velocity of the river as it rounds the next bend, which creates pressure on the landowner's downstream neighbor to install flood barriers; and so forth and so on.³⁶² The process essentially transforms rivers into swift, precarious, and costly-to-maintain canals.

On other fronts, though, federal policy is restorative.³⁶³ The Bureau of Reclamation experiments with episodic springtime flushes of its Western reservoirs.³⁶⁴ The NRCS buys floodplain easements and restores the encumbered land's hydrologic function,³⁶⁵ it also pays farmers and ranchers to plant buffer strips of native vegetation along waterways, and to ex-

356. Regarding native fish in the Colorado River system, for example, see JACK A. STANFORD, *INSTREAM FLOWS TO ASSIST THE RECOVERY OF ENDANGERED FISHES OF THE UPPER COLORADO* 11–14 (U.S. Nat'l Biological Survey Rep. No. 24, 1994). Regarding cottonwoods, see *id.* at 19–20.

357. *Id.*

358. Leshy, *supra* note 289, at 359–60 (describing role of federal government in fostering irrigation districts).

359. See generally *ALTERNATIVES IN REGULATED RIVER MANAGEMENT* (J.A. Gore & G.E. Petts eds., 1989). Stanford, *supra* note 356, at 14–15, gives a succinct overview of the situation on the Colorado and Green Rivers.

360. The Army Corps of Engineer is charged under the Clean Water Act with regulating the discharge of “dredge and fill” materials into the waters of the United States. 33 U.S.C. § 1344(a) (2000).

361. See, e.g., *Yellowstone River Listed as One of America's Most Endangered*, GREATER YELLOWSTONE REPORT, Spring 1999, available at <http://www.greateryellowstone.org> (last visited Oct. 21, 2002) [hereinafter *America's Most Endangered*] (“a domino effect sometimes referred to as ‘rip rap anarchy.’”); *Yellowstone River: River in Peril*, available at <http://www.yellowstoneriver.org/peril.html> (last visited Oct. 21, 2002) [hereinafter *River in Peril*] (describing “vicious cycle of floodplain development” along Yellowstone River).

362. See, e.g., *America's Most Endangered*, *supra* note 361; *River in Peril*, *supra* note 361, at 2.

363. Regarding the new approaches, see generally EXECUTIVE OFFICE OF THE PRESIDENT, *FEDERAL PROGRAMS OFFERING NON-STRUCTURAL FLOOD RECOVERY AND FLOODPLAIN MANAGEMENT* (1998); NAT'L WILDLIFE FED'N, *HIGHER GROUND: A REPORT ON VOLUNTARY PROPERTY BUYOUTS IN THE NATION'S FLOODPLAINS* (1998).

364. The Grand Canyon, for instance, has been the beneficiary of experimental “flood restoration” in recent years; for more information, see *Grand Canyon Flood*, available at <http://kuat.org/gcf> (last visited Sept. 25, 2002).

365. NRCS, *Emergency Watershed Protection Fact Sheet*, available at <http://www.nrcs.usda.gov/programs/ewp/factsheet.html> (last visited Feb. 13, 2003).

clude livestock seasonally from riparian pastures.³⁶⁶ The FWS finances wetlands restoration and protection.³⁶⁷ Just as irrigation and drainage districts once worked hand-in-hand with the government to undo natural rivers, nature districts could assist in putting rivers back together again. Consider the following scenarios.

- *(Physical) flood control co-management districts.* To overcome the riparian prisoners' dilemma, landowners could form nature districts with permitting authority supplemental to the weak-kneed Army Corps of Engineers. In this venture the nature district might find it profitable (financially and technically) to partner with the more conservationist FWS.³⁶⁸ FWS scientists could help district commissioners make better permitting and mitigation decisions. Broad societal benefits justify the FWS's paying the nature district for co-management rights.

- *Wetland restoration assessment districts.* Midwestern states once authorized drainage districts to apportion the cost of improvements between district landowners and upstream districts, on the theory that enhanced downstream drainage capacity redounds to the benefit of upstream farmers.³⁶⁹ In a modern updating of this theory, upstream districts that restore wetlands to reduce flooding in the district and downstream would be authorized to apportion the cost between district landowners and downstream vicinages.³⁷⁰ Whether such an apportionment is technically feasible or defensible is open to question, but the possibility is worth investigating.

- *Floodplain reconnection districts.* It is easy enough for the NRCS to breach a levee and buy a floodplain easement if the breach only affects a couple of landowners. If the floodwaters would spread out over many properties, though, the project becomes tricky. A nature district comprised of the affected landowners might help in two ways. It could signal community sentiment through a purely hortatory vote, through which landowners would express approval or disapproval of the breaching plan.³⁷¹ Second, the district might sell to the NRCS a collective conservation easement over the member landowners' floodplain property, solving the holdout problem.³⁷²

- *Riparian revegetation districts.* Early irrigation arrangements in the American West burdened the landowner with responsibility for con-

366. See generally Jeffrey Zinn, *Environmental Quality Incentives Programs (EQIP): Status and Issues*, available at <http://www.cnrc.org/nle/crsreports/air/air-17.cfm> (Mar. 2, 1998).

367. See *supra* note 268.

368. Such that permits would be denied unless approved by nature district commissioners and the Fish and Wildlife Service.

369. *Bay Island Drainage & Levee Dist. No. 1 v. Union Drainage Dist. No. 1*, 99 N.E. 385, 387 (Ill. 1912); *Ward v. Bd. of Supervisors of Pottawattamie County*, 241 N.W. 26 (Iowa 1932).

370. Perhaps the Federal Emergency Management Administration, given its role as insurer, would pay the downstream assessment.

371. A purely hortatory vote would not be an empty statement, if nature districts have the expressive powers I have posited. See *supra* Part III.C.3.

372. This would raise a takings question whose analysis awaits another day.

structing and maintaining the portion of the shared waterworks that traversed his land.³⁷³ A modern analogue would burden each riparian farmer with responsibility for maintaining streamside buffer strips of native vegetation, and each rancher with the duty to furnish a riparian fence and seasonally exclude livestock. In exchange for the district's commitment, a conservation agency would make an annual rental payment, at a price reflecting the degree of habitat protection afforded by the district's chosen regulations.³⁷⁴ Member landowners with innovative conservation or mitigation plans for their acreage could petition the contracting government agency for regulatory variances.

