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Reconciling Norm Conflict in Endangered Species Conservation on Private Land

ABSTRACT

“As If Equity Mattered” was the theme of the 2009 Berkeley symposium that resulted in the articles collected in this issue of the Natural Resources Journal. In this article we argue that for some aspects of natural resource policy, equity already matters a great deal. The challenge is understanding how policymakers and citizens deal with conflicting ideas about equity in a given policy context. This article considers the role of conflicting equity norms in public policy, with special attention to the protection of endangered species on private lands. After a brief review of the limited attention to norms and normative conflict in dominant understandings of the policy process, we review the role of two important normative ideas in endangered species conservation: an intrinsic norm of ownership as an individual right subject only to limited government interference, and an intrinsic normative duty to prevent extinction, regardless of a species’ utility or practical value. Tracing the prominence of these norms in endangered species policy back to the passage of the Endangered Species Act in 1973, we document in more detail the broad support for both ideas of “equity” among current private landowners affected by endangered species regulations in several locations across the United States. Our conclusion is that both norms remain highly salient, if in some tension, leaving many landowners with strong views about property rights receptive to the idea of cooperative efforts to protect species on private land.

“Rather than a peripheral and messy issue best avoided, questions of fairness and equity must be central to any policy deliberations, most necessarily environmental policy decisions, which often involve contentious redistributive and regulatory dimensions.”¹

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1. Joe Bowersox, *Sustainability and Environmental Justice: A Necessary Connection*, in *THE MORAL AUSTERITY OF ENVIRONMENTAL DECISION MAKING: SUSTAINABILITY, DEMOCRACY AND NORMATIVE ARGUMENT IN POLICY AND LAW* 247 (John Martin Gilroy & Joe Bowersox eds., 2002) [hereinafter *MORAL AUSTERITY*].

I. INTRODUCTION

When asked to think about natural resource policy “as if equity mattered,” we quickly realized that the hypothetical is unnecessary: Equity already matters a great deal. As our epigraph observes, one cannot avoid questions of equity in many environmental policy decisions. Indeed, we argue that the real challenge is understanding how policymakers and citizens deal with *conflicting* ideas—or “norms”—of equity. This article considers the role of conflicting equity norms in public policy, with special attention to the protection of endangered species on private land.

Few natural resource policy issues are more controversial with respect to equity and fairness than endangered species conservation on private land. Endangered species have been legally protected on private property at least since passage of the Endangered Species Act (ESA) of 1973, although the exact nature of those legal protections remains controversial despite more than 30 years of amendments and litigation. ESA implementation remains challenging and often ineffective, especially on private property.² Indeed, the ESA remains in limbo as of this writing, now more than 17 years overdue for a full congressional renewal and limping along via annual funding resolutions that defer the larger conflicts.

We argue that the political difficulties of renewing or even implementing the ESA stem from conflict between two deeply held normative beliefs: (1) a property owner’s intrinsic right to control land with limited political interference, and (2) a duty to care for land responsibly and to avoid contributing to a species’ extinction—which can also be framed as a species’ intrinsic right to exist. Federal officials have struggled to reconcile these two powerful, but sometimes conflicting, norms since the ESA’s passage in 1973, leading to the political stalemate of the past 17 years. Private landowners also struggle to reconcile these norms, generally supporting both ideas as they contemplate their obligations to endangered species on their properties. Any future progress on ESA reform and species conservation, we conclude, will require policy innovations that recognize the depth and breadth of support for *both* norms.

Our discussion proceeds as follows. First, we note the limited consideration of norms and normative conflict in dominant theories of the policy process. Next, we summarize federal efforts to protect endan-

2. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 27–60 (2003); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 277–370 (1993); Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 279–95 (1998).

gered species on private lands from 1973 to the present. This history includes a more detailed discussion of the two norms in conflict: an intrinsic norm of ownership as an individual right subject to only limited government interference, and an individual's normative duty to be a good steward of the land and prevent species from going extinct. After tracing the prominence of these norms in the policy process back to the origins of the ESA in 1973, we document the support for both ideas of equity among several communities of private landowners affected by endangered species regulation. Our conclusion is that both norms remain highly salient, if in some tension, leaving many landowners with strong views about property rights still receptive to the idea of cooperative efforts to protect species on private land.

II. NORMATIVE BELIEFS IN THE POLICY PROCESS

Norms—defined here as informal, shared rules of behavior appropriate to a given identity—exercise great influence over human behavior.³ Recognizing this, scholars have incorporated norms in their models of human behavior in psychology, sociology, economics, and other disciplines. Norms are also making inroads in some areas of political science.⁴ Public opinion scholars have explored in detail the important role of personal normative beliefs in shaping attitudes about specific policy issues.⁵ Theories of policymaking, however, have failed to fully incorporate the vital role of norms, including norms about equity and fairness.

The challenge of specifying better causal mechanisms relating norms to policy process outcomes is well recognized.⁶ Existing work tends to focus on the process of norm adoption or diffusion; for example, a human rights norm's expanding influence across government units and civil society, and the policy changes that follow.⁷ Sometimes, reframing an issue will shift the dominant normative perspective over time,

3. JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* (1989).

4. Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, America Political Science Association, 1997*, 92 *AM. POL. SCI. REV.* 1, 1–22 (1998); Anne Schneider & Mara Sidney, *What Is Next for Policy Design and Social Construction Theory?*, 37 *POL'Y STUD. J.* 103, 103–19 (2009).

5. See, e.g., William G. Jacoby, *Value Choices and American Public Opinion*, 50 *AM. J. POL. SCI.* 706, 706–23 (2006).

6. Sheri Berman, *Review: Ideas, Norms, and Culture in Political Analysis*, 33 *COMP. POL.* 231, 231–50 (2001); John Campbell, *Ideas, Politics and Public Policy*, 28 *ANN. REV. OF SOC.* 21, 21–38 (2002).

7. MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); ANN MARIE CLARK, *DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* (2001).

creating a new policy equilibrium.⁸ One norm, in effect, replaces another as the dominant influence over policy choice in this context.

In other instances, one norm will be unable to displace another despite reframing efforts. This will be especially likely when both conflicting norms are widely and deeply held in a given society. In this situation, both norms may remain highly influential for decision-makers and the public in deliberations about a particular policy issue. This seems likely to lead to policy “gridlock,” as posited by the Advocacy Coalition Framework (ACF), with neither side able to break the stalemate.⁹ Under the terms of the ACF, it normally requires some external shift in political strength to allow one coalition’s “core beliefs” to trump the other side and create a new policy equilibrium.¹⁰ In public opinion research, individuals are often expected to resolve norm conflict by prioritizing one norm over another or by expressing ambivalence and even indifference about which norms are more important.¹¹

Sometimes, however, the tension can be released by a policy that respects the demands of both norms in a sort of “fractious holism” of two contradictory imperatives.¹² More generally, outcomes of these norm conflicts will depend upon the content and relative strength of each norm and the details of the issue area. Those seeking to understand and improve the policy process, therefore, would benefit from greater attention to the role of deep normative conflict in a given policy domain. Are there other ways to resolve such conflict besides one norm replacing or outweighing another as the dominant frame for an issue? We think the answer is yes, and that ESA implementation on private lands is a promising area for another “fractious holism” between conflicting equitable imperatives.

