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Jessica Owley Lippmann*

The Emergence of Exacted Conservation Easements

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I. INTRODUCTION

Over the past thirty-five years, conservation easements have emerged as a new favorite land-preserving tool of conservationists.¹

1. Land-use planner William Whyte popularized the term "conservation easements" in 1959. Although voluntary private land protection schemes were not new, Whyte was the first to label them as conservation easements and to articulate a form for such a tool. William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BULL. 1 (1959). Conservation easements have seen the greatest rise in popularity since the emergence of land trusts. Land trusts have been growing over the past thirty years at an incredible rate. See JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK* xi (1988); Land Trust Alliance, 2003 National Land Trust Census Data, <http://www.lta.org/aboutlt/census.shtml> (last visited May 15, 2006).

The scholarship examining this tool has generally focused on donated and purchased conservation easements.² A largely over-looked category, however, is “exacted conservation easements.”³ Exacted conservation easements arise as mandated mitigation measures under environmental laws and land-use regulations. Property owners seeking to change their land must often obtain federal, state, and local permits. Increasingly, permit issuers require mitigation measures to compensate for environmental degradation or harms created by proposed projects. At times, these mitigation measures take the form of conservation easements.⁴ Different from traditionally discussed conservation easements, exacted conservation easements are not donated or voluntarily sold. Exacted conservation easements are mitigation requirements for landowners seeking to fulfill goals other than land protection.

Although similar to other conservation easements in structure, exacted conservation easements are a different creature when it comes to landowner motivation and government involvement. The common picture of a conservation easement is a donation or sale where a landowner exchanges property rights in return for long-term security for her land and various potential tax benefits.⁵ Wide-ranging tax benefits do not accompany exacted conservation easements, and conserva-

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2. See, e.g., Ian Bowles et al., *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL'Y F. 209 (1998); Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996); Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2 (1989); John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319 (1997); Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. (forthcoming 2006); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984); A.M. Merenlender et al., *Land Trusts and Conservation Easements: Who Is Conserving What and for Whom?*, 18 CONSERVATION BIOLOGY 65 (2004).
 3. Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293 (2004).
 4. DIEHL & BARRETT, *supra* note 1, at 5. Throughout this Article, I use the term “conservation easement.” I chose conservation easement because it is the term most commonly used in statutes and in the academic literature. However, academics and lawmakers do not universally accept this as the most appropriate term. As explained below, conservation easements are not easements in the traditional sense. See *infra* Part III. A more appropriate name may be “conservation servitude” because these agreements represent a type of property right more akin to equitable servitudes or real property covenants. Scholars have pointed out this inconsistency before. See, e.g., Korngold, *supra* note 2. Despite my misgivings about using the term “easement,” I use conservation easement here to refer generally to private land restrictions with a conservation purpose regardless of official legislative terms. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 (2000).
 5. See *infra* discussion Part IV.

tion does not drive the landowners as their primary project goal. This motivation difference elevates concerns about enforcing these types of conservation easements.

We know little about these exacted conservation easements. There are no state or federally compiled databases, and no guarantee of consistency in structure or enforcement of the property rights. Therefore, these exacted conservation easements represent a difficult enforcement situation and bring into question their long-term viability.

This Article outlines reasons why exacted conservation easements emerged and why they are such a popular tool. This Article begins by looking at conservation easements generally and how they arose in the context of environmental law and property law. This emergence is most easily and correctly understood by examining the development of American environmental law and its subsequent rejection by many facets of society. What remains is a push-pull relationship: we still have environmental goals and values, but we dislike government regulation. Conservation easements become a way to protect the landscape without public intervention. With conservation easements, it may appear that we can solve all our problems through private market-based mechanisms rooted in freedom of contract that honor private property rights. Although exacted conservation easements are an extension of the conservation easement phenomenon, they do not embody the freedom of contract associated with other conservation easements and often tie directly to regulation of property. Thus, the exacted conservation easement is a tool that directly conflicts with many of the goals that gave rise to its emergence.

II. BACKGROUND PRINCIPLES OF ENVIRONMENTAL LAW

Changing trends in environmental laws, along with changing attitudes towards those laws help explain the emergence of conservation easements. Before the 1960s, environmental regulations focused on either publicly owned lands or classic theories of nuisance law.⁶ The 1960s and 1970s saw the birth of more widespread environmental reg-

6. See Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 391 & n.175 (1990); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1454 & n.185 (1996). The boundaries of governmental environment authority have not been clear. Public environmental conservation efforts traditionally focused on public lands because governments were more confident making rules regarding land they owned. Hesitation over potential takings claims coincided with the growth in retention and acquisition of public lands as a conservation strategy. Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis*, 39 NAT. RESOURCES J. 649, 659-60 (1999) (discussing focus on federal land acquisition as an environmental protection strategy).

ulation expanding to include, among other things, actions on private lands. Environmental law extended to cover many facets of society. There was a growth of restrictions on private activities including restrictions on what one could do with privately owned land. Regulation and government bureaucracy grew, facing an eventual backlash with the Reagan administration in the 1980s. Property rights advocates rejected government control of both public and private land. People grew distrustful of the machinery of government and lobbied for a rollback of the restrictions. At the same time however, Americans still placed a high premium on environmental amenities.⁷ This drove lawmakers, academics, and others to look for ways to protect land while allowing more personal freedom of action, which led to an endorsement of market-based approaches and a movement away from stringent command-and-control style regulation. This more flexible approach accompanied a call for less government regulation: any regulation that would remain should be made at the lowest, most local level of government possible.

As governments began to reduce what was seen as obtrusive conservation efforts, private organizations stepped in to cover the slack. Nongovernmental organizations called “land trusts” began to head conservation projects in areas they felt the government was performing inadequately. Conservation easements are a tool land trusts can use to conserve land outside of the regulatory context. Government agencies are no longer the only entities with the power to make land-use decisions. Additionally, conservation easements draw upon the same sentiments that call for regulation at lower levels of government. Much like the localism movements, conservation easement advocates invoke the narrative of local decision making.

Thus, conservation easements emerge for two seemingly conflicting reasons. First, land trusts look to conservation easements when they believe that governmental authorities are not protecting important ecological resources. Second, landowners and other conservation easement advocates endorse the tool precisely because it does *not* involve the government. One motivation stems from disappointment with the government’s lack of intervention, and the other motivation draws upon a resistance to government involvement.

A. Rise in Environmental Regulation

Federal environmental regulation was slow to emerge in the United States. When European colonists first settled in North America, the land seemed abundant and prohibitions on environmentally harmful activities unnecessary. As the population grew and the Industrial Revolution came into full swing, environmental degrada-

7. Bowles et al., *supra* note 2, at 209.

tion became more evident. These patterns, combined with other political forces, led to the emergence of environmentalism in the 1970s. This Part explains this historical framework with an exploration into the emergence of the Administrative State as a regulator of the environment. In particular, this Part examines the shifting attitudes that alternately favored state government control, then federal control, and then returned to state control. This changing notion about the appropriate level of regulation helps explain why conservation easements have emerged as a popular land preservation tool.

The Progressive Era marked the true beginning of the administrative state. As never before, government bureaucracy grew. It seemed to make sense to place decision making power in the hands of a well-educated class of people—a professional elite.⁸ Rapid advances in natural sciences associated with the rise of this professional elite led to a more centralized system of regulation.⁹ Additionally, improvements in communications and transportation linked the nation together in a new way, bringing even the most remote areas to the general market.¹⁰ During this era, public opinion of the federal government differed greatly from the attitudes toward state governments, which citizens were likely to view as more corrupt and less efficient.¹¹ States lost much of their moral authority and popular allegiance shifted to the federal government.¹²

Distrust of state power grew out of the postwar civil rights movement. People did not see states as protecting the rights of individuals. The states' failures to remedy the problems of race relations led to an academic tendency to dismiss states as functional actors.¹³ Indeed, the dismal race situation was regarded as a death knell of federalism, leading Professor William Riker to assert: "if in the United States one disproves of Southern white racists, then one should disprove of American federalism."¹⁴ The federal government, alternatively, was seen as the protector of the individual and the securer of rights.¹⁵ Thus, civil rights advocates turned to Congress and lobbied for national laws.¹⁶

8. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 257–61 (1996); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 490 (1998); see also MAX WEBER, *On Charisma and Institution Building*, in THE HERITAGE OF SOCIOLOGY 66 (S.N. Eisenstadt ed., 1968).

9. SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* (1959).

10. Whittington, *supra* note 8, at 490.

11. *Id.* at 497, 500–03.

12. *Id.* at 500.

13. Sally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 954 (1982).

14. WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964).

15. See Whittington, *supra* note 8, at 500–01.

16. DAVID B. WALKER, *THE REBIRTH OF FEDERALISM* 137 (1995).

However, civil rights was not the only realm where states were inadequate. Beyond viewing state governments as racist, scholars and activists considered them inefficient.¹⁷ State governmental systems were largely underfunded, understaffed, and operating under many handicaps such as “outdated constitutions, fragmented executive structures, hamstrung governors, [and] poorly equipped and under-represented legislatures”¹⁸ An examination of state regulation in the 1930s and even into the 1970s showed entities that seemed to lack the capacity to protect environmental interests.¹⁹ The message seemed to be that states were not doing their job. State governments were not protecting the environment, and states did not appear to have the money or institutional capacity to protect natural resources or land properly. Professor Donald Pisani also argues that “[e]nvironmental laws were far less effective at the state than the federal level, in part because the states were highly sensitive to the demands of the industries within their borders.”²⁰

Congress largely formed the current environmental regulatory scheme in the 1970s. Population growth, escalating in the 1950s, led to increased pressure on both public and private land and resources. The growth in urban areas following the expanded economy of the Post-War Era caused pollution. In reaction to these ills, Congress passed a flurry of environmental laws including the Clean Air Act,²¹

17. Whittington, *supra* note 8, at 497–98.

18. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IN BRIEF: STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM 3 (1982).

19. Donald J. Pisani, *Natural Resources and Economic Liberty in American History*, in THE STATE AND FREEDOM OF CONTRACT 237 (Harry Scheiber ed., 1998).

20. *Id.* at 261. This same idea underlies the “race-to-the-bottom theory,” which suggests that when states compete to attract businesses and industries, there is a danger that the environmental quality of the region will suffer. *See generally* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-To-The-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (challenging race-to-the-bottom theories regarding environmental laws). Some worry that the competition will lead to states trying to outbid each other for businesses and industries by lessening regulations. *See, e.g.*, Scott R. Saleska & Kirsten H. Engel, “Facts Are Stubborn Things”: An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting, 8 CORNELL J.L. & PUB. POL’Y 55 (1998). *But see* Revesz, *supra* (arguing that there is no support for the theory that states will become lax in their environmental standards). Although logically it makes sense that industries would try to lobby states to get the most lenient standards possible, many businesses were actually supportive of nationwide standards. One reason is that federal standards make rules clear. Another reason is that when nationwide standards are in place businesses only need to comply with one uniform requirement instead of dealing with the potential of different standards in different states. This was especially attractive to auto manufacturers that wanted to avoid different emissions standards across the nation.

21. Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401–7671q (2000).

Clean Water Act,²² and Resource Conservation Recovery Act.²³ Congress had a new interest in the environment and transferred much of the responsibility for environmental regulation from the states to the federal government.

Beyond these specific pollution regulations, Congress recognized a need to make land-use and other decisions in a more environmentally conscious way. This led to the passage of the National Environmental Policy Act of 1969 ("NEPA")²⁴ which requires government agencies to incorporate environmental considerations into their planning processes. Although NEPA officially affects only federal land and federal projects, the involvement of federal permits in a project implicates NEPA bringing federal environmental review requirements into private land-use decisions.

Also during the 1970s, Congress passed the Endangered Species Act ("ESA").²⁵ It is unlikely that Congress realized the potential impact of the statute it was enacting. Today, this law is considered highly intrusive on private landowners. Relying on the Commerce Clause of the Constitution, in 1973 the federal government began to protect threatened and endangered species. The ESA calls for the Department of the Interior to list species that are threatened and endangered with extinction. Once a species is on the list, government agencies must work to protect that species. This protection includes setting aside habitat, working on recovery operations, and avoiding any actions that will further harm the species.²⁶ The law goes beyond public lands to regulate private landowners with listed animal species or habitat on their property. The existence of an endangered species or its habitat can lead to many new restrictions on land—restrictions for which the government rarely compensates landowners.