C. *Ranching for Wildlife*

Most Western states now sponsor "ranching for wildlife" programs.³⁷⁵ Landowners who improve habitat for wildlife are rewarded with extended hunting seasons and a guaranteed number of transferable hunting tags specific to the farm or ranch.³⁷⁶ These the landowner sells for premium prices. Ranching for wildlife can be a boon to very large landowners, and to wildlife.³⁷⁷ For small landowners the program has not worked as well—it is costly for the State to administer, and the resulting habitat improvement are scattershot rather than contiguous, and thus of modest conservation value.³⁷⁸

Special wildlife management districts could complement and enhance ranching for wildlife programs, increasing the value of wildlife and, for midsize landowners, the viability of wildlife ranching. State fish and game departments face incentives to maximize the number of permits they sell, and hence the size and reproductive potential of wildlife herds (a sex ratio skewed toward females), rather than the value of wildlife.³⁷⁹ Landowners who sell hunting rights, by contrast, confront incentives to manage for prized "trophy" males.³⁸⁰ If landowners were empowered to establish a concurrent regulatory regime, such that hunters within the nature districts had to have permits from both the district and the State, landowners could restrict the take of males and build up a trophy herd.

373. WELLS A. HUTCHINS, *MUTUAL IRRIGATION COMPANIES* 32–34 (USDA Tech. Bull. No. 82, 1929) (discussing community acequias in the desert Southwest, and church-established irrigation works in Utah).

374. The district would give NRCS a less costly means (reduced transaction costs) to achieve its "priority area" conservation goals under the Environmental Quality Incentives Program (EQIP). See Zinn, *supra* note 366 (regarding EQIP).

375. DONALD R. LEAL & J. BISHOP GREWELL, *HUNTING FOR HABITAT* 63–64 (1999), available at <http://www.perc.org/publications/library2.html> (last visited Sept. 24, 2002).

376. *Id.* at 8–10.

377. *Id.* at 8–11.

378. It is presumably for these reasons that most states have minimum acreage requirements. See *id.* at 18 tbl.2.

379. John T. Wenders, *The Economics of Elk Management*, in *WILDLIFE IN THE MARKETPLACE* (Terry L. Anderson & Peter J. Hill eds., 1995), cited in LEAL & GREWELL, *supra* note 375, at 3.

380. *Id.*

Also through nature districts, small landowners could band together and act as one large landowner vis-à-vis the state fish and game agency.³⁸¹ Thus ranching for wildlife could become viable for owners of modestly proportioned farms and ranches. Collective contracting would lower administrative costs to the State, and, more importantly, make it feasible for member landowners to coordinate their game harvests and habitat restoration projects across a large, contiguous landscape. The upshot would be better wildlife, better habitat, and better hunts—which for the landowner would translate into higher income.

D. Summing Up

The preceding examples surely do not exhaust the roles for special nature districts, but they do yield a rough schematic of district varieties. At one end of the spectrum are “hortatory districts,” which help landowners to clarify their expectations of one another and convey local sentiment to outsiders, but do not manipulate member landowners’ rights and duties under law. Next there are “liability-shifting districts,” which do just that without prescribing what members may or may not do on their land. “Ecological improvement districts,” financed by real estate transfer taxes or other assessments, represent a third variety. Fourth are “regulatory districts,” which may legislate on matters ranging from minimum lot size, to floodplain management, to big game harvests. The category of regulatory districts includes several subtypes worth distinguishing. “Positive regulatory districts” place affirmative rather than negative duties on member landowners—for example, the duty to plant riparian buffer strips. Positive or negative, regulatory districts may take the form of “compensated regulatory districts,” for which district commissioners develop regulatory standards by contracting with an external conservation agency, which gains enforcement rights and makes an annual rental payment to the district. Finally, “property transfer districts” acquire or convey interests in real property (e.g., conservation easements) from member landowners. In one guise, the property transfer district may exercise the power of eminent domain against individual members; in another, it may contract with an external conservation agency on behalf of member landowners as a whole (a *parens patriae* role).

Notice that from these nature-district building blocks one might even fashion a socially acceptable mechanism for “Public Preserve” undertakings. The Public Preserve School, I argued earlier, runs into difficulties in that it would (1) displace communities of rural landowners; (2)

381. Utah allows contiguous landowners to act as one for purposes of achieving the threshold minimum acreage for participation in the state’s ranching for wildlife program. LEAL & GREWELL, *supra* note 375, at 29. But Utah requires the consent of all landowners in the “block,” which raises the holdout problem, in contrast to the solution I propose.

regulate contrary to local understanding of property rights; and (3) raise the historically charged specter of eminent domain for conservation.³⁸² If nature districts were to serve as intermediaries between public conservation agencies and private landowners, these problems would fade. The landowners, through their nature district, could negotiate protection for a residual core of private property (requisite to sustaining the landowner community), compensation for buffer-zone regulations, and conditions on the exercise of eminent domain. In effect, the nature district would give member landowners a collective property right over their community's fate, allowing the landowners to price their community's dislocation—or to refuse to sell. In light of the sociology literature on landowner attachments to place, I suspect that most nature districts would prefer the co-management to the public-preserve future, but better that they make the call rather than some sociologist or legal-academic pontificator.

V. A COMPLICATION

This article has so far traded on the assumption that the rural lands that environmentalists covet for habitat are held by people who identify themselves culturally as rural farmers, ranchers, woodsmen, and the like. Out on the land, the situation is more complicated. The paradigmatic urban, affluent, and highly educated environmentalist, the kind whom Kellert describes as having “[a] highly romantic appreciation of nature . . . leading [him] to view as irrelevant and sometimes contemptible [others'] practical dependencies on mastering wild living resources,”³⁸³ is an eager consumer of country property. He may be the farmer's neighbor.

For more than a century now, Americans with the financial wherewithal to do so have been buying up property in striking outposts of natural beauty.³⁸⁴ Today, communities of longtime farmers and ranchers are pocked with outsiders, outsiders lured in by environmental amenities.³⁸⁵ The distribution of pockmarks is far from random.³⁸⁶ Fishermen cluster along rivers and coastlines; clubs of duck hunters buy up wetlands; hikers and hunters tend to favor the transition zones between

382. See *supra* Part I.D.1.

383. See VALUE OF LIFE, *supra* note 42, at 59.

384. The Gilded Age tycoons started the trend, buying up vast “camps” of land in the Adirondacks. Their doings are detailed in 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, 222–25 (1992).

385. This is most famously occurring in the American West, see generally ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION (William Riebsame ed., 1997), but casual empiricism suggests the phenomena is much more widespread.

