



Spring 2004

Private Conservation Literature: A Survey

Andrew P. Morris

Recommended Citation

Andrew P. Morris, *Private Conservation Literature: A Survey*, 44 Nat. Resources J. 621 (2004).
Available at: <https://digitalrepository.unm.edu/nrj/vol44/iss2/14>

This Book Review is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

BOOK REVIEWS

THE STATE OF THE NATURAL RESOURCES LITERATURE

Andrew P. Morriss* on Private Conservation Literature: A Survey

Books Reviewed:

Constance Best & Laurie A. Wayburn, *America's Private Forests: Status and Stewardship* (Washington, DC: Island Press, 2001).

Richard Brewer, *Conservancy: The Land Trust Movement in America* (Lebanon, NH: University Press of New England, 2003).

Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* (Washington, DC: Environmental Law Institute, 2003).

Sally K. Fairfax & Darla Guenzler, *Conservation Trusts* (Lawrence, Kansas: University of Kansas Press, 2001).

Robert L. Fischman, *The National Wildlife Refuges: Coordinating a Conservation System through Law* (Washington, DC: Island Press, 2003).

Julie Ann Gustanski & Roderick H. Squires, eds., *Protecting the Land: Conservation Easements Past, Present, and Future* (Washington, DC: Island Press, 2000).

Wallace Kaufman, *Coming Out of the Woods: The Solitary Life of a Maverick Naturalist* (Cambridge, Mass.: Perseus Publishing, 2000).

Mike McQueen & Ed McHahon, *Land Conservation Financing* (Washington, DC: Island Press, 2003).

John Randolph, *Environmental Land Use Planning and Management* (Washington, DC: Island Press, 2003).

Meredith Armstrong Whiting, *Innovative Public-Private Partnerships: Conservation of Forests, Farmlands and Wetlands* (New York: Conference Board, 2001).

THOMAS WYCHE, *Mosaic, 21 Special Places in the Carolinas: The Land Conservation Legacy of Duke Power* (Englewood, Colo.: Westcliffe Publishers, 2002).

Private conservation has arrived, almost. Despite private ownership of the vast majority of land in the United States¹ and

* Galen J. Roush Professor of Business Law and Regulation and Director, Center for Business Law and Regulation, Case Western Reserve University and Senior Associate, Property & Environment Research Center, Bozeman, Montana. A.B. 1981, Princeton; J.D., M. Pub. Aff. 1984, University of Texas at Austin; Ph.D. (Economics) 1994, Massachusetts Institute of Technology.

extraordinary growth in the number of private land trusts,² when we discuss land conservation, we still mostly talk about land owned or controlled by the federal, state, or local governments.³ One reason is the difficulty of writing about the diverse methods individual land owners use to protect the environment; another is the lack of comprehensive information about private land holdings. Also important is the statist orientation of many environmental writers, an orientation that is clear in many of the books reviewed here. Statism in environmental protection brings with it an unwillingness to see the impermanence of government solutions, an insistence on political control of resources over market control, and a distrust of market mechanisms. When the sorry record of governments in protecting the environment is taken into account,⁴ however, private measures that preserve resources for even a limited period become more attractive.

The role of private landowners in preserving land is only partially incorporated into much of the literature. Accepting, however reluctantly, the post-Berlin Wall lesson that markets work,⁵ some authors have simply substituted taxes and subsidies for direct commands, seeking to "buy" more environmental protection by lowering the price of conservation through market mechanisms.⁶ As a result, much of the literature on ownership of natural resources is focused on how to change private owners' behavior more cheaply through government controls that use market incentives rather than by command and control.

The books reviewed here are those that suffer least from these defects. They fall into five reasonably distinct categories: textbooks, case studies, land-type analyses, method analyses, and memoirs. Textbooks

1. JOHN RANDOLPH, ENVIRONMENTAL LAND USE PLANNING AND MANAGEMENT 77, tbl. 5.1 (2003) (noting that approximately 27 percent of the land in the United States outside Alaska is held privately; governments own over half of Alaska, boosting their share of the country's land by another 15 to 16 percent).

2. Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483 (2004).

3. In addition to the books reviewed here, the role of property rights and private efforts at conservation has been slowly growing throughout the environmental literature. See, e.g., LAND, PROPERTY, AND THE ENVIRONMENT (John F. Richards ed., 2002); ECOLOGY, LIBERTY & PROPERTY: A FREE MARKET ENVIRONMENTAL READER (Jonathan H. Adler ed., 2000).

4. See GOVERNMENT VS. ENVIRONMENT (Donald Leal & Roger E. Meiners eds., 2002).

5. See, e.g., NATURAL ASSETS: DEMOCRATIZING ENVIRONMENTAL OWNERSHIP (James K. Boyce & Barry G. Shelley eds., 2003), a collection that focuses on using environmental issues to accomplish income redistribution and other leftist goals. Conservation easements merit only two mentions in the index, both of which refer to passing references in a single chapter.

6. See, e.g., Dave Foreman, *Am I a Free Market Environmentalist?* (PERC Reports Mar. 1996) (Earth First! cofounder advocates using market mechanisms in some cases).

are interesting because they provide a measure of the degree to which a subject has become mainstream. How land use texts treat private conservation efforts tells us about how important land use professionals think it is. Case studies offer the raw material for assessment of the success of private efforts. Thorough case studies not only guide future efforts past potential pitfalls but also tell stories that illustrate the relative advantages and disadvantages of different kinds of private efforts. Analyses of conservation efforts aimed at particular types of land give a broader picture than individual case studies and offer a means of assessing the value of private efforts for classes of land. Methodological analyses examine individual facets of private conservation efforts, such as financing, giving guidance for those engaged in the efforts and, for policy makers, considering how (and whether) to change the law to encourage such efforts. Finally, memoirs of individuals who have succeeded or failed at private conservation efforts provide a different view of efforts. By recounting their authors' successes and failures, memoirs can teach a great deal about what to do and what not to do to preserve land through private means.

Textbooks

One measure of the acceptance of the importance of private efforts is that private conservation themes have begun to appear in land use textbooks. For example, *Environmental Land Use Planning and Management*, a recent textbook for a diverse set of target audiences including environmental planning, landscape architecture, geography, environmental studies, and natural resource management classes,⁷ devotes less than half of one of its 18 chapters to private conservation.⁸ Even that discussion is primarily providing definitions of conservation easements; there is little discussion of the details of implementing private land conservation measures.

The textbook gives a clear summary of conservation easements, land trusts, and a few other private conservation vehicles but exhibits a clear preference for government solutions—which is what motivates my opening qualification of the conclusion that private conservation has arrived. The lack of permanent protection seems to be what lies behind the textbook's reluctance to wholeheartedly embrace private conservation.⁹ Indeed, in one of the few instances where the textbook

7. The subject list comes from the publisher's press release announcing the book.

8. MIKE MCQUEEN & ED MCHAHON, *LAND CONSERVATION FINANCING* 83-92, 102-03 (2003).

9. See, e.g., *id.* at 103 ("One of the most important categories of private land stewardship is those large blocks of roadless, natural land not currently in resource

authors prefer private to public solutions, they find conservation easements superior to zoning because easements provide "permanent protection" while zoning "is subject to rezoning decisions."¹⁰

Permanence is not obviously a virtue. Locking in particular land uses forever is a remarkably bad idea—if only because it is difficult to anticipate the characteristics that may make any given location desirable in the future.¹¹ Before the invention of air conditioning, for example, it would be hard to imagine the rise of Phoenix, Tucson, Las Vegas, or other desert cities; the declining importance of water transportation has reduced the desirability of St. Louis, Cleveland, and other inland ports. If land uses had been permanently set in 1910, our landscape would look very different than it does today, and resources would be spent profligately to accommodate today's needs to the last century's land use patterns. None of these concerns are mentioned. Nonetheless, it is encouraging that private efforts merit a positive mention in a textbook for land professionals.

Case Studies

Five case study collections are reviewed here. The Conference Board, a non-profit organization promoting best practices by businesses,¹² has published a brief set of case studies of private conservation efforts. In *Conservation of Forests, Farmlands, and Wetlands*, it presented brief descriptions¹³ of three public-private partnerships: Bushley Bayou/Catahoula National Wildlife Refuge, the Chesapeake Forest, and Brazil's Atlantic Forest. The book's goal is to describe how a "strong commitment to the environment and a record of good stewardship are valuable assets for companies today."¹⁴

The case studies are primarily descriptions of the projects and collections of laudatory quotes from participants; there is little analysis. Each does identify a particular interest of the private partners served by

production. These are a de facto part of our nation's conservation lands, but they are not permanently protected.").

10. *Id.* at 93.

11. Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573, 584-90 (2004) (cataloging problems with permanently dictating land use).