8. James L. True, Bryan D. Jones & Frank R. Baumgartner, *Punctuated-Equilibrium Theory: Explaining Stability and Change in Public Policymaking*, in THEORIES OF THE POLICY PROCESS 155 (Paul A. Sabatier ed., 2007).

9. Paul A. Sabatier & Christopher M. Weible, *The Advocacy Coalition Framework: Innovations and Clarifications*, in THEORIES OF THE POLICY PROCESS, *supra* note 8, at 189.

10. *Id.*

11. Jacoby, *supra* note 5.

12. As Raymond describes it, citing Jane Bennett’s work, “fractious holism echoes Hegel by requiring that we recognize both the connections and the irreconcilable differences between two opposing concepts.” See LEIGH RAYMOND, PRIVATE RIGHTS IN PUBLIC RESOURCES: EQUITY AND PROPERTY ALLOCATION IN MARKET BASED ENVIRONMENTAL POLICY 60 (2003); See also JANE BENNETT, UNTHINKING FAITH AND ENLIGHTENMENT: NATURE AND THE STATE IN A POST HEGELIAN ERA (1987).

III. SPECIES PROTECTION ON PRIVATE LANDS: A BRIEF OVERVIEW

Government efforts to protect wildlife in the United States date back to nineteenth-century state laws protecting species of wild game. The federal government first legislated protective efforts in the early twentieth century with the Lacey Act and the Migratory Bird Treaty of 1918. Federal involvement remained limited to issues of migratory birds and interstate commerce in wildlife until the 1960s, when growing concern over new threats to species built pressure for more action. A series of federal statutes followed, starting with the Endangered Species Protection Act of 1966 and the Endangered Species Conservation Act of 1969. Both laws adopted the idea of protecting a list of species threatened with extinction, but relied heavily on land acquisition and imposed only modest restrictions on the actions of federal agencies. The 1969 Endangered Species Conservation Act addressed international trade in endangered species concurrently with the beginning of the international negotiations regarding the Convention on International Trade in Endangered Species (CITES).

Despite these efforts, pressure for greater protection of endangered species at the federal level continued to grow in the 1970s. With the United States' ratification of the CITES in 1973, it became evident that stronger domestic protections for endangered species would be required to comply with the international convention. Congressional opposition to the subsequent bill was limited, with the final version of the ESA passing the House, for example, by a vote of 355–4. President Nixon signed the bill into law on December 28, 1973.

The law and subsequent amendments offered several new safeguards for species threatened with extinction. It refined the process by which species would obtain protection, mandating that “listing” decisions be based only on the “best available science,” and not economic factors. Protections available to any listed species included prohibition on “taking” any member of a listed species on public or private land. Section 3 of the law defined “take” as the following: “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹³ Federal agencies were further required to consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (for oceanic species) to ensure that their actions would not jeopardize the continued existence of a listed species.

13. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2006)).

Species protection on private property was originally covered by Section 9 of the act—which applies to all persons, including private individuals, corporations, and federal and non-federal government officials and entities—prohibiting the “take” of a listed species.¹⁴ By regulatory rule, “harm” has been defined to include habitat modification or degradation that significantly impairs essential behavior patterns, including breeding, feeding, and sheltering.¹⁵ This is true even if no members of the protected species are present, in what is sometimes referred to as the “no corpses” rule.¹⁶

Around the same time as this regulation, Congress also amended the law to give landowners more flexibility to “take” limited habitat or numbers of protected organisms in exchange for other actions to protect the same species. These Habitat Conservation Plans (HCP), created under Section 10 of the law, gained popularity in the 1990s and have become an important part of ESA efforts on private land.¹⁷ There are also regulatory exceptions for small landowners (less than five acres) who provide habitat for threatened, but not endangered, species.

In amending the ESA to include these exceptions, Congress protected landowners from the ESA’s strict penalties. Without the amended exceptions, a private landowner may break the law by modifying his or her own property, including cutting down trees, building a deck, putting up a fence, or building a driveway. The consequences for violations are serious: criminal penalties up to \$50,000 in fines along with up to one year in prison, or civil damages up to \$25,000 for each violation.¹⁸

The ESA is one of the most stringent environmental laws in the world. It has maintained substantial public support¹⁹ as well as engendered substantial political controversy.²⁰ Overdue for full congressional reauthorization since 1992, the law remains active only through annual renewals, as Congress has been unable to reach an agreement on conditions for a longer-term reauthorization. Part of the dispute concerns the perceived equity of the ESA’s requirements for private landowners. Like most other environmental policies, the ESA requires “someone to sacri-

14. *Id.*

15. Sheldon, *supra* note 2, at 291–92.

16. STANFORD ENVIRONMENTAL LAW SOCIETY, *THE ENDANGERED SPECIES ACT 170* (2001).

17. Craig W. Thomas, *Habitat Conservation Planning: Certainly Empowered, Somewhat Deliberative, Questionably Democratic*, 29 *POL. & SOC’Y* 105, 105–30 (2001).

18. 16 U.S.C. § 1540 (2006).

19. B. Czech and Paul Krausman, *Public Opinion on Endangered Species Conservation and Policy*, 12 *SOC’Y & NAT. RESOURCES* 469, 469–47 (1999).

20. Jason M. Patlis, *The Endangered Species Act: Thirty Years of Politics, Money, and Science: Riders of the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 *TUL. ENVTL. L.J.* 257, 257–329 (2003).

face previously permitted or subsidized behaviors or entitlements” and these “‘someones’ must at [a] minimum perceive that they are treated fairly.”²¹ Thus, the crux of the reauthorization and implementation conflict seems to come down to a simple question: How can we treat both endangered species and private landowners fairly?

IV. INTRINSIC RIGHTS FOR OWNERS AND SPECIES: A FUNDAMENTAL NORMATIVE CONFLICT

In the policy arena of endangered species conservation there appear to be two compelling, and potentially conflicting, values at play. First there is the idea that private property is an intrinsic right of individuals upon which government and society should rarely infringe. Second, is a sense of obligation to care for, or steward, one’s land and avoid direct harm to species at risk of extinction. In the extreme case, we might call this second value an intrinsic right for species to exist.

