HABITAT RESERVE PROBLEM-SOLVING: DESPERATELY SEEKING SOPHISTICATED INTERMEDIARIES

BY

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In 2001, some 137 Pennsylvania communities across a dozen counties joined with the Audubon Society and dozens of other nonprofit organizations in an umbrella coalition of citizens alarmed by what they saw as the gradual destruction of one of the most significant wildlife habitat strongholds in the Northeast: the Kittatinny Ridge. Kittatinny, the "endless mountain" to the Leni-Lenape tribes that once inhabited the region, links New Jersey, Pennsylvania, and Virginia—supplying the mountain ridges on which the Appalachian National Scenic Trail unfolds, separating the plains of southeastern Pennsylvania from its ridge and valley regions to the north and west. Today, its more than 500 square miles traversing Pennsylvania are recognized as a globally significant migratory flyway that aids scores of migrant species in spring and fall, and supplies interior forest habitat to many more year-round.

The Kittatinny Coalition (KC) works from a common plan for the permanent conservation of the ridge as forested space. Some members are local land trusts that collect fee and sub-fee interests in real property to be held for conservation purposes. Other members supply needed technical assistance on animal behavior, habitat needs, watershed protection, etc. Still other members help build the KC's continuously improving Geographic Information System (GIS), a potentially significant conservation tool in its own right. Among the several challenges that have arisen since the KC emerged, none has been more challenging than goal setting and prioritization; specifically, the sorting of goals on a species-by-species or other basis which would allow the development of a comprehensive management plan, enabling the KC to identify high-priority areas for limited conservation funds and improve its corridors' connectivity, functionality, and resilience. Because of the diverse interests of its members, entities like the KC

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face a crisis of identity and risk the loss of their pooled assets to an over-abundance of low-value, low-impact conservation actions that are not appropriately prioritized or optimized for wider, landscape-scale objectives. In this Article, I will sketch some of the ways in which the fragmentative influences of conservation law lock entities like the KC into the horns of its dilemma as well as some ways in which the law should help entities like the KC scale up their (and our) conservation strategies and actions.

I. INTRODUCTION

Coalitions, partnerships, and cooperation will always be the future of conservation. For now there is disagreement, distrust, and dissonance within the myriad and constantly-shifting arrangements we have improvised in the hopes of leveraging conservation beyond its present means. In this Article, I explore some of the problems of cooperative conservation and the obstacles that local and regional actors face today as they strive to achieve broader-scale conservation successes. The Kittatinny Ridge, an "endless mountain" to the tribes that inhabited eastern and central Pennsylvania, links New Jersey and Pennsylvania to the hills of Maryland and Virginia in a vast corridor of forested acres totaling over 500 square miles.[1] It is one of the most impressive expanses of forested space in the urbanized landscapes east of the Mississippi and it is under constant threat of more fragmentation, conversion, and degradation—whether as wildlife habitat, watershed protection, or just plain scenery.[2] The Kittatinny serves multiple functions to resident and migratory wildlife while at the same time being home, if defined broadly, to more than a million and a half people.[3] In fact, its scale is its

1 *See* AUDUBON PA., CONSERVATION PLAN FOR THE KITTATINNY RIDGE IN PENNSYLVANIA (2006), *available at* http://pa.audubon.org/PDFs/KittatinnyConservationPlan-Apr2007.pdf.

2 *See id.*

3 *See id.* An update and "state of the resource" report was released in summer 2010. *See* AUDUBON PA., STATE OF THE KITTATINNY RIDGE (2010), *available at*

principal challenge: it is neither local nor national nor even statewide in scale; it is regional and corridor-like.[4] Preserving its integrity, therefore, begins as an extraordinary challenge and gets harder from there.

Our liberalism, we cannot forget, entrenches an often problematic distinction between public and private, feeding what, at times, has been a rather neurotic fixation on keeping government in its place. Property in land has long been a key currency within this distinction, for good and for ill. So-called private property has been one of the bluntest instruments for ending debates about the social responsibilities we all have to take care of our common resources and of each other.[5] Conservationists take this distinction largely as they find it,[6] although the array of public/private ventures testing this boundary today is vast and still expanding.[7] Public and private have become so intertwined in some of these projects that the distinction is almost overcome.

Bending the traditional categories is a growing array of organizational makeshifts—umbrella groups that join public and private actors into nominally cooperative entities that take their actions together.[8] One of these experiments, the Kittatinny Coalition (KC), is my focus here. The KC has brought together local, regional, and national land trusts; local and state conservation agencies and advisors; major environmental nonprofits; wildlife affinity groups; wildlife scientists; and educators.[9] All of them agreed to act jointly to conserve the ridge without truly having to specify what that mission entails, what their conservation priorities are, or how to do it.[10] This Article considers the KC as an example of a habitat problem-solving intermediary that emerged several years ago, only to fall on hard times and indecision. Part II details the standard tools of conservation today. Part III describes the "braiding" of the different legal regimes that have locked these conservation tools into certain predictable but troubling patterns. Finally, Part IV suggests some work-arounds for those locked into these now familiar traps in conservation politics.

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http://pa.audubon.org/PDFs/KittatinnyConservationPlan-Apr2007.pdf [hereinafter STATE OF THE RIDGE].

4 *See* AUDUBON PA., *supra* note 1.

5 *See* GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006); ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD (2003); ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND (2007) [hereinafter FREYFOGLE, ON PRIVATE PROPERTY]; LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002).

6 FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 5, at x–xv (discussing how to intertwine property rights with conservation interests).

7 *See* RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 36–40 (2003) (discussing the rise of land trust organizations in the 20th century).

8 *See, e.g.*, Larry S. Allen, *Collaboration in the Borderlands: The Malpai Borderlands Group*, RANGELANDS, no. 3, June 2006, at 17, 18.

9 *See* AUDUBON PA., *supra* note 1; Audubon Pa., Kittatinny Ridge Conservation Project Facts & Information: Project Overview, http://pa.audubon.org/kittatinny/facts_overview.html (last visited Feb. 11, 2011).

10 *See* AUDUBON PA., *supra* note 1; Audubon Pa., *supra* note 9.

II. PUBLIC, PRIVATE, AND COOPERATIVE CONSERVATION: THE TOOLBOX TODAY

Much as we have tried to establish a regulatory safety net, conservation in America is intimately bound up with ownership and will probably stay that way.[11] Stewarding owned resources, therefore, constitutes a big part of conservation's immediate future. Indeed, the vast majority of what we recognize as conservation is the supposed protection of the land community through possessory stewardship—not regulatory controls that coerce people to conserve.[12] For example, our governments of plenary power—the states—for many years were supposed to have inherited the wildlife within their boundaries from the Crown.[13] And over the arc of American history, states shifted from managing their wildlife for exploitation to managing the same wildlife for its relative scarcity.[14] Of course, states' ownership of their wildlife has been a fiction at most—but it has been a very salient and enduring fiction.[15] As the presumptive regulators of wildlife, states are hard to displace, politically. In addition, because state governments are so protective of landowner sovereignty and responsive to landowner concerns (at least normally), the status quo has been the under-protection of wildlife by states. Thus, only in its very recent past did American wildlife law take habitat loss and disturbance seriously at all.

Throughout its evolution, the structure of federal (and most state) wildlife law has remained surprisingly constant. First, what focus there has been on habitat has overwhelmingly taken the form of public lands acquisition (or retention).[16] Without public land, there has been precious little public attention paid to biodiversity in land use governance.[17] Second, when habitat has prompted controls on private property, the biota protected have overwhelmingly skewed toward what biologists know as charismatic megafauna—not intact species assemblages or natural processes and

11 *See* BREWER, *supra* note 7, at 1.

12 *See id.*

13 *See* Geer v. Connecticut, 161 U.S. 519, 522–23 (1896). It is important to note that *Geer*'s ownership notions were mostly abrogated in a series of later cases. *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 27–35 (3d ed., 1997).

14 *See* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW 26–31 (2d ed. 2010); THOMAS A. LUND, AMERICAN WILDLIFE LAW 101–10 (1980).

15 *See* Hughes v. Oklahoma, 441 U.S. 322, 334–35, 337 (1979); Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 598–99 (Cal. Ct. App. 2008).

16 *See* Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1336–38 (2002) (discussing the use of the Antiquities Act to set aside undeveloped lands for protection); Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463 (1999).

17 *See* Jamison Colburn, *Bioregional Conservation May Mean Taking Habitat*, 37 ENVTL. L. 249, 256–58 (2007) [hereinafter Colburn, *Taking Habitat*]; Jamison E. Colburn, *Habitat and Humanity: Public Lands Law in the Age of Ecology*, 39 ARIZ. ST. L.J. 145, 146–47, 149 (2007) [hereinafter Colburn, *Habitat and Humanity*]; Jamison E. Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 ALA. L. REV. 417, 436–37 (2005) [hereinafter Colburn, *Indignity*]; Jamison E. Colburn, *Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 ECOLOGY L.Q. 945, 946–47 (2006) [hereinafter Colburn, *Localism's Ecology*]; John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 559–63 (1996).

cycles.[18] Pennsylvania is exceptional in the northeast for the number and extent of its public land set-asides, although many of these have been managed for game species like deer and elk.[19] Finally, the law has done little to curb the introduction or release of invasive species and it has almost never provided the capital needed for other rehabilitative work at landscape scales.[20] So-called novel ecosystems are, therefore, increasingly the norm.[21] Nevertheless, federal (and most state) wildlife habitat law has directed its agents to engage in comprehensive conservation planning while at the same time saddling them with judicially enforceable duties to protect discrete, individual species and populations that are demonstrably imperiled. Migrations are playing a slowly but unmistakably growing role in that planning today, even as the action- and location-specific tasks accumulate and fill these agencies' backlogs.[22] This Part outlines the rise and solidification of our public, private, and hybrid conservation tools of today.

A. Conservation's Structural Turn Toward the Private

When it took shape in 1973, the Endangered Species Act (ESA)[23] was envisioned as legislation to address and even perhaps solve the conservation crisis we were just then noticing—at least within the confines of U.S. jurisdiction.[24] Since then, we have learned that federal legislation alone will accomplish no such thing. Today the ESA remains the exemplar of our "strictly science" federal conservation laws.[25] Yet, paradoxically, it is the very tool showing how ill-adapted our multi-agency state has become to the real problems of biodiversity loss and the applied science of conservation biology.[26] The agencies charged with its implementation are desperately under-resourced.[27] Yet they still may only set land use restrictions when they

18 *See* Peter Kareiva et al., *Nongovernmental Organizations*, *in* 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 176, 178 (Dale D. Goble et al. eds., 2006); David Orr, *The Constitution of Nature*, 17 CONSERVATION BIOLOGY 1478, 1480 (2003).

19 Christopher Gregory Klyza, *Public Lands and Wild Lands in the Northeast*, *in* WILDERNESS COMES HOME, REWILDING THE NORTHEAST, 75, 76 tbl.4.1, 87 (Christopher Gregory Klyza ed., 2001).

20 Colburn, *Indignity*, *supra* note 17, at 426, 446–53.

21 *See, e.g.*, Emma Marris, *The New Normal*, 11 CONSERVATION, Apr.–June 2010, at 12, 14–15 ("The nonjudgmental term for such a place is 'novel ecosystem'—one that has been heavily influenced by humans but is not under human management.").

22 *See* MANOMET CTR. FOR CONSERVATION SCIS., UNITED STATES SHOREBIRD CONSERVATION PLAN 5, 7 (Stephen Brown et al. eds., 2d ed. 2001) (describing measures intended to protect migratory shorebirds in an interagency conservation plan).

23 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

24 *See id.* § 1531(a)–(c); LAWRENCE R. LIEBESMAN & RAFE PETERSEN, ENDANGERED SPECIES DESKBOOK 6–7 (2d ed. 2010).

25 *See* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1041–43, 1049–56 (1997).

26 Colburn, *Indignity*, *supra* note 17, at 436–53; *see also* Doremus, *supra* note 25, at 1065–1129 (discussing the limits of science and its application in policymaking and the ESA).

27 *See, e.g.*, Endangered and Threatened Wildlife and Plants; Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871, 31,873 (June 14, 1999) (acknowledging that much of the Fish and Wildlife Service's budget in a fiscal year could be

can document the presence of a listed species, and then only to the extent that the few use restrictions they are empowered to impose have the support of the "best available scientific and commercial data."[28] These agencies face constant rule of law challenges to their plans and actions brought by aggrieved stakeholders, local communities, and interested citizens.[29] Thus, no matter their standard of care, the very structure of their authority—the ESA's moral stakes, procedural rigidity, and atomistic focus on particular taxa—embeds the public's conservation agents in legal conflict, deterring the very kinds of deliberation and collaboration they must sustain to succeed.[30]

To be sure, without listed species present, habitat degradation has typically been marginalized in our land use planning.[31] ESA section 9 prohibits anyone within the jurisdiction of the United States from killing or bringing "harm" to listed species.[32] The agencies' administrative definition of "harm" limits the prohibition to action, "including habitat modification, *which actually kills or injures wildlife*."[33] Proof burdens being what they are,

spent on just one duty under the ESA: the designation of critical habitat for listed species pursuant to court orders).

28 16 U.S.C. § 1533(b)(2) (2006). Courts have held that this statutory language requires the federal government to rely, wherever possible, on expert analysis and not simply the conclusory assertions of staff or interested private parties. *See, e.g.*, N. Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988). This statutory mandate also specifically excludes the use of economic considerations for listing, *see, e.g.*, N.M. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1284–85 (10th Cir. 2001), but it has been extremely difficult to say what constitutes the *best* scientific or commercial information amid the kinds of normative conflicts listing decisions produce. *See* Doremus, *supra* note 25, at 1031–34 ("Federal conservation statutes consistently invoke the mantra of science, demanding that executive branch agencies base their actions on the 'best available scientific information,' a term not defined in any statute.").