12. See The Conference Board, *About Us*, at <http://www.conference-board.org/aboutus/about.cfm> (last visited July 8, 2004) ("The Conference Board creates and disseminates knowledge about management and the marketplace to help businesses strengthen their performance and better serve society.").

13. The case studies are approximately two pages each. The entire publication is only 22 pages.

14. MEREDITH ARMSTRONG WHITING, *INNOVATIVE PUBLIC-PRIVATE PARTNERSHIPS: CONSERVATION OF FORESTS, FARMLANDS AND WETLANDS* 19 (2001).

the project, a key to linking conservation to more than charity. American Electric Power funded much of the acquisition and reforestation of the land involved in the Bushley Bayou transaction to gain carbon credits potentially useful to offset emissions in the future,¹⁵ as did General Motors in the Brazilian example.¹⁶ A timber company was able to purchase a tract of land it wanted by joining forces with conservation groups and the state of Maryland where the seller would not break up a large tract. By helping with the acquisition of conservation land, the timber company "was able to acquire on the lands the company wanted (200,000 acres of the most productive timberlands [out of the 278,000 acre tract])."¹⁷

While the case studies would be useful to a wider audience if they contained more details on the transactions, even the brief summaries here provide some evidence of the means of creating business incentives for private interests to engage in conservation. Unfortunately, two of the three are dependent on the participating businesses' fear of future regulation (*e.g.*, the Kyoto Protocol) rather than a direct profit motive. Only in the Chesapeake Forest example was the combination able to advance the profits of the business by lowering the transaction costs of purchasing the land the business wanted. Charitable efforts by private firms are laudable (if potentially troubling to shareholders); linkages between firms' direct interests and conservation have greater potential.¹⁸ If fear of regulation is the prime motivator, the conservation efforts begin to look suspiciously like payoffs to an extortion ring rather than a desire to provide for the future.¹⁹

A more detailed set of case studies, together with an overview of the legal issues, make up the Environmental Law Institute's *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success*. Written with the help of local organizations in ten Latin American countries²⁰ and, oddly, given the title, Canada, the book provides overviews of the eleven nations' legal rules on private

15. *Id.* at 15-16.

16. *Id.* at 18.

17. *Id.* at 16.

18. See TERRY L. ANDERSON & DONALD LEAL, *ENVIRO-CAPITALISTS* (1997) (describing how firms profit from providing environmental amenities).

19. Governments know well how to extort such payoffs. President Richard Nixon, no slouch in the business of encouraging donations, used the threat of OSHA regulation to induce business support for his reelection campaign. See Thomas O. McGarity, *Beyond Buckman: Wrongful Manipulation of the Regulatory Process in the Law of Torts*, 41 *WASHBURN L.J.* 549, 564 n.78 (describing "infamous 'Guenther memo'" that drew explicit connection between threatening regulation and contributions).

20. Argentina, Bolivia, Brazil, Canada, Chile, Costa Rica, Ecuador, Guatemala, Mexico, Paraguay, and Peru.

conservation and descriptions of attempts to provide private conservation in each. It also synthesizes the case studies and analyzes the Latin American legal regimes, drawing some regional conclusions.

The book documents the weaknesses in the legal rules among Latin American countries, noting for example, "the lack of a secure legal framework and a number of other barriers are slowing the use of [conservation] easements in the region, and removing these barriers is a priority for environmental law groups in the hemisphere."²¹ It provides model acts to recognize conservation easements and uses and to provide tax incentives to help remedy this lack.²²

The first half of the book outlines the common problems of Latin American countries. For example, "[i]n virtually all Latin American countries, private landowners by law own only the surface of the land, whereas in common-law countries, private property rights generally extend from below the surface to the sky above."²³ This prevents private landowners in Latin America from stopping mining concessions from being granted by governments on sensitive land, "even if the lands are placed under conservation status by a private entity."²⁴ Moreover, pressures for land distribution mean that conservation land uses are sometimes classified as "vacant" and open to expropriation.²⁵

Additional problems arise from the newness of private conservation efforts. Although the book documents numerous examples of creative solutions to allow private conservation efforts, it also notes that some such solutions are "novel arrangements that pose legal uncertainties that have not been tested in court."²⁶ Among the untested novelties are such well-tested Anglo-American ideas as easements appurtenant.²⁷ Lack of clear land title also poses problems, as does the

21. ENVIRONMENTAL LAW INSTITUTE, *LEGAL TOOLS AND INCENTIVES FOR PRIVATE LANDS CONSERVATION IN LATIN AMERICA: BUILDING MODELS FOR SUCCESS* 21 (2003).

22. *Id.* at 185-95.

23. *Id.* at 12.

24. *Id.* Ironically, U.S. environmental pressure groups object to the unification of mining and surface rights by the General Mining Law of 1872. See Andrew P. Morriss, Roger E. Meiners, & Andrew Dorchak, *Homesteading Rock: A Defense of the Free Access Principle Under the General Mining Law of 1872*, ENVTL. L. (forthcoming 2004).

25. ENVIRONMENTAL LAW INSTITUTE, *supra* note 21, at 13. One of the other books reviewed here highlights the importance of securing the mineral rights to lands being protected by conservation easements to prevent problems. See William T. Hutton et al., *Conservation Easements in the Ninth Federal Circuit*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 376 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

26. ENVIRONMENTAL LAW INSTITUTE, *supra* note 21, at 24.

27. *Id.*

general insecurity of property rights in Latin America.²⁸ The civilian legal systems do provide some structures more highly developed than in the common law; the *usufructo*, for example, can be used to lower the cost of purchasing land for conservation by creating an off-the-shelf, temporary, personal right in the seller to continue to make some use of the land.²⁹ Even where Latin American countries have written laws that provide security for property rights generally or conservation rights in particular, however, the shaky nature of the judicial system makes those rights insecure. Thus the study concludes that “[s]teps should be taken to ensure that laws protecting property rights are enforced on private conservation lands, especially to protect against land invasion; governments should also implement new procedures that provide for more rapid judicial and enforcement response to violations of property rights on conservation lands.”³⁰ Interestingly, as in the United States,³¹ relatively small payments (\$50/hectare/year in one example) produce changes in landowners’ behavior.³²

Latin American countries (and developing countries generally) suffer from ineffective legal systems that do not protect property rights.³³ This book would be stronger if it had acknowledged that the problem is a general one, not simply a problem for conservation easements. The book also fails to come to grips with the nature of the civil law system used in Latin America. The relevant comparisons are to European civil law countries, not the United States or Canada, largely common law countries. Are the problems with appurtenant easements specific to Latin America or are they due to the civil law’s view of easements generally? If the former, the remedy is importing legal reforms from continental Europe, not from common law countries. If the latter, the question arises of how civilian legal systems in Europe provide for private conservation easements. Despite these flaws, however, this is a valuable resource for those considering private conservation efforts outside the United States.

Julie Ann Gustanski and Roderick H. Squires’ fine collection, *Protecting the Land: Conservation Easements Past, Present and Future*, gives

28. *Id.* at 25.

29. *Id.* at 29.

30. *Id.* at 39.

31. See Jonathan H. Adler, *Wetlands, Waterfowl and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 59–60 (1999) (describing the role of private conservation efforts in protecting wetlands for migratory birds and the use of small payments).

32. ENVIRONMENTAL LAW INSTITUTE, *supra* note 21, at 37.

33. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2003) (describing problems created by lack of secure property rights).

concise surveys of state laws on conservation easements, thorough case studies of particular easements, and theoretical analyses that pull together the lessons learned from the case studies. The book contains numerous helpful charts that summarize the key features of states' laws and that will be of great assistance to social scientists considering empirical analysis of private conservation. Todd Mayo's superb survey puts conservation easements into the larger law of easements and provides a clear introduction for non-lawyers as well as a refresher course for lawyers.³⁴ It also catalogues issues to be addressed in drafting conservation easements. For example, Mayo provides a concise summary of the pros and cons of including an arbitration agreement in a conservation easement.³⁵ Arbitration is sometimes less costly than litigation and, as a private process, avoids some of the public relations problems of litigation.³⁶ However, conservation easements generally have public benefits, which may not receive as great a weight in a private proceeding as in court and arbitrators are less well equipped than courts to provide and enforce injunctive relief.³⁷ Steven Small provides an equally concise and clear history of the tax code provisions that provide incentives for donation of conservation easements.³⁸ Contributions such as these improve the "legal technology" of conservation easements and, as a result, easements become less costly to produce and enforce.³⁹

The case studies are detailed and provide valuable insights. For example, Leslie Reed-Evans' excellent chapter *A Limited Development and Conservation Success Story* chronicles the Williamstown (Massachusetts) Rural Lands Foundation's partnership with a dairy farm to save a 44 acre tract. By focusing on the important aspects of the tract, the foundation was able to finance the land acquisition by subdividing and allowing limited development on a portion of the tract.⁴⁰ The chapter includes maps, photographs, and financial details as well as a concise chronology. Relying solely on the executive director of the foundation as the author

34. Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 26-54 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

35. *Id.* at 47-48.