The American notion of an intrinsic right to ownership finds its origins in the U.S. Constitution and, before that, the political writing of John Locke. A “Lockean” notion of property presents property as a natural right, granted to humans by God.²² Locke conceived of this notion of property in the seventeenth century in England and it made its way into the U.S. Constitution 100 years later. Thomas Jefferson’s desire to protect individual landowners from government tyranny was especially important to promoting this Lockean vision in the United States.²³

Beyond the Constitution, Locke’s philosophy also found its way into the hearts and minds of many U.S. citizens. Dan Bromley points out that Locke managed to link land to a more important modern idea: liberty.²⁴ To Locke, land became the essential instrument whereby liberty was to be attained, and this linkage between land and freedom is deeply entrenched in U.S. culture.²⁵ It is what makes property norms so powerful—they encompass not only the power to own land and make decisions, but also an emotional power that lies at the heart of what it means

21. Joe Bowersox, *Environmental Justice: Private Preference or Public Necessity?* in *MORAL AUSTERITY*, *supra* note 1, at 45 (emphasis omitted).

22. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon ed., Prentice Hall 1952) (1764).

23. Daniel W. Bromley, *Rousseau’s Revenge: The Demise of the Freehold Estate*, in *WHO OWNS AMERICA? SOCIAL CONFLICT OVER PROPERTY RIGHTS* 19, 24 (Harvey M. Jacobs ed., 1998) [hereinafter *WHO OWNS AMERICA?*].

24. *Id.*

25. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990).

to be American.²⁶ Thomas Jefferson created an image of America where decentralized ownership would “serve as both the basis for informed democratic decision-making and a linkage for residents to take seriously their role as citizens . . . of a community.”²⁷ Thus, for Americans to be true citizens, they should own property.²⁸

An “instrumental” notion of property, on the other hand, conceives of the right to ownership as something granted to citizens by government. In this case, government is seen as having the authority to alter property laws and limit property rights, based on changing societal needs and desires. Landowners who view property this way reject the Lockean idea of ownership as a “natural” or God-given right, granted by some act of unilateral appropriation that must be recognized by a legitimate government. Instead, the right to own property is a societal privilege that comes with certain rights and responsibilities that may change over time.²⁹

The second core value, or normative belief, in the politics of the ESA, is an intrinsic duty to take care of the land and steward its natural resources. This norm finds its origins in a special brand of American conservationism dating back to Aldo Leopold and Henry Thoreau. Thoreau’s work includes influential essays about nature and the duty human beings have to conserve nature. As he wrote in *The Maine Woods*, “every creature is better alive than dead, men and moose and pine trees, and he who understands it aright will rather preserve its life than destroy it.”³⁰ An equally radical thinker, Aldo Leopold, was a pioneering American conservationist and the father of wildlife management. In *A Sand County Almanac*, he devised a land ethic based on the principle that an action is right if it “tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.”³¹ He also argued that a “land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the commu-

26. Bromley, *supra* note 23; see also Andrea Olive, *Willingness to Cooperate: Affirmative Motivations Among Landowners* (2009) (unpublished dissertation, Purdue University) [hereinafter *Affirmative Motivations*].

27. Harvey M. Jacobs, *Who Owns America?*, in *WHO OWNS AMERICA?*, *supra* note 23, at 245, 249.

28. Former President George W. Bush’s desire to create an “ownership society” by increasing levels of homeownership speaks to the enduring strength of this norm more than 200 years after Jefferson’s time.

29. More generally on the intrinsic/instrumental conceptions of ownership, see Raymond, *supra* note 12, especially chapter 2.

30. HENRY THOREAU, *THE MAINE WOODS* 159 (Thomas Y. Crowell & Co. 1909) (1864).

31. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 224–25 (1949).

nity as such.”³² Almost 60 years later his land ethic still holds sway in the minds of many landowners and environmental scholars alike.³³

Thus, there are two opposing norms of property—intrinsic and instrumental—as well as this “Leopoldian” norm of stewardship that a landowner may accept or reject. To some extent, these norms coexist easily: an instrumental norm of ownership is quite consistent with many policy suggestions in the Leopoldian spirit.³⁴ And, of course, there is little obvious tension between an intrinsic view of ownership and a lack of interest in conservation duties. Typically, in ESA discussions, the intrinsic view of ownership is seen as being in conflict with the Leopoldian goals of the law. But what if many landowners who value an intrinsic right to property also support a Leopoldian duty of stewardship? How common would such an internal normative conflict be, and how might it play out in terms of landowner behavior? In short, is there room for Leopold on a Lockean parcel of land?

V. NORMATIVE CONFLICT IN ESA POLITICS

“If the blue whale, the largest animal in the history of this world, were to disappear, it would not be possible to replace it—it would simply be gone. Irretrievably. Forever.”³⁵ Statements like this were common in the 1973 ESA legislative process. Witnesses spoke of the “intrinsic worth” of plants, of our “enormous obligation and responsibility” to protect such species, and of a “genuine respect for the myriad magnificent forms of life with which we are privileged to share the Earth.”³⁶ One went so far as to submit a photo of the headstones of extinct animals, while another observed that once such species are gone, “nothing can bring them back.”³⁷ Legislators echoed this line of thought. Senator Wil-

32. *Id.* at 204 (emphasis omitted).

33. See, e.g., ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 *STAN. L. REV.* 1433, 1433–55 (1993).

34. *Id.*

35. H.R. REP. NO. 93-412 (1973), reprinted in STAFF OF S. COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., *A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980* 143 (Comm. Print 1982) [hereinafter *ESA LEGISLATIVE HISTORY*] (prepared by the Congressional Research Service).

36. *Endangered Species Act of 1973: Hearing on S. 1592 and S. 1983 Before the Subcomm. on Environment of the S. Comm. on Commerce*, 93d Cong. 80 (1973) [hereinafter *S. Hearings 1973*] (HRG-1973-COM-0029, CIS-No. 74-S261-36, June 18, 21, 1973); *Endangered Species: Hearing on H.R. 37, H.R. 1461, H.R. 2735, H.R. 4755, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 256, 280 (1973) [hereinafter *H. Hearings 1973*] (HRG-1973-MMF-0015, CIS-No. 73-H561-10, Mar. 15, 26, 27, 1973).