386. I have found no studies that support (or refute) this claim. My claim jibes with common sense, and with observations that I made (informally) over the course of three years working with buyers and sellers of conservation lands in the Northern Rockies.

mountain and valley.³⁸⁷ Environmental organizations are trying to guide the market and improve the correspondence between ecological value and environmentalist ownership.³⁸⁸

Consequently, contingents of newcomers too small and atypical to wield power in county politics may end up dominating smaller, more landscape-specific nature districts. This may not turn out to be the great good fortune that it seems, for it suggests that the nature district may become just another locus for group conflict between urban environmentalists and culturally rural landowners, with all the attendant pathologies.³⁸⁹

I suspect, however, that landowner-environmentalists pushing their agenda in special districts are not nearly so likely to battle their way to Pyrrhic victory as are their ideological compatriots who swing swords in the state and federal legislatures. The explanation has a bright face and a dark underbelly. On the upside, envision a landscape in which environmentalists own swatches here and there of ecologically significant lands, but not the preponderance. The greens lack the numbers to create a special district encircling all the lands that count. So they will start small, where they comprise highly localized supermajorities. To expand, as they will want to do, they must win the trust of surrounding old-time landowners;³⁹⁰ they must demonstrate that conservation is not just for newcomers. These landowner-environmentalists will be careful not to step on old and calloused toes.

As for the dark underbelly, in small rural communities, opportunities for beyond-the-law retaliation against overreaching outsiders will be particular, tangible, and not merely environmental. Property is an easy target. Pet dogs running loose may be shot.³⁹¹ Fancy homes, seasonally unoccupied, are prone to vandalism. County officials sympathetic to the old-timers may look the other way. These vulnerabilities are not sym-

387. These claims too reflect my personal observations.

388. Many chapters of TNC operate conservation buyer programs, matching affluent, conservation-oriented buyers with ecologically significant properties. (There is no central repository of information on these programs; for chapter-by-chapter information, go to TNC's home page, www.nature.org, and run a search on "conservation buyer.") In the Greater Yellowstone Ecosystem, the Conservation Land Network contracts with biologists to rate the ecological value of properties on the market, in the hopes that conservation-minded buyers will gravitate toward lands with the highest ratings. See Conservation Land Network, *What We Do*, at www.conservationlandnetwork.org (last visited Sept. 24, 2002).

389. I have found the conflict documented in only one academic study, but I have seen it first hand and read of it in the newspaper all too many times, both in the Northern Rockies and in Northern Michigan. For the academic account, see Gary P. Green et al., *Local Dependency, Land Use Attitudes, and Economic Development: Comparisons Between Seasonal and Permanent Residents*, 61 RURAL SOC. 427 (1996).

390. This assumes that expansion depends on supermajority support from the annexed landowners—as it should, to keep annexation from being exploitative.

391. In a previous career, I worked with buyers and sellers of conservation lands in the Northern Rockies, a line of work that brought across my path a despairing university-professor-cum-bison-rancher who had finally given up on the rustic life when she found her dog laying lifeless in her driveway, a plug of lead buried in its chest. This was her neighbors' way of putting an exclamation point on their disdain for her breed of high-falutin' environmentalism. It worked—she moved.

metric. From a cultural perspective, members of the effete, landowner-environmentalist gentry are not disposed to blast away at their neighbors' animals, whereas bullets are a common remedy for problem dogs, at least in cow-country.³⁹² From a monitoring perspective, full-time residents can better guard against vandals than can seasonal residents. These asymmetries reinforce the primary asymmetry noted earlier, between the costs of policing proenvironment sabotage of development and antienvironment sabotage of nature.³⁹³ Absentee environmentalists might not appreciate these risks at first. But in small rural communities, there are plenty of channels through which veiled and not-so-veiled threats can be conveyed.

While the fact or threat of illegal retaliation may keep landowner-environmentalist supermajorities from creating special districts that traditional farmers and ranchers would deem unjust and hurtful to their kind, this dynamic hardly conduces to trust and cooperation in areas of common interest, or to breaking down the wise-use oppositions which keep (some) rural landowners from conceptualizing themselves in ways that encourage caring for nature. From Julia Wollendeck and Steven Yaffee's investigations of place-based environmental problem solving,³⁹⁴ to Elinor Ostrom's syntheses of the common property literature,³⁹⁵ to Robert Putnam's studies of Italian corruption,³⁹⁶ scholars concur that successful local self-governance requires a modicum of trust and mutual regard within the polity.

To better the chance that the necessary filaments of trusting regard will exist, and persist, among the landowners who form special nature districts, the states might pursue a two-track policy: on one side, funding programs that build positive ties among neighboring landowners, especially in communities inundated with newcomers; and on the other, structuring the law so as to keep nature districts from forming where they seem likely to entrench conflict between environmentalists and agriculturalists. Investigating the first track is largely beyond this paper's scope. Notice, though, that the problem parallels that of forging ties between environmental advocates, agency personnel, and agriculturalists.³⁹⁷ It would behoove environmentalists and government agencies to develop

392. At least this is the case in rural Montana and Northern Wisconsin, rural areas with which I have some familiarity.

393. See *supra* Part I.B.1.

394. See *supra* note 81.

395. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); ELINOR OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES* (1994); Elinor Ostrom, *Reformulating the Commons*, in *PROTECTING THE COMMONS: A FRAMEWORK FOR RESOURCE MANAGEMENT IN THE AMERICAS* 17 (Joanna Burger et al. eds., 2001); ELINOR OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES* (1994).

396. ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993)

397. See *supra* Part III.B.

gift and incentive programs with an eye towards involving newcomers and old-timers in shared projects of mutual interest.

I will give a little more attention to the more characteristically legal question of how public law and administration might guard against culturally divisive special districts. Three strategies are worth exploring. The first would give both factions formal veto rights over special district governance. This strategy depends on the existence of a discrete, objective identifying trait that is highly correlated with the subjective, identity-based categories, “newcomer” and “old-timer.” If newcomers are predominantly vacationers, for example, many a culturally inflammatory district can be avoided by conditioning district establishment on support from a majority or supermajority of the *resident* landowners,³⁹⁸ in addition to a pure landowner supermajority, and one weighted by acreage or assessed value.

The second strategy may seem paradoxical: to guard against special districts that polarize newcomers and old-timers, reveal the identity of district supporters—that is, organize districts by supermajority petition rather than secret-ballot election. The threat of retaliation against non-resident supporters is much more credible if the supporters’ identities are public. The more credible the threat, the better the odds that it will head off divisive district proposals at the pass.³⁹⁹

Public petitions increase the likelihood of preference falsification, compared to secret ballots. Newcomers fearing retaliation may decline to sign. Old-timers may not want to voice their support until other old-timers have stepped forward, with the result being that they all hold back. If a painful schism parts the old-timers, those not yet pegged as favoring one side or the other may prefer to keep their views private, in the interest of sustaining neighborly relations with everyone.