36. *Id.* at 47.

37. *Id.*

38. Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Protection into the Twenty-First Century*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 55-66 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

39. See Parker, *supra* note 2, at 507-08.

40. Leslie Reed-Evans, *A Limited Development and Conservation Success Story*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 119 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

of the case study is a limitation; an objective assessment of the success of the potentially controversial decision to partially develop the land to save the remainder would have strengthened the chapter. Reed-Evans' candor in her assessment, however, makes this a minor complaint.

Similarly, Dennis G. Collins' chapter, *Enforcement Problems with Successor Grantors*, is an excellent analysis of a pervasive problem with conservation easements. The purpose of an easement is to make the restrictions it imposes binding on future landowners, solving the problem of a lack of privity of contract beyond the original grantor-grantee relationship. While original grantors share the grantee land trust's interest in conservation (or they would not have made the grant of the easement in the first place), later owners of the remaining property may not be as enthusiastic about the limits conservation easements impose on their properties. Collins' account of one land trust's difficulties should be read by anyone planning a conservation easement, since it clearly identifies the problems created by imprecise initial drafting and statutes. Other standout chapters address how to use advanced technology to plan conservation priorities,⁴¹ protect trails,⁴² and preserve agricultural land.⁴³

Unfortunately, the book is organized by the federal circuit courts of appeal, which the editors justify as based on "similar legislative histories" and a claim that courts look to precedent from within the same circuit.⁴⁴ Since conservation easements are creatures of state property law, however, the relevant source for persuasive precedent lies with other states that have adopted similar statutes⁴⁵ (such as the Uniform Conservation Easement Act), not those who share geographic

41. Brian Stark, *Saving Special Places: How a Land Trust Used Emerging Technology to Address Conservation Priorities*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 400-11 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

42. Christine Thisted, *Easements and Public Access on the Ice Age National Scenic Trail*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 343-53 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

43. John B. Wright, *The Power of Conservation Easements*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 392-99 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

44. Julie Ann Gustanski & Roderick H. Squires, *Introduction*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 2 (Julie Ann Gustanski & Roderick H. Squires eds., 2000); Roderick H. Squires, *Introduction to Legal Analysis*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 69 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

45. See, e.g., Mayo, *supra* note 34, at 26 (noting that Connecticut, Delaware, New Hampshire, and Rhode Island adopted laws derived from Massachusetts' statute). Delaware is not covered in the same chapter as the other states with Massachusetts-based laws as it is in the Third Circuit rather than the First or Second.

boundaries.⁴⁶ This organization unfortunately arbitrarily limits the legal chapters' comparative framework and prevents the book from addressing trends across circuits.

Also using a case study method is Sally K. Fairfax and Darla Guenzler's *Conservation Trusts*, which provides detailed descriptions of nine conservation trusts⁴⁷ together with an analysis of the strengths and weaknesses of trusts as a means of accomplishing conservation goals. The authors set out to examine the variety of organizations that are termed "trusts" because the increasing reliance on organizations that are "built on or close to trust principles" is growing rapidly.⁴⁸ This growth reflects a broader societal disillusionment with the Progressive Era model of solving problems through reliance on an expert, disinterested bureaucracy. Not only are government power and resources being devolved to lower levels, they are also being dispersed to a variety of organizations including conservation trusts.⁴⁹

This book is a model case study, combining detailed analyses of individual organizations with a thorough analysis of what the individual case studies reveal when read together. Fairfax and Guenzler ask interesting questions about the role of trust principles in conservation, questions that the rest of the literature does not emphasize: "Where and under what circumstances is [a trust] a promising vehicle for resolving a dispute or solving a problem? How do structural choices play out over time, and what pitfalls should trust framers and analysts be on the lookout for?"⁵⁰ Those forming or studying private conservation efforts ought to be considering these questions; reading this book provides a primer on how to do so.

One of the most important themes emphasized here that is not well-represented elsewhere is the issue of accountability. Creating an organization and making it accountable to the public, donors, and others is costly. When is it an appropriate investment of resources to create a separate organization? Monitoring the organization is also costly. Who will pay for the monitoring? How will people even learn of an organization's existence, let alone whether it is accomplishing its

46. See Parker, *supra* note 2, at 490-01 (describing differences and commonalities in statutes across states).

47. The major case studies include the Platte River Whooping Crane Maintenance Trust, the Dade County Wetlands Trust, the Exxon Valdez Oil Spill Trustee Council, the Hawaiian Home Lands Trust, the North Dakota Wetlands Trust, the Great Lakes Fishery Trust, the Stephen Phillips Memorial Preserve Trust, the Society for the Protection of New Hampshire Forests, and the Napa County Land Trust.

48. SALLY K. FAIRFAX & DARLA GUENZLER, *CONSERVATION TRUSTS* 3 (2001).

49. *Id.* at 8-9.

50. *Id.* at 4.

purpose? Who has the right to seek judicial review of a trust's behavior?⁵¹ Conservation trusts have special accountability problems. "The core idea of a trust traditionally involves money, and the most fully evolved trust rules about accountability concern financial accounting. This is frequently viewed as a problem for trusts aimed at protecting environmental values. When the goal is improved habitat or wetlands protection, there is no equivalent of dollars and cents to count, and indicators of success in achieving trust goals are not well defined."⁵²

For another example of the accountability issues raised by trust language, consider the entities Fairfax and Guenzler term "pretend trusts," such as the federal Land and Water Conservation Fund.⁵³

In theory, the fund is supposed to receive deposits of \$900 million per year from [park fees, motorboat fuel taxes, and outer continental shelf oil production]. In fact, no deposits are made, no funds accumulate, and no interest accrues. Land acquisition funds are subject to congressional appropriation, just like any other federal expenditure.⁵⁴

By contrast, the real trusts described in the case studies provide real constraints on various actors' spending and other behavior.

The value of Fairfax and Guenzler's study is that it provides clear illustrations of problems in using trust mechanisms to meet conservation objectives as well as potential solutions. As they note, "There are several problems inherent in the trust concept that ought to cause potential framers at least a few sleepless nights."⁵⁵ Close attention to the results of this study will help those drafters sleep well again.

The case study of the Stephen Phillips Memorial Preserve Trust demonstrates the value of the authors' approach. Formed "to protect public recreation access and scenic values in the Rangeley Lakes area of Maine" by Betty Phillips, the widow of the trust's namesake, the trust has had many successes. It creatively used both land ownership and restrictive easements; the donor had deep knowledge of the land being protected and set out with an "incredible level of wording" how the land was to be managed.⁵⁶ The success of the trust owes a great deal to the

51. *Id.* at 31-32.

52. *Id.* at 206.

53. *Id.* at 20-21. Fairfax examines additional issues surrounding government "trusts" in her article in this volume. See Sally K. Fairfax et al., *Presidio and Valles Caldera: A Preliminary Assessment of Their Meaning for Public Resource Management*, 44 NAT. RESOURCES J. 445 (2004).

54. FAIRFAX & GUENZLER, *supra* note 48, at 20.

55. *Id.* at 36.

56. *Id.* at 164.

dedication and efforts of Mrs. Phillips. Nonetheless, the reason for the trust's success is also the source of a potentially serious problem.

The trust founder

was a determined woman who knew what she wanted and pursued it with skill and persistence. She was greatly concerned that her wishes regarding management of the land be respected after her death. Nothing she insisted on is particularly objectionable or radical. It is the inclusion of her preferences in perpetual trust documents and easements that suggests the problem.⁵⁷

Unfortunately her preferences included a firm opposition to the role of fire in land management. As a result, "the trustees appear to feel bound by her wishes, in spite of recent ecological studies that conclude that fire is natural and necessary to a healthy ecosystem."⁵⁸ Enshrining the trust creator's wishes into the trust documents is important, in part to encourage donors and in part to honor the contract between the donor and the trust. The same rules that protect donor intent, however, prevent new knowledge and adaptability.