B. Reaction to and Rejection of Environmental Regulation

After the Progressive Era and the New Deal, a large, interventionist, national state seemed likely to remain a central feature of the American system. Scholars and practitioners seemed to view the matter as largely settled; the federal government has wide-ranging powers to make laws and require the states to enforce them. There was a presumption that the federal government could expand its influence in any area Congress deemed appropriate. The Reagan administration counteracted this trend in the 1980s with a reinvigoration of the

22. Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251–1387 (2000).

23. Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. §§ 6901–6992k (2000).

24. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2000).

25. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

26. *See, e.g.,* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (holding that Congress intended to protect listed species regardless of economic cost).

states' roles. As Professor Sally Fairfax has described, there was a revival of state authority.²⁷

1. *Resistance to Command-and-Control Regulation*

The environmental regulations that emerged in the 1970s were largely command-and-control regulations. These laws generally dictate specific standards or technology that leaves firms with little flexibility in choosing how to comply with the laws. Beginning in the 1980s, there was a growing critique of this style of regulation as cumbersome and unduly rigid, because it often fails to accommodate creative ideas or stimulate firms to innovate. There is no incentive for firms to come up with creative solutions to environmental problems when the law dictates their activities.

Command-and-control regulation can also be somewhat patchwork. For example, the regulations control different technological aspects of pollution control without a coherent vision of integrating goals and laws. The most common critique of command-and-control regulations is that they are inefficient. Some economists and policymakers argue that command-and-control regulations impose a net social cost.²⁸ Discontent with command-and-control regulation led policymakers to look for more market- and incentive-based styles of regulation. This dislike of command-and-control also grew from a general dislike of bureaucracy. Command-and-control regulations demand a centralized bureaucratic structure for enforcement. Policymakers looked for ways not only to avoid bureaucracies by drawing on market forces, but also to encourage private efforts to protect the environment outside of an official regulatory scheme.

Today, there is an assumption in the regulatory world that market-based policies (sometimes called incentive-based) are more efficient than other styles of regulation, and therefore are preferable. However, this assumption did not always operate. When Presidents Nixon and Johnson made proposals for market-based approaches to curb pollution, policymakers did not even give the proposals real consideration.²⁹ When Ronald Reagan came into office, "efficiency" was the catchword of the day. He immediately set to work on his goal of reduc-

27. Fairfax, *supra* note 13, at 950–51. Additionally, Professor Fairfax notes that the "long trend towards a presumption of federal dominance in the shared areas appear[ed] to have been reversed, and compatibility of state and federal statutes . . . presumed." *Id.* at 951.

28. See Daniel H. Cole & Peter Z. Grossman, *When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887, 888 (critiquing the critiques of command-and-control).

29. Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L.Q. 1, 20 (1991).

ing government bureaucracy.³⁰ He considered less government more efficient, and he felt that his administration could regulate more efficiently by considering the full social costs of imposed regulations. This led him to issue Executive Order 12,291, which required cost-benefit analysis of any regulation with a broad impact.³¹ This order called for review of environmental laws (as well as other regulatory realms) with an eye toward economic factors.³² This appeared to conflict directly with the goals of environmental statutes, which valued protecting environmental amenities above the potential costs to business and industry.

By 1990, many different groups, including two branches of government, endorsed the tenets of market-based regulation. There was continued strong interest from the Executive Branch. The EPA even created a taskforce on economic incentives. Congress also seemed eager to think of more creative approaches—paving the way for marketable permit programs and regulatory approaches with more flexibility.

This sudden widespread support for market-based approaches may seem unusual if politicians were to acknowledge that market failures create the need for federal environmental laws in the first place. Problems with the operation of the free market lead to negative externalities in the form of pollution and destruction of environmental amenities. However, solutions to the market failures can be approached with market tools that go beyond command-and-control regulation. Economists argue that market-based approaches like Pigouvian taxes and subsidies should be considered alongside programs like tradable permits and tradable development rights.³³

Beyond the simple logic of utilizing the market to correct its own failures, other factors converged to make market-based approaches more attractive for environmental regulation in the 1990s. Although the command-and-control regulations of the 1970s yielded many environmental successes including cleaner air and water in many parts of the country, there was a growing sense that statutes were reaching the limits of their productiveness. Industries had reached all of the easiest targets.³⁴ Companies had made the cheaper, simpler changes

30. See Eric T. Mikkelsen, Comment, *Earning Green for Turning Green: Executive Order 12,291 and Market-Driven Environmental Regulation*, 42 U. KAN. L. REV. 243, 246 (1993) (arguing that Executive Order 12,291 was not productive and a turn to market-based regulatory approaches would be more efficient).

31. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

32. *Id.*

33. See, e.g., Don Fullerton & Gilbert E. Metcalf, *Environmental Taxes and the Double-Dividend Hypothesis: Did You Really Expect Something for Nothing?*, 73 CHI.-KENT L. REV. 221 (1998); Shi-Ling Hsu, *Fairness Versus Efficiency in Environmental Law*, 31 ECOLOGY L.Q. 303, 396-401 (2004).

34. See Cole & Grossman, *supra* note 28, at 887; Hahn & Stavins, *supra* note 29, at 1.

already. The improvements remaining had higher marginal costs.³⁵ Preventing a unit of pollution now costs more than it did in the past.³⁶ Industry, policymakers, and environmentalists all began to realize that the regulations needed changes to achieve more stringent goals and standards.

Events outside the environmental law realm also made market-based approaches more attractive. As the country entered into an economic downturn and the deficit continued to grow, people became more concerned about competitiveness. Sacrificing industrial growth and production for achieving small improvements in environmental amenities became questionable. Additionally, market-based modes of thinking arose in other areas of regulation. The push to deregulate many industries like trucking, telecommunications, and airlines demonstrated that government regulation could operate in combination with market-based approaches successfully. These events and changing norms led to an increased push to incorporate market mechanisms into environmental regulation. Instead of dictating what industries or permit applicants must do each step of the way, Congress and the Executive Branch began to create regulatory frameworks that allowed for more flexible methods of compliance.

This shift to increased use of market-based regulatory tools does not mean however, that command-and-control regulation disappeared. Nor does it mean that command-and-control is presumptively inefficient or inappropriate. Indeed, even when environmental regulation draws more heavily on market-based theories, a background of command-and-control style regulation continues to operate. Command-and-control achieved many environmental improvements. The difference is that now policymakers think more creatively about how to regulate and are more likely to take into account economic theories and arguments when drafting environmental laws.

2. *Increased Use of Contract Law*

Increasingly, private and quasi-public agreements enforced via contract law play an important role in the control of environmental amenities.³⁷ For example, nonprofit environmental organizations have become key figures in negotiating environmental agreements, including Habitat Conservation Plans under the ESA and the EPA's Project XL plans.³⁸ Thus, private negotiations have increasingly aug-

35. See Cole & Grossman, *supra* note 28, at 887; Hahn & Stavins, *supra* note 29, at 1.

36. See Cole & Grossman, *supra* note 28, at 887; Hahn & Stavins, *supra* note 29, at 1.

37. See Lee P. Breckenridge, *Nonprofit Environmental Organizations and the Restructuring of Institutions for Ecosystem Management*, 25 *ECOLOGY L.Q.* 692, 697 (1999).

38. See *id.*; Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. REV.* 543, 658–60 (2000).

mented, and at times replaced, the public regulatory structure as a source of environmental protection. Americans are relying more on the private sector to take on government responsibilities. This shift in action has been accompanied by an increase in contracting for social services. It is now more acceptable for governments at all levels to contract with private groups to perform traditional government functions.

Conservation easements fit into this framework well because they are private agreements addressing the public goal of conservation. Private groups take on conservation tasks that citizens may have otherwise thought of as governmental tasks.³⁹ The increased comfort with contracting with private groups to take on conservation work makes Americans more open to ideas of private conservation tools.

3. *Concerns about Takings Claims Question the Extent of Regulation*

Another important driving force behind the creation and growth of conservation easements was an uncertainty regarding government power to regulate the environment. It was not always clear that expansive federal environmental laws are constitutional.⁴⁰ Policymakers seeking to protect the environment may have avoided proposing environmental legislation for fear the laws would be held unconstitutional.⁴¹ Further, some analysts believed that courts might interpret even minor restrictions on land as regulatory takings, leading to either invalidation of regulations or forced payment of compensation.⁴² Conservation easements, though, can achieve environmental goals without instigating constitutional challenges to land-use and environmental laws.⁴³

If land regulation cannot protect land, the alternative seems to be government purchase of land and full governmental control over it. Creating conservation easements can serve as a middle ground between government acquisition and regulation. As Takings Clause ju-

39. See SALLY K. FAIRFAX ET AL., *BUYING NATURE* 6, 255–56 (discussing changing views of the role of government in land acquisition for conservation).

40. Indeed, the constitutional basis for many environmental laws remains shaky. Many environmental laws are based on the Commerce Clause, yet the Supreme Court continues to refine the boundaries of actions permissible under the Commerce Clause. Although the Court has not yet specifically struck down an environmental regulation as unconstitutional, there have been strong hints that such a ruling is not unthinkable. Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003); see also *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

41. See JOHN J. COSTONIS ET AL., *REGULATION v. COMPENSATION IN LAND-USE CONTROL: A RECOMMENDED ACCOMMODATION, A CRITIQUE, AND AN INTERPRETATION* (1977); DAVID D. GREGORY, *THE EASEMENT AS A CONSERVATION TECHNIQUE* (1972).

42. See, e.g., COSTONIS ET AL., *supra* note 41.

43. See *id.*

risprudence has evolved, the perceived need to use conservation easements to avoid regulatory takings claims arising from environmental laws seems to have lessened.⁴⁴

4. *Rise-of-the-Local*

Throughout the first seventy years of the twentieth century, state governments regulated land use and the environment on private land with the federal government retaining broad control over federally-owned land. The regulation of private land was inadequate to stem the growing tide of environmental ills, and the federal government created national programs. With the growth of federal programs and bureaucracy, many feel the federal government has gone too far, creating an over-intrusive public interest state. This reaction to federal regulation, combined with increased ability to regulate at the state level, has citizens and policymakers turning back to the states as the ideal actors. As local governments evolve, the devolution trend continues to decrease the ideal level of regulation.

This subsection details the push for local regulation that began to take root in the 1980s. This development is important in understanding the emergence of conservation easements because the sentiments behind this “rise-of-the-local” and the shift to private conservation techniques is similar. Conservation easements are rooted in the idea that decisions should be made at the lowest level possible. They are extremely local and can operate outside the federal context.

The recent growth of localism has aided in the shift of attitudes regarding federalism. There is now a push to devolve decision making to its lowest possible level. “Localism” proponents assert that allowing people to make the decisions that affect them strengthens the

44. Today, legal scholars think of successful takings claims as resulting in either payment of compensation to the landowner or an injunction on the activity or regulation that would lead to the takings. However, in the 1970s, some scholars were concerned that a court would simply invalidate an entire statute or regulation if it resulted in regulatory takings. *Id.* This has not been the direction that Takings Clause jurisprudence has taken, but that was not clear to policymakers and conservation easement advocates in the early 1960s and 1970s. The ability to regulate land use appears at least slightly more settled today. Discussions of Takings Clause issues are reemerging in contemporary conservation easement jurisprudence from a different angle. Now, scholars are worried that the existence of conservation easements may create takings concerns if landowners demand compensation for each “property right” or “development right” removed or restricted by regulation. See John D. Echeverria, *Revive the Legacy of Land Use Controls*, OPEN SPACE, Summer 2004, at 12; see also ERIC T. FREYFOGLE, *BATTLING OVER LEOPOLD’S LEGACY* 12–14 (2004). If neighbors are compensated for not developing, then it might not seem fair to be restricted by a regulation without receiving compensation. Conservation easements have moved from a solution for takings problems to a cause of them.

goals of individual liberty.⁴⁵ The lower the level of the government at which one can function, the better. As regulation gets smaller, it gets closer to the people—closer to people making the decisions that affect their lives. Justice Scalia describes decisions at lower levels of government as tending to maximize satisfaction.⁴⁶ Arguably, this framework brings citizens closer to democracy and further from the republican structure the country is based upon.