Notice, though, that secret-ballot hortatory districts can be used to attenuate the risk of preference falsification that inheres in petition-determined regulatory districts. If the landowners were to approve overwhelmingly (by secret ballot) a nonbinding statement of principles for their community, this might embolden potential preference-falsifiers to vote their true beliefs on a subsequent petition to establish taxing, regulatory, or contracting districts, insofar as these districts concretize the previously approved statement of principles. This assumes, of course, that the would-be preference falsifier can infer preferences typical of the relevant reference group from the secret ballot results.⁴⁰⁰

398. Residence being the objective proxy for the underlying, subjective cleavage between those who identify as newcomers and those who see themselves as old-timers.

399. Though improved community relations seem an improbable upshot of a nature district so deterred, the deterrence may keep relations from deteriorating as badly as they would have, had the district come into being.

400. This is a plausible assumption, if: (1) the secret ballot separately measures support from the relevant demographic groups (e.g., resident landowners versus landowners as a whole); or (2) the se-

It may be objected that the two strategies I have suggested for meliorating intradistrict conflict also condone an unwarranted “old-timer” privilege, even so far as to approve, implicitly, of illegal retaliation by locals against people and ideas regarded as intruders.⁴⁰¹ That is a fair concern, though it is not obvious that a state legislature that chooses open petitions rather than secret ballots as the medium of special district democracy signifies its approval of illegal retaliation against dissenters. A general interest in transparency, or a desire to support lawful social controls, might equally justify the choice. Neutralizing the message of local or traditional privilege implicit in giving special veto-rights to the resident landowners is probably more difficult. But even that message may depend on the rhetoric used by the law’s supporters. I, for one, would support experimentation with local “privileges” not out of a moral commitment to localism, but in a pragmatic hope for better ecological stewardship, and for a society whose landowning members become open to the discovery of value in nature.⁴⁰² Would that meaning or another one predominate? Without regard to the actual and contingent play of politics, it is very hard to say.

A third way of dealing with intradistrict conflict is to rely on administrative sensibilities rather than collective choice rules. Conservationists should try to gain footholds in their target community with one-on-one stewardship agreements before tempting the landowners with collective contracts. Agencies charged with approving or disapproving nature district formation should take fractiousness into account, and look askance at proposals that would bind together (into a single district) neighborhoods sharply divided on the district’s merits.⁴⁰³ Perhaps the law should even require would-be district organizers to file a thirty-day “notice letter” before commencing petition drives.⁴⁰⁴ In this brief window public officials could introduce district organizers to others’ successes and failures, and warn of the dangers that might lie ahead.⁴⁰⁵

VI. A CONTRARY VIEW

The programmatic and social-scientific contributions of this article are now complete. In this penultimate part, I situate my argument in his-

cret-ballot majority proves sufficiently large for one to infer substantial support on the part of various subgroups; or (3) landowners as a whole are the relevant reference group.

401. Thanks to Dan Farber for raising this challenge.

402. Notice that the whole special district approach could collapse if the policy leitmotif were to “avoid special privilege”—landowner governance of land-use can be seen as a “special privilege,” particularly insofar as votes are weighed by acreage or assessed value. Debating this question is beyond this paper’s scope.

403. See *supra* Part III.C.1 (compare my remarks in the last two paragraphs).

404. The model, of course, is the sixty-day notice letter that citizens must file before bringing suit under the major federal environmental statutes.

405. Nine times out of ten the organizers will know their own community better than the agency does, but a short waiting/education period will not hurt and, in rare cases, it may help.

torical context. Eric Freyfogle, singular among contemporary legal academics for his attention to the interplay of law, culture, history, and land-use, provides the occasion to do so. Freyfogle has raised doubts about the programmatic agenda—the play of ideas, incentives, gifts, and governance—developed in Part III of this article.⁴⁰⁶ Here, I outline and reply to his critique.

Freyfogle worries that my proposals will reinforce the libertarian conception of property that has wormed its way through rural landowners' imaginations.⁴⁰⁷ Libertarianism, he maintains, is no innocuous invader. It brings with it a pair of troubles. First, it discourages people from coming to value nature for its own sake.⁴⁰⁸ Second, libertarian ideology is irreconcilable with a conception of ownership in which the landowner's primary obligations run to "the land community"—people, nature, soils, and waters, taken as a whole.⁴⁰⁹ Duty to (and love for) the land community is the capstone of Freyfogle's thinking, much as it was fifty years earlier for Aldo Leopold.⁴¹⁰

Freyfogle's critique issues from an historical vantage. When the New Dealers set out to heal the land after the Dust Bowl, he points out, incentive payments and regulatory special districts ("conservation districts") were their tools of choice. Little did they accomplish.⁴¹¹ Some landowners installed erosion control measures, but when public funding dried up, the landowners reverted to their old ways.⁴¹² Conservation districts became ubiquitous, but hardly any were to implement meaningful restrictions on soil erosion.⁴¹³

Freyfogle's critique deserves more attention than I have space to give it. Here, I can offer only brief jottings on how the New Deal programs differ from (and thus do not impugn, in my view) the incentives and nature districts I have proposed, and on the tension between policies of economic enticement and the ideal of duty to the land community.⁴¹⁴

406. Letter from Eric Freyfogle to Chris Elmendorf (Feb. 7, 2002) [hereinafter Letter I] (on file with author).

407. *Id.* By "libertarian conception of property," Freyfogle means a normative framework in which the landowner is free to do virtually whatever he wants with his land, limited only by certain rigid, core, common-law doctrines of trespass and nuisance.

408. *Id.*; see also Letter from Eric Freyfogle to Chris Elmendorf (Feb. 15, 2002) [hereinafter Letter II] (on file with author).

409. Letter I, *supra* note 406; Letter II, *supra* note 408.

410. For an excellent précis on Leopold, see Eric T. Freyfogle, *A Sand County Almanac at Fifty: Leopold in the New Century*, 30 ENVTL. L. REP. 10,058 (2000) [hereinafter Freyfogle, *Almanac at 50*].

411. Letter I, *supra* note 406.

412. *Id.* (recounting Leopold's observations from the 1940s).