37. *H. Hearings 1973*, *supra* note 36, at 260, 276.

liams of New Jersey noted that we might be able to get along without certain other species in the world today, “[b]ut that does not mean we should.”³⁸ Instead, he continued, the simple fact that a species is “irreplaceable” is reason enough to save it.³⁹ Later on the floor of the Senate, another member of Congress declared that the law “responds to our duty to restore and propagate what we have—through carelessness and lack of understanding—nearly destroyed forever.”⁴⁰

Contrary to some accounts, the original record is not dominated by references to a few “charismatic megafauna.”⁴¹ While tributes to the bald eagle and grizzly bear can be found, so can many defenses of plants, insects, and mollusks. Consider the following comment by a U.S. Department of the Interior official:

It is often asked of me, “what is the importance of the mollusks for example in Alabama.” I do not know, and I do not know whether any of us will ever have the insight to know exactly why these mollusks evolved over millions of years or what their importance is in the total ecosystem. However, I have great trouble being party to their destruction without ever having gained such knowledge.”⁴²

One legislator quizzed witnesses repeatedly about the importance of preserving plants as well as wildlife.⁴³ Another introduced the full list of endangered species in the United States as of 1973 into the record, noting that it included seven reptiles and 30 fish as well as more charismatic mammals and birds.⁴⁴

Overall, more than 33 percent of all speakers at hearings on the bill—eight out of 22—in 1973 referred directly to a moral argument for species preservation. This figure probably underestimates the prominence of moral arguments in the ESA legislative process. Some witnesses in favor of the bill assumed strong congressional support and focused instead on details they thought would make the bill better, while members of Congress were, if anything, more enthusiastic in their use of moral arguments to support the law.

38. *S. Hearings 1973*, *supra* note 36, at 114.

39. *Id.* at 115.

40. ESA LEGISLATIVE HISTORY, *supra* note 35, at 471 (Senate vote on conference report).

41. Charismatic megafauna refers to animals with popular appeal for human beings, such as a panda bear or wild mustangs. The conservation of these types of animals tends to get greater attention as well as broad public support.

42. *H. Hearings 1973*, *supra* note 36, at 207.

43. *See, e.g., H. Hearings 1973*, *supra* note 36, at 240, 245; *see also* ESA LEGISLATIVE HISTORY, *supra* note 35, at 147 (discussing plants).

44. ESA LEGISLATIVE HISTORY, *supra* note 35, at 371.

In short, evidence for the influence of a Leopoldian norm against extinction is quite prevalent in the record of the ESA's passage. What's more, the apparent lack of serious opposition to the law is further evidence that it appealed to a powerful moral principle. What little concern was expressed about the law tended to focus on the balance of power between the states and the federal government in implementing the statute, rather than the ESA's larger normative goals.

The Leopoldian norm had a substantial impact on the wording of the law as well. ESA listing decisions must ignore economic costs. Prohibitions against taking listed species are almost without exception, and even these limited exceptions were debated extensively.⁴⁵ There is very little of the typical congressional language requiring protection "to the greatest extent practicable" or "where reasonable." Instead, the statute is quite uncompromising as befits a law driven by strong, intrinsic moral considerations.

The tranquility with which the ESA was enacted soon gave way to controversy. In 1978, the Supreme Court ruled that the law prevented further construction of a dam on the Little Tennessee River, the completion of which would have destroyed the only known habitat of the snail darter (*Percina tanasi*), an endangered fish.⁴⁶ Political chaos ensued, and has largely continued to the present day. The law was amended in 1978 and again in 1982, with provisions to reduce its limitations on private property owners and federal projects. Congress created the Endangered Species Committee, for example, with the power to authorize a species' demise in the face of overriding economic considerations. Congress also created HCPs in 1982 to permit landowners to "take" a small number of species or a portion of their habitat in exchange for other mitigation measures.

Neither reform satisfied the law's critics, who began to fulminate about its interference with private property rights. Prominent court decisions in the late 1980s and early 1990s restricting timber harvests on public and private land to protect the red-cockaded woodpecker (*Picoides borealis*) and the northern spotted owl (*Strix occidentalis*) intensified the conflict.⁴⁷ In this increasingly hostile atmosphere, the law faced formal

45. See, e.g., *S. Hearings 1973*, *supra* note 36, at 121; ESA LEGISLATIVE HISTORY, *supra* note 35, at 378 (floor debate on Senate bill).

46. Zygmunt J.B. Plater, *The Embattled Social Utilities of the Endangered Species Act: A Noah Presumption and Caution Against Putting Gasmasks on the Canaries in the Coalmine*, 27 ENVTL. L. 845, 854-65 (1997).

47. See *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (regarding red-cockaded woodpecker); *Northern Spotted Owl v. Hodel*, 716 F.Supp. 479 (W.D. Wash. 1988) (spotted owl decision); *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) (spotted owl decision).

reauthorization in 1992. After the 103rd Congress was unable to renew the bill, Republicans took control of the House and Senate for the first time in more than 40 years in 1994. Having campaigned on a "Contract with America" that prominently featured ideas based on an intrinsic norm of ownership, the new Congress took aim at the ESA. Efforts to substantially amend, reform, or even repeal the law peaked with a series of hearings and debates in 1995.⁴⁸ Despite all the political *sturm und drang*, however, nothing happened beyond a brief moratorium on new species listings.⁴⁹

The increasing attacks on the ESA in the late 1980s and early 1990s did little to cool the moralistic stance of the law's defenders. The 1995 ESA reauthorization hearings provide a useful contrast to the initial hearings on the law in 1973. In 1995, ESA supporters continued to invoke the norm against extinction. "[T]urning our backs on nature is immoral," said one senator, while another cited the biblical mandate that we should be good stewards of "our dominion" over the natural world.⁵⁰ A third simply concluded that we would be "a lesser society" if a species like the Louisiana black bear (*Ursus americanus luteolus*) were gone.⁵¹ A member of the House went further, exclaiming that he and his peers "are not here just to represent people, we are also here to represent all other living things on this planet . . ."⁵² Other witnesses invoked this moral duty to other species as well.⁵³

48. Joseph Sax, *The Ecosystem Approach: New Departures for Land and Water, Closing Remarks*, 24 *ECOLOGY* L.Q. 883, 883–86 (1997).

49. Towards the very end of his second term, President George W. Bush did remove the scientific review process from project proposals pertaining to public lands in an attempt to weaken the ESA, but President Barack Obama undid this amendment in his early months in office.

50. *Endangered Species Act Reauthorization: Oversight Hearings Before the Subcomm. on Drinking Water, Fisheries, and Wildlife of the S. Comm. on Environment and Public Works*, 104th Cong. 5–6 (1995) [hereinafter *S. Hearings 1995*] (S. Hrg. 104-366, pt. 2, July 13, 20, Aug. 3, 1995).

51. *Id.* at 767.

52. *Endangered Species Act Amendments: Hearing on H.R. 2275 Before the H. Comm. on Resources*, 104th Cong. 32 (1995) [hereinafter *H. Hearing Sept. 20, 1995*] (HRG-1995-HRC-0030, CIS-No. 95-H651-39, Sept. 20, 1995).

53. See *id.* at 82–83 (statement of Glen Spain, Northwest Regional Director, Pacific Coast Federation of Fisherman's Association); see also *Endangered Species Act Reauthorization: Field Hearings Before the Subcomm. on Drinking Water, Fisheries, and Wildlife of the S. Comm. on Environment and Public Works*, 104th Cong. 461 (1995) [hereinafter *S. Field Hearings 1995*] (S. Hrg. 104-366, pt. 1, June 1, 3, Aug. 16, 1995) (testimony of Rick Johnson, Idaho Conservation League); *id.* at 1014 (testimony of Dan Chu, Wyoming Wildlife Federation); *S. Hearings 1995*, *supra* note 50, at 37 (testimony of Jane Lubchenco, Or. State Univ., Dep't of Zoology).