Fairfax and Guenzler draw some specific conclusions from their case studies that can inform future efforts at private conservation. First, organizations need adequate funding and steps must be taken to ensure that promised resources are delivered.⁵⁹ Second, partnerships with the federal government need special attention to avoid the unique problems produced by federal funding mechanisms.⁶⁰ Trusts may be uniquely suited to public-private partnerships,⁶¹ but taking advantage of those opportunities requires careful planning. Third, cooperation among private organizations, in which one grants another a conservation easement over the first's property, can solve long-term institutional problems, including protection from judgment creditors.⁶² Fourth, trusts need to be accountable through the courts. "Much of the promise of the trust can be lost if there is no possibility that well-established expectations will be adhered to."⁶³ Fifth, trustees must be educated about their responsibilities and powers as trustees if trusts are to meet their potential. "[T]he advantages of a trust are lost if the trustees do not understand their obligations or do not know how a trust differs from

57. *Id.* at 165.

58. *Id.* at 166.

59. *Id.* at 210-11.

60. *Id.* at 211.

61. *Id.* at 148.

62. *Id.* at 211.

63. *Id.*

other organizational forms.”⁶⁴ Finally, conservation trusts need to be more creative in how they approach their missions.⁶⁵

The final case study reviewed takes a quite different approach. Thomas Wyche’s *Mosaic* is a photographic essay, with some text, that showcases the beauty of a single company’s efforts at land conservation. As the owner of more than 250,000 acres of land not directly involved in power generation, Duke Power Co. decided to set aside 69,000 acres for public enjoyment and preservation, turning them over to various government agencies for parks and conservation uses.⁶⁶ Wyche describes the history of each of the 21 areas he photographs and provides stunning views of waterfalls, rivers, woods, and other features. Duke Power acquired most of the land through a timber subsidiary and in connection with hydroelectric projects. Two things stand out. First, these areas were preserved because of deliberate decisions by a corporation to preserve the land and to subsidize the protection of the land.⁶⁷ Duke Power was able to do so, the company asserts, while remaining “fully cognizant” of its “responsibilities to the Company’s customers and shareholders,”⁶⁸ although it does not detail how it resolved the tension between maximizing shareholder value and turning over valuable assets to the state. Second, the photographs do not present these lands as free from humanity—humans camp, boat, swim, and fish throughout the book. The lands are preserved *with* people, not simply *from* people. The virtues of Wyche’s approach are apparent after even a short time viewing the photographs. Looking at the natural beauty he captures motivates the preservation of land in a way even the most eloquent text could not accomplish.

Land Type Analyses

Rather than providing case studies of particular efforts to preserve individual properties, two of the books reviewed here examine preservation efforts aimed at a particular type of land. Privately owned forests are the focus of Constance Best and Laurie A. Wayburn’s

64. *Id.* at 212.

65. *Id.*

66. Buddy Davis, *Introduction*, in THOMAS WYCHE, *MOSAIC, 21 SPECIAL PLACES IN THE CAROLINAS: THE LAND CONSERVATION LEGACY OF DUKE POWER* x (2002). This is not an uncommon route for “private” conservation efforts. As Professor Yandle notes in his contribution to this symposium, “There is evidence that suggests that the larger land trusts serve as land agents for government.” Bruce Yandle, *Comments on Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 519, 527 (2004).

67. WYCHE, *supra* note 66, at 7 (“Duke’s generosity in selling the property at substantially less than its true value was also a critical factor [in preserving it].”).

68. *Id.* at xv.

America's Private Forests. Best and Wayburn do a fine job of giving a picture of privately owned forestland. They clearly summarize data from a variety of sources, ably mixing statistics and qualitative data to present an overview of the 430 million acres (58 percent of the total forest land in the United States) of privately owned forests.⁶⁹ Anyone working on conservation of forestlands needs to read this book, if only because the data on private forests, which have "many inconsistencies and gaps" and exist only in scattered sources, "with differing quality and quantity of data collection,"⁷⁰ are collected here. By giving a thorough survey of the available data sources and doing some valuable synthesis, the authors have eased the work of those seeking to understand private forest ownership.

One important contribution of *America's Private Forests* is its clear analysis of the incentive effects of tax and regulatory laws' impacts on forest owners' behavior. The authors note, for example, how the IRS's definition of passive ownership penalizes forest owners, whose active management of their land tends to occur only in years of harvesting or replanting. Landowners classified as passive investors "cannot expense their annual costs and stewardship investments against other income...[r]ather, they are forced to capitalize these expenses and cannot recapture that value until after a future (often distant) timber harvest."⁷¹ Property taxes, inheritance taxes, and capital gains taxes can all create disincentives to maintaining and improving privately owned forests. Tax authorities sometimes focus on gross tax revenue rather than net tax revenue, as the authors note, leading them to favor development, which increases tax assessments but also demand for public services.⁷² The complexity of tax incentive programs deters smaller forest owners from making use of them.⁷³ The authors provide a thorough list of ways to create tax incentives for the conservation of forests.⁷⁴

A second strength of the book is its clear discussion of financial market issues that affect landowners' decisions. Increasing ownership of forest assets as investments by pension funds and other investors is occurring, driven in part by tax considerations.⁷⁵ These investments are taking new forms, which may in turn alter the incentives of resource owners.

69. CONSTANCE BEST & LAURIE A. WAYBURN, *AMERICA'S PRIVATE FORESTS: STATUS AND STEWARDSHIP* 3 (2001).

70. *Id.* at xxvii.

71. *Id.* at 110.

72. *Id.* at 112.

73. *Id.* at 109.

74. *Id.* at 176-79.

75. *Id.* at 37-39.

Best and Wayburn discuss a range of measures to improve incentives for private landowners to responsibly manage forestland and to maintain it as forest. They heavily emphasize educational and technical assistance programs run by states and the U.S. Department of Agriculture (USDA)⁷⁶ and improvements to regulatory programs to eliminate unintended disincentives to conservation by private landowners.⁷⁷ Although they note the success of positive financial incentives, such as USDA's subsidies for tree planting, that have played a role in almost 40 percent of private forest owners' planting in recent years,⁷⁸ these programs receive relatively little attention from the authors compared to the more extended analyses of education and regulation. Similarly, opportunities for "enviro-capitalists"⁷⁹ to profit from good stewardship are mentioned briefly but the discussion lacks the detail and emphasis the public programs receive.⁸⁰

The book's flaws stem from its unwillingness to accept and understand some of the key differences between *private* and *public* property.⁸¹ For example, Best and Wayburn write that "[t]he relatively short period of people's lives leads to a lack of continuity in forest ownership and therefore in forest stewardship."⁸² Yet, at the same time, they find that the longer life span of the increasingly corporate nature of some forest owners is not a positive development, because "[f]orest management goals change based on a variety of company objectives."⁸³ Human life is too short; corporations' purposes too changeable.

Worrying about owners' life spans misses the point, however. Privately owned property currently capitalizes in its market price the possible future uses. Well-maintained forests suitable for, say, recreation, wildlife, and sustainable timber harvesting will be worth more than a nonsustainable timber harvest and the resulting clear-cut land where the sum of the values from the former activities outweighs the sum of values from the latter. Regardless of the length of any individual owner's time of ownership, markets for private property allow entrepreneurs who recognize ways to increase value by combining sustainable timber practices and fee hunting to bid forest resources away from owners who do not see those opportunities.

76. *Id.* at 121-33; 143-49.

77. *Id.* at 135-39; 138-39.

78. *Id.* at 126.

79. See generally ANDERSON & LEAL, *supra* note 18.

80. BEST & WAYBURN, *supra* note 69, at 166-73.

81. See generally Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights*, 28 *ECOLOGY L.Q.* 123 (2001) (distinguishing various forms of property ownership).

82. BEST & WAYBURN, *supra* note 69, at 101.

83. *Id.* at 102.

The problem with Best and Wayburn's analysis is that the reason they do not ultimately trust markets is because markets will not save all the forests. The authors believe a crisis exists: "The forest landscape is unraveling,"⁸⁴ "the viability—indeed, the existence of America's seemingly vast landscape of private forests is increasingly threatened by population growth, sprawling urbanization, fragmentation, and nonforest development,"⁸⁵ and forest fragmentation is "one of the greatest threats to biodiversity worldwide."⁸⁶ These are just a few of the examples of this belief. Something must be wrong and, since the book is examining private forests that are not being sufficiently preserved, what is wrong must be related to private ownership. The reason: "Markets do not account for and allocate the costs and benefits of private forests equitably among all stakeholders."⁸⁷

The authors neglect, however, to consider the alternative. Public ownership of forestland has its own problems and there is an extensive literature on those problems.⁸⁸ The incentives for public land managers are not necessarily compatible with long-term stewardship, as the record of public forest ownership demonstrates. What is necessary is a comparison of the strengths and weaknesses of private and public ownership in different circumstances, allowing development of a nuanced approach.