413. *Id.*

414. The other question—whether libertarian ideology discourages people from coming to value nature for its own sake—I consider less pressing, vis-à-vis the arguments of this paper. I think the claim must ultimately rest on a theory of adaptive preferences (libertarian property is not compatible with large-scale nature conservation; therefore, committed libertarians will not let themselves feel the attractions of this desideratum) or on a theory of commodification. The adaptive preferences argument does not apply to my program, which is specifically designed to overcome the holdout problems that make libertarian property inconsistent with large-scale conservation. And the commodification

A. *Historical Failures: Soil Conservation in the New Deal and Afterwards*

Much of the promise of incentive programs lies in the relationships that form between environmentalists (or their counterparts in the public conservation agencies), landowners, and the land itself.⁴¹⁵ The New Deal programs did little to foster such relationships.⁴¹⁶ In point of fact, “the environmentalist” was not yet a broadly identifiable archetype, which makes analogizing from the New Deal to the present scene precarious. The first wave of soil conservation subsidies were employment programs, with the federal government supplying an army of unemployed laborers to build soil conservation works on the lands of willing farmers in select demonstration areas.⁴¹⁷ A brand new agency, the Soil Erosion Service (later entitled the Soil Conservation Service (SCS)), which styled itself after the technocratic, Progressive-with-a-capital-P Forest Service, ran the demonstration projects.⁴¹⁸ While the SCS recognized the importance of landowner buy-in,⁴¹⁹ it apparently made little effort to involve landowners in goal setting, experimentation, monitoring, or evaluation with respect to demonstration projects. Instead, the SCS presumed that landowners would visit the demonstration sites, favor what they saw, and adopt the same practices back home.⁴²⁰

On the heels of the demonstration projects came the era of the hopeful-sounding “whole farm conservation plan,” which SCS employees

arguments, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996), chafe against everyday experience, in which we assign to many things that have a price (one’s home, labor, heirlooms, decision to make a charitable gift, and yes, one’s experience of nature) both market and nonmarket meanings and valuations, Norman W. Spaulding III, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 *STAN. ENVTL. L.J.* 293 (1997); cf. Martha C. Nussbaum, “Whether From Reason or Prejudice:” *Taking Money for Bodily Services*, 27 *J. LEGAL STUD.* 693 (1998) (showing coexistence of market and nonmarket valuations of labor, even in so troubling a domain as sex).

415. As hostilities born in fear and ignorance start to break down, and landowners (cash in hand) set to work on ecological stewardship experiments, there is reason to hope that landowners will open themselves to new, more ecologically directed ways of valuing the earth and its critters. See *supra* Part III.

416. I am no expert on the New Deal conservation programs, having read only a few histories of these initiatives and some of Leopold’s contemporaneous essays. What I say here draws on: R. BURNELL HELD & MARION CLAWSON, *SOIL CONSERVATION IN PERSPECTIVE* (1965); ROBERT J. MORGAN, *GOVERNING SOIL CONSERVATION: THIRTY YEARS OF THE NEW DECENTRALIZATION* (1965); *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD* (Susan L. Flader & J. Baird Callicott eds., 1991); Craig L. Williams, *Soil Conservation and Water Pollution Control: The Muddy Record of the United States Department of Agriculture*, 7 *ENVTL. AFF.* 365 (1979).

417. See Williams, *supra* note 416, at 371–72, and sources cited therein.

418. For an impressionistic but perhaps telling account of the esprit de corps (and distance from landowners) among the new “SES men” by a Forest Service veteran, see Aldo Leopold, *Coon Valley: An Adventure in Cooperative Conservation* (1935), in *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD*, *supra* note 416, at 218.

419. See *infra* note 431 and accompanying text.

420. MORGAN, *supra* note 416, at 80–81; Williams, *supra* note 416, at 372–73, 375–76.

worked up with individual landowners.⁴²¹ Again, though, the practice was top-down, with the agency classifying the landowners' soils and designating agricultural practices appropriate to each type.⁴²² Neither long-term relationships with landowners nor an agency culture of conservation were established. In search of a loyal political constituency, the post-Depression SCS shifted resources from soil conservation to production enhancement.⁴²³ Reports by the General Accounting Office in the 1970s found that landowners commonly regarded the whole-farm plan as nothing but a bureaucratic hoop to jump through en route to subsidies for select practices that the farmer wanted to adopt anyway (less profitable stipulations of the plan the farmer would simply ignore).⁴²⁴

The SCS was not the only purveyor of soil conservation subsidies. For decades Congress also disbursed its largesse through the so-called Agricultural Conservation Program (ACP), whereby farmers were paid to install structures designated as "conservationist" by committees of the farmer's peers.⁴²⁵ The ACP did nothing to establish relationships between conservationists and landowners or to promote site-sensitive land stewardship.⁴²⁶ It was a boondoggle, nothing more.

The failings of the early soil conservation programs raise the agency-capture warning flag,⁴²⁷ but they also reinforce (by discrediting the alternative) the participatory texture of this article's proposals. Whether the recent achievements of programs like the FWS's Partners for Wildlife will hold up over time is certainly an open question.⁴²⁸ Where ecological recovery can be tangible for the landowner, not just for people downwind or downstream,⁴²⁹ and where environmentalists or

421. Williams, *supra* note 416, at 381; see also John H. Davidson, *Conservation Plans in Agriculture*, 31 ENVTL. L. REP. 10,501 (2001) (continuing a more detailed examination of the theory and practice of whole farm conservation plans).

422. HELD & CLAWSON, *supra* note 416, at 67-69.

423. *Id.* at 69-75.

424. See Williams, *supra* note 416, at 382. Aldo Leopold made similar observations in the late 1940s. LEOPOLD, *ALMANAC*, *supra* note 10, at 208-09.

425. Williams, *supra* note 416, at 400-03.

426. *Id.* (describing how Congress overrode the USDA and forced it to subsidize whatever practices the local "county committees" wanted subsidized).

427. It is far less likely, however, that today's conservation incentive programs, like Partners for Wildlife, will be captured by agricultural interests and reinvented as ecologically harmful production subsidies. In the 1940s and 1950s, no environmental movement existed to counterbalance the organized agricultural interests (whose organization the production subsidies much enhanced). Today, Americans benefit from a host of environmental watchdog groups and a national press that pays close attention to environmental issues. Today, an agency outfitted by Congress with conservation dollars would not dare ignore environmentalists when it goes shopping for a constituency. It is instructive that in 1985, the Farm Bill launched a major new conservation incentive, the Conservation Reserve Program, and that the subsequent farm bills (in 1990 and 1996) both expanded and brought into tighter focus (on environmental benefits) the package of conservation incentives. See Linda A. Malone, *Reflections on the Jeffersonian Idea of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill*, 12 STAN. ENVTL. L.J. 3 (1993) (regarding the 1985 and 1990 farm bills).

428. On the achievements, see *supra* note 268.

429. See *supra* text accompanying notes 210-11.

wildlife officials can forge ongoing ties with the landowner, I remain cautiously hopeful.