The norm against extinction even permeated the testimony of those attacking the law. A paper industry representative and ESA critic noted that anyone opposing a law in favor of protecting species in general would be taking a “sociably unsupportable position.”⁵⁴ A timber worker critical of the law admitted that protecting species from extinction was the “moral thing to do.”⁵⁵ Asked about efforts to protect the endangered black-footed ferret (*Mustela nigripes*), a Wyoming rancher had this to say: “Some people might even think, even some of my rancher friends, that I’ve lost my marbles. But I think that any species that we can save, whether it’s important or not, has a value.”⁵⁶ Even Senator Thomas of Wyoming, a staunch ESA critic, remarked that the issue was not whether a species like the grizzly bear has value, but how best to protect it.⁵⁷

Those who challenged our moral duty to avoid extinction almost always did so in an oblique manner. A common strategy was to push for more consideration for human concerns under the law,⁵⁸ while more daring speakers suggested that extinction was a “natural” part of the evolutionary process.⁵⁹ But such questions were generally tentative, rarely stated with authority or as a serious challenge. Senator Thomas, for example, questioned the importance of preserving a particularly uncharismatic species—the hot spring snail—at a hearing in Idaho. But in the next breath, he illustrated the challenges of such a position:

I think, you know, it’s easy to say we’re going to protect everything that might be threatened, every plant and every animal. And that may be a nice idea—to when we really get practical, I suppose there will ultimately be some level of importance attached [to different species]. I don’t know how you do that; it’s difficult to do that. But it’s one of those probably inevitable things.⁶⁰

Supporters of the bill were willing to admit that some priorities had to be set in protecting species. But their decision rule remained consistent with the Leopoldian duty to other species: Rather than prioritizing species by their utility to humanity, we should simply deal with the most endan-

54. *H. Hearing Sept. 20, 1995, supra* note 52, at 46.

55. *S. Field Hearings 1995, supra* note 53, at 32.

56. *S. Field Hearings 1995, supra* note 53, at 1064.

57. *S. Hearings 1995, supra* note 50, at 769.

58. *See, e.g., S. Field Hearings 1995, supra* note 53, at 8 (opening statement of Senator Packwood); *id.* at 51 (testimony of Mike Wiedeman).

59. *S. Field Hearings 1995, supra* note 53, at 55 (testimony of Allyn Ford, Roseburg Forest Products); *id.* at 1030 (comments of Congresswoman Barbara Cubin).

60. *S. Field Hearings 1995, supra* note 53, at 490.

gered species first.⁶¹ This is a strong statement of every species' intrinsic right to exist, offered at a time when the ESA was under intense political attack.

Instead of challenging the Leopoldian duty to other species, ESA critics invoked the intrinsic norm of ownership by focusing on the law's allegedly unfair burdens on private property owners. As Senator Chafee concluded at a 1995 ESA reauthorization hearing: "The burden of the ESA . . . does fall disproportionately on specific communities and on certain individuals. As a matter of fairness, that's of grave concern to me."⁶² Other members of Congress, especially those critical of the law, echoed the argument.⁶³ Examples of individuals suffering major economic losses in land value due to species protections were a staple of arguments against the act.⁶⁴

A pillar of ESA reform, therefore, has been to provide positive incentives for private property owners to protect endangered species, rather than coercive and costly regulations. Witnesses in the 1995 hearings described the perverse incentives created by the law for private landowners.⁶⁵ On this account, those with promising habitat for endangered species are pushed toward a "scorched earth" policy of early timber harvests, fields planted from hedgerow to hedgerow, and otherwise ensuring that any scrap of potential habitat is eliminated quickly before it becomes home to an endangered species, thereby losing its economic value.⁶⁶ These reports appear to be more than just anecdotal; one analysis found a significant increase in timber harvesting in North Carolina as private forests approached an age where they would become protected habitat for the endangered red-cockaded woodpecker.⁶⁷

Members of Congress who participated in the 1995 hearings noted that nearly every witness who spoke in favor of ESA reform cited com-

61. See, e.g., *S. Hearings 1995*, *supra* note 50, at 372 (statement of Mollie Beattie, Director, U.S. Fish & Wildlife Service, U.S. Department of the Interior); *H. Hearing Sept. 20, 1995*, *supra* note 52, at 33 (statement of George T. Frampton, Assistant Secretary, U.S. Department of the Interior).

62. *S. Field Hearings 1995*, *supra* note 53, at 425.

63. See, e.g., *H. Hearing Sept. 20, 1995*, *supra* note 52, at 2 (statement of Richard W. Pombo, U.S. House of Representatives, co-sponsor of H.R. 2275).

64. See, e.g., *id.* at 53-54 (testimony of Benjamin Cone, Jr., landowner, Greenville, N.C.); *S. Field Hearings 1995*, *supra* note 53, at 1058 (testimony of Terry Schramm, cowboy, Walton Ranch, Colo.).

65. *S. Field Hearings 1995*, *supra* note 53, at 29.

66. Michael J. Bean, *Overcoming Unintended Consequences of Endangered Species Regulation*, 38 *IDAHO L. REV.* 409, 415 (2002).

67. Lueck & Michael, *supra* note 2.

penetration for private property owners as a priority.⁶⁸ Clearly, this was an idea built directly on the strength of the norm of ownership. “Protecting endangered species costs money,” concluded one witness, continuing: “That costs something and I think the first thing this legislation [proposing reforms to the ESA] does is faces up to that and says that somebody is going to bear the cost besides the landowner. It is going to be society as a whole, and that is a very fair way to go about it.”⁶⁹ The power of the norm favoring ownership was such that supporters of the ESA were loath to challenge it. Secretary of the Interior Bruce Babbitt, for example, acknowledged issues of “fairness” raised by the ESA for property owners, and that additional protections—besides financial compensation—to meet those fairness concerns were important.⁷⁰

Thus, those fighting for ESA reform in 1995 and more recently have put the fairness argument with respect to private property front and center. Rather than taking on the norm against extinction directly, in an ironic twist, opponents have used the same norm to challenge the law’s protection of subspecies and “distinct population segments.”⁷¹ In response, those defending the law have been reluctant to challenge claims about unfair burdens. Recent ESA innovations from HCPs to financial incentives for protecting private habitat in the 2008 Farm Bill reflect the continued influence of the intrinsic property rights perspective in ESA politics.