29 *See, e.g.*, 64 Fed. Reg. at 31,872–73 ("We have been inundated with citizen lawsuits for our failure to [designate critical habitat], and we have been challenged on numerous 'not prudent' critical habitat determinations . . . .").

30 Colburn, *Indignity*, *supra* note 17, at 436–53; George Cameron Coggins, *A Premature Evaluation of American Endangered Species Law*, *in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 1, 1–7 (Donald C. Baur & Wm. Robert Irvin eds., 2002).

31 Colburn, *Habitat and Humanity*, *supra* note 17, at 146–49.

32 16 U.S.C. § 1538(a) (2006). Under the Act, the "take" of any listed species is specifically prohibited and "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

33 Final Redefinition of Harm, 46 Fed. Reg. 54,748, 54,748 (Nov. 4, 1981) (codified at 50 C.F.R. pt. 17) (emphasis added). "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2009). Harass in the definition of 'take' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. *Id.* In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Supreme Court rejected the proposition that ESA section 3's definition of "take" could not bear an administrative definition of "harm" that included habitat modifications injurious to a population rather than to definite individuals. *Id.* at 696–708; *id.* at 710 (O'Connor, J., concurring) ("One need not subscribe to theories of 'psychic harm' to recognize that to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete. This, in my view, is actual

though, enforcement personnel face an acute resource problem in minimizing the harm that comes to listed taxa or their designated critical habitats.[34] Having to prove that any discrete action was the legal cause of the complained-of harm deters enforcers in all but a vanishingly small number of contexts.[35]

There is, therefore, a broader truth here about prohibitive norms and land conservation: the scarcity of public investment prevents them from being, at least at the federal level, "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[36] ESA section 7 and a few of its state analogues specifically prohibit the government from authorizing or carrying out any "destruction or adverse modification" of any listed species's designated "critical habitat."[37] But this prohibition governs only a small (and shrinking) list of actors[38] and,

injury." (citation omitted)); *see also id.* at 734 n.5 (Scalia, J., dissenting) (remarking that the concurrence relies on an "imaginative construction" to arrive at this result). Counsel for landowner organizations still argue, though, that "the harm regulations provide that a land use activity does not become harm unless and until the activity kills or actually injures a member of a listed wildlife species." Steven P. Quarles & Thomas R. Lundquist, *When Do Land Use Activities "Take" Listed Wildlife Under ESA Section 9 and the "Harm" Regulation?*, *in* ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES, *supra* note 30, at 207, 217. This is obviously a strategic position calculated to further complicate federal protections against broad scale habitat degradation. While the "harm" definition was amended in 1981 to require "significant" habitat destruction or degradation that "actually" kills or injures "wildlife," *see* 46 Fed. Reg. at 54,749, one can do so by impairing the "essential behavioral patterns of a listed species" like breeding, *id.* at 54,748, by disrupting the population and not just its individuals. Indeed, there would be nothing for the "harm" extension of the definition of "take" left to signify—given ESA section 3's other defining terms like "wound," "kill," and "harass"—if it necessarily required proved harm *to particular animals*.

[34] *See* BEAN & ROWLAND, *supra* note 13, at 218 n.121.

[35] Patrick Parenteau, *The Take Prohibition*, *in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 30, at 146, 147, 150–51.

[36] 16 U.S.C. § 1531(b) (2006). The agencies' experiences with consultations pursuant to ESA section 7 in which "take" has been inferred on the basis of incomplete proof underscores this point. *See, e.g.*, Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1251 (9th Cir. 2001) (invalidating "Incidental Take Statements" issued in the course of consultation as being insufficiently supported by proof).

[37] 16 U.S.C. §§ 1536(a)(2), 1533(b)(2) (2006); *see also* Susan George & William J. Snape III, *State Endangered Species Acts*, *in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 30, at 344–45, 352, 348–49 (discussing various habitat designation provisions). On state imperiled species programs generally, see Lawrence Niles & Kimberly Korth, *State Wildlife Diversity Programs*, *in* 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE, *supra* note 18, at 141, 141–55. This ESA prohibition only applies to federal agencies. All other parties—governed only by ESA section 9—are under no direct duty with respect to designated critical habitat. *See* Kieran F. Suckling & Martin Taylor, *Critical Habitat and Recovery*, *in* 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE VOLUME 1, *supra* note 18, at 75, 77.

[38] In *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), the Supreme Court curbed substantially the instances in which section 7 will apply. It interpreted mandatory language in the Clean Water Act, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006), in conjunction with an agency decision to act ("The Administrator shall approve each submitted program unless he determines that adequate authority does not exist.") to mean that that agency had no discretion to consider whether the action would jeopardize listed species as 7(a)(2) otherwise requires. 551 U.S at 661–62. The 5-4 majority held

in all events, critical habitat designations have become twisted knots of regulatory politics unto themselves.[39] The ESA requires that, concurrent with the listing of an imperiled species, the federal government "shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat."[40] Yet, if it deems the costs too high to landowners within the "geographical area occupied by the species, at the time it is listed,"[41] the government can simply elect not to designate private lands.[42] And as stakeholders and courts clarify the diversity

that the list of factors and the "shall" created a closed set of decision criteria and that application of ESA section 7(a)(2) was foreclosed as a result. *Id.* Because the Clean Water Act language was not unique, savvy agency counsel can now assert broadly that their own enabling statute or statutes are analogous to the Clean Water Act as construed in *National Association of Home Builders*.

[39] *See, e.g.*, Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129 (2004). The government now routinely admits it makes its critical habitat decisions in response to lawsuits and threats to sue. *See* Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 CONSERVATION BIOLOGY 399, 400, 402 (2006). Though the statute proclaims its goal to be the conservation of ecosystems, the means Congress actually provides consist chiefly in the designation and protection of resources for listed species. *See* Ctr. for Biological Diversity v. Norton, 240 F. Supp. 2d 1090, 1098 (D. Ariz. 2003). And critical habitat designations have become harder and harder for the agencies to complete. *See, e.g.*, *id.* at 1091–94 (cataloging hurdles of the Fish and Wildlife Service to designating critical habitat for the Mexican spotted owl).

> Between April 1996 and July 1999, FWS designated more than 250 species as threatened or endangered under the ESA, but had made critical habitat designations for only 2. Of a total 1,200 species listed by FWS as threatened or endangered, FWS has designated critical habitat for only 113 (9%) of them. Furthermore, while FWS must designate critical habitat once a species is listed, "the FWS has typically put off doing so until forced to do so by court order."

Id. at 1103 (citations omitted) (quoting *N.M. Cattle Growers' Ass'n*, 248 F.3d 1277, 1283 (10th Cir. 2001)).

[40] 16 U.S.C. § 1533(b)(2) (2006); *see also N.M. Cattle Growers' Ass'n*, 248 F.3d at 1285 (expressly rejecting the baseline approach to economic analysis because the ESA required a detailed analysis of the economic impacts fairly traceable to the designation of critical habitat even if those impacts would also be caused in the absence of critical habitat designations—i.e., by the listing of the species in and of itself).

[41] 16 U.S.C. § 1532(5)(A)(i) (2006). The statutory definition of "critical habitat" for a listed species is "the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with [ESA section 4], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . . ." *Id.* The designation can be extended to areas "outside the geographical area occupied by the species at the time it is listed," but only if the Fish and Wildlife Service (FWS) specifically finds "that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

[42] *See* 16 U.S.C. § 1533(b)(2) (2006) ("The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . . ."); *see also N.M. Cattle Growers' Ass'n*, 248 F.3d at 1285 (concluding that FWS has a statutory duty to analyze the quantifiable costs and benefits of designating protected habitat even if those factors are coordinately caused by the listing of the species itself—through the operation of ESA section 9—or other regulatory requirements).

of ways in which habitat actually suffers "adverse modification" from traditional land uses,[43] the resource-starved agencies have a growing incentive not to designate any more habitat than they absolutely must. Restoration of species long extirpated locally, and even perhaps the protection of lands for migrations long ago lost, are normally beyond the pale.[44] The Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) (collectively, the Services)[45] have said they will seek to restore historically occupied habitat to the range of a species "only when a designation limited to its present range would be inadequate to ensure the conservation of the species."[46] As the evidence on migrations to date confirms, this is an extremely tricky threshold to identify as a practical matter[47] and a rather compromised and cynical one as a normative matter.[48]

It is perhaps not surprising, then, that the Kittatinny Ridge has virtually no designated critical habitat today and is, in fact, virtually invisible to federal wildlife law.[49] A great deal of wildlife habitat critical to migrations and migratory species is like the Kittatinny in this respect.[50] Federal road projects—Interstate highway 81 traces many of its 234 Pennsylvania miles along the ridge, for example—are perhaps the only consistent trigger of any federal conservation responsibilities under federal law.[51] Like any part of our landscape that is long-disturbed—subject to farming, logging, urbanization, or other forms of cultivation long before 1973—much of the Kittatinny Ridge

43 *See* Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1069–71 (9th Cir. 2004) (discussing the correct interpretation of "adverse modification" in considering impacts of logging); Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 439–43 (5th Cir. 2001) (discussing the link between adverse modification and critical habitat value to species survival and recovery in the context of sturgeon fishing).

44 *See Ariz. Cattle Growers' Ass'n*, 273 F.3d 1229, 1244–47 (9th Cir. 2001) (finding that Congress did not intend for all land capable of supporting a protected species to be regulated by FWS and thus a species not recently reported in an area or only potentially migrating to an area to recolonize was insufficient to justify the issuance of an Incidental Take Statement).

45 These two agencies are responsible for implementing the ESA. *See, e.g.*, 50 C.F.R. § 424.12(e) (2009).

46 50 C.F.R. § 424.12(e) (2009).

47 *See* Heather L. Reynolds & Keith Clay, *Migratory Species and Ecological Processes*, 41 ENVTL. L. 371 (2011).

48 Too much of what we regard as *conservation* today is more properly labeled *restoration* of biota and functional ecosystems. *See generally* OSWALD J. SCHMITZ, ECOLOGY AND ECOSYSTEM CONSERVATION (2007) (discussing the complexity of ecosystem conservation). Thus, if repopulation is beyond the scope of the ESA, that statute's scope is severely limited.

49 *See* Robert L. Fischman & Jeffrey B. Hyman, *The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance*, 28 VA. ENVTL. L.J. 173, 221 (2010); U.S. Fish & Wildlife Serv., Critical Habitat Mapper, http://criticalhabitat.fws.gov/flex/crithabMapper.jsp. (last visited Apr. 15, 2011) (mapping critical habitat nationwide).

50 Joel Berger, *The Last Mile: How to Sustain Long-Distance Migration in Mammals*, 18 CONSERVATION BIOLOGY 320, 321 (2004).

51 *See generally* 16 U.S.C. § 1536(a)(2) (2006) (requiring consultation if a federal agency's proposed action might "jeopardize the continued existence" of a listed species or modify any designated critical habitat); *Nat'l Ass'n of Home Builders*, 551 U.S. 644, 665 (2007) (holding that the consultation duty covers only *discretionary* agency actions and does not attach to actions that an agency is required by statute to undertake).

is normally occupied by species that have adapted to human disturbance in substantial ways.[52] We might say that forests like those along the Kittatinny Ridge are simply not extraordinary enough to garner much attention from federal conservation law.

The "harm" prohibition in particular and the geography of listing more generally yield a specific insight into regulatory habitat protection. Because it is only the exceptional constituents of nature that trigger federal (and most state) land use controls,[53] our administrative agencies are now used to viewing local land use authorities as obstacles to—not as essential elements of—their land planning and conservation actions.[54] The statutory authorities that empower state and federal agencies to control land uses, especially on private land, skew toward the special, thereby excluding the ordinary. As a result, these authorities encourage the balancing of local and regional conservation efforts in lieu of federal action. Because no place is more ordinary in this sense than the northeastern United States, and because no place has seen a developing conservation community for longer, places like the Kittatinny Ridge should be cooperative conservation's ground zero.[55] But it is in environments of this kind that conservation is at its weakest.[56] In places like the Kittatinny Ridge—where the thinning of wildlife began generations ago, fire has been suppressed for centuries, and much of what remains is adapted to traditional multiple use—wildlife habitat protection law tends to be more of a distraction than anything else.[57] It distracts people and chills the relationships that might lead to more collaboration and more bridging of the familiar gaps in our land use politics.[58] In this environment,

52 *See* AUDUBON PA., *supra* note 1.

53 *See supra* notes 36–37 and accompanying text.

54 *See, e.g.*, Martin F. J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BIOSCIENCE 360 (2005) (evaluating success of the Services' strategies under the ESA without referring to coordination with local entities). Local land use authority throughout the Kittatinny is a predominant driver of land use decision making, an influence Pennsylvania has sought repeatedly to reform. *See* Joel P. Dennison, *New Tricks for an Old Dog: The Changing Role of the Comprehensive Plan Under Pennsylvania's "Growing Smarter" Land Use Reforms*, 105 DICK. L. REV. 385 (2001).

55 Others have commented on this paradox at length. *See* Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325, 329 (2002) [hereinafter Doremus, *Saving the Ordinary*] ("Although saving the special will always be an important component of nature protection, that strategy alone cannot solve the current biodiversity problem. Saving biodiversity is by definition a general goal, not readily amenable to any special focus."); Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 304 (1991); Daniel J. Rohlf, *Six Biological Reasons Why the Endangered Species Act Doesn't Work—And What to Do About It*, 5 CONSERVATION BIOLOGY 273, 275 (1991).