To the next level: governance. What should we make of the poor showing of the soil conservation districts? The story is a peculiar one. Depression-era proponents of soil conservation perceived the need for locally credible institutions to educate farmers and, in time, to impose land-use regulations.⁴³⁰ With President Franklin Roosevelt in the bully pulpit and the SCS threatening to rescind funding from laggard states, it took only ten years for federal proponents to get all of the states to enact conservation district enabling legislation.⁴³¹ The SCS announced that it would only deal with landowners who belonged to conservation districts, and landowners quickly got in line, enacting the requisite districts. But the SCS did not get quite what it had hoped for. Many states declined to delegate regulatory powers to their conservation districts,⁴³² or allowed districts to pass regulations only with the approval of extreme landowner supermajorities (on the order of seventy-five to ninety percent).⁴³³ Also, the SCS wanted conservation districts organized on watershed boundaries, but landowners ending up following county boundaries.⁴³⁴

The SCS's relationship with conservation districts is a case study in institutional misdesign. Neither markets, nor hierarchies, nor intermediate forms (relational contracts), nor norms of reciprocity came into play.⁴³⁵ The SCS did not contract with districts, did not regulate districts, and did not withdraw funding from poorly performing districts. Instead its tool of choice was the MOU-without-consequence, by the terms of which the districts were to go through the motions of various planning processes, and to enforce the whole-farm conservation plans that the SCS developed on behalf of member landowners.⁴³⁶ Basically, the SCS contracted with individual landowners (the whole-farm plans) and left enforcement entirely in the hands of the landowner's peers (the conservation district). If the SCS had had a crack monitoring program, a system for sanctioning districts, and the stomach to redline inveterately self-serving districts, this regime might have worked—but the agency had none of these.⁴³⁷

430. MORGAN, *supra* note 416, at 40, 45.

431. HELD & CLAWSON, *supra* note 416, at 202–05. (The years were 1937–1947.)

432. MORGAN, *supra* note 416, at 64–79. None of the states initially authorized their conservation districts to levy taxes or assessments—a power SCS thought too controversial to request. *Id.* A handful of states have since given districts limited assessment powers. Frarey et al., *supra* note 287, at 161.

433. Frarey et al., *supra* note 287, at 155.

434. MORGAN, *supra* note 416, at 327–28, 333–38.

435. These are the institutional building blocks of economic enterprise. *See generally* OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (1996) (regarding markets, hierarchies, and relational contracts); Ostrom, *supra* note 227 (regarding reciprocity).

436. MORGAN, *supra* note 416, at 92–98.

437. By the late 1940s, the Secretary of Agriculture conceded that his agency “could not incorporate the soil conservation districts into [USDA’s] ‘administrative mechanism to the degree necessary to insure the proper execution of programs for which Congress holds the Department responsi-

As regulatory entities, conservation districts were, and remain, a joke. A survey in the early 1960s found that only twelve districts had land-use regulations in place;⁴³⁸ ten years later the number had fallen to two.⁴³⁹ A half-dozen states that initially authorized conservation districts to regulate land-use have since rescinded that authority.⁴⁴⁰ It should not be surprising that farmers and ranchers have not warmed to conservation districts as regulatory bodies, for reasons both of motive and institutional design. Soil erosion may be a problem for the owner of an eroding farm, and it certainly is a problem for riparian communities downstream, but the costs do not fall on the community of origin as such. Hence owners of eroding farms have little motive to collectively self-regulate,⁴⁴¹ at least in the absence of contractual arrangements with the government or downstream communities—contractual arrangements for which the conservation district enabling acts do not provide. On the institutional side, two factors give landowners good reason to be wary of regulation.⁴⁴² First, the borders of conservation districts were fixed without regard for what makes sense, ecologically and socially, as a regulatory unit.⁴⁴³ Second, few conservation district enabling acts reserve the vote to landowners.⁴⁴⁴ The possibility of regulation thus raises the specter of conflict between landowners and tenants, or between rural landowners and people who live in town. Making matters worse, in 1959 the Colorado Supreme Court declared it unconstitutional to create soil conservation regulations by landowner supermajority.⁴⁴⁵

The inauspicious history of conservation districts does not dim the prospects for special nature districts. To briefly recap: regarding motive, landowners may be prompted to form special nature districts either to realize local interests in conservation, as in the Malpai borderlands and ranching for wildlife areas, or to benefit from collective contracts with state or national conservation agencies.⁴⁴⁶ On the institutional side, landowners would control special nature districts, and may tailor boundaries

ble' . . ." MORGAN, *supra* note 416, at 137. Little progress was made over the next thirty years, if the GAO reports from the 1970s are any indication. See Williams, *supra* note 416, at 383.

438. MORGAN, note 416, at 263.

439. Williams, *supra* note 416, at 379 n.85.

440. Frarey et al., *supra* note 287, at 154.

441. That is, assuming they have not internalized a land ethic.

442. Frarey et al., *supra* note 287, at 158 (advancing a different institutional argument, suggesting that many conservation districts simply do not have the resources to adopt and monitor land-use regulations).

443. Presumably if landowners sought collective self-regulation, they would have done otherwise.

444. Frarey et al., *supra* note 287, at 159 (reporting that only eight out of the forty-seven states surveyed reserved electoral control of conservation districts to landowners).

445. *Olinger v. People*, 344 P.2d 689 (Colo. 1959). This case has not been cited by other jurisdictions, and I am not sure whether soil conservation advocates were widely aware of it. Constitutional questions raised by "nature districts" are beyond the scope of this article. I address them in forthcoming works.

446. See *supra* Part IV.

to the specific issue at hand.⁴⁴⁷ Enforcement would come from the district itself, where local conservation interests motivate the district, and otherwise would be provided for by contract.

B. Incentives and Duties to the Land Community

The imagery of incentives and collective contracting is far removed from that of landowner duties to the soils, waters, creatures, processes, and people that together comprise Freyfogle and Leopold's land community. Should this give pause to those, myself among them, for whom Leopold's vision of people and nature stands as a compelling account of human flourishing? The problem invites two quite different responses. One keeps the destination in tight focus, framing the matter in terms of probabilities: does my agenda or some other look like the better bet, where the object is a people for whom Leopold is the polestar? The second approach, in keeping with the "green pluralism" theme sounded in part IV, invites the Leopoldian to question whether striving for a fully formed and legally instantiated land ethic is advised in a liberal society fractured over the proper relationship between people and nature. Two intuitions motivate the second approach. Thinking instrumentally, first, the gain for nature may be greater if foundational questions of duty are papered over, enabling people to work together on the goals they have in common without clashing over discrepancies in the structure of their values.⁴⁴⁸ And pressing deeper, the human experience may be more engrossing, more open to growth and insight, to the extent that people experience their values as provisional.⁴⁴⁹ The second approach, then, asks the Leopoldian to negotiate a balance between personal embrace and celebration of the land ethic, skeptical questioning of it, and political compromise; and, further, to see this awkward balance as intrinsically valuable in its own right, on par with the land ethic itself. This is my own view—provisionally—but I will not further explore it here. Instead I will limit myself to a few words for those who are foundationally committed to Leopold-as-societal-polestar.