VI. NORMATIVE CONFLICT AMONG PRIVATE LANDOWNERS

Despite their vital role in ESA conservation, we know surprisingly little about the property and conservation views of the vast majority of private landowners affected by ESA issues who do not testify at congressional hearings. Building on the very small number of previous studies in this area,⁷² the lead author of this article conducted in-depth inter-

68. For one example, see comments of Senator Chafee, *S. Field Hearings 1995*, *supra* note 53, at 1000.

69. *H. Hearing Sept. 20, 1995*, *supra* note 52, at 47 (statement of W. Henson Moore, American Forest and Paper Ass’n and Endangered Species Coordinating Council).

70. *S. Hearings 1995*, *supra* note 50, at 14, 21 (statement of Bruce Babbitt, Secretary of the Interior). In his response, the secretary stressed the new exemption for landowners with fewer than five acres from most ESA regulations as one way of making the system fairer. *Id.*

71. The argument being that there is little moral obligation to protect an isolated population of grizzly bears, say, if they are common in another part of the country or world and thus not threatened with extinction more generally.

72. Amara Brook, Michaela Zint & Raymond De Young, *Landowners’ Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation*, 17 CONSERVATION BIOLOGY 1638, 1638–49 (2003); Douglas Jackson-Smith, Urs Kreuter & Richard S. Kran-

views about property rights and species conservation issues with 101 small, non-agricultural landowners in Indiana, Ohio, and Utah.⁷³ The interviews took place in the Indiana Conservation Management Area for the endangered Indiana brown bat (*Myotis sodalis*); Middle Bass Island, Ohio, where the threatened Lake Erie water snake (*Nerodia sipedon insularum*), lives; and in Hurricane, Utah, where the endangered desert tortoise (*Gopherus agassizii*), lives. Each community represents areas where the potential for ESA conflict with private landowners exists, but has not yet been fully realized.⁷⁴ Interviews focused on small non-agricultural landowners for two reasons: (1) they are often overlooked in favor of larger ranch and timber lot owners, yet (2) the land they own is becoming increasingly important for conservation as urbanization expands.⁷⁵

Interviewees were asked in detail about their thoughts on intrinsic and instrumental norms of ownership. Following this discussion, the researcher asked each landowner to place him or herself on a hypothetical continuum with the two views on opposing ends. As Table 1 (below) illustrates, almost half of the interviewed landowners, 47 percent overall, favored the intrinsic view of property, whereas only 21 percent identified more with the instrumental perspective. While these results cannot be generalized to American landowners at large, the evidence suggests that an intrinsic view of property seems to be common among landowners from a range of demographic backgrounds in distinctly different communities. In all cases, many of these owners believe private property is an intrinsic right that should largely be free from government interference.

However, when asked about property norms landowners also revealed their stewardship values. In Utah a landowner concluded, “in the end we go back to my religious heritage that says it is really God’s land. And we can’t take it with us when we go anyway so we are really just stewards.”⁷⁶ Agreeing, a landowner in Indiana said, “We are just stew-

nich, *Understanding the Multidimensionality of Property Rights Orientations: Evidence from Utah and Texas Ranchers*, 18 SOC’Y & NAT. RESOURCES 587, 587–610 (2005).

73. This section is based on data previously discussed in Leigh Raymond & Andrea Olive, *Landowner Beliefs Regarding Biodiversity Protection on Private Property: An Indiana Case Study*, 21 SOC’Y & NAT. RESOURCES 483, 483–97 (2008) and *Affirmative Motivations*, *supra* note 26.

74. For example, although ESA issues directly affect all three communities, none have reached a highly polarized state of conflict comparable to disputes over the red-cockaded woodpecker in North Carolina, or the northern spotted owl in the western United States.

75. Mark W. Schwartz, Nicole L. Jurjavic & Joshua M. O’Brien, *Forum, Conservation’s Disenfranchised Urban Poor*, 52 BIOSCIENCE 601, 601–06 (2002); Berry J. Brosi, Gretchen C. Daily & Frank W. Davis, *Agricultural and Urban Landscapes*, in 2 THE ENDANGERED SPECIES ACT AT THIRTY 256 (J. Michael Scott, Dale Goble & Frank W. Davis eds., 2006).

76. Interview with Utah Landowner No. 4 (Sept. 11, 2007).

Table 1: Private property views among landowners

Landowner location	Intrinsic view of property				Total number of landowners interviewed
		Middle	Instrumental view of property	Don't know / no answer	
Indiana	12 (55%)*	4 (18%)	4 (18%)	2 (8%)	22
Ohio	21 (48%)	10 (23%)	9 (21%)	4 (9%)	44
Utah	15 (43%)	9 (26%)	8 (23%)	3 (9%)	35
Overall	48 (47%)	23 (23%)	21 (21%)	9 (9%)	101

* Percentages are calculated by total N in each row but may not tally to 100% due to rounding.

ards. This land has been around for millions of years and I am here for a short time. I have never owned a piece of property that wasn't a better piece of property when I got rid of it than when I got it."⁷⁷ Moreover, throughout the interviews landowners were asked about stewardship values in a number of other ways, including whether or not they feel property owners have an obligation to not harm endangered species found on private property. Table 2 (below) depicts landowner attitudes regarding their obligations to protect endangered species.

Table 2: Do landowners have an obligation not to harm endangered species on their property?

Landowner location				Total number of landowners
	Yes	No	Don't know / no answer	
Indiana	17 (77%)*	3 (14%)	2 (9%)	22
Ohio	19 (70%)	6 (22%)	2 (7%)	27
Utah	12 (67%)	3 (17%)	3 (17%)	18
Overall	48 (72%)	12 (18%)	7 (10%)	67

* Percentages are calculated by total N in each row but may not tally to 100% due to rounding.

Overall, 72 percent of landowners felt that owners are obligated to protect endangered species on their property, with no significant variation across the three locations. This sense of obligation resembles the stewardship ethic found by Jackson-Smith, Kreuter, and Krannich⁷⁸ among agricultural landowners in the American West. It suggests that landowners want to take care of the land, and that intrinsic property views are not necessarily irreconcilable with a conservation norm.

77. Interview with Indiana Landowner No. 20 (Oct. 21, 2005).

78. Jackson-Smith, Kreuter & Krannich, *supra* note 72.

Landowners were also asked if they would be willing to voluntarily carry out—or refrain from carrying out—certain actions on their property. The specific actions for each location are summarized in Table 3 (below). Since these actions are strictly voluntary (not required by ESA law) and would be carried out at the landowners' expense, we expected most or all landowners to be unwilling to cooperate in this manner. From Table 3, however, we can see that at least some landowners were willing to carry out each of these voluntary actions, and in several cases a majority of landowners expressed such willingness, including on critical issues like giving the FWS access to one's property. Given that the interviewed landowners were relatively conservative politically, and interact with largely "non-charismatic" species,⁷⁹ this result is somewhat contrary to conventional wisdom about private landowners and the ESA.