Local control has a lineage in the United States traceable to struggles of historical importance including states' rights and home rule movements. "States' rights" emerged as a political rallying cry in 1910 in opposition to what some saw as intrusive federal regulation of daily life.⁴⁷ The argument has resurfaced many times during the nation's history. For example, southern states invoked it during the Civil Rights Era when resisting new federal legislation that created protections for minorities.⁴⁸

States' rights advocates argue that regulation enacted and implemented closer to home makes more sense. They view state governments as more in tune with the needs of the people and the land than the federal government, asserting that local governments are in the best position to respond to the needs of their constituents.⁴⁹ Logically this argument applies to smaller units of government: if a state is more in tune with its citizens, then counties and municipalities are even more in sync.

The belief that local is best has manifested itself in many ways. For example, politicians advertise themselves as naïve about politics. It is best to be as disconnected from Washington and the federal government as possible. A "Washington insider" is one who does not understand the needs of local people—someone disconnected from the "real world." Growing out of this attitude, Congress cut federal regulations. The current Bush administration has consistently curtailed federal environmental and land-use regulation. Additionally, there have been several movements in the American West pushing for state and local regulation of resources. The Sagebrush Rebellion, County Supremacy Movement, and the efforts of the Quincy Library Group serve as concrete manifestations of both the localism and wise use movements that urge the federal government to reduce or remove regulations.

45. Lino A. Graglia, *In Defense of "Federalism,"* 6 HARV. J.L. & PUB. POL'Y 23 (1982).

46. Antonin Scalia, *The Two Faces of Federalism,* 6 HARV. J.L. & PUB. POL'Y 19, 20 (1982).

47. See ARTHUR SCHLESINGER, *NEW VIEWPOINTS IN AMERICAN HISTORY* 240–42 (1922).

48. See generally DAVID R. GOLDFIELD, *BLACK, WHITE, AND SOUTHERN* 63–86 (1990).

49. Owen Demuth, Comment, *Sweetening the Pot: The Conservation and Reinvestment Act Re-Ignites the Property Rights/Land Conservation Debate for the Twenty-First Century,* 50 BUFF. L. REV. 755, 782–83 (2002).

The Sagebrush Rebellion erupted in the 1970s. As a response to Congress' passage of stricter environmental laws of the 1970s and a nationwide economic downturn, western states and industry groups called for the transfer of federal lands to states.⁵⁰ The sagebrush rebels argued that states, and not the federal government, should own the lands then designated as federal. They sought state regulation and ownership because they viewed the states as "less bureaucratic, more responsive, and more representative of state and local interests because state governments are 'closest to the people.'"⁵¹

The Rebellion is not a success story in terms of the states' rights movement and localism. Although they succeeded in bringing the plight to the attention of the public, the rebels were unable to pass the federal legislation they desired. The federal government did not turn over ownership of federal lands to state governments. Nine western states did pass their own state legislation asserting ownership over such lands, but those states have not enforced the statutes.⁵² The movement merely yielded a political statement.

Land-use disputes are such a standard element of stories of the Old West, that it is hard to view the Sagebrush Rebellion as much else. In some ways, it seems but another stage in the history of a rebellious region, but the sentiments emerging from this movement reach beyond the western United States. Although this was a dispute over federal regulation of public, not private, lands, the attitudes of the participants show the growing rejection of federal regulation and land-use planning.

The County Supremacy Movement stems from the same ideas as the Sagebrush Rebellion and the anti-environmental movement of the 1980s. Of special significance was an incident in Catron County, New Mexico when federal regulators sought to protect the Gila River's fragile ecosystem.⁵³ The Forest Service had repeatedly reduced grazing on the county's lands in that area and, at one point, incited local rage by calling for a halt to timber production.⁵⁴ In response to the concerns of locals, Catron County passed the first "wise use" ordinance, which as-

50. See generally R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER* (1993).

51. Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 849 (1982).

52. Nevada, Arizona, Colorado, Hawaii, Idaho, New Mexico, Utah, Washington, and Wyoming have passed "Sagebrush Rebellion" style laws asserting state ownership over federal lands based on the "equal footing doctrine" loosely described in Article IV of the Constitution. John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

53. Alexander H. Southwell, Comment, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZ. L. REV. 417, 424 (1997).

54. *Id.*

serts county supremacy over the federal government for local land-use decisions.⁵⁵

The aim of the County Supremacy Movement is to protect property rights and to return governmental power to local authorities.⁵⁶ Based in the West, the movement grew out of a distrust of federal governmental power and a dislike of what the participants saw as overly intrusive land-use regulations. The movement emphasizes both local sovereignty and personal property rights. Anger and frustration regarding federal intrusion into everyday life fuels the movement.⁵⁷

The movement found its voice in 1993 in Nye County, Nevada where the federal government owns ninety-two percent of the land.⁵⁸ On Independence Day in 1994, the commissioner of Nye County used a bulldozer to open a closed Forest Service road amid the cheers of armed supporters. He drove a Forest Service agent off the road and openly defied federal control of public lands in the West.⁵⁹ The action was authorized by local ordinances asserting that the federal government does not own the public lands or traditional roads within the State of Nevada.⁶⁰ This declaration of local sovereignty and defiance of federal authority stands as the most aggressive posture in the County Supremacy Movement.

The County Supremacy Movement is the most violent of the localism movements. Often tied to the rise of militias, anti-federalists sentiments have led to violence, including a bombing outside of a forest ranger's home.⁶¹ The militia movement and various wise use movements share an anti-federal, anti-regulatory philosophy.⁶² The common thread amongst all of these debates is hatred of federal regulation.

Different from the movements described above, the Quincy Library Group represents the efforts of one particular locality asserting rights

55. *Id.* at 424 n.44 (discussing Catron County, N.M., Ordinance 004-91 (May 21, 1991), *repealed by* Catron County, N.M., Ordinance 003-92 (Oct. 6, 1992)).

56. *Id.* at 420-21.

57. *Id.* at 421.

58. Peter D. Coppelman, *The Federal Government's Response to the County Supremacy Movement*, 12 NAT. RESOURCES & ENV'T 30 (1997).

59. Southwell, *supra* note 53, at 418-19.

60. *Id.* at 418 (discussing Nye County, Nev., Ordinances 93-48 to -49 (Dec. 7, 1993)).

61. Southwell described the violent and extremist elements of this movement, including linking it to racist ideology, the militia movement, the Branch Davidians, and even the Oklahoma City bombing. *Id.* at 430-32. While all those ties are merely conjectural, it is widely believed that the movement in Nye County led to the bombing of Forest Service facilities and a bombing outside of a forest ranger's home. Southwell cites the advocacy group Public Employees for Environmental Responsibility as having catalogued more than fifty-eight incidents of violence against public employees, including two arsons, five assaults, and six instances of being shot at. *Id.* at 430 n.75.

62. BRIAN CZECH & PAUL R. KRAUSMAN, *THE ENDANGERED SPECIES ACT* 5 (2001).

to make decisions about land use in its region. In the early 1990s, there was a great deal of environmental pressure on the forests of the northwestern United States. New studies showed that the Northern Spotted Owl depends on old growth forests for habitat. The studies also demonstrated that the owl's population was dwindling. Environmentalists urged a halt to all old growth logging, while area residents and logging companies opposed any measures that would disrupt the forest economy. Officials from several different agencies and at all levels of government entered the fray. Worried about the federal government's potential actions, locals gathered to discuss the future of the land. In the town of Quincy, California, local officials, timber company representatives, and environmentalists initiated a community-based planning process for three northern Sierra Nevada national forests. This group soon evolved into the Quincy Library Group, a name taken from the local library where members regularly met.⁶³

The group put together a proposal for their land instead of deferring to the government agencies (particularly the Forest Service) that were developing plans for the area. The group then bypassed the regulatory agencies and went straight to Congress, billing its proposal as a restoration of local decision making for natural resources. Congress passed the recommendations in the group's plan as the Herger-Feinstein Quincy Library Group Forest Recovery Act.⁶⁴ The Quincy Library Group's plan serves perhaps as the country's most visible example of a trend toward community-based resource management planning.

These movements and efforts are all part of a growing insurrection against the federal government.⁶⁵ We can best understand these efforts in conjunction with other anti-environmental and anti-regulation movements. Overall, there seems to have emerged an anti-national mood. The nation's capital is perceived as far removed from the needs of the citizens. The 1994 midterm congressional elections reflected this attitude. Candidates framed being part of the federal government as a negative trait, and the country accordingly brought in a new generation of conservative politicians working to cut federal regulation.

63. David Owen, Comment, *Prescriptive Laws, Uncertain Science, and Political Stories: Forest Management in the Sierra Nevada*, 29 *ECOLOGY* L.Q. 747, 749 (2002).

64. Herger-Feinstein Quincy Library Group Forest Recovery Act, 16 U.S.C. § 2104 (2000).

65. There has been opposition to the federal government's involvement in land-use decision making since the Articles of Confederation. When Congress began regulating public lands, settlers resisted the move as a form of feudalism. Local governance, however, is not necessarily less intrusive or more environmentally sound. Although these localism movements may represent valid concerns, they also embody a misconception about local governance. Government at all levels can be intrusive into daily life and infringe upon private property rights. Despite the localists' rhetoric, the federal government is not necessarily more intrusive than state or local governments.

This movement hit hard at many issues like property rights and environmentalism.

The rhetoric behind these movements, however, is misguided. Most of the restrictions placed on private lands originate at the local level with nuisance laws. State and municipal governments are still the entities making land-use decisions. Many environmental restrictions come from the state and local levels, and zoning, the most intrusive type of private land regulation, is now, and has always been, a local action. At the turn of the last century, municipalities regulated local land use relatively lightly with some building codes related to health and safety and a few other regulations like setbacks and siting of noxious uses.⁶⁶ At that time, no city had comprehensive zoning laws.⁶⁷ Since then, however, zoning laws have grown and local land use is now one of the most regulated areas of law. Most of these regulations are made at the municipal level.⁶⁸ Modern cities are marked by high levels of land-use regulation and related controls on the use of property.⁶⁹ To that end, "urban jurisdictions now typically regulate most aspects of the development and use of property within their borders."⁷⁰

Despite the fact that local governance is not less intrusive, it is generally not viewed with the same distaste and distrust as federal regulation. Thus, either localists are misguided in their push for local governance, or the level of regulation is not the factor pushing their agenda. It must not really be the restriction on private property that people are rejecting, but the source of the restriction. Reasons for the rise-of-the-local can be found in the writings of many political theorists, but none of them really serves as a completely satisfactory answer.

Emile Durkheim's ideas describe the historical increase of social control over property. Solidarity is the bond that contributes to the integration of society.⁷¹ The most basic type of solidarity is social or mechanical solidarity based upon social capital. The more closely knit the members of the community are, the more likely the group is to

66. Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 107-08 (2000).

67. *Id.* at 108.

68. *Id.*

69. See John R. Nolen, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351 (1993) (providing a history of land-use planning, and describing the state of local zoning laws today).

70. Nestor M. Davidson, *The Urbanization of Property Law* 30 & n.114 (2003) (unpublished manuscript, on file with the NEBRASKA LAW REVIEW) (citing CHARLES HAAR & MICHAEL ALLAN WOLF, *LAND USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND REUSE OF URBAN LAND* (4th ed. 1989)).

71. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 64 (George Simpson trans., 1964).

work collectively.⁷² As these relationships develop, the number of legal rules grows proportionally.⁷³ Actions that break these social bonds or violate accepted custom are crimes.⁷⁴ According to Durkheim, mechanical solidarity “is most likely where population is most dispersed and [the] division of labour [is the] lowest.”⁷⁵ Thus, as Professor Charles Geisler explains, “those resisting greater property regulation are apt to reside in open country and smaller communities, places in which social control is akin to moral consensus and cohesion rather than law.”⁷⁶ Mechanical solidarity is a solidarity built upon similarities. People in the same situation, with the same backgrounds, act in similar ways. Thus, this level of solidarity reaches its maximum when there is no individuality.⁷⁷

Durkheim’s theory may help explain why the rise-of-the-local is coming out of the West. The strongest aspects of the movement have emerged from rural areas. Understanding the West as the battleground does not fully explain the ferocity of the movement or its staying power. Durkheim’s ideas about mechanical solidarity help provide a background understanding, but do not hold sway in a unified nation with open channels of communication and understanding of social ills. Additionally, these are not areas absent regulation; the regulation is merely at a different level.