Freyfogle is, of course, the keenest exponent of this perspective within the legal academy. Though he sometimes downplays the role of law in moving society toward the Leopoldian ideal,⁴⁵⁰ Freyfogle often argues that the law should embody and express the idea that landowner

447. Overlapping districts are even possible, if that is what the landowners want. Of course some third party, perhaps the state fish and game commission, would have to arbitrate were the overlapping districts' regulations to work at cross purposes. And the legal framework would have to provide for merger, so that overlapping or adjoining districts that would do better as one could combine.

448. Compare this to Cass Sunstein on the virtues of incompletely theorized agreements within a conflicted polity. See, e.g., CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

449. This I take to be one of Unger's central themes. E.g., ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984).

450. *Five Paths*, *supra* note 151, at 126–27 (discussing goals of conservation work, views of history).

prerogatives are everywhere secondary to ecological health.⁴⁵¹ The central charge of property and land-use law is to specify duties to the land community, and to fairly apportion the burdens of conservation among owners of *ecologically comparable* lands.⁴⁵² Landowners have no legitimate objection to disparate treatment unless the disparities are ecologically incongruous. Beyond apportioning burdens within ecologically comparable lands (the stuff of transferable development rights⁴⁵³), compensation for land-use restrictions and other requirements should be paid mainly as a temporary, transitional measure.⁴⁵⁴

Freyfogle appreciates that his vision for law, fully realized, is not a live option against the present cultural milieu.⁴⁵⁵ Defenders of the land community, then, should press forward on nonlegal fronts, seeking new ways and opportunities to show, first, the attractiveness of “land health” and associated duties as organizing principles for human societies; and, second, that property law’s allocation of rights and duties law is neither immutable in practice nor Platonic in aspiration, but has always—and rightly—varied with contemporaneous interpretations of community welfare.⁴⁵⁶ Legal advocates for the land community have roles to play, but these are incremental or indirect: rearguard actions to keep conservation policy from assuming forms that work against the idea of duties to the land,⁴⁵⁷ doctrinal expansion of nuisance law to incorporate ecological

451. Eric T. Freyfogle, *Land-Use Pollution and Property Rights in the United States*, in THE FUTURE OF POLLUTION ENFORCEMENT AND REGULATION 29, 37 (Antônio H. Benjamin & José C.M. Sicoli eds., 2001) [hereinafter Freyfogle, *Land-Use Pollution*]; Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L.Q. 631, 656–58 (1996) [hereinafter Freyfogle, *Ethics, Community*].

452. Freyfogle, *Land-Use Pollution*, *supra* note 451, at 37; Eric T. Freyfogle, *The Particulars of Owning*, 25 ECOLOGY L.Q. 574 (1999) [hereinafter Freyfogle, *The Particulars of Owning*]; Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 ENVTL. L. REP. 10313, 10316–17 (2001).

453. Eric T. Freyfogle, *Eight Principles for Property Rights in the Anti-Sprawl Age*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 777, 793–96 (1999); Freyfogle, *The Particulars of Owning*, *supra* note 452, at 587–88.

454. Letter I, *supra* note 406; *cf. infra* note 457 (discussing Freyfogle’s objection to paying water-rights holders for in-stream flows). Freyfogle does allow that compensation should be paid when the landowner is singled out to provide exceptional ecological services, e.g., a wildlife refuge. *See* Freyfogle, *supra* note 164, at 131.

455. *Five Paths*, *supra* note 151.

456. Eric T. Freyfogle, *Community and Market in Modern American Property Law*, in LAND, PROPERTY, AND THE ENVIRONMENT (John F. Richards ed., 2002) (tracing mutability of property law in American history); Eric T. Freyfogle, *Land Health as an Organizing Goal*, in PROCEEDINGS OF THE BIENNIAL GEORGE WRIGHT SOCIETY/NATIONAL PARK SERVICE CONFERENCE (1999) (presenting “land health” vision); *Almanac at 50*, *supra* note 410 (same); Freyfogle, *Land-Use Pollution*, *supra* note 451, at 36–38 (discussing conservation rhetoric). Freyfogle’s most significant contribution to the visioning project is BOUNDED PEOPLE, *supra* note 9.

457. Letter II, *supra* note 408. Freyfogle speaks to the role of law in sustaining narratives of collective obligation in a number of passages in BOUNDED PEOPLE, *supra* note 9. *E.g., id.* at 112 (“[L]and-use rules should be viewed as expressions of community values and expectations.”); *id.* at 136–40 (arguing that ownership norms should change in line with ecological understandings); *id.* at 147–50 (criticizing notion that environmentalists should protect in-stream flows by purchasing water rights as akin to demanding that civil right supporters buy antidiscrimination rights from private proprietors; in both cases, a baseline of regulation is necessary to sustain the right conception of duty).

harms,⁴⁵⁸ expansion of the concept of “beneficial use” in Western water law,⁴⁵⁹ and campaign finance reform.⁴⁶⁰

This strategy would be irreproachable were law to influence values through an inexorable, gravitational pull. But if law affects values and attitudes more contingently, in virtue of the groups behind particular laws, or changes to the pattern of human relationships that result from legal transitions, then the program I have outlined also deserves attention from those who would lever society toward the Leopoldian end state. Nature district governance, for instance, manifests the idea that the rights of land ownership change over time, in line with predominant understandings of a community’s welfare. In virtue of their provenance and lines of accountability, nature districts can make this point evident to rural landowners who discredit or ignore environmentalist thinking.

Moreover, the framework I have sketched should facilitate rural landowners’ coming to understand and value nature in its own right.⁴⁶¹ Aldo Leopold recognized that the sense of duty integral to the land ethic depends on prior affinities with nature, and pleasure in naturalistic discovery.⁴⁶² This aspect of Leopold’s thought echoes or is echoed by transcendentalists (Thoreau), satirists (Edward Abbey), ecologists (Rachel Carson), and philosophers (Holmes Rolston) who have turned their minds and pens to nature, each of whom insists that joy and wonder in naturalist encounter form the basis of healthy, rightful attitudes toward nature.⁴⁶³ Without legal reforms that dampen environmentalist-landowner conflict, I doubt that these or any other depictions of land ethic praxis (the first prong of Freyfogle’s nonlegal agenda) will reach the rural landowner.

C. *Summing Up*

My skeletal response to Freyfogle’s critique frames the debate, but it hardly does justice to the depth of his thinking, and it barely nicks the surface of history. The interplay among incentives, law, values, group conflict, and social norms is hugely complex, and further case-study research and historical exegesis may cast into doubt this article’s proposals. Freyfogle’s questions are live.

458. Freyfogle, *Ethics, Community*, *supra* note 451, at 656.

459. *Id.* at 656–57.