56 Doremus, *Saving the Ordinary*, *supra* note 55, at 334 ("Human beings simply are not wired to care about, or even to notice, the ordinary. We cannot attend to everything that competes for our attention. We have therefore developed a variety of filtering mechanisms to help us focus effectively on some things by more or less shutting out others. . . . The ordinary . . . provides a poor focal point.").

57 *See* AUDUBON PA., *supra* note 1.

58 One of the principal chilling influences in environments of this kind is the unpredictability of species's listing under the ESA—a process that is driven as much by ESA section 4 litigation as anything else. *See* LIEBESMAN & PETERSEN, *supra* note 24, at 13–27

conservationists have to struggle just to interpret their own designs and goals. Conservation in this environment is much more a question of experiments in landscape restoration than it is in maintaining some status quo. Yet restoration often entails ambitious biological and physical manipulations, not to mention protecting adequate landscape permeability, that is, the properties that make landscapes traversable for species and natural forces.[59] For these goals, federal (and most state) imperiled species law is increasingly irrelevant.[60]

To read most analyses of the law of biodiversity, one would think public lands are the solution to this obvious gap in the available tools. The facts, however, suggest otherwise. The major federal public lands systems and the statutes governing them have been shaped to fit other priorities,[61] and the potential connectivity between public lands as habitat is, as a rule, very low.[62] Indeed, according to analyses of these systems keyed to conservation values, crippling deficiencies are the norm, especially east of the Rockies.[63] The Kittatinny Ridge is no exception. Along the Kittatinny Ridge, in fact, public lands owned outright are the rare exception and will remain that way as long as public acquisition remains both prohibitively expensive and politically toxic.[64] The National Park Service (NPS) administers a narrow strip down the spine of the ridge on either side of the Appalachian Trail, and it administers the Delaware Water Gap National Recreation Area at the ridge's northern reaches.[65] The federal government operates the Fort Indiantown Gap National Guard Training Site.[66] Otherwise, the only public lands of spatial significance are Pennsylvania's highly dispersed collection of

(discussing the many issues involved in the decision to list a species, including judicial interpretations and the Services' responses).

59 Colburn, *Indignity*, *supra* note 17, at 421–36; *see* Fischman & Hyman, *supra* note 49, at 212.

60 *See* George & Snape, *supra* note 37 ("No mechanisms for recovery, consultation, or critical habitat designation exist in 32 state [endangered species] acts."); Fischman & Hyman, *supra* note 49, at 212–17 (listing actions that could be taken to promote migration on federal lands, but noting "[r]estricting migration protection efforts to public lands, however, will not be sufficient to protect migrations generally").

61 *See* Colburn, *Habitat and Humanity*, *supra* note 17, at 175–76 (arguing that limiting agencies to preserving public lands from certain land uses is not sufficient to protect biodiversity); Robert B. Keiter, *Ecological Concepts, Legal Standards, and Public Land Law: An Analysis and Assessment*, 44 NAT. RESOURCES J. 943, 986 (2004) (noting that the conclusion that minor biodiversity-oriented changes to public lands laws indicate a reorientation of public lands policy is "premature").

62 Colburn, *Indignity*, *supra* note 17, at 432–34.

63 *See* J. Michael Scott et al., *Gap Analysis: A Geographic Approach to Protection of Biological Diversity*, 57 J. WILDLIFE MGMT. (WILDLIFE MONOGRAPHS, NO. 123) 1, 34 (1993); J. Michael Scott et al., *Nature Reserves: Do They Capture the Full Range of America's Biological Diversity?*, 11 ECOLOGICAL APPLICATIONS 999, 1004 (2001). *See generally* J. Michael Scott et al., *National Wildlife Refuge System: Ecological Context and Integrity*, 44 NAT. RESOURCES J. 1041, 1046–47 (2004) (showing that fragmentation of the refuge system is inhibiting conservation policies).

64 *See* SALLY K. FAIRFAX ET AL., BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004, at 256, 263 (2005).

65 AUDUBON PA., *supra* note 1.

66 *Id.*

state game lands, state parks, and state forests—of which there are over a dozen units along the Kittatinny Ridge broadly defined.[67] Thus, linking the public lands together to make more continuous, permeable landscapes is a task for someone other than the government's stewards of existing public lands. And as the nonprofit sector has scaled up, it has become the driving force for habitat conservation in this region, as in most others.[68]

With sprawl so menacing a threat to the conservationists along the 185 mile long Kittatinny Ridge[69] and with no reconstitution of our privatist land ethic in sight, there has been a growing urgency to state, local, and private capital campaigns to acquire more conservation land. Acquisitions of this kind are most often justified as protections of the ridge's "ecosystem services."[70] Indeed, with the rise of the green infrastructure movement, a steady infusion of state and local capital—both financial and human—has come to the region's conservation circles over the last decade.[71] But there are other threats besides sprawl (itself an umbrella term with many meanings), and their salience and significance vary among KC members. For example, much of the coalition defines the overabundance of white-tailed deer—which are browsing Pennsylvania forests into completely altered environments[72]—as a threat to the resource.[73] Not all members share that view, though.[74] White-tailed deer have often been managed to hyper-abundance by state wildlife regulators, much to the appreciation of

67 *Id.*

68 *See* FAIRFAX ET AL., *supra* note 64, at 259.

69 Pennsylvania is estimated to have lost over four million acres of farmland to sprawl since 1950. *See* DEBRA WOLF GOLDSTEIN, USING CONSERVATION EASEMENTS TO PRESERVE OPEN SPACE: A GUIDE FOR PENNSYLVANIA'S MUNICIPALITIES 4 (2002), *available at* http://www.dcnr.state.pa.us/brc/Easements.pdf.

70 The KC touts the many "ecosystem services" the Kittatinny Ridge provides, including "clean and reliable drinking water; a multitude of recreational options . . . an abundance of wildlife, including the world-famous fall raptor migration; breathtaking scenery . . . and economic impact from the many visitors to the region's parks, trails, and game lands." STATE OF THE RIDGE, *supra* note 3, at 2, 12.

71 *See* MIKE MCQUEEN & ED MCMAHON, LAND CONSERVATION FINANCING 17 (2003); Alexandra Dapolito Dunn, *Siting Green Infrastructure: Legal and Policy Solutions to Alleviate Urban Poverty and Promote Healthy Communities*, 37 B.C. ENVTL. AFF. L. REV. 41, 53–56 (2010). *See* Audubon Pa., Blue Mountain – Kittatinny Ridge Conservation Project Partners, http://kittatinnyridge.com/partner_coalition.html (last visited Apr. 2, 2011) (noting that the organization has significantly expanded its partners since 2001).

72 Stephen B. Horsley et al., *White-Tailed Deer Impact on the Vegetation Dynamics of a Northern Hardwood Forest*, 13 ECOLOGICAL APPLICATIONS 98, 112 (2003).

73 AUDUBON PA., *supra* note 1.

74 The Pennsylvania Federation of Sportsmen's Clubs (PFSC) is careful not to advertise its support for unchecked deer populations, but neither does it view deer herd reduction as a priority. *See* Joe McGarrity, *Joint Legislative Budget and Finance Committee*, ON TARGET, May/June 2010, at 11, 13, *available* at http://www.pfsc.org/LinkClick.aspx?fileticket=xR-MieN3xew%3d&tabid=152 (arguing for balancing deer population with plant regeneration); Steve Smith, *Profitable Conservation Program Pays Landowners to Plant Trees and Improve Wildlife Habitat*, ON TARGET, May/June 2010, at 15, 15, *available at* http://www.pfsc.org/LinkClick.aspx?fileticket=xR-MieN3xew%3d&tabid=152 (promoting a program giving property owners incentives to plant trees and shrubs that benefit white-tailed deer).

sportsmen's groups.[75] As another example, the Kittatinny boasts more than a dozen significant bird-watching locations where birders watch migrating raptors and other species each fall.[76] But what could land use changes do to disrupt this migration? The evidence on hand today is rather inconclusive; there apparently will never be the equivalent of the newly constructed rancher's fence that killed several hundred migrating pronghorn in the 1980s.[77] But even the smallest changes in land use can affect the ridge's functionality as interior forest habitat for resident species. The ridge's role in avian migration is a biophysical question entirely apart from a more general need for large forested areas.

The protection of migrations and migrating species present this dilemma rather squarely. What might pass superficially for an agreed-upon set of priorities across a landscape (and the immense ridge/corridor of the Kittatinny is emblematic here) can easily fracture when the specific questions of a firm conservation plan arises—especially one that is spatially explicit, institutionally specified, and politically strategized.[78] One of the principal goals supposedly shared by all the many actors along the Kittatinny Ridge is to enhance the public's recognition of the Ridge's value to its communities.[79] So-called green infrastructure may be the most serviceable moniker to that end.[80] Even if all can agree that the ridge's green infrastructure is worth preserving, though, the question eventually arises: at which locations is it most in jeopardy? Even assuming the piecemeal acquisition, one parcel at a time, of at-risk lands before they can be subdivided and urbanized is the goal, and that donated capital is its principal means, the pervasive opportunity costs that donors face will eventually influence the decisions.[81] Furthermore, many conservationists disagree passionately over the precise role of "limited development" and whether it ought to be welcomed as an alternative to unplanned and/or dispersed

75 PA. DEP'T. OF CONSERVATION & NATURAL RES., DEER MANAGEMENT PLAN 2, *available at* http://www.dcnr.state.pa.us/forestry/deer/Deer_Management_Plan.pdf (stating as a deer-management goal, to "provide deer viewing and hunting opportunities to the public" to promote recreation and tourism).

76 *See* AUDUBON PA., *supra* note 1, at 9.

77 David J. Cherney, *Securing the Free Movement of Wildlife: Lessons from the American West's Longest Land Mammal Migration*, 41 ENVTL. L. 599, 603 (2011).

78 Collaborative ventures of many different kinds confront this fact of life. How an individual effort moves from gently worded abstractions to practical actions taken together is ably mapped in Wondolleck and Yaffee's patient study. *See* JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCES MANAGEMENT (2000).

79 See AUDUBON PA., *supra* note 1, at 6.

80 Dunn, *supra* note 71, at 43 ("The term 'green infrastructure' has many definitions because it is used on a variety of scales—watershed or sub-watershed, neighborhood, or site.").

81 Even in U.S. land markets with comparatively depressed prices (like much of Pennsylvania), the conservation community should not be expected to invest at the levels that were common from 1999 to 2008. The scarcity of conservation capital globally is forcing hard choices that are now being driven by opportunity costs as much or more than biology. *See* Robin Naidoo & Wiktor L. Adamowicz, *Modeling Opportunity Costs of Conservation in Transitional Landscapes*, 20 CONSERVATION BIOLOGY 490, 491 (2006).

subdivision-driven development.[82] The spatially haphazard distribution of subdivision-driven development can turn the nominal contributors to the KC into real time competitors for scarce public attention, financial and human capital, and governmental support.[83] Even supposing broader consensus on priorities can be achieved, the spatial targeting necessitated by scarcities of capital often makes it impossible to strategize rationally.[84] The KC is no exception on this point: if the KC or its members have the requisite competence to choose projects wisely or to engineer good conservation development schemes collectively, it remains to be seen in practice.[85]

Of course, the tool that has come to dominate all others, given its relative precision, scalability, and affordability, is the conservation easement.[86] Indeed, for years now conservation nonprofits' over-use of

82 *See* Jeffrey C. Milder et al., *Conserving Biodiversity and Ecosystem Function Through Limited Development: An Empirical Evaluation*, 22 CONSERVATION BIOLOGY 70, 72, 78 (2008); Jeffrey C. Milder, *Using Limited Development to Conserve Land and Natural Resources*, 25 EXCHANGE, Spring 2006, at 14, 14, 19. *But see* Jeremy D. Maestas, Richard L. Knight, & Wendell C. Gilgert, *Biodiversity and Land-Use Change in the American Mountain West*, 91 GEOGRAPHICAL REV. 509, 520–521 (2001) (finding that even limited development projects have deleterious effects on biotic communities); Mark W. Brunson & Lynn Huntsinger, *Ranching as a Conservation Strategy: Can Old Ranchers Save the New West?*, 61 RANGELAND ECOLOGY & MGMT. 137, 139 (suggesting that limited development may subject human populations to animal-borne disease).

83 A major priority for the KC is the enactment of growth control ordinances throughout the more than 100 municipalities comprising the Ridge that have the authority to do so. See STATE OF THE RIDGE, *supra* note 3, at 14. No detailed plan for doing so appears in the KC's most recent update, *see id.*, which is a potentially serious problem for the KC. *See* WONDOLLECK & YAFFEE, *supra* note 78, at 170 ("As logger Jim Neal of the Applegate Partnership comments, 'Abstraction is death for a partnership.' Effective partnerships in our studies grappled with issues in a tangible way by visiting sites and grounding their discussions in hands-on experiences.").

84 Without detailed cost-benefit data with which to prioritize conservation acquisitions it is impossible to choose parcels based on their expected monetary costs and conservation benefits. Modeling has been proposed as one means of traversing this hurdle in conservation planning, but even good models require more data than is usually available to local land trusts. *See* David Newburn et al., *Economics and Land-Use Change in Prioritizing Private Land Conservation*, 19 CONSERVATION BIOLOGY 1411, 1413 (2005); *see also* Paul R. Armsworth & James N. Sanchirico, *The Effectiveness of Buying Easements as a Conservation Strategy*, 1 CONSERVATION LETTERS 182, 188 (2008) ("The effectiveness of easements also depends on the information available to conservation investors regarding the value private landowners place upon keeping their properties in biodiversity friendly land uses.").