By assuming a problem (the vanishing forests) and a diagnosis (private landowners are misbehaving), the authors also assume a cure (landowners must be bribed or coerced into better behavior). The crucial missing element is a comparative institutional analysis; no institution will save all the forests because there are competing demands for forestland and so the question is which institution does better relative to the others. By assuming that less than complete protection is a failure, and failing to consider the comparative strengths and weaknesses of private and public ownership, Best and Wayburn miss an opportunity to help with the institutional choice.

84. *Id.* at xx.

85. *Id.* at xix.

86. *Id.* at 54 (quoting *FOREST ISLAND DYNAMICS IN MAN-DOMINATED LANDSCAPES* (R.L. Burgess & D.M. Sharpe eds., 1981).

87. *Id.* at 107. Prof. David Haddock argues persuasively in an article in this volume that such externalities are often irrelevant to decision makers. See David D. Haddock, *When Are Environmental Amenities Policy-Relevant?*, 44 NAT. RESOURCES J. 383, 386–89 (2004) (summarizing argument).

88. See Roger Sedjo, *The National Forests: For Whom and for What?* (PERC Policy Series PS-23 2001), available at <http://www.perc.org/pdf/ps23.pdf> (summarizing literature on management problems).

This can be remedied by reading Robert Fischman's authoritative *The National Wildlife Refuges: Coordinating a Conservation System Through Law* along with Best and Wayburn's book. Fischman's volume may appear out of place in an essay on the literature of private conservation. The National Wildlife Refuges are, after all, federal property, mostly controlled by the Fish and Wildlife Service (FWS), not private property. Its inclusion here is as a contrast, since it concisely explains what is necessary to publicly manage conservation land. In just over 200 pages, Fischman offers a brief history of the refuge system,⁸⁹ a thorough analysis of the 1997 legislation reforming the system,⁹⁰ and discussion of how the system does and does not work in some specific contexts.⁹¹

Fischman provides a sympathetic reading of the FWS's struggle to bring coherence to its management of the sprawling, fragmented refuge system constructed piecemeal. Forced in some cases to share management with other agencies, given conflicting priorities, and without a natural constituency in Congress, the FWS manages refuges in every state, ranging in size from the gigantic (ANWR) to the tiny (acre-sized units near urban areas). Many individual refuges have specific purposes outlined in the documents (executive orders, legislation, and the like) that conflict with the FWS's system-wide goals.⁹² Interest groups, particularly hunters, have claims on some refuges.⁹³

These often-conflicting goals leave the FWS in a difficult position. Without a clear mandate from Congress on how to balance the various goals, the FWS engages in a complex planning process mandated by the 1997 statute. As Fischman notes, even this process is not enough to resolve all the conflicting interests, particularly where management decisions must cut across jurisdictional boundaries.⁹⁴

Compared to private conservation efforts, the refuge system appears to this reader to demonstrate the high costs of public ownership of conservation resources. Interest groups jockey for position with respect to management decisions (rent-seeking in economic terms); agencies struggle to implement or avoid congressional intent, depending

89. ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 15-76 (2003).

90. *Id.* at 79-159.

91. *Id.* at 163-99.

92. *Id.* at 88.

93. It is to Fischman's credit that he recognizes the legitimacy of hunters' claims. Having played a major role in establishing wildlife refuges and having paid for them through duck stamps and other fees, hunters have a legitimate claim to extra consideration in management decisions. *Id.* at 202.

94. *Id.* at 131-32.

on the circumstances (the principal-agent problem); and refuges are created across a bewildering range of land types and locations (the presence of *national* wildlife refuges in all 50 states is strong evidence of pork barrel politics).

Fischman has an optimistic view of the FWS's experience with the refuge system, concluding that its evolution into a more coherent and focused conservation mission makes it a model for public control of private property for conservation purposes and for other nations.⁹⁵ "Ultimately, the task of ecological conservation will require a change in the way we view private property. The compatibility principle, which favors some uses but allows a wide variety of activities so long as they do not materially interfere with or detract from conservation goals, can serve as a standard for public control of private land use in protective zones."⁹⁶ This seems to me to be a radical conclusion and not necessarily the only one possible from the record Fischman sets forth.⁹⁷

An alternate reading of the book looks to the extraordinary lengths necessary to bring coherent conservation management to bear on the refuge system in 1997—over 100 years from the first refuge's creation. To control this sprawling and scattered set of parcels of land, Fischman points to the *process* constraints on the FWS as critical: notice and comment rule making, public advisory panels, internal appellate review, and judicial review.⁹⁸ These are extraordinarily inefficient means of making decisions and quite expensive to implement. We adopt such measures to constrain agencies because we distrust their unconstrained discretion. Private land owners rarely, if ever, adopt such mechanisms because they bear the costs and reap the benefits of operating their lands. Yet, as described in several of the works reviewed above, private landowners do engage in substantial conservation activity. The FWS's struggle to define and implement a conservation system (for what are, after all, called *National Wildlife Refuges*, a term that ought to imply a clear purpose) is a powerful statement of the difficulty in getting public ownership of conservation land right and the costs of such attempts. By reading this book together with *America's Private Forests*, a reader can get a clear picture of the comparative strengths and weaknesses of public and private land conservation efforts.

95. *Id.* at 209.

96. *Id.*

97. It is a strength of Fischman's careful history that readers are not forced to agree with his conclusions. Fischman is careful to present throughout the book a full account of the facts and issues, even when doing so undercuts his central thesis.

98. *Id.* at 145–59.

Method Analyses

Rather than examining a particular type of land, some authors focus on a particular means of privately protecting land. *Conservancy: The Land Trust Movement in America* by Professor Emeritus Richard Brewer of Western Michigan University's Department of Biological Sciences analyzes land trusts. In some respects this is three books in one. The first third is a justification for land trusts that relies on the familiar enemies of the environment: shortsighted individuals, urban sprawl, cars, and highways.⁹⁹ The second section then discusses how to create conservation land, covering issues from how to choose which parcels are worth the effort to the relative merits of conservation easements, outright ownership, and other strategies.¹⁰⁰ The book concludes with histories of a range of national, regional, and local organizations devoted to land conservation.¹⁰¹

The opening sermon against sprawl and for land preservation is an overtly partisan¹⁰² diatribe that adds little to the massive literature expounding on the evils of low-density living. Sprawl is bad: it "eats up natural and farm lands and leaves a landscape devoid of functional open space";¹⁰³ it is "dysfunctional land use characteristic of most parts of the United States";¹⁰⁴ it consists of "little boxes made of tickytacky that the folk singers sang about disapprovingly" in the 1960s;¹⁰⁵ it "pauperizes the cities,"¹⁰⁶ leads to a "lack of social ties" among people,¹⁰⁷ and causes

99. RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* 1-96 (2003).

100. *Id.* at 97-175.

101. *Id.* at 176-293.

102. For example, a discussion of the 1980s includes the comment, "Most of us tend to block unpleasant memories, so we may need reminding that a primary goal of the Reagan administration was, in Kirkpatrick Sale's words, 'to dismantle government regulations and squelch environmental and other public influence....'" *Id.* at 37. This is certainly a contestable characterization. The Reagan Administration did not agree with people like Kirkpatrick Sale, an editor at the left-wing magazine *THE NATION* and author of a defense of the Luddite movement (*Rebels Against the Future: The Luddites and Their War on the Industrial Revolution: Lessons for the Computer Age* (1995)). Relying on a partisan author like Sale does not, however, provide a credible source. Even more offensively, the chapter goes on to dismiss President Reagan as "a mouthpiece for self-interested corporations, ideologues in right-wing foundations, and associations of Western ranchers and miners that make their living off U.S. government lands." *Id.*

103. BREWER, *supra* note 99, at 43.

104. *Id.*

105. *Id.* at 45.

106. *Id.* at 51.

107. *Id.* at 52.

obesity.¹⁰⁸ Sprawl for Brewer is, in short, the archenemy of land conservation.

Perhaps. Former suburbanites living in the country sometimes manage their land more responsibly than the farmers they buy the land from—replacing monocrop, heavy chemical agriculture with grassland and forests. Such possibilities do not exist here, however. Unfortunately the mélange of partisan quotes and statistics that Brewer throws together in the first third of the book is not likely to convince anyone but the previously converted. The presentation is not rigorous enough to provide a comprehensive resource for a land preservation group looking for solid information for a public education campaign. The rationale for including this section is unclear and it detracts from the vital contribution the remaining two thirds of the book makes. This approach is typical of a great deal of the literature on land conservation. It would be more persuasive to heathen eyes like mine if proponents of the “sprawl is sinful” school of thought addressed some of the serious counterarguments instead of preaching to the choir.