Max Weber’s theories also provide some insight into these changing notions about environmental regulation. Weberian reasons to opposition of land-use planning are psychologically determinant. The reasons for embracing the local and rejecting the federal are psychological, cultural, and ideological. The opponents to land-use planning are irrational and parochial. They place parochial local interests above societal interests.⁷⁸ They exhibit phobic responses to outside influences, and in response, immerse themselves in rural subcultures alienated from the mainstream. Weber would attribute this resistance to a lack of education or sophistication needed to understand the importance of land-use planning.⁷⁹

The localism movement is using rhetoric that is not appropriate. It is not that local governments are less invasive; it is only true that they are more local. The rise-of-the-local connects to larger ideas of resistance to bureaucracy where we elect people who are “anti-govern-

72. *Id.*

73. *Id.* at 64–65.

74. *Id.* at 70.

75. Charles C. Geisler, *Local Control Versus Social Control in Land Use Planning: Sociological Perspectives*, in *PROPERTY AND SOCIAL RELATIONS* 96–97 (Peter Hollowell ed., 1982).

76. *Id.* at 97.

77. DURKHEIM, *supra* note 71, at 130.

78. Geisler, *supra* note 75, at 97.

79. *Id.*

ment” and Washington outsiders. This is resistance to the federal system and an objection to progressivism. These elements also give rise to conservation easements.

III. BACKGROUND PRINCIPLES OF PROPERTY LAW

As the above discussion suggests, changes in environmental law concepts helped set the stage for the rise of conservation easements. The growth of environmental regulation was strongly situated in a centralized bureaucratic structure. Early environmental laws emphasized agency expertise and nationwide standard setting. Although these command-and-control style regulations helped curb some of the worst environmental problems, they could not finish the job. The need for new approaches to environmental law, combined with a growing distrust of bureaucracy, pushed towards more local regulation that emphasizes market-based approaches. Conservation easements fit well in this newly emerging framework.

Changing environmental law norms only tell part of the story of the rise of conservation easements. A conservation easement is a property law tool. Full understanding of conservation easements requires examination of their development and the changing roles of property in American society. Although Americans place the concept of property on a pedestal, people have become more accepting of restrictions on property rights and of parceling out property rights in a single piece of land. Recognition of divided property rights, combined with an acknowledgment that property rights are highly valued, but not absolute, paves the way for conservation easements. This Part describes American notions of property law by detailing the shifts in thinking that created the opportunity for land conservation via non-proprietary interests in land.

A. Early Philosophical Notions of Property and Ownership in America

Before Europeans came to what is now the United States, aboriginal peoples occupied that land. Now known as Indians, many different tribes lived on and with the land. Each group developed its own relationship with the land and its own property regime. There were examples of private ownership, communal ownership, rights of use that excluded other rights, and so on. When the Europeans arrived, they imposed their own ideas of property and land management on the tribal nations. Although some nations and individuals recognized tribal property rights enough to enter into contracts and treaties with them, others felt that European nations could, if they wanted to, justifiably conquer Indians and acquire their lands.

In *Johnson v. M'Intosh*,⁸⁰ the United States Supreme Court explained what is now known as the discovery doctrine. Chief Justice Marshall explained that the European colonizers divided rights to the New World.⁸¹ These original "discoverers" acquired the preemptive right to procure Indian land by purchase or conquest.⁸² Further, the Court described tribes as merely having a "right of occupancy" over the land.⁸³ The American government, including the federal courts, did not recognize that Indians had property rights of the same nature as American settlers.

The federal courts looked to the United States Constitution to assert that the federal government had rights to assert control over Indian land, and so rules were developed to justify confiscating Indian land. Among these, "[o]ne of the most powerful . . . rules is the characterization of some Indian property as compensable and others as not compensable."⁸⁴ Case law split land into either "aboriginal" or "recognized" title.⁸⁵ Although tribes retained many of the classic property rights (e.g., the right to occupy, the right to manage, and the right to bequeath), their rights were always tempered by the fact that the federal government could come in at any time and supercede the right.

Some philosophers disagreed with this attitude toward tribal lands. Invoking a natural law connection between all nations, Spanish humanist Franciscus de Victoria developed theories on international law that he felt should be applied to Indians in America.⁸⁶ He argued that aboriginal inhabitants of the New World⁸⁷ possessed legal rights as free and natural men. Based on this argument, he asserted that the Pope's grant of title to the New World was "baseless."⁸⁸ In his view, such a grant should not be able to supersede the inherent natural rights of those already living on the land.⁸⁹ Because the Indians in America were clearly, in his view, rational beings, they should have been able to claim a natural right by virtue of their humanity. Al-

80. 21 U.S. (8 Wheat.) 543 (1823).

81. *Id.*

82. *Id.* at 587.

83. Indian title "is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (holding that because Indians do not have property rights to their land they do not need to be compensated for federal government takings of land which they occupy).

84. ROBERT CLINTON ET AL., *AMERICAN INDIAN LAW* 667 (3d ed. 1991).

85. *Id.*

86. OTTO FRIEDRICH VON GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY*, 1500 TO 1800, at 85 (Ernest Barker trans., 1960).

87. De Victoria used the specific example of the Indies.

88. CLINTON ET AL., *supra* note 84, at 675.

89. *Id.*

though de Victoria's ideas did not take hold in America, he hit upon a key element of American justification of denying tribal property rights: to resolve the problem of Indian land possession, Americans simply denied the humanity of the Indians. In a new world where ideas of natural law helped shape both federal and state laws, denial of humanity was one of the only ways to avoid acknowledging the rights of tribes.

Colonial conceptions of the indigenous peoples allowed colonists to see the land as unoccupied and abundant. Although labor was in short supply,⁹⁰ land was for the taking. In this New World, the problems of the old were gone. No longer was there an oppressed proletariat because all had access to land. A passion for owning land prevented the existence of class laborers for hire. Thus, as long as the laborer could accumulate for himself and remain the possessor of his means of production, capitalist accumulation and the capitalistic mode of production were impossible.⁹¹ This situation fit perfectly with the ideas of John Locke, Jean-Jacques Rousseau, and Thomas Jefferson, whose ideas laid the foundation for the concepts of both Manifest Destiny and the "American dream."

Locke made the case for property of an unlimited amount as a natural right of the individual. Because people specifically formed civil societies in order to protect property and create a system of enforceable rights, Locke believed there was no reason why society should wish to diminish this right other than to protect the rights of other property holders. Under this construction, the only inappropriate use of land is use that negatively affects the land of others. Locke believed that man has a property in his own person, and thus, his labor, as a product of his body, belongs properly to man.⁹² Further, when man mixes his labor with the land, with nature, he makes that land his property.⁹³ This mixing of labor and land essentially removes the land from the common state of nature and converts it to individual property.⁹⁴ Locke also explained that man should be able to take as much land as he could productively use. Thus, the key is not how much land each person needs to satisfy his requirements, but how much a person can put to productive use. If someone is not actively using his land in a way

90. This was one of the reasons behind the proliferation of the slave trade. The lack of a local labor force meant that it had to be imported.

91. KARL MARX, *THE PROCESS OF CAPITALIST PRODUCTION* 765-74 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., International Publishers 1967) (1867).

92. JOHN LOCKE, *OF PROPERTY, CHAPTER V OF THE SECOND TREATISE OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1964), *reprinted in* *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 18 (C.B. MacPherson ed., 1978) [hereinafter *MAINSTREAM AND CRITICAL*] (1689).

93. *Id.*

94. *Id.*

that society views as productive, other members of society have the right to obtain the land as property by mixing their labor with it. In Locke's words, a man is entitled to "[a]s much Land as a Man Tills, Plants, Improves, Cultivates and can use the Product of, so much is his Property."⁹⁵

Locke's ideas were founded in a system in which scarcity was not a problem. Indeed, he explained in his famous *Second Treatise of Government* that there is enough land for all.⁹⁶ As long as a man leaves enough land for others to appropriate through labor, he does no harm. In fact, in Locke's eyes, he has done the equivalent of taking nothing at all. Despite these ideas justifying unlimited appropriations, Locke explained that this ideal did not operate in the European old world.⁹⁷ He applied his ideas to the New World where he saw a land without scarcity of natural resources.⁹⁸

Rousseau's ideas about property were also influential in America. His was also a labor theory of property. He began with the idea of a natural right, but took it to a different conclusion. Instead of arguing that man should be able to appropriate as much land as he could use, Rousseau argued that man's natural right to property is limited to what he can work by himself and use to serve the needs of his family. Rousseau viewed this limited right as sacred and believed Locke's theories unjustified because they contradicted this natural right.

When humans first began to cultivate areas large enough to need the help of others, both property and labor in the economic sense developed.⁹⁹ Development in property led to the first rules of justice. Division of land produced a new right of property different from the sacred right of natural law.¹⁰⁰ Society developed to protect property. As the law of property developed, it changed the idea of property as natural law into an irrevocable right based on society, justice, and positive law. Property became a civil right.¹⁰¹

95. *Id.* at 19.

96. *Id.* at 20.

97. *Id.* at 21.

98. *Id.* at 20 ("For he that leaves as much as another can make use of, does as good as take nothing at all. No Body could think himself injur'd by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left to him to quench his thirst. And in the Case of Land and Water, where there is enough of both, is perfectly the same.").

99. JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY (Roger D. Masters ed., New York: St. Martin's Press 1964), reprinted in MAINSTREAM AND CRITICAL, *supra* note 92, at 31 (1755) ("From the cultivation of land . . . division necessarily followed . . .").

100. *Id.* at 33.

101. *Id.* at 36.

Thomas Jefferson drew on Locke's and Rousseau's ideas.¹⁰² Jefferson's plans for the development of the United States were strongly grounded in Locke's notions of property as a natural right rooted in labor. He envisioned a world where individual family farms would cover the landscape. Yeomen farmers would form the backbone of American society. He also believed Rousseau's idea that man should only be entitled to the land he needed. Jeffersonian and Lockean ideas were then embedded in the Constitution and the framing of American law. Property is recognized as a sacred right in the both the Declaration of Independence¹⁰³ and the Bill of Rights. The Fifth Amendment recognizes explicitly the right of private property declaring the government may not infringe upon it without just compensation to the owner.

Although rights to private property were secure in the minds of the framers, it was less clear which entities should be the enforcers of these rights. The Federalists and Anti-Federalists¹⁰⁴ grappled with notions of state versus federal power. The states' rights position is closely associated with the early Anti-Federalists. They opposed the new Constitution and resisted creating a national government that would encroach on state sovereignty.¹⁰⁵ Although the sentiments of the Federalists eventually ruled the day, and the states ratified the Constitution, states' rights has remained a strongly held belief. In the end, a shared system of regulation was adopted with a federal judiciary serving as the ultimate arbiter.¹⁰⁶

Even after the federal system was clearly established, the federal government was slow to regulate private landowners. There must be a

102. For information about Jefferson and his theories and speeches, see generally MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* (1970).

103. The phrase "the pursuit of happiness" is commonly interpreted . . . to mean one's right to own land and exercise broad discretion in its disposal and use." Geisler, *supra* note 75, at 105 n.1.

104. There is confusion in the terminology here because those who now label themselves Federalists are more in keeping with the intellectual tradition of the Anti-Federalists. I use the term Federalist and Anti-Federalist as originally intended by the framers of the Constitution. Federalists are those arguing in favor of a strong national government where states surrender some of their sovereignty for the benefit of being part of the strong federal system. Anti-Federalists are concerned about state sovereignty and usually argue in favor of strong states' rights. See JACKSON TURNER MAIN, *THE ANTI-FEDERALISTS* xxiii–xxvii (2004).

105. HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST, WHAT THE ANTI-FEDERALISTS WERE FOR* 10–11 (1981).

106. The role of the Supreme Court as the ultimate arbiter of constitutional rights was not obvious during the writing of the Constitution. In fact, states' rights advocates intentionally kept any such statement out of the Constitution with the Madisonian Compromise. It was not until the Judiciary Act of 1789 and the following landmark case of *McCulloch v. Maryland*, 17 U.S. 316 (1819), that this role was secured.

constitutional foundation for any federal statute, but the boundaries of this authority have not always been clear. Early federal regulations of land entailed dispersing lands. By the end of the American Revolution, many people were landless.¹⁰⁷ The land on the East Coast was occupied and settlers began to head west. Statutes such as the Homestead Acts described the circumstances under which citizens could gain land. These laws were grounded in the ideas described above—all Americans have the potential to be landowners, and they can gain this property by the sweat of their brow. Rousseau's influence appears in the limited acres granted each family under the Homestead Acts.

The meaning of land ownership changed from the end of the Civil War to World War I. The labor theory of value made less sense in an economy dominated by cities, corporations, giant factories, and elaborate transportation systems. The Industrial Revolution shifted the population from rural to urban areas, consolidating property in the hands of a few and increasing environmental damage. The rise of corporations and large scale businesses led to a new conception of property that "move[d] away from its land-law roots."¹⁰⁸ One of the biggest developments in American society has been the transformation from a primarily rural, agrarian society to an overwhelmingly urban one. This process of urbanization was driven by industrialization. Historian Arthur Schlesinger described the era as a "momentous shift [in] the center of national equilibrium from the countryside to the city."¹⁰⁹ After World War II, the number and power of corporations grew. This led to increased pressure on the public domain.¹¹⁰

The United States was built on Lockean ideals of private property. Because of this groundwork, Americans view private property as a sacred right. This attitude has led many landowners to resent regulations they view as infringing upon their rights as property owners. The property rights movement draws on these concerns to lobby against further government intrusion. The development of ideas of property in the United States logically led to the emergence of a property rights movement. Reactions against government regulation have led to a rise-of-the-local where property owners lobby for local and state control of resources. The Sagebrush Rebellion, County Supremacy Movement, and the efforts of the Quincy Library Group exemplify this movement. Any arguments against federal regulation are of concern to environmentalists because environmental laws are

107. Pisani, *supra* note 19, at 238 ("By the Revolution, between one-third and one-half of adult white males in western Pennsylvania, Kentucky, and parts of Massachusetts were landless.").

108. See Davidson, *supra* note 70, at 12 & n.37 (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 145-48 (1992)).

109. ARTHUR M. SCHLESINGER, *THE RISE OF THE CITY 1878-1898*, at 435 (1933).

110. Pisani, *supra* note 19, at 260.

often simultaneously regarded as the most intrusive to property owners, and in the most need of comprehensive federal regulation.

B. The Evolving Meaning of Property

The meaning of property is ever changing. Even more complicating is the fact that the term "property" in common parlance is quite different from a legal or political definition of property. When we think of property, we think about objects that we possess or land to which we hold title. In reality, property is a complex concept involving various rights and obligations. This discussion looks to notions of property relating to land; specifically, the American concept of land as property. What it means to own land has changed over time in the United States. As the both population and bureaucracy have grown, ideas about rights in land have evolved.¹¹¹

Although in common usage property rights are *things*,¹¹² to legal theorists, property describes *rights*.¹¹³ The rights that define property are both contested and ever changing. Theorists debate which rights are most essential, but generally the incidents of ownership include the right to possess, the right to manage, the right to income, the right to capital, and the right to transmit. Property describes a political relationship between persons: rights of persons in relation to other persons. Morris Cohen described property as "a power to impose one's will on others."¹¹⁴ Under this construction, property is most about exclusion. On your land or your property, you get to make the rules. The underlying presumption is that private landowners determine actions and rules that govern their property. Outside their land, others determine the rules whether another private party or a government agency. Professor Charles Reich described this characteristic of property in the following terms:

111. See John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1 (discussing the evolving nature of private property).

112. The term property did not always mean "things" however. The treatment of property as things came with the growth of capitalism and the market economy. Beginning in the seventeenth century, the pattern of old limited rights in land was surpassed by virtually unlimited rights. C.B. MacPherson, *The Meaning of Property*, in MAINSTREAM AND CRITICAL, *supra* note 92, at 7. MacPherson explains that the "more freely and pervasively the market operated, the more this was so." *Id.*

113. Any number of theorists can be cited for this proposition. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1965); cf. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-57 (1913) (discussing property as the nexus of rights, privileges, and powers).

114. C.B. MacPherson, *Introduction to Morris Cohen, Property and Sovereignty*, in MAINSTREAM AND CRITICAL, *supra* note 92, at 153.

[Property] performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done.¹¹⁵

One of the key defining features of property is that it represents an enforceable claim. For property rights to be meaningful, a landowner must have the ability to limit the actions of others on her land. Legally, something is property if society both recognizes the claim and is willing to enforce it.¹¹⁶ Thus, property goes beyond mere possession.

The right to determine the rules on your land is not unlimited, however. The rights of others temper one's right to own land. Thus, a property owner may not use his land in a way that will harm others. This limitation forms the basis for common law nuisance claims.¹¹⁷ Importantly, because property represents an ability to generate an income from land, one may not interfere with her neighbors' ability to make productive use of their land.

The most common property metaphor is that of a "bundle of sticks." This image grew out of the concept of property as various rights.¹¹⁸ Each stick in the bundle that represents property is a different right. Over time or across cultures, sticks may be added or taken away (or perhaps cut down to a smaller size). In the United States, property law has been described as losing sticks out of its bundle over time.

Because property describes socially constructed rights, as societies evolve and physical circumstances change, the meaning of property changes as well. This is easily seen in the American context where a growth in population and bureaucratic structure dramatically changed rules about land. In the country's infancy, land was abundant

115. Reich, *supra* note 113, at 771.

116. C.B. MacPherson argues that property should be an enforceable claim "because property is necessary for the realization of man's fundamental nature, or because it is a natural right. Property is not thought to be a right because it is an enforceable claim. It is an enforceable claim only because, and in so far as, the prevailing ethical theory holds that it is a necessary human right." MacPherson, *supra* note 112, at 3.

117. See Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926 (1999).

118. Hohfeld is generally credited for developing the bundle of sticks metaphor. Although he never actually used that phrase, his description of property as a collection of rights, privileges, and powers laid the foundation for the concept. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 365 (2001). Although widely accepted as a good representation of property, this metaphor is not universally accepted. See, e.g., J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996).

and easy to acquire. By the time the frontier closed and the federal government switched its policy from dispersion to retention, Americans were restricted as to what they were allowed to do on their lands. Over the years, as local, state, and federal governments grew, regulations encompassed more areas of daily life. During the Progressive Era of the 1920s, people put their trust in the hands of experts and government agencies to dictate proper courses of actions. When regulations continued to increase without expert agencies clearly bettering the world, distrust of government decision making emerged as a powerful force. This distrust grew with the rise of environmental legislation in the 1970s and the advent of federal land-use planning.

The United States is now a country with much regulation on the federal, state, and municipal levels. Regulation by the federal government in particular has raised the ire of many property owners. Some property owners argue that the federal government intrudes too much in their lives affecting their ability to make land-use decisions. This distrust of and distaste for federal regulation has led to a growing movement for moving decision making to a more local level.

Private property owners have lost many sticks in their property rights bundle. In particular, these losses have occurred with the advent of environmental and zoning laws.¹¹⁹ There are not only fewer sticks, but the remaining sticks are less certain. Removed rights are scattered to multiple claimants.¹²⁰ Federal regulation has played a particularly conspicuous role both because of the dislike of regulation from afar and the increased role played by federal courts. As noted by rural sociologist Charles Geisler, "[a]s regulation increases, land assumes new meanings. So too, does the bedrock institution of property itself."¹²¹

While increasing population and accompanying urbanization led to more regulation, it also created an atmosphere where Americans were detached from land. Jefferson's vision of yeoman farmers working the land is far from today's reality. The federal government owns one-third of America's land. The family farm is nearly extinct—large corporations run the farming industry. The majority of Americans do not live in rural areas nor do they work with the land; most Americans live in cities and work in the capitalist economy. Although most Americans are concerned with clean air, clean water, and living healthy lives, laws infringing on land-use activities do not appear to touch the

119. Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95, 103–04 (2000).

120. *Id.* at 107–08. This scattering of sticks also leads to higher transactions costs. As explained by Ronald Coase in his famous article, transactions costs lead to inefficiencies in regulation and bargaining. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–19 (1960).

121. Geisler, *supra* note 75, at 96.

lives of most of us. We do not feel that we have lost control over the right to develop our land because we do not own land. Even urban homeowners are not very affected by federal restrictions. People wishing to change their land through farming or development feel the restrictions more immediately.

This objection to regulation of private property is inappropriate and not in keeping with the history of the United States. Private property is the result of government largess.¹²² The government determines and regulates property—it makes private property possible. The government has always regulated private property in this country. The Constitution may protect some property rights, but it also asserts the right of government to tax private property and the Fifth Amendment lays out the right of eminent domain. Property rights actually come from the state, and, thus, the state should be free to delineate what those rights should be. The ultimate justification for private property should be the good of society.

In the end, notions of property depend upon the narratives invoked. The rise-of-the-local is built upon a story of freedom. The movement's narrative involves an image of the yeoman farmer working his land building a future for his family. This is the essence of the American dream. This image does not operate alone, however, but includes the sense of property giving someone an individual right: Americans are free individuals working land the way they want to work it. The idea of property as a social good smacks of communism. The mere mention of society and regulation leads to unmerited theories of communist intervention and the disruption of the American capitalist system. In reality, the regulated American system is the foundation of our capitalist economy. The real way to understand this rejection of the federal government is to listen to the stories being told. Traditional Eurocentric upper class, rural ideas of unlimited public resources open to all are guiding the rhetoric despite their inaccuracies and ignorance of history.

IV. EMERGENCE OF CONSERVATION EASEMENTS

Increasing population and development pressures have led to environmental degradation and loss of open space.¹²³ In the search for solutions to these problems, ways to restrict private property have developed.¹²⁴ Much of this conservation work has been done via land-

122. Reich, *supra* note 113.

123. This problem has been oft-studied and remarked upon. For a specific discussion in the context of the land conservation movement, see RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 13 (2003).

124. Many books and articles discuss the emergence of new land preservation tools and creative property arrangements in response to increased environmental degradation. See, e.g., *id.*; LAND SAVING ACTION (Russell L. Brenneman & Sarah M.

use and environmental regulations coming from all levels of government. Some conservationists, however, have looked to a much older area of law: the law of servitudes. Servitudes enable private agreements restricting land use, often creating arrangements that last far into the future. The common law of servitudes offers three tools for restricting land for conservation purposes: easements, real covenants, and equitable servitudes. Planners and conservationists drew on all three of these to protect environmental values, but found them all lacking in some way. To satisfy the goals that traditional servitudes could not achieve, policymakers created a new property tool in conservation easements.

A recognition of development pressures combined with a desire to continue development led planners to look for more flexible tools that could work within the development context. Additionally, a dislike of public regulation pushed nonprofit organizations to explore routes that are more private. One of the key elements of American law is the "freedom of contract." As a people, we uphold our right to make private agreements. This is a form of autonomy where we assert our right to make decisions regarding what we own, whether that be our labor or our property. Growing out of this freedom of contract is the idea that we have the ability to make long-term agreements regarding our land. These combined sentiments paved the path for private land-use restriction agreements like conservation easements.

Conservation easements appear to be a promising solution to the dilemma of balancing private development and conservation interests. When landowners willingly enter into conservation easement transactions with private land conservation organizations, the exchange appears to avoid the unpleasantness of a government land-use regulation. Such conservation easements are agreements entered into willingly and, at times, even enthusiastically. Landowners can donate or sell a conservation easement to a local land trust, keeping the transaction both local and out of government hands.¹²⁵ This absence of governmental involvement is one of the chief benefits of donated and sold conservation easements noted by scholars.¹²⁶

Not only do conservation easements represent decisions that take the government out of the process, but they are also done at a local level. An individual can turn to a local land trust comprised of people he knows or at least people from his community. By preserving land

Bates eds., 1984); PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION (Mont. Land Reliance & Land Trust Exch. eds., 1982).

125. Conservation easements often have governmental ties because of funding, but these are not necessarily felt directly by the landowner.