460. Letter II, *supra* note 408.

461. The argument is set forth in the last paragraph. *See supra* Part III.B.

462. This is the reason his land ethic inhabits the closing pages of *A Sand County Almanac*. When the reader finally gets there, she has as interpretive resources four seasons’ worth of Leopold’s observations on the delights of living by the ethic. Freyfogle expands on this point in *Almanac at 50*, *supra* note 410, at 10,061–63.

463. EDWARD ABBEY, *DESERT SOLITAIRE* (1968); HOLMES ROLSTON, *ENVIRONMENTAL ETHICS* (1988); Rachel Carson, *The Marginal World*, in *BY THE LIGHT OF THE GLOW-WORM LAMP: THREE CENTURIES OF REFLECTIONS ON NATURE* 151 (Alberto Manguel ed., 1998); Henry David Thoreau, *Walking*, in *THIS INCOMPERABLE LANDE: A BOOK OF AMERICAN NATURE WRITING* 194 (Thomas J. Lyon ed., 1989).

VII. ONWARD (CONCLUSIONS)

This article has framed a private-lands predicament. A concatenation of biophysical factors and social circumstances undermines the coercive conservation strategies embodied in the domestic policy status quo and the regulatory reforms recommended by legal scholars. Yet voluntarism unmodified is not an attractive alternative, given the harvest that holdouts and free-riders would reap. What is needed, ultimately, are coercive conservation strategies that track community sentiment among rural landowners. This means that the central challenge of reform is, first, to breed an environmentalism—a set of ideas regarding values in nature, desirable relations between people and nature, and the governance of these relations—that can take root in communities of rural landowners, and, second, to enable those communities to form their own institutions for collective choice.

Orienteering with the aid of rural sociology, social psychology, and the new law-and-norms literatures, this paper picks out a path of environmentalist self-criticism and policy reform, a path which just might twist up and out of the private-lands predicament.

I have urged mainline environmental organizations to embrace a more plural conception of the ways in which environmentalists may legitimately value nature, one which appreciates the conservationist values of trappers, hunters, motorized recreationists, and commercial fishermen. I have argued for expanding public programs that give individual landowners affirmative incentives to protect and restore ecological resources, and recommended fine tuning such programs to encourage ongoing relationships among landowners, government personnel, and environmentalists. I have suggested that environmental groups make selective gifts of lands, in trust, to resource users whose traditions have become the source of pressing ecological problems. Through the trust environmentalists and landowners can jointly test and come to understand the relationships between various management practices and environmental outcomes—and each other.

Finally, I have proposed “special nature districts” as the centerpiece of private-lands conservation policy. These landowner-initiated, landowner-governed jurisdictions could undertake any number of ecological restoration and management projects. Special nature districts have the wherewithal to bring holdouts and free-riders into line. They have potential, too, as fora in which landowners can test and clarify changing community norms regarding conservation stewardship, relations with environmentalists and public agencies, and the like.

There is a risk, particularly in rural communities targeted by second-home buyers, that special districts will become a locus for conflict between newcomers and traditionalists. Such conflicts could set back whatever progress environmentalists and public conservation agencies make working one-on-one with area landowners. To mitigate the risk of

conflict, I have proposed a treble-majority principle to govern special nature districts. For a district to come into being (or survive a challenge to its existence) would require: (1) supermajority support from the landowners, counted equally; (2) supermajority support from the landowners, weighed by the acreage or assessed value of their land; and (3) majority (or supermajority) support from resident landowners. I have also suggested that the odds of dangerously divisive districts would decline were regulatory, taxing, and contracting districts established with public petitions rather than secret ballots. Creating a secret-ballot hortatory district en route to a regulatory, contracting, or taxing district would attenuate the risk of preference falsification on the petition for the second district.

This article has advanced tentative ideas. While their ultimate merit is uncertain, in the near term they yield a substantial research agenda for legal scholars and their associates in the social sciences. For social psychologists and sociologists, there are questions regarding norms, environmental values, and intergroup relations. Do incentives programs change landowner attitudes toward the environment, as theory predicts? If so, is the change better explained by cognitive dissonance (with respect to the act of participation), or personal relations (with conservation agency employees), or a materialist theory of environmental values? The answer has obvious ramifications for policy design. Second, do gifts in conservation trust work to assuage intergroup tensions, as I have speculated, or does the gift-compliance connection obtain only within groups or among “neutrals”? Third, there is a need for studies of the newcomer/old-timer relationship with attention to environmental attitudes and norms of regulatory fairness. The results would aid public officials in setting limits to the use of nature districts in transitional communities. Fourth, it would be helpful to have studies that trace attitudes and social influence over periods of months and years, rather than the momentary, snapshot results more often obtained by social psychologists.⁴⁶⁴

This article also invites more characteristically legal lines of study. One set of projects (on which I am now working) would assess the relationship between special nature districts and constitutional strictures. Nature districts highlight a number of puzzling, often inchoate, and seemingly peripheral features of the doctrine and practice of constitutional law. These include the private delegation doctrine and the outer limits of the one-person/one-vote principle; due process and the informalizing of law;⁴⁶⁵ and of course the just compensation clause, particu-

464. The economist Bruno Frey and his colleagues merit recognition for their recent work on this subject. See Bruno Frey et al., *The Old Lady Visits Your Backyard: A Tale of Morals and Markets*, 104 J. POL. ECON. 1297 (1996) (theorizing a “compensation cycle” to explain why strident, “we won’t be bribed” opposition to the compensated siting of a radioactive waste facility had largely dissipated within a year).

465. This question could be raised by: (1) “informal” practices of nature district administration, designed to account for the stress of legalisms on cooperation in small groups, cf. *supra* notes 228–30

larly when nature districts act in a *parens patriae* capacity to transfer property interests, or impose on member landowners an affirmative duty to maintain certain structures or ecological conditions.

A second fertile field awaiting the legal scholar is that of design—how to structure nature district enabling legislation, the nature districts themselves, and the contracts between nature districts and conservation agencies. Topics of particular interest include the relationship between ecological and social boundaries (might nature districts be nested to reconcile the two?); enforcement; conflicts between overlapping or otherwise interdependent districts; and the expansion, contraction, merging, and termination of nature districts. The public choice and social psychology literatures will aid in this inquiry, as will local government law, and further insights may be gleaned from case studies of common property regimes and place-based environmental problem solving by stakeholder collaboratives.

A final area ripe for inquiry—political-economic, historical, and ethnographic—is empirical study of landowner-controlled special districts, including their relationships with one another and with more traditional units of government. There is a treasure trove of history to unearth in the soil conservation districts. Key insights may also be gleaned from other special districts that (1) present a significant risk of redistributive rather than productive endeavor, or (2) necessitate close, ongoing coordination among member landowners, with respect to the management of living resources. Both issues will recur in many of the nature districts I have proposed.