85 As others have shown, designing limited development projects that work is challenging even under the best of conditions. *See, e.g.*, Ned Sullivan & Steve Rosenberg, *Employing Limited Development Strategies to Finance Land Conservation and Community-Based Development Projects*, *in* FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE 90 (James N. Levitt ed., 2005). The structure that is perhaps most difficult to arrange and maintain is the partnership with developers. *See* Milder, *supra* note 82, at 16–17.

86 *See* FAIRFAX ET AL., *supra* note 64, at 203–43; C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 4 (2008) (noting that "conservation easements are the primary tool of private land conservation today," and that there were over 5.7 million more acres of conservation easements created than fee acquisitions in the period from 2000–2005). A conservation easement can be many things across the fifty states. The standard form is a sub-fee interest in land that binds the landowner to do or to not do various things with the land. *See* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 6–8 (1989).

conservation easements has provoked words of caution.[87] For novel property interests that have yet to be tested in court much, conservation easements are shaping up to be a major variable in conservation politics in the coming century.[88] The KC, like other similar groups, has identified the acquisition of conservation easements as one of its chief conservation objectives.[89] But how should an entity like the KC—which, at its inception, exists only on paper—identify and target the highest value acquisitions first, acquire only that land (or those interests in land) that ought to be acquired and can be stewarded, and keep all of its constituent parts working together toward their common ends? Assessing the available tools is a key step in answering that question.

Conservation easements are creations of legislation—at common law, most would have been unenforceable[90]—and forty-nine of the fifty states have adopted some form of enabling legislation over the last half-century.[91] According to most such statutes, these easements are interests in real property;[92] they run with the land, binding subsequent owners like any servitude;[93] and they can be purchased for value.[94] We all know the impressive growth in scale and scope of organizations like The Nature Conservancy (TNC) and the Trust for Public Land (TPL).[95] Almost as widely noted have been the hundreds of local land trusts that have proliferated in the last decade—numbering over 1600 in the 2005 Land Trust Alliance census.[96] But the conservation of lands that are at risk of sale and

87 *See, e.g.*, Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

88 *See* Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039 (2007); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005).

89 *See* AUDUBON PA., *supra* note 1.

90 Dana & Ramsey, *supra* note 86, at 12–17.

91 *See* ROBERT H. LEVIN, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES 7 (2010), *available at* http://www.landtrustalliance.org/policy/cestatutes finalreport.pdf. North Dakota is the only state without an enabling statute of some kind—and indications are that it will remain a holdout. *Id.*

92 The Uniform Conservation Easement Act (UCEA) adopted an explicitly permissive approach to the creation of conservation easements, settling on three essential features: (1) such an easement is a nonpossessory interest in real property; (2) it imposes limitations or affirmative obligations on the owner-in-possession; and (3) the easement serves conservation purposes broadly defined. *See* UNIF. CONSERVATION EASEMENT ACT §§ 1(1), 2(a), 12 U.L.A. 165, 174, 179 (2008). Notably missing from these properties are the common law requirements of "touch-and-concern" and "privity of estate," both of which are abolished by the UCEA and its copies. *Id.* § 4(6)–(7), 12 U.L.A. at 187. Twenty seven states adopted the UCEA or similar language. LEVIN, *supra* note 91, at 7.

93 LEVIN, *supra* note 91, at 11.

94 *See* UNIF. CONSERVATION EASEMENT ACT § 2(a), 12 U.L.A. 165, 179 (2008).

95 *See* BREWER, *supra* note 7, at 1.

96 *See* ROB ALDRICH & JAMES WYERMAN, LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT 3 (Chris Soto & Anne W. Garnett eds., 2005), *available at* http://www.landtrustalliance.org/land-trusts/land-trust-census/2005-national-land-trust-census/ 2005-report.pdf. The stunning growth in land trust numbers in the five years reviewed in the 2005 census, a 32% increase, *id.*, drew a lot of attention. *See, e.g.*, Patrick O'Discroll, *Report:*

subdivision in places like the Kittatinny (even after the 2008 recession and collapse of so many real estate markets) can quickly consume the available capital, even if all the resources of these organizations could be combined.[97] And the sad fact is that the pooling of resources by groups like TNC, TPL, and local land trusts is actively discouraged by existing law. This is because the tax treatment of conservation easements and the nonprofit status of the organizations acquiring them are just as important as the status of the easements under a state's real property law.[98] Thus, to an increasing extent, the Internal Revenue Service (IRS) sets the terms and conditions of this playing field. Furthermore, lately IRS has been under pressure to identify and eradicate perceived abuses.[99]

Groups like TNC and its local analogues purchasing land and sub-fee interests in land from willing sellers and/or donors are driving an on-going transformation of our conservation politics. Whether by fee simple or through some kind of sub-fee interest to better leverage limited capital, these organizations are the leading edge of conservation's privatization today.[100] Fairfax and many others link this turn to neoconservative attacks on the regulatory state.[101] Whatever its causes, it is bringing us an unmistakably more private conservationism. Today, more than 1600 local land trusts nationwide that gather conservation easements and other interests in land are at work across landscapes like the Kittatinny.[102] But their work is increasingly opaque, increasingly shielded from meaningful public scrutiny, and increasingly under the scrutiny of blunt instruments like IRS—and this may wind up being their Achilles' heel.[103] Of course, finding limited capital is

Conservation Efforts Offset Land Lost to Sprawl, USA TODAY, Nov. 30, 2006, http://www.usatoday.com/news/nation/2006-11-29-conservation-sprawl_x.htm (last visited Mar. 22, 2011). The 2010 census is due to be released later this year. Land Trust Alliance, FAQs, http://www.landtrustalliance.org/land-trusts/land-trust-census/2010-national-land-trust-census/faqs (last visited Feb. 14, 2011).

97 *See, e.g.*, The Nature Conservancy, Conservation Easements, http://www.nature.org/aboutus/privatelandsconservation/conservationeasements/index.htm (last visited Apr. 20, 2011).

98 *See infra* Part III.A.

99 *See infra* notes 139–61 and accompanying text.

100 *See* Emily Bateson & Nancy Smith, *Making It Happen: Protecting Wilderness on the Ground*, *in* WILDERNESS COMES HOME: REWILDING THE NORTHEAST 182, 196–97 (Christopher McGrory Klyza ed., 2001); FAIRFAX ET AL., *supra* note 64, at 7–8. For an account of one aspect of the privatization movement, see JOHN H. ADAMS ET AL., A FORCE FOR NATURE: THE STORY OF NRDC AND THE FIGHT TO SAVE OUR PLANET 23–30 (2010) which describes the formation of the Natural Resources Defense Council as the nation's first environmental law firm in the 1970's, including the firm's initial fight with IRS to retain its tax-exempt status despite litigating for environmental conservation.

101 *See, e.g.*, FAIRFAX ET AL., *supra* note 64, at 203; Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 275 (2007).

102 *See* Fairfax et. al., *supra* note 64, at 261. Collectively, local land trusts have "about one million members, many of them avid, hard-working volunteers." BREWER, *supra* note 7, at 1. By 2005, more than half of the area protected by these groups took the form of conservation easements. *See* Armsworth & Sanchirico, *supra* note 84, at 182.

103 Morris and Rissman conclude that the public availability of information about private conservation deals is diminishing and that this could have significant long-term costs. *See* Amy

often viewed as the solution to conservation problems, especially at a regional level.[104] But this is too simple by half. Acquisition of these interests is not only the beginning of a sometimes burdensome stewardship obligation. It can also be the dissipation or deconcentration of scarce conservation resources like financial and human capital.[105]

Spatially explicit planning with a parcel map, priorities that are express and widely agreed upon, and agendas that fit the relevant local governments' zoning ordinances (instead of, as is more common, fighting them) remain rare.[106] Thus, as I have argued in the pages of this journal before, property acquisitions and private planning do not represent just a shift in tactics.[107] They are changing the polarities of conservation as a practical political endeavor.[108] Private property, even when it is managed to provide a public good like habitat or watershed integrity, is still private property.[109] Its managers need never weather the exacting scrutiny that is constantly focused upon the actions of administrative agencies like NPS or FWS.[110] And

Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237 (2009).

104 *See* Colburn, *Taking Habitat*, *supra* note 17, at 276.

105 *See* Paul R. Armsworth et al., *Land Market Feedbacks Can Undermine Biodiversity Conservation*, 103 PROC. NAT. ACAD. SCI. 5403, 5407 (2006), *available at* http://www.pnas.org/content/103/14/5403.full.pdf (discussing how purchasing land for conservation can undermine conservation efforts); A.M. Merenlender et al., *Land Trusts and Conservation Easements: Who Is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 70 (2004) ("Frequently, easements are assumed to be good for conservation because they at least abate the risks of the land being subdivided or developed to its highest economic use, and this is considered a benefit to all forever. The real story is much more likely to be that, with the conservation easement in place, where there is currently one house there will be two or three houses, with the easement protecting an unknown quantity of open space of unidentified ecological integrity for an undetermined amount of time.").

106 *See, e.g.*, Joe Duggan, *14 Nebraska Counties Oppose Conservation Projects Funded by Trust*, LINCOLN JOURNALSTAR.COM, Mar. 31, 2010, http://journalstar.com/news/local/article_c41abcd4-3c4f-11df-a9ba-001cc4c03286.html (last visited Feb. 16, 2011) (reporting on a request by 14 Nebraska counties for an environmental trust to revoke grants for easements and an acquisition to conserve wildlife). The exceptions come almost exclusively from the organizations large enough to carry out such analyses and strategy-driven acquisitions. *See, e.g.*, TRUST FOR PUB. LAND, A VISION FOR THE FUTURE OF CONSERVATION: BARNEGAT BAY 2020, at 26, 30–31, 35 (2008), *available at* http://www.tpl.org/content_documents/nj_Barnegat_Bay_2020_08.pdf (setting out parcel-by-parcel priorities, environmental quality goals, and coordinating staff for the more than 425,000 acre Barnegat Bay watershed in Ocean County, New Jersey).

107 Colburn, *Taking Habitat*, *supra* note 17, at 276.

108 *Id.*

109 *See* Morris & Rissman, *supra* note 103, at 1265 (reporting the views of one interviewee that, "Not everything is the public's business. This [conservation deal] is a private transaction, especially those that are donated. They are recorded. [The public] shouldn't be able to go through our files." (second alteration in original)). *But cf.* Cheever, *supra* note 87, at 1101 (arguing that creating a government right to enforce conservation easements might protect against their abuse, which would make private easements more like a public resource).

110 In the context of characterizing and pricing particular environmental degradations, this lack of scrutiny can be extremely advantageous, of course. *Cf.* James Salzman, *Creating Markets for Ecosystem Services: Notes from the Field*, 80 N.Y.U. L. REV. 870, 880 (2005) ("In most cases, our scientific knowledge is inadequate to undertake meaningful marginal analysis—

without the right mechanisms of accountability, private deals employing private conservation tools can be of dubious merit, can be used to conceal sham transactions and self-dealing, and can even be contrary to the public interest.[111] To date, the principal remedy for these risks has been IRS.[112] IRS supervision presents a number of challenges, though. Going forward, IRS's indirect management of privatized conservation—through its scrutiny of tax-exempt statuses or of particular deals—should be a major issue for conservationists. Part III examines IRS's role in more detail.

Finally, the concerned citizens who are willing to pay to protect nature can paradoxically drive up the price of their own consumption.[113] As more complex, finer-grained mosaics of public and private ownership emerge,[114]

to predict with any certainty how specific local actions affecting these factors will impact the local ecosystem services themselves. For example, it is difficult to predict how developing thirty percent of *this* wetland will impact water quality, flooding events, or local bird populations."). But it can also camouflage or even insulate the decidedly irrational actions of ignorant or biased agents from needed scrutiny. *See, e.g.*, Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 139 (2010).

111 *See* Bray, *supra* note 110, at 139. A series of Washington Post articles in 2003 cast suspicions onto The Nature Conservancy with allegations that the organization was party to arguably fraudulent, tax sheltering deals. *See Senate Finance Committee Questions Nature Conservancy Practices, Calls for Changes*, PHILANTHROPY NEWS DIGEST, http://foundationcenter.org/pnd/news/story.jhtml?id=109300023 (last visited Apr. 15, 2011). After the dust settled, not a single instance of fraud or illegality was discovered, but nonetheless the Nature Conservancy changed certain controversial practices like selling conservation easements to trustees and allowing drilling on some of its preserves. *See id.* Still, broader problems of myopia and irrational decision making exist. *See* Armsworth et al., *supra* note 105, at 5407–08 ("Conservation groups typically ignore land market dynamics when prioritizing areas for investment. . . . Continuing to ignore market forces risks making wasteful use of limited conservation resources, and in some circumstances, may even result in conservation investments doing more harm than good."); *see also* William Murdoch et al., *Maximizing Return on Investment in Conservation*, 139 BIOLOGICAL CONSERVATION 375, 387 (2007) (explaining that informal ways of dealing with uncertainty in conservation efforts leads to a "fallible process" that is not capable of taking into account numerous interdependent factors).

112 *See supra* Part III.

113 *See* Armsworth et al., *supra* note 105, at 5407 ("[L]and prices rise when conservation groups invest significant sums in local land markets, making future investments more difficult.").