Table 3: Landowner willingness to carry out certain conservation actions⁸⁰

Specific action	Yes	No	Don't know	Total N
Indiana				
1. Plant more trees	15 (67%)*	6 (28%)	1 (5%)	22
2. Reduce night lighting	7 (35%)	12 (65%)	0 (0%)	19
3. Reduce pesticides	5 (27%)	12 (58%)	3 (15%)	20
4. Build bat house	5 (25%)	12 (75%)	0 (0%)	19
Ohio				
1. Give FWS access to property	33 (84%)	6 (16%)	0 (0%)	39
2. Put up a LEWS** sign	20 (55%)	9 (25%)	7 (20%)	36
3. Avoid spring construction	10 (30%)	23 (70%)	0 (0%)	33
Utah				
1. Give FWS access to property	9 (50%)	9 (50%)	0 (0%)	19
2. Reduce pesticides	4 (21%)	9 (52%)	5 (27%)	18
3. Avoid soil disruption	5 (30%)	13 (70%)	0 (0%)	18

* Percentages are calculated by total N in each row but may not tally to 100% due to rounding.

** Lake Erie water snake

However, while stewardship and responsibility were important to most landowners, a minority took a harder line. One landowner said, "You pay for it, it is your land and you can use it within the legal system. You can do whatever you choose—build a house on it or let it grow wild, you can do whatever you want on it. It is your property."⁸¹ Echoing

79. STEPHAN R. KELLERT, *THE VALUE OF LIFE: BIOLOGICAL DIVERSITY AND HUMAN SOCIETY* (1996).

80. This table is from *Affirmative Motivations*, *supra* note 26.

81. Interview with Indiana Landowner No. 12 (Oct. 6, 2005).

some testifying before Congress in 1995, a Utah landowner said, “if [the government] think[s] the species is that important, they need to compensate the landowner. People ought to be paid.”⁸² These attitudes toward government regulation of private property suggest a challenge for policymakers in dealing with at least some private owners.

At the same time, even landowners who rejected government regulation of private property sometimes supported a Leopoldian duty to other species. For example, one landowner opposed to government regulation also felt that “we are on this earth and we have dominion over the animals, but we are not supposed to abuse them. We are supposed to take care of them.”⁸³ Another Lockean owner said that “everything has a right to exist” and that “all animals do have a purpose in the grand scheme of the way God made the earth.”⁸⁴ Finally, a third Lockean landowner said her idea of conservation is “just being good stewards and not deliberately harming [other species].”⁸⁵

All of this raises the question: Are Lockeans more or less willing than non-Lockeans to protect endangered species on their own property? In fact, support for intrinsic property rights is not significantly correlated with any of the 10 forms of willingness to cooperate in species conservation listed in Table 3. Consider, as an example, willingness to give the FWS access to one’s property to monitor endangered species. If intrinsic ownership norms were a serious barrier to cooperation, one would expect landowners supporting an intrinsic ownership norm to be largely unwilling to give government access to their property to monitor a species’ condition. However, as Table 4 (below) reveals, more Lockean owners express willingness to give the FWS access than opposition to the idea.

Thus, while it seems clear that landowners favoring a more instrumental view of property are more open to cooperating with government conservation efforts, it also seems evident that many advocates of an intrinsic ownership norm also support a norm of obligation to species on their land, and some willingness to cooperate with government conservation efforts on their properties. In short, there does appear to be room for both Locke and Leopold on private property as well as in Congress.

82. Interview with Utah Landowner No. 1 (Sept. 11, 2007).

83. Interview with Utah Landowner No. 9 (Sept. 13, 2007).

84. Interview with Utah Landowner No. 3 (Sept. 11, 2007).

85. Interview with Indiana Landowner No. 2 (Sept. 24, 2005).

Table 4: Landowner willingness to give FWS access to his/her property (Ohio & Utah)

Landowner's view of property	Yes	No	Don't know / no answer	Total number of landowners
Intrinsic property view	18 (50%)*	9 (25%)	9 (25%)	36
Middle	6 (32%)	2 (11%)	11 (58%)	19
Instrumental property view	11 (65%)	2 (12%)	4 (24%)	17
Don't know	3 (43%)	0 (0%)	4 (57%)	7
Total N	38 (48%)	13 (16%)	28 (35%)	79

* Percentages are calculated by total N in each row but may not tally to 100% due to rounding.

VII. RESOLVING THE CONFLICT?

Two widely supported norms regarding equity and fairness shape ESA politics: a *stewardship* norm asserting a moral duty to avoid harming other species and an *intrinsic ownership* norm that allows only limited government interference with private property. Although these two norms often conflict, they also retain broad apparent support among private landowners and political elites working on ESA issues. Thus, any future resolution for ESA conflicts seems likely to require a manner of reconciling these two norms—some sort of “fractious holism”—rather than solutions that simply elevate one norm over the other. We conclude by reviewing what this finding—that equity *already* matters in ESA policy—might mean for current and future ESA policy design.

First, it might be useful to re-emphasize areas of broad agreement. Most citizens and political elites seem to agree that it is important to protect endangered species. Disagreement and gridlock focus more on the means of achieving that goal, in particular who should bear the costs of species protection. The burden-sharing issue is a significant challenge to ESA protection on private land because of the salience of the intrinsic property norm. Recognizing this, politicians have tried to improve cooperation with private landowners through economic incentives and cooperative management strategies, with mixed success.

Some notable incentive programs used in conjunction with the ESA are voluntary agreements, such as HCPs with “No Surprises” provisions, Safe Harbor Agreements, and Candidate Conservative Agreements with Assurances.⁸⁶ In these programs, the FWS and a landowner

86. For example, the “No Surprises” rule for the HCPs says “if unforeseen circumstances occur that make the commitments of the [ITP] holder appear to be insufficient to protect the listed species, the permittee will not be required to commit additional land or

reach an agreement whereby the landowner agrees to certain conservation measures in return for a guarantee that he or she will not have to incur additional conservation related costs or restrictions in the future.⁸⁷ For example, HCPs offer Incidental Take Permits (ITP) that legalize a limited degree of habitat destruction in exchange for other mitigation actions by a landowner.⁸⁸ Although HCPs have provided some flexibility in working with private owners, it has been noted that they provide benefits only after ESA sanctions have been levied or threatened against the landowner.⁸⁹ Furthermore, HCPs apply only to certain cases, and their ecological effects remain uncertain.⁹⁰ Lastly, like other voluntary landowner agreements, the HCPs process is time-consuming and expensive for landowners.⁹¹ Thus, HCPs are an incomplete solution at best to reconciling these normative tensions in working with private landowners.