For example, we observe a consistent set of choices by Americans for life outside cities. It is true, as Brewer notes, that those choices are subsidized to some extent by government expenditures on highways. Other factors, such as the low cost of gasoline (which Brewer suggests should cost \$7 to \$16/gallon),¹⁰⁹ also contribute. Yet it is still true that people choose to live in the suburbs and beyond and do not do so simply because gas is cheap. This was once thought to be a good thing. Indeed, it was not so long ago that “reformers” were focused on getting people out of congested cities, prompting Austrian economist Friedrich A. Hayek to note that at the turn of the twentieth century “a satirical German weekly could suggest that an economist be defined as a man who went around measuring workmen’s dwellings, saying they were too small.”¹¹⁰ Now reformers are trying to shoehorn us back into high-density urban living. Rather than a jeremiad against urban sprawl, Brewer (and others) needs to explain why so many Americans’ preferences for semi-rural and suburban living should be overridden.

When Brewer turns to practical questions about how to save land, he offers an important perspective. Not all land is equally worthy

108. *Id.*

109. *Id.* at 46. As Dominic Parker notes in his contribution to this symposium, land trusts are subsidized in the production of environmental amenities because their acquisitions are partially financed through the tax code. Parker, *supra* note 2, at 499. The authors critical of subsidies for roads generally do not call for an end to all subsidies but also do not provide a means to distinguish permissible subsidies from impermissible ones.

110. FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 342 (1960).

of "saving," and those interested in saving land must consider the opportunity costs of their actions.¹¹¹ Brewer advocates a hard look at potential acquisitions and is critical of the haphazard way many land conservation organizations proceed: "Most land trusts consider themselves conservation organizations, but often the conservation is almost accidental. They save real estate and in doing so they save ecosystems and organisms, but many acquire land almost without a plan, and their stewardship often is either nonexistent or aimed mostly at improving public access."¹¹² He offers nine rules for acquiring land: (1) Preserve landscapes or representative natural ecosystems; (2) Have a vision and a plan and protect the high-quality sites that realize them; (3) Preserve the largest areas possible; (4) Add land around preserves; (5) Some small preserves are worth saving; (6) Construct corridors if it is easy; (7) Save land with rare, threatened, and endangered species, and take care of them; (8) Opportunism in the protection of land is not necessarily a vice; and (9) Prioritize.¹¹³ As is inevitable with so many rules, there will be conflicts among them and Brewer does not address how to resolve those conflicts. The rules nonetheless offer a valuable checklist that could guide any group considering taking part in land preservation efforts.

One of the key points Brewer makes repeatedly is that land conservation efforts do not stop with acquisition of property rights (outright ownership, conservation easements, development rights, or others). The conservation organization that acquires those rights must monitor its property (e.g., ensuring that the owner of the land observes the conservation easement), manage the land sensibly, and be prepared to defend the organizations' rights against attempts to infringe on them. This takes money and Brewer's solution is to seek an endowment to fund monitoring, management, and defense of protected land. Although he is not a lawyer, Brewer does a good job of identifying potential legal problems that may arise with different forms of conservation property rights ownership. For example, he notes that if a land trust acquires a conservation easement on a parcel and then later acquires the parcel, the easement will be extinguished.¹¹⁴

There is an important problem with Brewer's approach, however. Brewer identifies good practices with eternal protection. Outright ownership of land is therefore preferable to ownership of a

111. Unfortunately, Brewer does not use economic analysis explicitly, so he does not say "opportunity costs," but the economic term summarizes his insights.

112. BREWER, *supra* note 99, at 97.

113. *Id.* at 100-14.

114. *Id.* at 144-45.

conservation or agricultural easement because it prevents courts from allowing the servient estate holder to seek a change in the easement's terms.¹¹⁵ Ownership by a land trust is better than ownership by a university or other entity because the land trust will be more focused on protecting the land.¹¹⁶

Property law has long struggled with the issue of dead hand control, as Professor Mahoney notes in her contribution to this symposium.¹¹⁷ The infamous Rule Against Perpetuities,¹¹⁸ whose "reign of terror"¹¹⁹ in law schools has traumatized generations of law students, was created to prevent the English aristocracy from ruling from beyond the grave. The Rule's terrors serve a purpose by limiting such "dead hand" control.¹²⁰ Permanently tying up land in *any* use is troubling, regardless of how important that use appears to current landowners for (at least) two reasons. First, even accepting conservation as the overriding purpose of a land trust, we may be wrong about the appropriate way to manage land or the appropriate land to preserve.¹²¹ Attitudes toward land, particular species, and best practices change substantially in quite short periods of time. A hundred years ago the government funded the extermination of wolves in Yellowstone; today it subsidizes their return.¹²² Attitudes toward the role of fire in ecosystems have swung from efforts at suppression to recognition of the importance of periodic fires.¹²³ It would take an amazing arrogance to pretend that we have finally "figured it out" with respect to land management and that we will not learn more in the future. That knowledge, which we perhaps cannot even imagine now, means that land use decisions made today are unlikely to be correct for all eternity. Preserving flexibility in

115. *Id.* at 292.

116. *Id.* at 80–85.

117. Mahoney, *supra* note 11.

118. JOHN CHIPMAN GRAY, *RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942) ("no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest").

119. W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952).

120. See Ira Mark Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. REV. 23, 25–26 (1987) ("That the Rule serves a useful societal purpose by limiting dead hand control is a viewpoint almost unanimously accepted.").

121. See Steven J. Eagle, *Environmental Amenities, Private Property, and Public Policy*, 44 NAT. RESOURCES J. 425, 428–30 (2004) (discussing knowledge problem in environmental context).

122. See HANK FISCHER, *WOLF WARS* (1995) (recounting extermination and restoration of the wolf in Yellowstone).

123. See, e.g., Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649, 664–65 (1997) (describing history of National Park Service fire policy).

land use to adapt to new knowledge in the future is thus critical to any system of land ownership.

Second, and more importantly, there are important constituencies not present when we determine land use today: future generations.¹²⁴ As we subsidize the creation of obstacles¹²⁵ to changes in land use, we should be wary of locking in a set of choices for our grandchildren and those that come after them, people who may have quite different information and needs from those alive today.

The book is also unfortunately marred by a jarring anti-Mormon prejudice in one section. In discussing the number of land trusts in the western states, Brewer notes that Utah has relatively few and then quotes a geographer's conclusion that the reason is Mormon cultural attitudes toward conservation.

These cultural attitudes in Utah come from the Brigham Young model of Mormonism. Development is seen "as a way to prove that the people are living righteously.... Belief in the inherent ethical goodness of large families and in unlimited economic expansion and a millennial mandate to build a radiant city for God have combined to produce the most challenging setting for conservationists in the American West. In Utah, to speak of limits is tantamount to apostasy."¹²⁶

This is, at best, an appalling ignorance of the history of Mormon settlement and the doctrines of that church. Mormon scriptures commend stewardship just as firmly as other Christian churches.¹²⁷ The enthusiasm of the early Mormon settlers in Utah for developing the land was due to their having been forced from the East by mobs in Illinois, an "extermination order" issued by the governor of Missouri, and the murder of Joseph Smith.¹²⁸ Arriving in an isolated desert, they set about surviving through agriculture. Remarkably they did so using a system of

124. See Barton H. Thompson, *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 602 (2004) ("future generations also cannot have a direct say about current resource uses that inevitably will impact them").

125. As Professor Mahoney accurately notes, we cannot prevent future generations from changing land uses but we can raise the cost to them of doing so. Mahoney, *supra* note 11, at 582.

126. BREWER, *supra* note 99, at 272 (quoting John B. Wright, *Cultural Geography and Land Trusts in Colorado and Utah*, GEOGRAPHICAL REV. 269 (1993)).

127. Not being an expert on the subject, I consulted a friend who is a bishop in the Mormon church for examples. See, e.g., *The Doctrine and Covenants of the Church of Jesus Christ of Latter Day Saints*, § 42, verse 32 ("every man shall be made accountable unto me, a steward over his own property...").

128. See generally LEONARD ARRINGTON, *GREAT BASIN KINGDOM* (1958).

private property in both land and water, with a firm view of stewardship.

Why then is there so little private conservation in Utah? Perhaps the answer lies in the high percentage of land within the state in public hands: 65.8 percent of the state is federal land, 7.8 percent is state land, and 4.5 percent is held by Native American tribes.¹²⁹ That leaves less than 12 percent for private ownership, making it unsurprising that relatively few Utah residents would think that more land needed to be removed from private use. Moreover, as documented in *Protecting the Land*, Utah does have an active constituency for land conservation.¹³⁰ Since the issue is peripheral to Brewer's primary points, it is particularly unfortunate that he chose to include this prejudiced speculation.

The final portion of *Conservancy* is composed of brief histories of a number of national and local land conservation organizations. These will be helpful for those considering creating an organization although the histories would be more useful if they had focused on more clearly identifying the management strategies that produce success and failure. This section also includes a helpful description of the major publications in the land conservation field.