114 Innovative dealmaking, including the use of conduit organizations passing acquisitions into eventual public ownership, public/private partnership, debt market and revolving fund financing, is becoming the stock-in-trade for the larger organizations like the Trust for Public Land, The Nature Conservancy, and some others. *See* Patrick Coady, *Conservation Finance Viewed as a System: Tackling the Financial Challenge*, *in* FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE, *supra* note 85, at 22, 32–33 (commercial debt markets); Mary McBryde et al., *External Revolving Loan Funds: Expanding Interim Financing for Land Conservation*, *in* FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE, *supra* note 85, at 73, 75 (noting that "one increasingly important financial tool" is the revolving loan fund, which is a "dedicated pool[] of capital held by nonprofit organizations specifically to provide short-term . . . loans for land conservation"); Linda J. Mead, *Mackinaw Headlands: A Model in Public–Private Partnerships*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 287, 290–91 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (describing the two-year process by which the Little Traverse Conservancy, McCormick Foundation, state trust, village of Mackinaw, Schott Foundation, and county officials ultimately conveyed a conservation easement to Emmett County); Sullivan & Rosenberg, *supra* note 90, at

the individual strategies driving deals become ever more complex and contingent.[115] Yet, the success of these strategies is ever more important to broader scale conservation successes.[116] For even the most impressive conservation acquisitions are always separated by still more unprotected land that is fragmented in ownership, of declining value as timber or farmland, beset by invasive species and other systemic disturbances, and often close enough to conservation land that its value as a target of residential developers increases.[117]

This all frames one simple conclusion: conservation acquisitions in themselves cannot constitute a complete, regional-scale strategy for places like the Kittatinny Ridge.[118] As conservationists scale up their ambitions and seek to protect a resource the size of the Kittatinny Ridge, they must inevitably prioritize. Each ordering decision is a moment for deliberation about both means and ends. A question thus arises: Why have we not seen more innovation and experimentation in the forms of cooperation and coordination toward conservation's broader-scaled ends?

B. Why Not More Innovation in Form?

Over a century ago, the Trustees of Public Reservations (Trustees) (later renamed to remove doubt about the group's legal status)[119] was founded to serve as an advocate of conservation and landscape planning in Massachusetts.[120] The Trustees viewed the Gilded Age's explosion of

90, 93 (public-private partnerships); Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 375 n.10 (2001) (acquisition of private lands for transfer to public ownership).

115 Kevin W. Schuyler, *Expanding the Frontiers of Conservation Finance*, *in* FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE, *supra* note 85, at 109, 110.

116 *Id.* at 120 ("Pushing the frontier of conservation finance is essential to expanding the ability of the conservation community to achieve its collective mission; and although the task ahead may seem daunting, the power of leverage, tax advantage, and compounding can lessen the burden.").

117 *See, e.g.*, Elizabeth Brabec & Chip Smith, *Agricultural Land Fragmentation: The Spatial Effects of Three Land Protection Strategies in the Eastern United States*, 58 LANDSCAPE & URB. PLANNING 255, 255, 260–61 (2002) (detailing fragmentation in Southampton, New York); Charles J. Fausold & Robert J. Lileholm, *The Economic Value of Open Space: A Review and Synthesis*, 23 ENVTL. MGMT. 307, 309–10 (1999) (describing the "enhancement value" reflected in the fair market value of certain properties in close proximity to open spaces, greenbelts, parks, etc.); Andrew J. Hansen et al., *Effects of Exurban Development on Biodiversity: Patterns, Mechanisms, and Research Needs*, 15 ECOLOGICAL APPLICATIONS 1893, 1897, 1902 (noting that "the percentage of nonnative species increase[s] along the rural-urban gradient"); Leroy J. Hushak, *The Urban Demand for Urban-Rural Fringe Land*, 51 LAND ECON. 112, 112, 115, 122 (1975) (discussing the declining value of agricultural land as a result of zoning and property tax policies).

118 The result is more attention being paid to "limited development" schemes for finance and other purposes. *See* Sullivan & Rosenberg, *supra* note 85, at 90; Jeffrey C. Milder, An Ecologically-Based Evaluation of Conservation and Limited Development Projects 2 (May 2005) (unpublished Masters' thesis, Cornell University).

119 *See* BREWER, *supra* note 7, at 13.

120 *See id.* at 17.

urbanization much the same way that the land trusts of today view sprawl.[121] Whatever its architects' original vision, the Trustees soon pioneered the modern land trust of today: "Most of the things that land trusts do by way of planning, inventorying desirable natural areas, fund-raising, cooperating with government, establishing local committees to steward preserves and later adding professional stewardship staff, restoration of damaged ecosystems, and providing educational programs were anticipated by the Trustees."[122] Indeed, after an era in which the publicly-owned conservation lands of the United States were denounced as costly, contentious, and biologically unstable, so-called private conservation entered a boom period.[123] Yet, almost a century after the Trustees were organized and set in motion, private conservation's boom consisted mostly of exactly the same institutional forms pioneered a century before. Local land trusts, TNC, TPL, and most other conservation firms are veritable clones of the Trustees.[124] With the exception of the new servitude form—the conservation easement—and various tax subsidies, the law has done little to evolve with or to enhance private conservation's improvisations today.[125] Why hasn't there been more innovation in the legal forms of private conservation in the century since it began?

From 1998 to 2002, some 500 state and local ballot measures allocated more that $20 billion to land conservation.[126] During that same period, however, the ten largest real estate developers in the nation developed some $120 billion worth of land.[127] Fueling this sustained push for more and more local conservation and local land trusts has been the fragmentative process of land subdivision and development itself. Exurbia is hard to describe accurately. One criterion stands out, though: the ongoing subdivision of land and low-density urbanization. Exurbia's threatening undertones—farms and ranches turned into cul-de-sacs, transmission corridors, and roads—have, of course, played a major role in the rise of the land trust movement and its

121 *See id.* at 16–18.

122 *See id.* at 20.

123 *See* FAIRFAX ET AL., *supra* note 64, at 203–04, 242 (remarking that the land trust movement peaked in the 1990s at more than 1,200 groups, but not before negotiating "massive acquisition deals" in the Northern Forest and other "record-breaking acquisitions of unprecedented complexity"); BREWER, *supra* note 7, at 9.

124 ALDRICH & WYERMAN, *supra* note 96, at 3, 13. Today, the Trustees owns approximately ninety properties, not including the first it acquired. *See* BREWER, *supra* note 7, at 19. Like most regional land trusts, the Trustees blur the public/private boundary by the scale of their operations, the public subsidy of their acquisitions, and the rhetoric with which they communicate their ambitions. FAIRFAX ET AL., *supra* note 64, at 250, 255–56 ("[T]he steady blurring of boundaries between public and private conservation programs is too frequently neglected.").

125 Conservation easements would likely not have "run with the land" at common law. *See* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1269–71 (1982) (describing the doctrine of "touch and concern" and its traditional place in the enforcement of real covenants and equitable servitudes).

126 Jeffrey C. Milder, *A Framework for Understanding Conservation Development and Its Ecological Implications*, 57 BIOSCIENCE 757, 757 (2007).

127 *Id.*

gravitation toward the conservation easement.[128] A principal driver is the fact that land trusts, like their public counterparts who conserve land by local land use regulation, must do so one parcel at a time, reacting to local land markets that are, at best, rather unpredictable. Whatever larger scale organizations and coordination on behalf of migrations and migratory species we can achieve must be built on the substantial energy and pluck of land trusts and local public conservation movements. As a result, our dilemma is this: How do we organize that which is always inchoate, reactive, and largely place-based? Part III argues that the current institutions overseeing local and private conservation's expansions and intermixtures are not at all competent to recognize their needs or their obstacles. Consequently, they will not by themselves enable broader scale cooperation or the sorts of innovations needed.

III. IDENTITY CRISIS: LANDSCAPE-SCALE CONSERVATION FROM THE BOTTOM UP

Tales of pocket preserves and easements on golf courses have drawn IRS into an increasingly skeptical posture toward conservation easements and other private acquisitions on behalf of nominally public causes.[129] IRS's problem, and ours, is the stunning array of conservation purposes and interests in land that are arising in this era of privatized conservation. This Part argues that if more coordination and collaboration among the atomized actors of this movement are to be had, it will have to be pushed by a new class of intermediaries that possess the depth of field, personnel, and competence to do so. As the law is evolving today, though, these intermediaries face virtually insurmountable obstacles.

A. The Braiding of Property, Tax, Corporate, and Land Use Planning Law

After a series of exposé-style stories on the putative abuses of conservation donations by TNC and others, as well as a prolonged Senate Finance Committee investigation into the tax exemption for qualified conservation donations,[130] IRS has worked diligently on making credible

128 *See* FAIRFAX ET AL., *supra* note 64, at 180; BREWER, *supra* note 7, at 41–56.

129 *See, e.g.*, Tyler Arnold, Note, *Double Eagle: Internal Revenue Code § 170(h)*, 15 SOUTHEASTERN ENVTL. L.J. 457, 467–71 (2007) (discussing IRS reaction to and increased scrutiny of easements for golf courses and patchwork properties); Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 Envtl. L. Rep. 10,223 (Envtl. Law Inst. 2004).

130 Arnold, *supra* note 129, at 468–71. The Internal Revenue Code requires that in order for contributions to be tax deductible the transfers must meet three basic conditions: 1) the taxpayer must contribute a qualified real property interest in perpetuity; 2) the donation must be to a qualified organization exclusively; and 3) the transfer must be for conservation purposes exclusively. *See* 26 U.S.C. § 170(h)(1)(A)–(C) (2006). These three prerequisites then break down into a complex triad of conditions, each of which may generate a variety of risks for parties to a conservation transfer. *See infra* text accomanying notes 140–44 and accompanying text.

threats that the conservation world's tax cheats will be caught.[131] IRS's problem (and ours) is that society wishes to encourage the donation of property for conservation, but its chosen means of doing so have two major drawbacks. First, many conservation "donations" entail high monitoring and enforcement costs.[132] Second, the more IRS invests in monitoring and enforcing its rules on "qualified" conservation contributions, the more it chills the very sort of experimentation and problem solving we need most. The nonprofit world knows that tax-exempt status is no longer a given. Indeed, "If, as Chief Justice John Marshall wrote, '. . . the power to tax involves the power to destroy,' then the power to exempt from tax presents the opportunity to intimidate, harass and bully."[133] Thus, if we are going to support the limited purpose multi-scalar partnerships that migrations and migratory species increasingly require—partnerships that intertwine the collective efforts of nonprofits, local land use authorities, and developers—we should start with the laws that most drive the partnering behavior: the tax law and practice of conservation deals, the law of nonprofit corporate governance, and the land use plans and processes in exurbia.

Before 1980, conservation donations were relatively rare.[134] With the enactment of Internal Revenue Code section 170(h), though, IRS was thrust into the role of sorting out the "good" from the "bad" conservation deals—those that ought to be subsidized and those that ought not to be.[135] Today, IRS's superintendence of the qualifications on the deduction of sub-fee donations has never been more important and never more assiduously monitored. Yet IRS has refused to adapt to this mission. It has gathered neither the institutional competence nor the bureaucratic will to process the necessary biological and ecological details. These details determine whether conservation purposes that must be fulfilled in perpetuity make sense given the interests changing hands. Not surprisingly, a decision tree constructed from IRS's interpretive rule on qualified conservation contributions is a tangled mess requiring a plethora of complex judgments about conservation value[136]—none of which fall into IRS's special competence of tax

131 James J. Fishman, *Stealth Preemption: The IRS's Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545, 546–47 (2010).

132 The tendency of some of these arrangements to demand vigilant oversight and enforcement reminds us of the common sense motivations behind the "touch and concern" doctrine at common law. *See* Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 207–20 (1970).

133 Fishman, *supra* note 131, at 557 (quoting McCulloch v. Maryland, 17 U.S. 316, 431 (1819)).

134 Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL. L. 47, 49 (2005).

135 *See* STEPHEN J. SMALL, FEDERAL TAX LAW OF CONSERVATION EASEMENTS, at 6-1 to 6-3 (3d ed. 1994). Internal Revenue Code section 170(h) made sub-fee interests in land into tax-deductible donations whereas previously, only one's entire interest in the property qualified. *Id.* at 2-2 to 2-3.

136 *See* Treas. Reg. § 1.170-14. Each of the three major conditions has multiple modes of satisfaction, leading to a large number of distinct contingencies within the rule—several of which require their own multi-factored analysis—that may or may not satisfy the restrictions on the deduction. *Id.* § 1.170A-14(b)–(d) (2003) (establishing the three major conditions, which include qualified real property interest, organization, and conservation purposes). Another

administration.[137] Of course, each of these judgments is to be made by taxpayers in the first instance, subject to IRS review. IRS knows it must prevent abuse but it lacks the competence to distinguish the abuse from shrewd conservation work under extreme resource constraints. If and when IRS denies or challenges a deduction—or even issues a guidance document suggesting that it will do so at some future point—it makes splash headlines in the conservation community.[138] Because of their complexity, the tax code and IRS regulations cast a shadow over innovations in conservation dealmaking.[139]

Recent court cases, including *Glass v. Commissioner*,[140] *Turner v. Commissioner*,[141] and *McLennan v. United States*,[142] all demonstrate the basic point: sorting out the adequate from the inadequate conservation donation can be a rather onerous affair.[143] Conservation deals that intertwine donative property transfers with for-value transactions start off under an air of suspicion.[144] Developers are disfavored by the tax code's treatment of donations even when they seek to partner with land trusts or other charitable organizations.[145] Section 170(h) is literally designed to withhold tax advantage from conservation development. Thus, more than just treading carefully, land trusts, municipalities, and others without access to sophisticated legal counsel often labor under paralyzing uncertainties about the tax implications of their conservation plans.[146] These uncertainties are

subsection provides examples of conservation purposes, *id.* § 1.170A-14(f), and yet another dwells more extensively on what constitutes enforceability in perpetuity, *id.* § 1.170A-14(g).