A more successful voluntary landowner program is the Partners for Fish and Wildlife program. This program was established in 1987 with the intent of providing technical and financial assistance to private landowners, including local governments and tribes, who are interested in voluntary conservation projects on their properties. As of 2005, the program had “worked with over 37,700 private landowners to restore 753,000 acres of wetlands, 1.86 million acres of native grasslands and other uplands, and 6,806 miles of riparian and in-stream habitat” including removal of “260 fish passage barriers.”⁹² However, the program is limited by a modest budget and a prohibition against recruiting landowner participation.⁹³ Thus, while the Partners program does exemplify the potential for reconciling stewardship and intrinsic property norms, it

monies beyond what was negotiated [in the original HCP].” STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 16. See also Christian Langpap & JunJie Wu, *Voluntary Conservation of Endangered Species: When Does No Regulatory Assurance Mean No Conservation?* 47 J. ENVTL. ECON. & MGMT. 435, 435–57 (2004).

87. *Id.*

88. Endangered Species Act, 16 U.S.C. § 1539 (2006).

89. REED F. NOSS, MICHAEL A. O’CONNELL & DENNIS D. MURPHY, *THE SCIENCE OF CONSERVATION PLANNING: HABITAT CONSERVATION UNDER THE ENDANGERED SPECIES ACT (1997)*; Leigh Raymond, *Cooperation Without Trust: Overcoming Collective Action Barriers to Endangered Species Protection*, 34 POL’Y STUD. J. 37, 37–57 (2006).

90. Frances C. James, *Lessons Learned from a Study of Habitat Conservation Planning*, 49 BIOSCIENCE 871, 871–74 (1999).

91. Bean, *supra* note 66, at 409–20.

92. Partners for Fish and Wildlife Service, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/partners/partners.html> (last visited Sept. 14, 2009); see also PARTNERS FOR FISH AND WILDLIFE SERVICE, U.S. FISH AND WILDLIFE SERVICE, *STRATEGIC PLAN: THE PARTNERS FOR FISH AND WILDLIFE PROGRAM: STEWARDSHIP OF FISH AND WILDLIFE THROUGH VOLUNTARY CONSERVATION: OCTOBER 1, 2006, TO SEPTEMBER 30, 2010*, 4, available at <http://www.fws.gov/partners/docs/783.pdf>.

93. *Id.*

is hindered by a lack of funding, a fragmented project-by-project approach, and a lack of landowner awareness.

Beyond these two relatively modest reforms, and some recent additional economic incentives for private land conservation in the 2008 Farm Bill, there is little sign of movement in Congress or the FWS toward a broader reconciliation of these two conflicting normative perspectives. In this regard, we are pessimistic that ESA policy gridlock will continue until Congress “catches up” to at least some private landowners, who seem more open to finding a balance between the potentially conflicting values of property and stewardship than their elected representatives.

What might future ESA reforms that better reconcile these two equity norms look like? Enhancing cooperation will require a variety of strategies, some of which will only work under certain conditions. To begin, we recognize that material incentives will sometimes be the only way to encourage landowners to comply and cooperate with the ESA. This is because voluntary compliance will be limited in at least two types of situations: (1) where private landowners’ economic interests are high, and (2) where stewardship norms are weak.⁹⁴ Similarly, other literature has suggested that different strategies are necessary where property norms vary. Jackson-Smith, Kreuter, and Krannich conclude that encouraging environmentally sound land management practices requires different approaches for landowners whose stewardship values are stronger as opposed to landowners whose private property rights orientations are defined mainly through individualistic values. For example, utilizing an educational message that celebrates and reinforces these values and encourages voluntary self-regulation may work for the former, while case “incentive-based” programs may be the easiest way to change behaviors for the latter.

Perhaps most promising, from our point of view, is the general conservation philosophy known as co-management, which combines regulation with the use of economic incentives as well as education and outreach campaigns. We believe it is this strategy that is most likely to inspire greater conservation from Lockeans. The goal of co-management is to make conservation in the economic interest of the landowner or, at the very least, to prevent compliance from being an economic burden.⁹⁵ The key to this approach is finding the right mix of regulation and incen-

94. Jackson-Smith, Kreuter & Krannich, *supra* note 72.

95. *Affirmative Motivations*, *supra* note 26; Christopher S. Elmendorf, *Ideas, Incentives Gifts and Governance: Toward Conservation Stewardship of Private Land*, in *Cultural and Psychological Perspective*, 2 U. ILL. L. REV. 423, 423–505 (2003); Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 541–92 (2006).

tives, as too many incentives will undermine regulation, and conversely, too few incentives will fail to motivate cooperation and conservation. The approach tries to balance what government can reasonably expect a landowner to do for the common good and what is asking too much. Thus, regulators need a better grasp of property norms and landowners' willingness to voluntarily take part in conservation efforts—work that, of course, could be done by outside actors supplying information to already overworked agency staff, as already happens with various HCP and Environmental Impact Statement processes. Ideally, where voluntary action ends, regulation, outreach, and incentives should start. Through including landowners in the process of conservation and engaging them in dialogue about conservation on their property, there is the possibility of leveraging the efforts of citizens who want to safeguard biodiversity. Also, providing landowners with carefully planned incentives—planned in regard to timing, amount, and commitment—could certainly boost landowners' willingness to foster conservation on their property.

VIII. CONCLUSION

Our main point goes beyond the details of ESA policy design, as important as those are. We close by reiterating our primary finding: Contrary to some expectations, conservation is important to many committed Lockeanes who express fairly robust willingness to cooperate with the government on species protection efforts on private land. While it would be easy to assume that a stewardship norm enhances willingness to cooperate and an intrinsic property norm diminishes cooperation, we did not find such a straightforward relationship. The visions of Leopold and Locke are not two ends of a single normative continuum, but co-exist uneasily in the normative thinking of many landowners.

This relatively widespread support for both Locke and Leopold casts many ESA reform proposals in a new light. Strategies that attempt to promote one norm over the other, such as the “hammer harder” strategy of tougher enforcement of existing regulations on private land,⁹⁶ or efforts to move legal norms away from intrinsic notions of ownership,⁹⁷ look less promising from this perspective. Other options that stress co-production of conservation efforts on private lands, especially with smaller property owners, look more appealing from the perspective of reconciling these two important visions of equity.

96. Elmendorf, *supra* note 95.

97. FREYFOGLE, *supra* note 33.

Our goal here has not been to “conduct normative argumentation” or “provide an assessment of the comparative merit of selected values by judging one value superior and defending this judgment with reasoned evidence” as suggested by other scholars delving into normative conflicts.⁹⁸ Instead, we have drawn attention to these conflicting moral norms and how the future of the ESA will likely have to be built around them. Although these deeply held and conflicting notions of equity may make ESA policy design more difficult, they also offer distinct opportunities for better species protection on private land.

98. Joel J. Kassiola, *Why Environmental Public Policy Analysis Must Include Explicit Normative Considerations: Reflections on Seven Illustrations in MORAL AUSTERITY*, *supra* note 1, at 239.