126. See, e.g., James Boyd et al., *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 212 (2000).

locally and making workable long-term conservation strategies, some conservation easement proponents believe they can stave off federal land-use regulation. It is not a direct tradeoff, of course; there are no G-men sitting at the door saying, "Donate a conservation easement, or we will regulate your land." It is more removed than that. If conservation policies are going well, and people feel that there is open space and healthy habitats, the G-men never even come to town.

Conservation easements are flexible tools. As private agreements, they can be tailored to meet the needs of the parties. A landowner can decide what type of restriction is palatable while the conservation group can delineate exactly what it feels needs to be conserved. This can be done on an easement-by-easement basis instead of using broad-based land control rules. As agreements between private parties, changes to conservation easements can also be negotiated privately. Most conservation easements allow the parties to the agreement to review the instrument and make changes if appropriate. Landowners may feel that the potential to modify later makes conservation easements attractive. If they trust the group they are working with, they may trust them to be reasonable in the future. If these are agreements amongst neighbors, the parties can turn to each other to work out solutions to problems that may arise. Such negotiation and restructuring would not be possible with governmental regulation.

Conservation easements grow directly out of the distinctly American view of property. The previous Part detailed property as a concept in the United States, illustrating our unique ties to property and the American concept of ownership. The Part began with the pre-conquest attitudes to show how deeply embedded these notions are and how they shaped our society and our property law. The narrative continued to describe our current ideas of property and show how conservation easements are a logical outgrowth of our property law framework.

The remainder of this Part discusses the details of conservation easements. This discussion begins by reviewing the common law rules regarding servitudes. These rules explain the legal circumstances surrounding the emergence of conservation easements. To understand why preservationists felt conservation easements were needed, it is necessary to know what was in place before. After briefly summarizing common law servitudes, this Part continues by explaining what Americans could *not* do in the context of the readily available tools. Mostly, negotiators were concerned with stability: Were the agreements enforceable? Assignable? Because of a lack of clarity on these issues, policymakers created conservation easement statutes. Thus, after detailing the remaining gaps, the Part describes the creation of conservation easements under the current legal framework.

Conservation easements are a culmination of the areas discussed earlier in this Article. Conservation easements fit well within the con-

text of changing notions about property and environmental law. Having explained why we have conservation easements, this Article now turns to the details about conservation easements, examining their benefits in particular. These benefits help explain why conservation easements are so popular.¹²⁷ This background sets the stage for the next Part, which looks specifically at exacted conservation easements and how they emerged from the more traditional conservation easements.

A. Common Law Rules Regarding Private Land Protection Agreements

In Roman law, private agreements restricting land were known as servitudes.¹²⁸ English law borrowed the term and device from the Romans, and American law inherited it from the English.¹²⁹ Generally, servitudes are rights to affect another's use and enjoyment of his or her land and are "a central contribution to the world of private ordering."¹³⁰ Professor Susan French describes servitudes as a way to "tie rights and obligations to land ownership or occupancy so that, without any further agreement, successors to the land take it with the benefits and burdens of the servitude arrangement."¹³¹ Under traditional common law rules, there are three categories of servitudes: easements, real covenants, and equitable servitudes.¹³² These three divisions developed in the nineteenth century, and thus are relatively recent, even though the general concept of private land restriction agreements dates back to Roman law.¹³³ All three of these tools have been used at different times and in different ways. This section explains these three tools, and the next section describes why they are inadequate for conservation, leading to the creation of conservation easement statutes.

127. Although there are also many concerns associated with conservation easements, I do not address them in this Article. Here I am interested in the benefits side of the equation. Not only do the benefits and perceived benefits give rise to conservation easements and explain their growing popularity, but these benefits can also be directly contrasted with benefits of exacted conservation easements.

128. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. a (2000).

129. *Id.*

130. Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 928 (1988).

131. *Id.* (further explaining servitudes as ways to make "permanent changes in the default allocations of rights and obligations" to land). However, servitudes are not necessarily permanent; they may be of limited duration.

132. These three types of servitudes represent broad, general categories that may be used for conservation purposes. More specific types of servitudes can be divided out and described separately. Susan French explains that depending on how you count them, up to fourteen categories of servitudes operate in American and English law. *Id.* at 933.

133. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. a (2000).

1. Easements

One of the oldest methods of restricting land is an easement. *Black's Law Dictionary* defines an "easement" as:

an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose. . . . Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land.¹³⁴

Some common forms of easements are rights of way, rights of entry, rights to the support of land and buildings, rights of light and air, and rights to place or keep something on an adjacent piece of land.¹³⁵ Importantly, easements are not possessory interests in land.

Any examination of an easement begins with two essential questions: (i) is the easement affirmative or negative;¹³⁶ and (ii) is it appurtenant or in gross. Affirmative easements explain what an individual *may* do.¹³⁷ They describe a right existing in someone other than the owner of the present possessory estate. Essentially, affirmative easements entitle the easement holder to perform an affirmative act on the possessory owner's estate. Negative easements, alternatively, describe a prohibition. Negative easements prohibit someone from doing something on her land that would otherwise be permissible.¹³⁸ The holder of the negative easement then has the right and ability to enforce the restriction.

Traditionally, courts only upheld affirmative easements and specialized categories of negative easements. English law only recognized four things negative easements could protect: (i) light; (ii) air; (iii) subjacent or lateral support; and (iv) "flow of an artificial stream."¹³⁹

134. BLACK'S LAW DICTIONARY 548 (8th ed. 2004).

135. See generally JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 723-49 (1998) (discussing basic concepts regarding easements).

136. British law also recognized a third category of "spurious" easements. Under English law, the benefit of an easement could not be held in gross unless specifically permitted by statute. When permitted, such easements were called "spurious easements." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. a (2000).

137. There is a special category of affirmative easements that describe rights to take something off or from land. These are called profits à prendre. These create rights to enter and use land in possession of another, but only in order to remove something from the land. Examples include rights to remove timber, minerals, and game, rights to cut wood, and rights to pasture cattle. *Id.* Some scholars and courts consider profits à prendre to be a type of easement, and others consider profits à prendre to be a separate category of servitudes. DWYER & MENELL, *supra* note 135, at 723 n.1.

138. The latest *Restatement of Property* for servitudes has done away with the category of negative easements, calling them instead "real covenants." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmts. b & h (2000). I treat real covenants as a separate category of servitudes as described below in subsection III.A.2.

139. See DWYER & MENELL, *supra* note 135, at 724 (explaining that "[a] common law, and in virtually all states today, the only negative easements are for light, air,

American courts have expanded these categories in only very limited ways, adding, for example, easements preventing neighbors from blocking a view or obstructing sunlight to solar panels.¹⁴⁰

After determining whether the easement in question is affirmative or negative, the next quality to examine is whether the easement is "appurtenant" or "in gross." Obligations that are connected to the land, instead of to a specific person, are appurtenant. The land subject to the easement is the "servient estate."¹⁴¹ The land benefited by the easement is the "dominant estate."¹⁴² Using the example of a negative easement preventing obstruction of light, the owner of the servient estate may not block the windows on the dominant estate. The restriction remains in place even if the dominant estate changes hands. Thus, whoever owns the dominant estate enjoys the benefit of the appurtenant negative easement.¹⁴³ Correspondingly, whoever owns the servient estate carries the burden of the negative easement. If an easement is not appurtenant, it is in gross, which means that the benefit is associated with a particular person or entity. Easements in gross describe rights not associated with the person who owns a particular parcel; they create a personal right related to the land in another individual.¹⁴⁴ The holder of the easement is not defined by that person's ownership of land.

In English law, an easement could not be created or held in gross.¹⁴⁵ American courts also favor appurtenant easements over easements in gross, and where an easement instrument is ambiguous, courts will interpret it as an appurtenant easement.¹⁴⁶ Importantly,

lateral support, and flow of an artificial stream" and that "American courts, in contrast to their English counterparts, have shown greater flexibility in stretching these categories").

140. Dana & Ramsey, *supra* note 2, at 13 (explaining some modern day expansions of air and light easements to protecting views and access to sunlight for solar panels); *see also* Petersen v. Friedman, 328 P.2d 264 (Cal. Ct. App. 1958) (affirming judgment in favor of easement holder's action to enjoin adjacent landowners from violating the easement by erecting antennae). The list of negative easements is limited largely because similar goals can be met using other structures. Almost all types of negative easements can be treated as promises by a servant owner not to use his land in a certain way. Courts have not found it necessary to expand the categories of permissible negative easements because they can classify the right to prevent a neighbor from doing something on his land as an equitable servitude. Equitable servitudes are discussed *infra* in subsection III.A.3.

141. A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY 1056 (3d ed. 1984).

142. *Id.*

143. *Id.*

144. *Id.*

145. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. a (2000).

146. *See, e.g.,* Martin v. Music, 254 S.W.2d 701 (Ky. 1953); Burcky v. Knowles, 413 A.2d 585 (N.H. 1980); Mrantha Settlement Ass'n v. Evans, 122 A.2d 679 (Pa. 1956); Mitchell v. Castellaw, 246 S.W.2d 163 (Tex. 1952); Green v. Lupo, 647 P.2d

they may or may not allow transfer of easements in gross. Although easements in gross are clearly not assignable under English law, American law is a bit more opaque, with states reaching differing results on the question of assignability.¹⁴⁷

There are three ways to enforce an easement. First, the easement holder may sue at law for monetary damages. Second, the easement holder may seek equitable relief in the form an injunction.¹⁴⁸ Third, in some cases, easement holders may turn to self-help and personally remove obstacles to an easement.

There are several ways to terminate an easement. The most straightforward is by agreement of the parties involved (the easement holder and the owner of the servient estate). Often easement instruments delineate termination rules, agreeing, for example, to terminate after a period of time, or after the occurrence of a specified event.¹⁴⁹ Other methods differ by jurisdiction, but easements generally may be terminated by release,¹⁵⁰ abandonment,¹⁵¹ estoppel,¹⁵² prescription,¹⁵³ merger,¹⁵⁴ and eminent domain.¹⁵⁵ One has to look carefully at the state law and at the specific terms of an easement to determine how it can be enforced, terminated, and transferred.

51 (Wash. Ct. App. 1982). The parties usually have in mind that the easement will benefit a parcel of land. If the benefit of the easement will be useful to a successor owner of that parcel, courts take that as an indication that the parties intended an appurtenant easement.

- 147. Ross Netherton studied whether easements in gross are assignable in the United States and found no clear consensus. In his 1979 paper, he reported that sixteen states leaned toward nonassignability, five states sustained assignability, six required statutory authorization for easements in gross to be assignable, and nine states had such conflicting case law that no clear rule could be divined. Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 558–59, 578–79 (1979). Although the *Restatement of Property* rejects the notion that easements in gross may not be assigned, it is still part of the common law in many states. Hollingshead, *supra* note 2, at 327–28.
- 148. Examples of injunctions include requiring repair, requiring the land be returned from status quo, or enjoining a landowner from continuing an offending activity.
- 149. Other examples include an agreement to terminate an easement upon the completion or removal of its purpose, or upon failure to comply with other easement conditions. 3 RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* § 34.19 (Patrick J. Rohan ed., 2004).
- 150. RESTATEMENT (FIRST) OF PROPERTY § 500 (1944).
- 151. *Id.* § 504.
- 152. *Id.* § 505.
- 153. Continuous, uninterrupted, and adverse use for a statutorily specified period. *Id.* § 506.
- 154. An easement is a right in someone else's land; if the land becomes the easement holder's land, the easement ceases to operate. Essentially, if the easement holder acquires title to the servient estate, the servient and dominant interests merge and the easement terminates. *Id.* §§ 497–99.
- 155. *Id.* § 507.