137 *See* Internal Revenue Serv., The Agency, Its Mission and Statutory Authority, http://www.irs.gov/irs/article/0,,id=98141,00.html (last visited Feb. 16, 2011) ("The IRS role is to help the large majority of compliant taxpayers with the tax law, while ensuring that the minority who are unwilling to comply pay their fair share.").

138 *E.g.*, Joe Stephens & David B. Ottaway, *IRS Toughens Scrutiny of Land Gifts*, WASH. POST, July 1, 2004, at A01, http://www.washingtonpost.com/wp-dyn/articles/A19102-2004Jun30.html (last visited Apr. 18, 2011).

139 *See, e.g.*, LINDSTROM, *supra* note 86, at xi (2008) (warning that due to uncertainty about future legal changes, his book is "a snapshot of a moving picture").

140 471 F.3d 698 (6th Cir. 2006) (affirming Tax Court's setting aside of Commissioner's notice of deficiency in appeal regarding a spatially small conservation easement that both Tax Court and Sixth Circuit found constituted a qualified contribution).

141 126 T.C. 299 (2006) (affirming IRS's disallowance of deduction for conservation easement granted in a limited-development scheme in Fairfax County, Virginia because of inadequate conservation purpose in grant limiting development in proximity to grist mill at Mount Vernon).

142 994 F.2d 839 (Fed. Cir. 1993) (upholding refund to taxpayers who sued to recover taxes on donated scenic easement by proving donative intent and conservation purposes despite IRS's conclusions to the contrary).

143 *See, e.g.*, SMALL, *supra* note 135; Arnold, *supra* note 129; Jonathan M. Burke, Note, *A Critical Analysis of* Glass v. Commissioner*: Why Size Should Matter for Conservation Easements*, 61 TAX. LAW. 599 (2008).

144 The requirement of a "qualified organization" under the regulations—together with the "exclusively for conservation purposes" restriction—typically excludes for-profit land development firms from participating, even if their involvement is crucial to a project's success. *See* Treas. Reg. § 1.170A-14(c), (e) (2003).

145 *See id.* § 1.170A-14(c), (e); LINDSTROM, *supra* note 86, at 130.

146 *See* LINDSTROM, *supra* note 86, at xi, 11–12 (providing numerous warnings to the reader about the uncertainty of conservation easement taxation).

aggregating into significant pressures against needed experimentation with, and deliberate adaptations of, forms involving for-profit enterprises.[147]

When these uncertainties are paired with the idiosyncratic property interests that most easement-enabling statutes permit today,[148] the information costs of the median conservation deal swell, often to excess.[149] Unlike most interests in real property, conservation easements do not come "off the rack." They are subject to virtually unlimited tailoring—tailoring that the Uniform Conservation Easement Act itself encouraged.[150] The result is that as more individually tailored deals take place, each involving a slightly different interest with its own character-determinative idiosyncrasies, the information costs rise for those who would bundle them into bigger plans—or who would unbundle them in order to sort the figurative wheat from the chaff.[151]

When individual assets and their bottom-line values become opaque, probabilities diminish that subsequent purchasers will have the knowledge they need to acquire or avoid them rationally.[152] These high information costs have increasingly troubling implications for local land use planners, who too must set and adjust a community's long term land use goals too often with insufficient knowledge of private conservation planners' investments or future intentions.[153] In business today, this kind of uncertainty has given rise

147 *See, e.g.*, Nancy A. McLaughlin, *Conservation Easements: Federal Tax Incentives and the Meaning of Perpetuity*, *in* SOPHISTICATED ESTATE PLANNING TECHNIQUES 345 (A.L.I.-A.B.A. Course of Study, No. SR013, 2009) (advising readers that caution is warranted in valuing and deducting conservation easements of various kinds and that only a "thorough understanding of the various laws that may impact the administration of perpetual conservation easements" can reduce the risks associated therewith).

148 Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE, *supra* note 114, at 9, 14–22 (discussing the great variety of forms that conservation easements, restrictions, and servitudes take in different states and how often different parties tailor these instruments to their particular circumstances).

149 *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 26–27 (2000) (noting that the creation of new or idiosyncratic property interests impose information costs on society).

150 *See* UNIF. CONSERVATION EASEMENT ACT, *Prefatory Note*, 12 U.L.A. 165, 167–68 (2008) ("[T]he Act allows great latitude to the parties . . . to arrange their relationship as they see fit. . . .[Its purpose is to] sweep[] away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross.").

151 Thus, quite unlike property forms generally, conservation easements look like highly tailored, party-centric contracts that rely on complicated governance-like arrangements typically needed in, for example, complex commercial relationships. *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 789–809 (2001).

152 *See* Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 300–01 (1984) (discussing the importance of legal rules for helping property purchasers make informed choices to minimize losses).

153 Coordination toward common ends among land use planners and the conservation community remains astoundingly dependent upon word-of-mouth connections that are too often insufficient. *See* David N. Bengston et al., *Public Policies for Managing Urban Growth and Protecting Open Space: Policy Instruments and Lessons Learned in the United States*, 69 LANDSCAPE & URB. PLAN. 271, 281–82 (2004). In the few states where local governments are granted a reviewing role in proposed conservation easements this concern may be

to a variety of compensatory strategies.[154] But with the same information costs rising in the public sector, the only practical step for those would scale up from the mostly local actions being taken today in areas like the Kittatiny[155] is the use of intermediaries with the depth of personnel, experience, and expertise needed to recognize, categorize, and bundle or unbundle the property interests in question—perhaps even trading some in exchange for others.[156]

Conservation organizations today are overwhelmingly of a single organizational kind: the so-called 501(c)(3) nonprofit corporation.[157] These entities are a function, again, of the Internal Revenue Code, IRS rules and regulations, and the variety of state laws on incorporation and corporate governance across the fifty states, all interacting as a system.[158] To maintain its nonprofit status—which is an extremely valuable sort of government forebearance to most conservation organizations[159]—the average conservancy must cope with the stealth preemption of state corporate governance law IRS has been carrying out in the name of good governance for the better part of a decade.[160] While stealth preemption is a concern on a number of grounds, it would not necessarily have implications for conservation without IRS's own relative incompetence again informing the picture.

What expertise has IRS to sort out well-governed conservation entities from those organized to invite fraud, abuse, or other malfeasance?

correspondingly reduced. *See* LEVIN, *supra* note 91, at 12 (listing Massachusetts, Montana, Nebraska, Oregon, and Virginia as "requir[ing] some degree of public comment and/or approval for the creation of an easement"); Bray, *supra* note 110, at 153–54 (describing Massachusetts's experience). Virginia, though it mandates no local approval, requires that proposed conservation easements conform to any governing local comprehensive plan. *See* LEVIN, *supra* note 91, at 12.

154 *See* Ronald J. Gilson et al., *Braiding: The Interactions of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010) (discussing differing enforcement strategies for formal and informal contracting in the modern business world); *see also* Ronald Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009) (discussing the rise of new supply patterns with unconventional enforcement systems).

155 *See supra* notes 65–68 and accompanying text.

156 An urgent need for "bridge" financing in conservation acquisitions spurred the rise of such intermediaries of conservation finance. *See* McBryde et al., *supra* note 114, at 78. There is no reason that ownership/brokerage intermediaries cannot exist as well.

157 *See* Fishman, *supra* note 131, at 549 & n.11. Again, the Internal Revenue Code has dictated this prominent patterning of conservation practice. IRS has made known that will seek the revocation of a firm's 501(c)(3) tax-exempt status in cases where it finds the firm has engaged in prohibited transactions. *See, e.g.*, *McLennan*, 994 F.2d 839, 840 n.2 (Fed. Cir. 1993).

158 Fishman, *supra* note 131, at 550–51.

159 One founder of the Natural Resources Defense Council tells of IRS badgering and harassment—apparently led by Nixon appointees hostile to the organization's purposes—that ultimately cost the organization over $100,000 in legal fees just to receive nonprofit status. *See* ADAMS ET AL., *supra* note 100, at 23–30.

160 *See* Fishman, *supra* note 131, at 551–57 (describing the "traditional locus" of nonprofit governance rules as state law and the creeping federalization of the field by IRS rules, regulations, rulings, circulars, etc.). "Beyond certain fundamental mandates, state nonprofit statutes do not prescribe specific corporate governance approaches. In most jurisdictions, nonprofit governance procedures are matters of internal organizational decision." *Id.* at 553.

Admittedly, tax sheltering as a practice crosses social and economic boundaries.[161] But in this particular field, someone must first say what is or is not a bona fide conservation purpose—and that is a decision for someone other than IRS. Moreover, the legal fiction of corporate form can be deceptive: entities that are not for profit are held in our collective esteem in ways mostly unrelated to their actual behavior.[162] Many 501(c)(3) corporate entities make and break fortunes, provide billions of dollars in goods and services annually, and transact business irrespective of their ostensibly charitable purposes.[163] But, while IRS may intend to preserve appearances and ensure some minimal standards of conduct in return for being left untaxed,[164] the norms it is attempting to establish are equivocal at best.[165] Indeed, whether IRS or states' Attorneys General try to impose standards on conservation nonprofits, the tools available for doing so are blunt instruments.[166] They cast long shadows upon exactly the sort of organizational experimentation that conservation so desperately needs for goals like protecting migrations and migratory species.

In an intermixed landscape with a legacy of what we might call spot-market—that is, opportunistic—conservation by local land trusts and others, consolidating larger blocks or corridors of protected space may entail exchanging lands or waters already acquired (or encumbered with easements) for lands or waters that are still unprotected.[167] A large-scale nonprofit organization like TNC or TPL that wished to serve as an

161 William M. Gentry & Matthew E. Kahn, *Understanding Spatial Variation in Tax Sheltering: The Role of Demographics, Ideology and Taxes*, 32 INT'L REGIONAL SCI. REV. 400, 422 (2009).

162 *See* Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1405–06 (1998) (noting the weakness of the legal controls on nonprofit governance generally); Gary W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1133 (2007) ("[T]he modern economic forces that have required nonprofits to adapt to new market and funding realities by moving into commercial activities, developing fee-for-service models, and professionalizing their operations are in tension with the antiquated nineteenth-century image of charity prevalent in the public's understanding of charitable organizations.").

163 *See* LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 22 (2d ed. 1999) ("[I]f the U.S. nonprofit sector were a separate country, it would exceed the gross domestic products of most countries in the world, including Australia, Canada, India, the Netherlands, and Spain."); Jenkins, *supra* note 162, at 1120–21 (noting that throughout its recent unprecedented expansion, the nonprofit sector has been "challenged by questions of effectiveness and accountability").

164 *See* Fishman, *supra* note 131, at 558–78 (noting IRS's nonprofit sector governance initiative and the measures it has implemented to improve nonprofit corporate governance).

165 *See id.*; Jenkins, *supra* note 162, at 1131–35 (describing the push for more accountability and comparing the nonprofit sector to Enron, Tyco, and other recent corporate failures without specifying what constitutes adequate accountability in the governance of firms that do not seek to make a profit).

166 *See* Fishman, *supra* note 131, at 568, 589 (describing IRS's recent attempts to use Form 990 as one example of the blunt instruments available to IRS); Jenkins, *supra* note 162, at 1128 (noting that "state attorneys general have long been criticized for their permissive oversight" and, according to a survey by the author, "states have dedicated a median of one full-time equivalent attorney to charitable oversight").

167 *See, e.g.*, Richard A. Fuller et al., *Replacing Underperforming Protected Areas Achieves Better Conservation Outcomes*, 466 NATURE 365 (2010); Peter Kareiva, *Trade-In to Trade-Up*, 466 NATURE 322 (2010).

intermediary brokering the exchange of conservation properties, local development permissions, and presently unburdened lands faces daunting obstacles today. Besides at least inviting an IRS audit of any donors whose deductions were involved,[168] such an organization might very well jeopardize its own nonprofit status.[169] Tax penalties are notoriously unpredictable and the courts have repeatedly upheld IRS's authority to govern by example.[170] As a result, IRS stands in the way of innovative and necessary advances in conservation strategy.

For example, as to any given transaction, IRS has said that, "If the donor *(or a related person)* reasonably can expect to receive financial or economic benefits greater than those that will inure to the general public as a result of the donation of a conservation easement, no deduction is allowable."[171] Thus, assuming any conservation easements involved in a transaction could actually be reformed or otherwise amended (whether through *cy pres* or some other avenue),[172] the tax uncertainties of an innovative deal are enough to chill all but the most determined. The inherent ambiguity of the term "related person," coupled with IRS's failure to define it further, creates a situation in which the tax uncertainties for the relevant parties—intermediaries, developers, and local land trusts—outweigh the benefits of innovative transactions. It would be a fool's errand to try to substantiate the benefits that "inure to the general public" in excess of benefits to the broker or any "related person" in such a transaction.[173]

168 Any deduction must be documented in accordance with the terms of I.R.C. § 170(h) and the governing IRS rules in Treasury Regulation § 1.170A-14. *See supra* note 136. Ordinarily this includes IRS Form 8283, "Noncash Charitable Contributions," a form that will document the contribution's deductibility, including the supposed "perpetuity" of the "qualified real property interest." *See* Treas. Reg. § 1.170A-14(a) (2003). IRS has said that it will pay particular attention to charitable contributions of the sort mentioned in the text. *See* Notice 2004-41, 2004-28 I.R.B. 31, 31.