Land Conservation Financing, with two authors from The Conservation Fund, promises on its back cover "a comprehensive overview of successful land conservation efforts." The book is well written and provides a wealth of detail about land conservation efforts, particularly since 1990. Unfortunately, it fails to deliver much beyond a recounting of ballot campaigns and bond issues. The first, and largest, section of the book describes measures in eight states (California, Colorado, Florida, Illinois, Maryland, Massachusetts, Minnesota, and New Jersey).¹³¹ The descriptions are primarily sparse descriptions of programs (few are more than a page) and lists of successful and unsuccessful state bond elections for conservation programs. There is little comparative analysis (which programs are more successful across or within states) and almost no serious discussion of the reasons why some programs are more successful than others. Instead the state programs are given brief, almost entirely laudatory descriptions emphasizing the number of acres preserved and the number of dollars raised.

129. Utah Land Ownership, available at <http://www.governor.utah.gov/dea/Presentations/PILT1.PDF>.

130. See Heidi A. Anderson et al., *Conservation Easements in the Tenth Federal Circuit*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 437 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

131. MCQUEEN & MCMAHON, *supra* note 8, at 20-75.

The programs the authors describe vary significantly in how they are funded. Some are funded primarily by bonds, others by state appropriations, lottery funds, dedicated taxes on land transactions, or dedicated taxes unrelated to land (e.g., cigarette taxes).¹³² Some programs share revenue streams with non-conservation activities such as recreation or affordable housing. Some state programs are administered by public/private boards, others have more direct political control. Surely there are important lessons to be learned about the most effective means of finance both with respect to the amount of land protected and the way the land is protected. Regrettably, the authors do not explore these questions—a lack made all the more unfortunate by the authors' participation in important land conservation efforts. Their views would be interesting and important because of their experiences.

The second section of the book deals with local land preservation efforts, both by local governments and by groups using foundation funding. Again the authors deliver primarily descriptive accounts that emphasize dollars raised and spent and acres purchased or otherwise protected. Again the reader (at least this one) is left wanting more: Is one of the foundations described more successful at accomplishing effective conservation than the others? Do some local governments do a better job than others in spending the money they raise? The authors describe successive tax surcharge campaigns on Cape Cod to fund open space acquisition. The first failed, eleven months later the second passed. Why the different outcome? Beyond noting that the tax had a different structure and that the second proposal was drafted "in partnership with real estate interests," the authors do not say.¹³³ Yet this is critical information for understanding the question of how to finance conservation through local governments.

The local examples unfortunately focus entirely on efforts by local governments and foundations, ignoring the many cases of private conservation undertaken by nonprofits, individuals, and corporations. Ducks Unlimited, for example, has financed a successful program to preserve "prairie potholes" along migration paths.¹³⁴ Timberland owners, including International Paper, have turned to conservation-

132. Funding mechanisms raise important equity considerations that are largely ignored. See Haddock, *supra* note 87, at 420–21 (describing regressive impact of funding conservation efforts through tax incentives). Moreover, as Parker notes in his contribution, "the conservation method that maximizes tax benefits may not be the same as that which minimizes the costs of providing environmental amenities...." Parker, *supra* note 2, at 485.

133. MCQUEEN & MCMAHON, *supra* note 8, at 78–80.

134. See Adler, *supra* note 31, at 59–60 (describing role of private conservation efforts in protecting wetlands for migratory birds).

oriented land management practices to produce revenue.¹³⁵ Private individuals undertake significant conservation activities today. Some of these private efforts at land conservation saved critical habitat at times when government spending was aimed at eradicating “pest” species.¹³⁶

The lack of critical analysis of the conservation activities the authors describe is particularly unfortunate because, as the authors note, current efforts appear to be ad hoc, “well intentioned but haphazard and narrowly focused...[and have] done little to integrate land use planning and biodiversity, or to shape and direct growth.”¹³⁷ The final section of the book offers a yardstick by which to measure land conservation: “green infrastructure.”¹³⁸ The authors define “green infrastructure” as more focused on connecting islands of green space into ecosystems, planning before development, and creating a broader vision of green space’s role with respect to “the needs of both nature *and* humans.”¹³⁹ They offer seven principles for green infrastructure, along with selected strategies on how to implement the principles.¹⁴⁰

The book concludes with descriptions of successful green infrastructure projects and suggestions on political strategies to protect public land conservation funding in difficult economic times. Unfortunately, the latter are mostly platitudes: “form alliances” and “gather grassroots support.”¹⁴¹ Those are certainly good strategies—the question is how to do so. When state revenues are down and legislatures face difficult choices between cuts to popular programs (state universities, public education, medical care for uninsured children), how does one go about making the case that funds should be spent instead on purchasing green space? The authors’ answer that green space may be lost to development if funding is cut is not compelling: children will miss out on medical care, universities will slip behind in attracting top faculty and stocking their libraries, and failing public schools will produce more

135. See Holly Lippke Fretwell & Michael J. Podolsky, *A Strategy for Restoring America's National Parks*, 13 DUKE ENVTL. L. & POL'Y F. 143, 156–57 (2003) (describing how International Paper increased profits by managing land for wildlife and recreational use in addition to timber production).

136. See Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95, 128–29 (2000) (describing private efforts to save habitat to protect hawks being exterminated by government agencies).

137. MCQUEEN & MCMAHON, *supra* note 8, at 134.

138. *Id.* at 137–39. “Green” infrastructure is contrasted to “grey infrastructure” (roads, sewers, and water) and “social infrastructure.” *Id.* at 136.

139. *Id.* at 137. This quote illustrates a broader problem with the environmental literature: the exclusion of humanity from nature. See Mahoney, *supra* note 11, at 590 (“In the eyes of many, human activity has endangered the natural world.”).

140. MCQUEEN & MCMAHON, *supra* note 8, at 139–45.

141. *Id.* at 159.

graduates who cannot read. Undoing those problems is also difficult—how should green space advocates make the case that land preservation is more important under such circumstances?

Land Conservation Financing does suggest fertile areas for future research. Some states have emphasized matching funds, with larger matches for communities that commit to more significant local funding sources.¹⁴² Understanding the details of how state match programs affect outcomes would provide useful information for future program design.

The most serious flaw in the book is its uncritical acceptance of every program described. The authors accept every justification offered, weakening their stronger cases by associating them with weaker ones. For example, in praising Marin County's efforts to prevent development of farmland, the authors note that the county's farms provide 20 percent of the local milk supply¹⁴³ without considering that raising cows in Marin County, California, is due to the federal milk regulatory system, which has prevented efficient milk production at the cost of raising milk prices and continuing local, inefficient producers in business.¹⁴⁴ California is, as the authors note, undergoing rapid population growth and Marin County is one of the more desirable places to live. If more people are moving to California, would not we expect to see the substitution of housing for dairy farming take place? What are the consequences of existing Marin County residents foreclosing that change? Indeed, even if one is inclined to accept the overall "sprawl is threatening all our green space" argument with which the book begins, it will not always be better to "preserve" land than to allow changes in use. Having states "dangle"¹⁴⁵ money before local governments will surely produce more local funds than otherwise. Is that always a good thing? It is not as clear as the authors seem to assume.

One impact of dedicating land use to green space in perpetuity is to increase the price of nearby land that is not restricted.¹⁴⁶ In densely

142. *Id.* at 27 (describing Massachusetts program that varies state match according to whether local government has adopted maximum tax surcharge to support program).

143. *Id.* at 95.

144. See Daniel A. Sumner & Joseph V. Balagtas, *United States' Agricultural Systems: An Overview of U.S. Dairy Policy*, ENCYCLOPEDIA OF DAIRY SCIENCES (H. Roginski et al., eds. 2002), available at http://aic.ucdavis.edu/research1/DairyEncyclopedia_policy.pdf (noting that dairy programs transfer resources from consumers to producers).