169 *See* Stephen J. Small, *Proper—and Improper—Deductions for Conservation Easement Donations, Including Developer Donations*, 105 TAX NOTES 217, 219 (2004). The very sorts of transactions that caught the Senate Finance Committee's attention in 2004 were TNC's "conservation buyer" transactions—legal at the time but later frowned upon by the Senate, the Washington Post, and much of the public. *See id.* at 218–19. In such a transaction, a nonprofit acquires a property, unbundles and retains a conservation easement that allows for a residence to be built (generally), and then sells the burdened property to a buyer seeking a home site but otherwise uninterested in the property's fuller development. *See id.* at 219.

170 *See, e.g.*, Helvering v. Mitchell, 303 U.S. 391, 399 (1938) ("To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil.")

171 Notice 2004-41, 2004-28 I.R.B. 31, 31 (emphasis added).

172 In most states, easements can be reformed after creation—either by the express terms of the enabling statute or by various doctrines applicable to the reform of charitable trusts. *See* McLaughlin, *supra* note 88, at 426. But not every change or amendment satisfies the requirements for reformation, and the resulting rigidities have garnered much more speculation and commentary than firm legal precedent. *See, e.g.*, *id.* at 426–27. *But see* Bjork v. Draper, 886 N.E.2d 563, 574 (Ill. App. 2008) (refusing amendment or modification of a conservation easement).

173 Appraisers are easier targets for IRS because the IRS rules require that qualified appraisals of any contribution's value be documented along with the claimed deduction. Treas. Reg. § 1.170A-14(i) (2010). Substantiation of such appraisals is another area where a robust knowledge of the tax code and IRS practice is imperative, because the burden is always on the

So long as conservation properties are donated principally in the forms envisioned by IRS to nonprofit organizations that principally take the form envisioned by IRS, landscape-scale deals that trade one currency (local zoning or other land use permissions, for example) for another (the tax advantages of a conservation easement reducing the taxable net worth of real property, for example)—even those that clearly serve conservation purposes—will remain suspect. Thus, the ad hoc partnerships that form in place and stumble toward such goals will arise only accidentally. A conservancy would make a foolish error to actively seek out donors by reminding them of the tax benefits of their donations, just as any firm like TNC or TPL would have to be rather risk-prone to provide counsel or assistance in areas so close to tax fraud and corporate malfeasance.[174] Part III.B examines the substance of these ad hoc partnerships as they are presently formed and dissolved.

B. What Are Cooperative Ventures in Law, Really?

The grey market in bundling and unbundling conservation deals to achieve broader-scale purposes like the protection of the Kittatinny Ridge is patterned to some extent by the equivocal legal norms on point today. To a great extent, the equivocations come down to two sources: first, the Internal Revenue Code and IRS, and second, the non-standard interests in land being created under the immense conservation easement tent that we erected starting in the 1980s. I have argued to this point that reducing these uncertainties could spark real expansions in this market and that actors like IRS ought to consider as much.[175] Taken in broader perspective, though, the joint and cooperative ventures of today represent so many experiments—and perhaps some extraordinary opportunities. For as these distinctly interested and structured legal entities partner with one another, pool their information, and search for common ground, they are each able to learn

taxpayer to substantiate a deduction. *See* Small, *supra* note 169, at 221–23. How could an appraiser rationally compare the public benefits of "relatively natural habitat of fish, wildlife, or plants" on a given parcel, for example, Treas. Reg. § 1.170A-14(d)(1), with the dollar value of an itemized deduction taken by some person for some given taxable period? *Id.* § 1.170A-14(h)(3)(i).

174 *See* LINDSTROM, *supra* note 86, at 95 ("Soliciting contributions based on projected tax savings can get a land trust into trouble very fast. This is because, in some cases, such solicitation may be considered the marketing of a tax shelter; the unauthorized practice of law; or, where projections and actual benefits are significantly different, fraud or misrepresentation.").

175 Imagining how one could successfully unwind some of these deals underscores the points being registered in a growing literature on the underappreciated wisdom of many common law property doctrines. *See, e.g.*, Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (noting several reasons why the law should guard against the fragmentation of productive assets into infinitely separate shares of the whole); Julia D. Mahony, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002) (critiquing the perpetuity requirement in conservation easement practice); Merrill & Smith, *supra* note 149 (praising common law property's tendency toward standardization).

from their experiences—to learn by doing, so to speak.[176] As Professor Yaffee and colleagues have documented, collaboration among different interests toward broad scale consensus and ends like ecosystem management tends to proceed through life stages, paced by various drivers and prompts, and can either sizzle or fizzle.[177] Without the right external pressures, the latter seems more likely.[178] And, along the Kittatinny ridge (like many other places),[179] federal regulatory prompts are absent and will probably remain so.[180]

Accelerating these processes at broader scales may therefore require that some agent actively pool the experiences of individual actors and enable each of them to learn by monitoring, so to speak. Encouraging learning by monitoring is one of the principal advantages of noncentralized systems that allow difference and diversity.[181] Unfortunately, few agents capable of such information-gathering exist today.[182] The pooling of real-time, spatially explicit information among land trusts and other conservation actors remains a major deficit in conservation practice. Most states do not require spatially explicit or generally searchable recordation of conservation property interests.[183] Most localities do a technologically infantile job of mapping their zoning and other land use plans and goals, to say nothing of

176 *See* Carl J. Walters & C. S. Holling, *Large-Scale Management Experiments and Learning By Doing*, 71 ECOLOGY 2060 (1990). WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001), provides an insightful accounting of this kind of learning-by-doing through ad hoc partnering and directly deliberative problem solving in place-based communities.

177 *See* WONDOLLECK & YAFFEE, *supra* note 78, at 51–66.

178 *See* Steven L. Yaffee, *Learning from Experience: What Does the History of Ecosystem-Based Management Suggest for Collaborative Strategies for Managing Animal Migrations?*, 41 ENVTL. L. 655, 677 (2011) (estimating that half of all the collaborative processes Yaffee's laboratory has studied succeed because they have some "regulatory driver" in the form of a federally-listed endangered or threatened species).

179 *See* U.S. Fish & Wildlife Serv., *supra* note 49 (indicating that a large percentage of the country is not designated critical habitat, the major federal regulatory prompt).

180 *See, e.g.*, Cherney, *supra* note 77 (discussing the efforts of the Bridger-Teton National Forest Supervisor and private parties to protect the migration of pronghorn elk in the absence of federal regulation doing so).

181 *See* Charles F. Sabel, *A Real-Time Revolution in Routines*, *in* THE FIRM AS A COLLABORATIVE COMMUNITY: RECONSTRUCTING TRUST IN THE KNOWLEDGE ECONOMY 106 (Charles Heckscher & Paul Adler eds., 2006); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008) (discussing the European Union's method of monitoring Member States' governance in seeking effective governing practices).

182 *See* BREWER, *supra* note 7, at 1, 177–226 (indicating that the majority of land trusts are small and local and discussing only three larger organizations as part of the history and current state of the land trust movement: the Land Trust Alliance, The Nature Conservancy, and the Trust for Public Lands).

183 *See* LEVIN, *supra* note 91, at 13 ("Although every statute requires easements to be recorded, very few states have any separate tracking, mapping or registering requirements for easements."); Morris & Rissman, *supra* note 103, at 1266 ("There are no publicly available maps showing where conservation easements are concentrated or how their spatial distribution is related to that of other protected lands.").

making such information widely available.[184] Indeed, state-to-state differences in vernacular often hinder regional cooperation, whether by increasing the costs of information pooling or by defeating the wider benchmarking of accomplishments.[185] Thus, the pooling of information about problem-solving teams that form in place to collaborate toward broader ends remains woefully under-developed.

If we are going to enable more conservation actors to build their actions into broader-scaled plans and strategies, we will have to reduce the frictions that are such an impediment to doing so today. We need conservation customs and tools that are more generative—that enable and reward improvisation instead of keeping it in the shadows. Part IV sharpens the issues and problems that those customs and tools should be able to solve, and proposes a few specific changes that might make them a reality in the near future.

IV. WHAT TO DO ABOUT CONSERVATION'S SCALE AND IDENTITY PROBLEMS

Organizations like the KC are not really organizations in the standard sense. Indeed, they have very little agency in their own right. They are of the same substantive type as something like the Malpai Borderlands Group (MBG)—a robust, highly successful cooperative partnership that anchors and guides the multiple-use conservation planning of lands along the Arizona–New Mexico–Mexico border.[186] But organizations like the KC have yet to demonstrate their own resilience or usefulness to their contributing elements.[187] They are inchoate in a very real sense. Groups like the KC are the future for migrations and migratory species, though. If they do not succeed, becoming more like MBG, vital parts of our ecosystems will continue to diminish in abundance and functionality.[188] This Part outlines

184 *See* JOHN O'LOONEY, BEYOND MAPS: GIS AND DECISION MAKING IN LOCAL GOVERNMENT 12 (2000).

185 *See* Sean P. Ociepka, *Protecting the Public Benefit: Crafting Precedent for Citizen Enforcement of Conservation Easements*, 58 ME. L. REV. 225, 229 (2006) (discussing lack of uniformity in state conservation easement statutes); *see also* LEVIN, *supra* note 91, at 44 (discussing wide variation in state conservation easement statutes).

186 *Compare* AUDUBON PA., *supra* note 1 ("The Kittatinny Coalition was formed in 2000 to bring together all the organizations and agencies that have been involved in ridge conservation activities at the local, regional, state or federal level."), *with* MALPAI BORDERLANDS GROUP NEWSL. (Malpai Borderlands Grp., Douglas, Ariz.), November 2009, at 6, 7, *available at* http://www.malpaiborderlandsgroup.org/Admin/Upload_Folder/Malpai%20Borderlands%20Group%20Newsletter%202009.pdf (listing cooperators, including federal agencies, state agencies, and private sector groups, and listing the board of directors, including members of numerous cooperators); *see also* WONDOLLECK & YAFFEE, *supra* note 78, at 4 (characterizing MBG as one of the few such groups that have received "considerable public attention"). While KC has not yet been formally incorporated, *see* STATE OF THE RIDGE, *supra* note 3 (referring continuously to partner organizations rather than a formally incorporated group), MBG was formed as a nonprofit corporation in 1993, *see* Allen, *supra* note 8, at 18.

187 *See text accompanying supra* notes 87–89 and accompanying text.

188 *See* U.S. ENVTL. PROT. AGENCY, COMMUNITY-BASED ENVIRONMENTAL PROTECTION: A RESOURCE BOOK FOR PROTECTING ECOSYSTEMS AND COMMUNITIES, at 1-1 to 1-5 (1997), *available at* http://www.epa.gov/care/library/howto.pdf (discussing the role of environmental groups

how the law should change to enable these groups to gel more readily and play more active roles in the lives of their disparate constituents.

A. Border Patrol: Cooperative Organizational Forms that Succeed

IRS and the Senate Finance Committee know almost nothing about what it takes to make good conservation decisions. Ironically enough, one of the catalyzing events in the early history of the MBG was TNC's purchase of a large ranch in the Malpai area in an attempt to preserve its tremendous habitat values.[189] Management of the more than 320,000 acre ranch soon became a huge drain on TNC and it went looking for one of the very same conservation buyers the *Washington Post* would later cast suspicions upon in 2003.[190] One of the ranchers who started the MBG bought the ranch from TNC, fully intent on protecting it much as TNC hoped.[191] That transaction began what would become decades of directly deliberative problem-solving between the world's largest conservancy and a handful of ranchers in a high desert of the American southwest intent on continuing a business that is more about love of the land than profit.[192] As more social capital was earned in that venture, more of what the U.S. Forest Service, Bureau of Land Management, and the equivalent state land management agencies were doing on their lands was tied into the Malpai group's plans and enterprise.[193] Thus, as we scrutinize conservation deals today, intent on rooting out the corruption and abuse we suspect they represent, we ought to remember the trust deficits most conservationists face and how unlikely the sort of partnering TNC and MBG pioneered in 1991 still remains. If we want our figurative border patrollers to maintain legal fictions separating public from private and profit from nonprofit, we should hardly be surprised to learn that they have saddled our conservation entrepreneurs with such frictions that real innovations in form remain rare.

Instead of tasking an already overburdened administrative agency with more enforcement work in specialized areas beyond its competence, we should rely on other forces to expose and eliminate the true corruption in

structured similarly to KC and MBG); *see also* AUDUBON PA., *supra* note 1 (listing threats to the Kittatinny Ridge).

189 BILL MCDONALD, THE FORMATION AND HISTORY OF THE MALPAI BORDERLANDS GROUP 2, *available at* http://www.malpaiborderlandsgroup.org/The_Formation_And_History_Of_The_Malpai_Borderla1.pdf.

190 *See* NATHAN F. SAYRE, WORKING WILDERNESS: THE MALPAI BORDERLANDS GROUP AND THE FUTURE OF THE WESTERN RANGE 53, 58–59 (2005); Joe Stephens & David B. Ottoway, *Nonprofit Sells Scenic Acreage to Allies at a Loss*, WASH. POST, May 6, 2003, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062601001.html (last visited May 18, 2011); *see supra* note 114. TNC found its conservation buyer, Drummond Hadley, and the early form of the public/private–profit/nonprofit MBG started from there. *See* Allen, *supra* note 8, at 18–19.

191 MCDONALD, *supra* note 189, at 2–3.

192 *See id.*, *supra* note 189; SAYRE, *supra* note 190, at 50–66 (2005) (discussing the history of the Gray Ranch and its connection to the Malpai Borderlands Group).

193 *See* SAYRE, *supra* note 190, at 144–57; Allen, *supra* note 8, at 19–21.

the conservation deals increasingly intertwining nonprofit, for-profit, and public entities. Real accountability in these settings depends directly on the appropriate filters to manage information flows, not their absolute transparency. An umbrella group like the Land Trust Alliance (LTA)—a membership organization that pools information from local land trusts and offers guidance on best practices, resources, tools, etc.—is positioned to make use of its broad perspective without losing touch with its constituent members' concerns.[194] LTA could, with the right help from IRS and states' Attorneys General, establish practically authoritative guidelines for land trusts, especially as to mergers and acquisitions, good governance, and necessary terms and conditions for easements.[195] LTA is perhaps ideally positioned to combine both a deep knowledge of current practices and a history of objective analysis of broader trends and drivers.[196] LTA's *Land Trust Standards and Practices* is amply suited to sort the greenwashing from the bona fide in limited development projects.[197] More importantly, LTA's databases and long-term relationships with major land trusts could enable it to identify synergies that could and should be more of a driver in the land

194 *See* Land Trust Alliance, Leadership in Land Conservation, http://www.landtrustalliance.org/about (last visited Apr. 4, 2011) ("The Land Trust Alliance promotes voluntary private land conservation to benefit communities and natural systems. We are the national convener, strategist and representative of more than 1,700 land trusts across America."); *see also* BREWER, *supra* note 7, at 178–79 (noting that the LTA's activities include publishing a newsletter, magazine, and books, as well as encouraging land trusts to adopt best ethical and practical principles for land trust conduct); *see also* Gustanski, *supra* note 148, at 482 (concluding that an ideal conservation decision making process "[a]ids in determining or recognizing common community goals and values . . . [i]nvolves all stakeholders . . . [c]oordinates the view of those affected by decisions made . . . [and i]ntegrates the perspectives of experts (e.g., land trusts, planners, farmers, ecologists, developers)").

195 The Land Trust Alliance's nascent accreditation program, an outgrowth of its long-developing standards and practices for land trusts, is a promising step toward such a goal. *See* LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES 1–15 (2004), *available at* http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf (describing ethical and technical guidelines for land trusts). Such an accreditation remains entirely voluntary, however, and likely outside the reach of many land trusts without the capacity, nor any immediate, material reason, to seek it. *See* LAND TRUST ACCREDITATION COMM'N, THE ACCREDITATION SEAL: A MARK OF DISTINCTION IN LAND CONSERVATION (2010), *available at* http://www.landtrustaccreditation.org/images/uploads/AbouttheSeal.pdf. A regulator like a state's Attorney General, or a state's legislature, however, would have any number of tools to incentivize such accreditation. *See generally* LEVIN, *supra* note 91 (describing the state of conservation easement enabling statutes and the role of the attorney general).

196 *See* BREWER, *supra* note 7, at 176–84 (discussing trends in LTA's history); ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 7–14 (2005) (discussing the LTA census and conservation easement trends). LTA has worked for more than 25 years and bills itself as the "national convener, strategist and representative of more than 1,700 land trusts across America." Land Trust Alliance, Leadership in Land Conservation, http://www.landtrustalliance.org/about (last visited Feb. 16, 2010). Most importantly, "[b]y early 1999, LTA had begun to de-emphasize the idea that more land trusts are always a good thing." BREWER, *supra* note 7, at 182. LTA still lacks any kind of inducement or other practical authority when it comes to merging or consolidating land trusts that are "too small to succeed," but this kind of inducement can always be added by others in support of LTA's guidance.

197 *See* LAND TRUST ALLIANCE, *supra* note 195; Milder et al., *supra* note 82, at 16.

trust community.[198] One larger, financially sound land trust with the resources for professional staff and effective project selection and management where there previously had been three or four anemic organizations with little such capacity would provide the kind of consolidation places like the Kittatinny often desperately need.[199]

Likewise, larger conservation organizations such as the Audubon Society, TNC, Ducks Unlimited, and a few others must deliver more of the technical acumen so necessary to evidence-based conservation today, even if this means delivering it to other nonprofits. Their economies of scale make these organizations a valuable resource to the much smaller, often volunteer-driven local land trusts. As they continue to expand their already robust networks of cooperating experts and professionals, their natural tendencies toward internalization and competition for scarce donor loyalties[200] must be checked by an ethic of collaboration and exchange. In addition, the opportunities to make this expertise more widely available must become more manifest and that can only happen if smaller conservation agents disclose—advertise—the help they need. A "critical antecedent" to real learning by doing in contexts like this is "a small number of credible hypotheses" that can organize collective investigation and generate the true "surprises" such endeavors inevitably yield.[201]

In addition, mandatory recording of protected areas of various kinds is a goal virtually all conservationists should support. As more land is subject to conservation restrictions of myriad kinds, spatially explicit maps and other demonstrative aids would make conservation as a whole immensely more communicative and might even enable precisely the sort of peer-to-peer accountability that is so effective. Cost-benefit targeting and acquisition information, after all, could be a superior benchmark of conservation performance,[202] whether used by volunteers deciding where to spend their own social capital or by philanthropists assessing return on their investments. Instead of the asymmetrical and coarse versions of such accountability we have today—IRS's Form 990 and the veiled threats it represents[203]—we ought to strive to create richer measurements of success.[204] Broader and more uniform disclosure and aggregation of

198 *See, e.g.*, ALDRICH & WYERMAN, *supra* note 96 (describing the results of the 2005 LTA census and trends).

199 *See* BREWER, *supra* note 7, at 182 ("Marginally effective land trusts probably ought to merge . . . .").

200 ROBERT J. BRULLE, AGENCY, DEMOCRACY, AND NATURE: THE U.S. ENVIRONMENTAL MOVEMENT FROM A CRITICAL THEORY PERSPECTIVE 251–53, 252 tbls.10.15 to 10.17 (2000) (categorizing the U.S. environmental nonprofit sector according to various "discourses" and tracking the rhetoric and funding strategies used in each in competition with the others).

201 Walters & Holling, *supra* note 176, at 2066.

202 *See generally* Newburn et al., *supra* note 84 (discussing the need for conservation targeting models, analyzing current models, and noting important economic factors that should be considered in future models).

203 *See supra* notes 171–76 and accompanying text.

204 This is a role that IRS or states' attorneys general can and perhaps should play. Parts of an information return could certainly be for other than tax purposes. *See* Fishman, *supra* note 131, at 558–60; *see also* Morris & Rissman, *supra* note 103, at 1278–80 (noting the need for some

protected areas' essential data—data that would aid true return-on-investment analyses—is a necessary starting point toward such ends.[205] Of course, disclosure of such complex information is never a panacea; finding the right agents to sort, aggregate, and distribute the information is much of the challenge.[206] The agents who could make such disclosures generative are those with the broadest reach and perspective, deepest expertise, and widest influence.[207]

Finally, as I have argued before, municipalities confronting development pressures, mobile capital, and scale issues of their own could do worse than to find the right partner nonprofits as the holders of exacted conservation easements.[208] Doing so would allow them to reach broader scales than their own comparatively small territories, make use of expert staffs and volunteers they cannot afford themselves, and shield conservation monitoring and enforcement work that requires trust and cooperation from local political forces.[209]

powerful agent with broad jurisdiction to make collection of spatial and other data on conservation easements and other acquisitions broadly useable).

205 *See* Murdoch et al., *supra* note 111, at 387 (acknowledging that information gaps are and will remain abundant but that "[return on investment analysis] is not just about giving answers—it provides a structured way of learning").

206 In the most comprehensive study of disclosure as a social ordering tool, Archon Fung and colleagues found that highly effective disclosure systems succeed only because the information they provide becomes "an intrinsic part of the decision-making routines of users and disclosers." ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 90 (2007). "Simply providing more information to consumers, investors, employees, and community residents will not assure that risks are diminished or that schools, banks, and other institutions improve their practices." *Id.* Rather, targeted transparency is most likely to work where data are useable, portable, reliable, and their disclosure and uptake is sustainable. *Id.* at 176–82.

207 Jonathan Zittrain argues that a generative system is one that produces "unanticipated change through unfiltered contributions from broad and varied audiences." JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 70 (2008) (emphasis omitted). The five principal determinants of generativity are

> (1) how extensively a system leverages a set of possible tasks; (2) how well it can be adapted to a range of tasks; (3) how easily new contributors can master it; (4) how accessible it is to those ready and able to build on it; and (5) how transferable any changes are to others—including (and perhaps especially) nonexperts.

Id. at 71. Conservation depends vitally on generativity's chief input—participation—but with tools like conservation easements and threats like IRS so prominently a part of its growing architecture, there are reasons to worry that generativity's chief output—innovation—will remain bottled up. To whatever extent we imagine conservation as a system, we would be wise to enhance its generativity as Zittrain sketches this property of systems.

208 *See* Colburn, *Taking Habitat*, *supra* note 17, at 289–300 (explaining how government/nonprofit partnerships are beneficial).

209 *See id.*

B. Diversifying the Concepts and Modes of Conservation

Conservation is a complex concept with many different senses.[210] In conservation circles, it tends to encode a great deal implicitly. "Conservancy" has an uncontroversial, almost quaint connotation.[211] Yet land and sub-fee interests in land should perhaps be just as controversial in our political lives today as chaining oneself to a tree. In view of their error risks, inherent trade-offs, and high monetary and human costs, no other major strategy in environmental politics today is as risky, yet avoids scrutiny so well, as the easement strategy our land trusts have mainstreamed.[212] The major nonprofits that have experimented with collaborative development and sustainable design—which necessarily involve local, state and federal governments, donors, and for-profit investors—have discovered that, however intelligent in concept, the polarities of conservation politics make such projects virtually impossible to complete in our legal system as it is.[213] Our only choice is to try, though. Consider the following: Landscape fragmentation can actually be exacerbated by the premature or opportunistic selection of parcels for easements—leading to more sprawl and higher areal demands for some spatially resolute urbanizing area.[214] Much if not most of the thinking about which parcels to acquire is being done by individual owners or donors with their own highly partial and biased motivations.[215] Thus, scaling conservation ambitions up inevitably leads to a checking function on these more individualistic judgments. For it is only through that up-scaling that the opportunity costs of a particular conservation deal can be compared against nature's other scales—like those of migrations and migrating species. What conservation rightly demands at these other scales is a constantly-evolving consensus that our regulators and other leaders must understand first and foremost as a shifting function of our best available

210 *See, e.g.*, Colburn, *Indignity*, *supra* note 17, at 428–29 (explaining the numerous considerations involved in conservation biology and answering the question, "[W]hat should be saved?").

211 *See* BREWER, *supra* note 7, at 4, 9, 13 (explaining that conservation has strong American roots and has enjoyed broad public support).

212 *See* Colburn, *Taking Habitat*, *supra* note 17, at 299 (asserting that the conservation easement presents risks for conservation while rising in cost, undermining its effectiveness); Korngold, *supra* note 88, at 1039 (arguing that the costs and risks of conservation easements are substantial); Morris & Rissman, *supra* note 103, at 1246 (explaining that lack of conservation easement tracking and data makes it difficult for policy analysts to evaluate the costs and benefits of conservation easements).

213 John Adams recounts the story of NRDC's effort to build a sustainable paper mill in the Bronx in the 1990s by partnering with New York State, New York City, the Clinton Administration, MoDo of Sweden, various construction firms, and a host of philanthropic heavyweights. ADAMS ET AL., *supra* note 100, at 155–62. Besides the many mutual animosities that killed the project—Democrat to Republican (and vice versa), environmentalists to developers (and vice versa), local officials to state (and vice versa), etc.—NRDC discovered an important truth in the process: our law is better at stopping bad things from happening than at making good things happen. *Id.* at 162.

214 *See supra* text accompanying notes 86–88.

215 *See supra* text accompanying notes 86–88.

science. By embracing the multi-scalar nature of that enterprise, though, the very concept of conservation inevitably expands into a more open-ended agenda.

V. CONCLUSION

I noted at the outset our liberalism and the challenges it brings for those serious about conservation in the twenty-first century. The problem is not that our federalism or anything else in our Constitution deprives us of the authority needed to build larger or more integrated systems of public reserves.[216] It is not even that innovative structures joining public and private lands into landscape-scale partnerships have never been imagined or legislated.[217] It is that whatever Americans' regard for environmental quality comes to, the American land ethic has remained basically possessory and divisionary in nature.[218] Thus, barring some seismic shift, the majority of Americans will support conservation by and through government if and only if it does not entail severe strictures on property rights (real or perceived). It is time for coalitional entities like The Kittatinny Coalition to make more out of themselves and us than they are at present by shouldering a different kind of responsibility going forward. These entities must begin viewing the problem-solving they do to reconcile public goals, like the protection of migrations and migratory species, with our intermixed landscapes as the scarce and undervalued public resource it is. They must begin capturing their deliberations and sharing their insights and outcomes as widely as possible. Without that kind of intentional experimentation, the directly deliberative partnering attacking problems as they appear locally will never progress fast enough to make enough difference in a world generating ever more depletion, toxification, and environmental loss.

216 *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 131, 145 (1976) (upholding federal authority to reserve unappropriated water rights independent of state law restrictions on doing so); United States v. Albrecht, 496 F.2d 906, 910–11 (8th Cir. 1974) (upholding federal authority to create an easement not recognized at common law and enforcing it against successors in interest).

217 *See, e.g.*, Act of Aug. 7, 1961, Pub. L. No. 87-126, 75 Stat. 284 (establishing Cape Cod National Seashore and empowering the Secretary of Interior to acquire title to lands within the designated "seashore" through various mechanisms and empowering Secretary to exercise veto authority over the zoning policies of six Massachusetts towns within the proclamation boundary).

218 *See* Colburn, *Localism's Ecology*, *supra* note 17, at 951–52; Colburn, *Habitat and Humanity*, *supra* note 17, at 146, 149; Colburn, *Taking Habitat*, *supra* note 17, at 256.