145. MCQUEEN & MCMAHON, *supra* note 8, at 21 (describing a Massachusetts program).

146. See William A. Fischel, *Sprawl and the Federal Government*, 21 CATO POLICY REPORT (Sept./Oct. 1999), available at http://www.cato.org/pubs/policy_report/v21n5/cpr-21n5.html ("Buyers would be limited to bidding for the stock already available inside the boundary. Housing prices would rise as people moving to the area had to bid for a fixed stock. In the short run, existing homeowners would get a capital gain from such a policy. (I sometimes suspect that is what makes urban growth boundaries politically popular.)").

populated states such as New Jersey, removing substantial amounts of land from potential development is a massive wealth transfer from future residents to existing owners of unrestricted land. Given New Jersey's well-documented history of using land use regulation to "zone out" the poor from well-to-do communities, which led to the landmark decision of the state supreme court in *Southern Burlington County NAACP v. Township of Mt. Laurel*,¹⁴⁷ a bit of skepticism about New Jersey voters embracing of a means of increasing land prices might be justified.¹⁴⁸ Moreover, not all development is environmentally unsound. In my own semi-rural township in Ohio, houses are replacing soybean farms. Is this a net loss to the environment? Given the intensity of soybean farming due to federal agricultural programs,¹⁴⁹ with the attendant fertilizer runoff and pesticide use,¹⁵⁰ it is not immediately clear that large-lot-zoned development has a long-run net detrimental impact compared to farm use.¹⁵¹

Memoirs

Wallace Kaufman's *Coming Out of the Woods* is the one book among all those reviewed here that ought to be required reading for anyone considering taking part in a land conservation effort. Kaufman created covenants and easements in a number of areas in North Carolina in the 1980s and 1990s as part of an effort to preserve forestland. Kaufman headed into the woods to live and emerged with "the story of how [his] life [in the woods] has led to the opposite conclusion from Thoreau's, to the conclusion that the preservation of wildness is in

147. 336 A.2d 713 (N.J. 1975).

148. See generally William A. Fischel, *Zoning and Land Use Regulation*, in II ENCYCLOPEDIA OF LAW AND ECONOMICS 403, 423 (Bouckaert Boudewijn & Gerrit de Greef eds. 2000), available at <http://www.dartmouth.edu/~wfischel/Papers/WAF-zoning%20ELEPdf.pdf> ("While many courts and statewide policies are hostile to selective exclusion of the poor, they usually look benignly on general exclusion in the name of open space, small-town character, and farmland and wetland preservation.").

149. See Andrew P. Morriss & Roger E. Meiners, *Market Principles for Pesticides*, 28 WM. & MARY ENV'T L. & POL'Y REV. 35, 46 n.60 (2004) (discussing subsidization of soybeans); Yandle, *supra* note 66, at 521 (discussing how agriculture is sometimes seen as environmentally sound and sometimes as destructive).

150. Jorge Fernandez-Cornejo & Sharon Jans, Dep't of Agric., *Pest Management in U.S. Agriculture* (Agric. Handbook No. 717, 1999), at 3 ("In 1995, four crops—corn, soybeans, cotton, and wheat—accounted for more than 85 percent of the herbicides used....").

151. See Fischel, *supra* note 148, at 423 ("The frequent alliance between promoters of farmland preservation and environmental protection—the former activity usually less tolerant of species diversity than a typical housing subdivision—may be accounted for by their joint effect of forestalling development and preservation of open space.").

civilization.”¹⁵² Over the course of that story, Kaufman ranges from reflections on Gilgamesh¹⁵³ to a job as a housing and land use adviser in Central Asia.¹⁵⁴

As a new professor in the English Department at the University of North Carolina at Chapel Hill, Kaufman hatched a plan with some colleagues to find and buy a piece of rural land on which they could each build homes. The original group never quite managed to commit to any particular parcel, but Kaufman soon found an ally in a Ph.D. student willing to take the plunge with him. They formed a corporation, bought some land, and set about drafting covenants to add to the deeds that would allow them to pay off their mortgage by selling off some tracts. Kaufman is open and direct about the mistakes they made (including getting “pinhooked” by a native North Carolinian)¹⁵⁵ and the lessons he learned in the process of developing the land he names Saralyn. To take just one example, he began building an access road with a small rented chain saw, soon graduated to owning a larger saw, and finally allowed bulldozers to do the job as he learned the hard way the impact of the state’s requirements for the road.¹⁵⁶ Kaufman’s discoveries, and his spare and lively prose, make this an entertaining read.

The reason that this book deserves a wide audience is not its considerable wit and charm but because Kaufman brings an unsentimental realism to his narrative, one missing from most writing about the lost forests. He loses his job and his wife, in part due to his passion for his land, but does not whine about the consequences of his choices. He mourns the loss of native bird species but recognizes that passenger pigeons and Carolina parakeets were hunted into extinction not simply because of a human urge to slaughter but because those species competed with settlers’ livestock.¹⁵⁷ He builds a fireplace, despite recognizing fireplaces as “environmental crimes” for their inefficient heat production, because he wants one for its beauty.¹⁵⁸ Kaufman is as

152. WALLACE KAUFMAN, *COMING OUT OF THE WOODS: THE SOLITARY LIFE OF A MAVERICK NATURALIST* 7 (2000).

153. *Id.* at 6.

154. *Id.* at 286–88.

155. *Id.* at 25. “Pinhookers went to property owners and suggested they had a buyer and established a price. With that price in mind, they went hunting buyers at double the money, hoping to pocket the difference.” *Id.*

156. *Id.* at 32–39.

157. Kaufman concludes, “I do not justify the extinction of any species, but in a way the settlers’ battle with the pigeons represented species competing against species: Each fought for its own urgent needs.” *Id.* at 81.

158. *Id.* at 128.

unsparing in his assessment of his own behavior as he is of others' choices:

Like most back-to-the-land environmentalists at the time, I chose air pollution [from the fire place] over economic bondage and association with the fossil fuel industry. To lessen the burden on my conscience, I wrote articles and white papers for the Conservation Council documenting the evils of oil and gas and begging for more industry attention to solar and wind energy. I was president of the council when we won the right from the Nuclear Regulatory Commission to challenge the licensing for a nuclear plant. We knew what we didn't want from the behavior of public companies: We didn't want them to behave the way we behaved. Maybe it is a high compliment to capitalism that individuals believe corporations may behave with greater morality and civility than individuals.¹⁵⁹

Describing attempts to save the rural way of life, he notes that "[c]onspicuously absent from the ranks of the activists fighting to preserve rural character were rural characters themselves."¹⁶⁰ Considering the environmental impacts of fossil fuel use, he concludes that substituting oil, gas, and coal for wood as fuel "has saved vastly more of the environment than all the tanker spills combined have despoiled. In our quest for material wealth, we are finding substitutes for trees and metals."¹⁶¹ Later he notes his reliance on *The Foxfire Book* that collected "oral testimony of old mountain people" about rural living but also adds, "Nothing in it told why their lives had left them looking so beat up and toothless."¹⁶²

This narrative is critical to understanding the limits of what private conservation efforts can accomplish. Kaufman showcases the incredible beauty of the woods at Saralyn and the benefits for himself and his daughter of the woods' existence. Yet he also is clear on the limits of what can be accomplished through preserving land. Ultimately Kaufman finds that we cannot leave civilization to become wild again.

[W]e have no choice but to live in the cages and mansions of our habitat called civilization. We are changed forever, and no fantasy of communing with dolphins or dancing

159. *Id.* at 129.

160. *Id.* at 304.

161. *Id.* at 280.

162. *Id.* at 165.

with wolves will make us wild again. I am grateful for that. The wild is not gentle. Wild humans who come to mind are Geoffrey Dahmer, Charles Manson, Adolph Hitler, and Pol Pot.¹⁶³

Moreover, Kaufman is clear about the limits of various methods of land preservation. Despite his efforts and the covenants aimed at protecting the land, Kaufman finds that the buyers of the land "consistently work their way around the covenants."¹⁶⁴ People played loud music, let detergent run into the woods from washers, cut down trees for pastures, and started businesses that drew more people into the woods. Turning the land into public parks also has its limits. As he recounts a conversation with a neighbor who wants someone else to pay for preserving the land bordering his, Kaufman notes, "Now we had come down to a fundamental obstacle to saving land the way environmentalists want to do it—someone else has to pay to rescue a favored piece of land."¹⁶⁵

This book is an essential read not because it has a checklist on how to design a conservation easement or because it creates a conceptual framework for thinking about reallocations of property rights to serve conservation goals. Those are important things, which some of the other books reviewed here address. What Kaufman's book does, which none of the others do, is address the question of why we preserve land without sentimentality or alarmist statistics on sprawl. His unflinching analysis of the motives and the actions of everyone involved in creating Saralyn, including his own, forces the reader to think carefully about why and how to preserve land. Going back to first principles is not a bad thing to do from time to time and this is a marvelous place to start. Indeed, alone of the books reviewed here, Kaufman starts to do what Professor Haddock suggests those favoring land conservation must do: "actually come to grips with the planet's budget constraints...."¹⁶⁶

Conclusion

The literature on private land conservation has progressed substantially in the last five years. Although the definitive work on private land conservation has not yet been produced, the growth in the literature is encouraging. Despite their flaws, all of the books reviewed above belong on the shelf of anyone engaged in private land conservation.

163. *Id.* at 194.

164. *Id.* at 244.

165. *Id.* at 270.

166. Haddock, *supra* note 87, at 423.