2. Real Covenants

Real covenants, a second type of servitude, are promises regarding the land that run with the land and are enforceable at law.¹⁵⁶ Like easements, real covenants can be either affirmative¹⁵⁷ or negative.¹⁵⁸ A real covenant is an agreement between a landowner and one or more other parties where the landowner promises to do (or refrain from doing) something related to her property. This action (or inaction) bestows a benefit on the other party or parties to the agreement. If the agreement is structured appropriately, both the benefits and burdens of a real covenant pass to successive owners of the underlying estates.¹⁵⁹ Courts consider the burden and benefit separately to determine whether they run to subsequent landowners.¹⁶⁰

At common law, for a burden to run with the land (i) the covenant had to be in writing; (ii) the original parties to the agreement had to intend it to run; (iii) the burden and the benefit of the covenant both had to touch and concern the land; and (iv) there had to be both horizontal and vertical privity.¹⁶¹ The first two requirements are relatively straightforward, although some investigation into the original intent of the parties may be needed where it is not clear from the written document. The requirement that the burden touch and concern the land is a bit more ambiguous. Generally, this has meant that the burden refer to a "physical use or restriction of the covenantor's land."¹⁶² Traditionally upheld burdens include covenants to repair or maintain land or structures on the land. Some courts recognize broader burdens as touching and concerning land. For example, some courts have upheld restrictions on businesses that would compete with business activity on neighboring land.¹⁶³

Many courts hold that a burden will not run with the land if the benefit does not touch and concern the land.¹⁶⁴ It is not entirely clear

156. CASNER & LEACH, *supra* note 141, at 939.

157. Lake Arrowhead Cmty. Club, Inc. v. Looney, 770 P.2d 1046 (Wash. 1989).

158. Runyon v. Paley, 416 S.E.2d 777 (N.C. 1992).

159. This is a key distinction between a covenant under contract law and a real covenant under property law. Under traditional common law, the rights and duties associated with contracts were not assignable. Contracts terminated at the death of one of the original parties to the agreement. With real covenants, these rights and duties (now termed burdens and benefits) attach to the underlying property and transfer with the property interests.

160. Judith S.H. Atherton, *An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape*, 6 J. ENERGY L. & POL'Y 55, 59 (1985).

161. CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND": INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS, 92-143 (2d ed. 1947).

162. DWYER & MENELL, *supra* note 135, at 759.

163. See, e.g., Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 290 (Mass. 1979).

164. GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES 378 (2d ed. 2004).

why the benefit must touch and concern the covenantee's land in order for the burden to run. Some courts have used this requirement to prevent restrictions on trade.¹⁶⁵ In *Norcross v. James*,¹⁶⁶ the Massachusetts Supreme Court declined to uphold a covenant preventing a landowner from mining his land. Although the burden tied to the land, the benefit did not. The goal of the covenant was to prevent competition from a nearby mine. The court deemed the benefit personal and would not allow the covenant to run.¹⁶⁷

Professor Gerald Korngold offers several potential reasons for courts' disfavor of covenants in gross. First, some courts may have been concerned about the marketability of land.¹⁶⁸ It may be more difficult to locate the benefit holder where a covenant is in gross rather than appurtenant. This increased effort in locating a benefit holder can increase transactions costs when a landowner seeks to modify or terminate a covenant.¹⁶⁹ It takes more time and effort to determine the appropriate person with whom to negotiate.

Second, Korngold contends that courts may have enforced such a rule in an effort to minimize long-term (or "dead hand") control and limit veto power over land.¹⁷⁰ Where a covenant must be appurtenant—where the benefit much touch and concern the land for the burden to run with the land—the number of potential benefit holders is limited. Generally, this means that the benefit holder is someone located nearby and is usually a member of the community. Such a limitation can work to prevent one person or organization from exerting veto power over large areas of land. This is essentially a democracy argument. If one wealthy person can pay everyone to enter into covenants that benefit him in gross, he will be able to assert his view of the landscape and community planning. Following this logic, limiting the categories of permissible benefit holders curbs the ability of powerful individuals or groups to have undue control over an area. This concern is similar to anti-trust concerns where courts work to limit the power of individuals or small groups.¹⁷¹ The appurtenancy restriction

165. See, e.g., *Norcross v. James*, 2 N.E. 946 (Mass. 1885) (declaring a covenant not to compete to be unenforceable against successors because it did not touch and concern the land, rather than declaring anti-competitive business agreements void on other public policy grounds), *overruled by Whitinsville Plaza*, 390 N.E.2d 290.

166. *Norcross*, 2 N.E.2d 946.

167. *Accord Shell Oil Co. v. Henry Ouellette & Sons Co.*, 227 N.E.2d 509 (Mass. 1967).

168. KORNGOLD, *supra* note 164, at 378; see, e.g., *Minch v. Saymon*, 233 A.2d 385 (N.J. Super. Ct. Ch. Div. 1967).

169. KORNGOLD, *supra* note 164, at 378; see also, e.g., *Minch*, 233 A.2d 385.

170. KORNGOLD, *supra* note 164, at 378.

171. See, e.g., *State v. Hossan-Maxwell, Inc.*, 436 A.2d 284 (Conn. 1980); *Sun Oil Co. v. Trent Auto Wash, Inc.*, 150 N.W.2d 818 (Mich. 1967) (expressing concern that businesses could use covenants to create monopolies by creating agreements limiting landowners' ability to visit competing gas stations).

also works to limit outside influence.¹⁷² Only those individuals or organizations that own land in the community can create these restrictive agreements.

Third, Korngold offers that courts may have upheld such a rule because it increases flexibility in the enforcement of covenants. When the parties to covenants are neighbors, they may be more likely to modify agreements in order to maintain community relations.¹⁷³ Additionally, such parties may be more likely to settle disputes informally. This may be especially true in situations with reciprocal covenants. A landowner may be more willing to cooperate in adjusting a covenant to meet a neighbor's needs if that landowner thinks it is likely that the table will be turned in the future. Indeed, entering into flexible agreements and negotiating changes over time could build social capital.

Real covenants also contain other complicated requirements, such as horizontal and vertical privity, concepts that have long befuddled property law students. Unfortunately, jurisdictions apply the privity requirement differently.¹⁷⁴ Horizontal privity refers to the relationship between the original parties to the covenant (the covenantor and the covenantee). Vertical privity describes the relationship between one of the original parties to the covenant and his successor.

For the burden of a covenant to run, the traditional rule is the original parties to the covenant must be in horizontal privity of estate. In jurisdictions where courts apply a strong form of horizontal privity, the owners must have simultaneously existing interests in the land burdened by the agreement.¹⁷⁵ This usually means that there is either a landlord-tenant relationship, or there is an easement operating, and the covenant is between the owners of the dominant and servient estates.¹⁷⁶ Obviously, this strict requirement limits the ability to create real covenants that run with the land by limiting who can enter into such agreements. Courts have modified the requirement to

172. KORNGOLD, *supra* note 164, at 378-79.

173. *Id.* at 379 (citing *Roman v. Nadler*, 14 N.W.2d 482 (Minn. 1944); *Hassinger v. Kline*, 457 N.Y.S.2d 847 (1983)).

174. French, *supra* note 130, at 934; Hollingshead, *supra* note 2, at 330 n.61. The concept of privity was introduced, but not defined, in *Spencer's Case*, (1583) 77 Eng. Rep. 72 (Q.B.).

175. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 (2000); 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 18 (2004). Indeed, in England, only landlord-tenant relationships satisfy horizontal privity requirements; the promise must actually appear in a lease. The rationale for this is likely tied to England's historically inadequate land reporting system. Judges wanted to curtail restrictions on land because covenants could not be discovered by visual inspection of the land. This is essentially a notice requirement. If the agreement is in a lease, courts infer that the parties are aware of the restrictions and bargained for the deal. See *Keppell v. Bailey*, (1834) 39 Eng. Rep. 1042 (Ch.).

176. JAMES C. SMITH, NEIGHBORING PROPERTY OWNERS § 7:13 (Supp. 2004).

some weaker forms of horizontal privity.¹⁷⁷ Most jurisdictions appear to view horizontal privity as tied to the conveyance of the fee simple. For example, privity of estate is present where the promise is contained in a conveyance of the fee simple.¹⁷⁸ Real covenants are the only type of servitude with a horizontal privity requirement.¹⁷⁹

Beyond the horizontal privity requirement, most jurisdictions also require vertical privity. For the burden to run to a successor owner of the land, that landowner must be in vertical privity of estate with the original covenantor. Vertical privity exists where the successor acquires the covenantor's land by an approved method.¹⁸⁰ Approved methods include devise, intestacy, grant, or judicial sale. Acquiring land by adverse possession does not yield privity. Thus, an adverse possessor will not be subject to the burden of a real covenant. Additionally, the successor must acquire the same type of interest that the predecessor had (although it could be over a smaller portion of the land or for a shorter duration).¹⁸¹

Determining whether the *benefit* of a real covenant will run with the land is a separate analysis from determining whether the *burden* runs with the land. The circumstances determining when a benefit will run with the land at law similar, but not identical: (i) the agreement must be in writing; (ii) the parties must intend for the benefit to run with the land; and (iii) the benefit of the covenant must touch and concern the land. The privity requirements are not as strict for the benefit side of the analysis. Most states hold that the benefit of a covenant can run without horizontal privity,¹⁸² but there must be at least

177. See, e.g., *Mosely v. Bishop*, 470 N.E.2d 773 (Ind. Ct. App. 1984); *Morse v. Aldrich*, 36 Mass. 449 (1837); see also SMITH, *supra* note 176, § 7:13; Hollingshead, *supra* note 2, at 329.

178. *Wheeler v. Schad*, 7 Nev. 204 (1871); *Runyon v. Paley*, 416 S.E.2d 177 (N.C. 1992); Hollingshead, *supra* note 2, at 330 n.61. American courts have expanded the privity requirement to the point where a real covenant could be created in any transaction involving conveyance of some other interest in land. The first expansion of the English rule occurred as early as 1837 in Massachusetts. It was called simultaneous or instantaneous privity. French, *supra* note 130, at 934 & n.23.

179. There is also a minority view holding that horizontal privity should not be required. *Gallagher v. Bell*, 516 A.2d 1028 (Md. Ct. Spec. App. 1986).

180. DWYER & MENELL, *supra* note 135, at 757.

181. *Id.*

182. *Pakenham's Case*, Y.B. 42 Edw. 3, pl. 14 (1368), reprinted in 2 JOHN C. GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY 357 (2d ed. 1906). It appears that both the privity and notice requirements were linked by a desire to keep lands free of undiscoverable burdens. The courts were concerned about purchasers unwittingly buying land burdened by restrictions that were not obvious from a physical inspection of the property. Benefits are not accompanied by this same concern and they do not affect marketability. The *Restatement (First) of Property* supports the view that horizontal privity should not be required for a benefit to run. RESTATEMENT (FIRST) OF PROPERTY § 548 (1944).

vertical privity between the original covenantee and the successor.¹⁸³ This occurs when the person claiming the benefit is the successor to the benefit estate.¹⁸⁴ The vertical privity requirements are a bit more relaxed for determining whether the benefit runs with the land as compared to determining whether the burden runs. For the benefit to run, courts often allow one to succeed to an estate of lesser duration.¹⁸⁵

As mentioned above, real covenants are promises regarding land enforceable *at law*. These last two words are important. Historically, the judicial system consisted of two categories of courts: courts of law and courts of equity.¹⁸⁶ In courts of law, the only available remedies were monetary.¹⁸⁷ Courts of equity allowed for remedies like injunctions and specific performance.¹⁸⁸ Today, lawyers even call these “equitable remedies.”¹⁸⁹ The courts of law and equity merged long ago, but there are still some holdover distinctions in remedies and other places. Because real covenants are enforceable at law and not in equity, damages are the available remedy, giving rise to personal liability only. Injunctive relief is not available when enforcing agreements as real covenants.¹⁹⁰ This distinction is one of the main reasons behind the birth of the equitable servitude discussed in the following subsection.

3. *Equitable Servitudes*

A third category of servitudes is “equitable servitudes.” The newest form of servitudes, equitable servitudes first emerged in the middle of the nineteenth century.¹⁹¹ They developed as a reaction to the rigid requirements of real covenants.¹⁹² Like real covenants, equitable ser-

183. See 9 RICHARD R. POWELL, *POWELL ON PROPERTY* § 60.04[3][c][v] (Michael A. Wolf ed., 2000).

184. *Id.* § 60.04[3][c][iv].

185. *Id.*; *Old Dominion Iron & Steel Corp. v. Va. Elec. & Power Co.*, 212 S.E.2d 715, 719–20 (Va. 1975) (holding that simply because a corporation is a lessee of only a portion of an estate does not prevent the corporation from suing to enforce the benefit of a covenant running with the estate).

186. In England (and a few states in America), law and equity courts remain separate courts.

187. *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990).

188. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211–14 (2002); *Willard v. Tayloe*, 75 U.S. 557, 562 (1869).

189. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 468–69 (1957).

190. 7 G.W. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY: THOMPSON ON PROPERTY* § 61.05(a) (David Thomas et al. eds., Supp. 2005). By characterizing the agreements as equitable servitudes, one may be able to obtain injunctive relief.

191. *Atherton*, *supra* note 160, at 60.

192. See, e.g., *Hills v. Miller*, 3 Paige Ch. 254 (N.Y. Ch. 1832); *Tulk v. Moxhay*, (1848) 41 Eng. Rep. 1143 (Ch.).

vitutes are created by written agreement.¹⁹³ Essentially, equitable servitudes are covenants running with the land enforced in equity.¹⁹⁴ As is true with real covenants, both the burden and benefit of an equitable servitude will only run with the land if the original parties to the agreement intended them to run.¹⁹⁵

As with real covenants, the running of the burdens and benefits are examined separately. If a burden runs, it is not axiomatic that the benefit runs with the land as well. The burden of an equitable servitude will not run with the land unless that burden touches and concerns the land. Generally, the burden will not run in cases where the benefit does not touch and concern the land as well. This means that in some jurisdictions, the burden will run even where the benefit is in gross.

A key difference between equitable servitudes and real covenants is that equitable servitudes do not have any privity requirements.¹⁹⁶ Notice requirements are also prominent with equitable servitudes.¹⁹⁷ The courts of equity developed the rule that the burden would not run to a purchaser without actual or constructive notice.¹⁹⁸

As stated earlier, for the benefit of an equitable servitude to run with the land, the parties must intend that it do so. Additionally, the benefit of an equitable servitude must touch and concern the land for it to run with the land. However, the benefit of an equitable servitude may run with the land even if the burden does not touch or concern the land.¹⁹⁹

The most obvious differences between equitable servitudes and real covenants are the respective remedies associated with them. An

193. There is one common exception to this rule: negative equitable servitudes may be implied by general plans developed for subdivisions. *See, e.g.,* *Turner v. Brocato*, 111 A.2d 855 (Md. 1955); *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925); *Buffalo Acad. of Sacred Heart v. Boehm Bros., Inc.*, 196 N.E. 42 (N.Y. 1935); *Evans v. Pollock*, 796 S.W.2d 465 (Tex. 1990); *Mid-State Equip. Co. v. Bell*, 225 S.E.2d 877 (Va. 1976); *RESTATEMENT (THIRD) OF PROP.: SERVITUDES* § 2.14 (2000).

194. *Netherton*, *supra* note 147, at 551. The *Restatement of Property* for servitudes actually recommends abolishing the distinctions between equitable servitudes and real covenants. *RESTATEMENT (THIRD) OF PROP.: SERVITUDES* § 1.4 cmt. a (2000).

195. *Dwyer & Menell*, *supra* note 135, at 766.

196. *Id.*

197. *Id.*; *Mackinder v. OSCA Dev. Co.*, 198 Cal. Rptr. 864, 869–71 (Cal. Ct. App. 1984).

198. The burden of a real covenant might not turn to a purchaser without notice because of recording acts. In most jurisdictions, the burden of an equitable servitude will not run without notice to the purchaser where the person is a bona fide purchaser of the burdened land. *RESTATEMENT (FIRST) OF PROPERTY* § 539 cmt. 1 (1944); *Powell*, *supra* note 183, § 60.04[4]. Equitable servitudes continue to run against successors who do not pay (or give any value) for the land regardless of whether they received notice. *Powell*, *supra* note 183, § 60.04[4].

199. This is also true with real covenants.

equitable servitude is enforced by equitable remedies making them more appropriate for conservation purposes.

B. Common Law Rules Left a Gap (Enforceable, Assignable Negative Easements In Gross)

Although the common law offers many possible ways to restrict land, these ways all present problems when pursuing long-term land conservation. To protect land, it would be helpful to be able to make enforceable perpetual negative servitudes in gross. Land preservationists want an agreement that will run with the burdened land so conservation can continue beyond the current landowners. This requires assignable tools; no traditional servitude meets all these needs.

If using an easement to protect land, one is likely to desire a *negative* easement. The goal is to prevent the landowner from destroying, developing, or harming his land. As discussed earlier, the categories of allowable negative easements differ by jurisdiction, but historically negative easements have been limited. When courts do uphold negative easements, they are appurtenant easements. For conservation purposes, it would be more useful to have easements in gross. That way, conservation organizations, like land trusts, could hold the easement. Some jurisdictions do permit easements in gross, but not negative easements in gross because none of the permissible negative easements can be held in gross. Additionally, if seeking long-term protection of land, a conservationist would want a transferable easement. Then, the conservation benefit will remain even if the easement holder dies (or, if an organization dissolves). In most jurisdictions, easements in gross could not be transferred at common law.²⁰⁰ Today, courts increasingly allow transfer of easements in gross.²⁰¹ Uncertainty about transferability combined with limitations on permissible negative easements mean that easements do not work well to achieve long-term land protection goals.

Because real covenants can be either affirmative or negative, they may be a useful tool. However, there are limitations to real covenants. Meeting the privity requirements can be difficult, depending on the jurisdiction's version of privity. It is also difficult to have a real covenant in gross that can run with the land because in many jurisdictions the burden will not run where a benefit is in gross. Even where a viable real covenant can be created to protect conservation values, violation of the covenant results only in an award of monetary damages. If

200. George Kloek, *Assignability and Divisibility of Easements In Gross*, 22 CHI.-KENT L. REV. 239 (1944); Gerald E. Welsh, *The Assignability of Easements In Gross*, 12 U. CHI. L. REV. 276 (1945).

201. Alan David Hegi, Note, *The Easement In Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 110-11 (1986) (noting that courts are increasingly allowing transfer of easements in gross).

the aim is to protect the environment and prevent ecosystem degradation, specific performance and other equitable remedies are more desirable. For example, it would be better to stop habitat destruction than to later receive money for the loss of a species, which would be of unknown value.

Equitable servitudes may then appear to be the last resort, and indeed, the fact that they yield equitable remedies and do not have privity requirements makes them attractive. The limiting factor is the likelihood of a rule preventing the running of the burden where the benefit is in gross.²⁰² Traditionally, courts have not favored agreements between parties when a landowner's burden or obligation was tied to his land, but the benefit was not.²⁰³ The prohibition on holding equitable servitudes in gross makes them an inappropriate tool for widespread conservation. Conservation organizations and government entities would not be able to negotiate enforceable agreements under this rubric.

The inadequacy of these servitudes has led states to enact conservation easement statutes. These state statutes do not require conservation easements to be tied to neighboring land. Holders of conservation easements may be located anywhere and may move around without disrupting their conservation easement property right. Thus, conservation easements under these statutes can be characterized as either negative easements in gross, or negative covenants running with the land where the burden will run even though the benefit is in gross. Neither one is a character of the common law unless in a jurisdiction where the court would permit the burden of a covenant to run even though the benefit is in gross.

C. Fundamentals of Conservation Easements

Because of common law obstacles to conservation easements, states have passed laws recognizing a new type of servitude called a conservation easement.²⁰⁴ All fifty states now have conservation easements statutes,²⁰⁵ affecting over three million acres of land nation-

202. Peter M. Morrisette, *Conservation Easements and the Public Good, Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 382-83 (2001); Jeffrey Tapick, Note, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVT'L. L. 257, 270-71 (2002).

203. CASNER & LEACH, *supra* note 141, at 941.

204. See generally SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 152 (2001); King & Fairfax, *supra* note 2.

205. Wyoming was the last state to adopt a conservation easement statute. Act of Feb. 25, 2005, 2005 Wyo. Sess. Laws 127 (to be codified at WYO. STAT. §§ 34-1-201 to -207 (2005)). Prior to its adoption, Wyoming had conservation easements that relied on common law notions of real covenants, easements, and equitable servitudes. See generally Michael R. Eitel, Comment, *Wyoming's Trepidation Toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming*

wide.²⁰⁶ The oldest identifiable conservation easement statutes were adopted in 1956 in Massachusetts²⁰⁷ and in 1959 in California.²⁰⁸ These early laws provided little guidance on how conservation easements should operate; therefore, few landowners took advantage of them.²⁰⁹ Originally, the California and Massachusetts statutes only authorized government entities to hold conservation easements,²¹⁰ but in 1969, Massachusetts became the first state to allow nonprofits to hold conservation easements.²¹¹ Many states with conservation easement statutes modeled their legislation on the Uniform Conservation Easement Act ("UCEA"),²¹² which the National Conference of Commissioners on Uniform State Laws approved in 1981.²¹³

Conservation easements are property rights in land held by someone other than the landowner. Additionally, these rights must have a conservation purpose. The UCEA defines a conservation easement as:

State Legislature, 4 WYO. L. REV. 57 (2004); Tapick, *supra* note 202. Additionally, Wyoming residents could still take advantage of federal tax breaks if they adhered to IRS guidelines. The federal tax guidelines do not require conservation easements to comply with state law.

- 206. Nancy McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 21 (2004). McLaughlin's article shows the amount of land protected by conservation easements held by land trusts. Because the acreage protected by government entities is unknown, the total number of protected acres is much higher.
- 207. 1956 Mass. Acts ch. 631.
- 208. The Scenic Easement Deed Act of 1959, CAL. GOV'T CODE §§ 6950–6954 (West 1959). Although these are the oldest conservation easement statutes, scholars show conservation easements as dating back much further. The first American conservation easement appears to have been written in the late 1880s to protect the parks and parkways of Boston designed by Frederick Law Olmstead. See Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 9 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) [hereinafter *PROTECTING THE LAND*]; Jean Hocker, *Foreword to PROTECTING THE LAND*, *supra*, at xvii. These older conservation easements were born without statute, and therefore the courts could have overturned them based on the common law impediments discussed in the previous section. Additionally, although there is a rich history of conservation easements, they were still considered an obscure tool until recently. Indeed, the first publication using the term "conservation easement" was not written until 1959. *Id.*; see also Whyte, *supra* note 1. Even today, scholars, practitioners, and landowners tend to think of conservation easements as a "new" tool. See Hollingshead, *supra* note 2 (describing the history of conservation easements).
- 209. Morrisette, *supra* note 202, at 385.
- 210. Cheever, *supra* note 2, at 1080.
- 211. Morrisette, *supra* note 202, at 385.
- 212. Nat'l Conference of Comm'rs on Unif. State Laws, Unif. Law Comm'rs, A Few Facts About the Uniform Conservation Easement Act, www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited May 15, 2006).
- 213. For the text of the UCEA, see <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.pdf> (last visited May 15, 2006).

A nonpossessory interest of a holder in a real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agriculture, forest, recreational or open-space use, protecting natural resources, maintaining or enhancing air or water quality or preserving the historical, architectural, archaeological, or cultural aspects of real property.²¹⁴

When an owner places a conservation easement on his land, whether by donating it, selling it, or creating it to meet legal requirements, he is generally agreeing to refrain from exercising certain rights.²¹⁵ These can include the right to develop, the right to farm in a certain manner, and the right to fill in wetlands. In the traditional property-as-a-bundle-of-sticks metaphor, a conservation easement takes a stick from the bundle and sells or gives it to someone else. State statutes determine who may accept the stick and set rules about the method of transfer. It is not a straightforward transfer of a right, however, because the holder of a conservation easement cannot exercise the right it holds. For example, if a landowner donates a conservation easement in the form of the right to develop his property, the holder of the conservation easement does not gain the development right. Conservation easements, therefore, are really rights of enforcement. The holder of the conservation easement has the right to bring an action against the landowner if the terms of the conservation easement are violated. Generally, the conservation easement holder is either a government entity or a nonprofit conservation organization. Because statutes and regulations about conservation easements vary by state, there may be differences in the duration and requirements regarding conservation easements, including limitations on who is allowed to hold the right.

Conservation easements are different from traditional easements. The term “conservation easement” is so new it is not even in law dictionaries.²¹⁶ The legal concept of a conservation easement is a statutory construction that contradicts principles of common law despite

214. UCEA § 1(1) (1981).

215. Although we generally think of conservation easements as negative restrictions preventing landowners from doing certain actions, conservation easements may also have affirmative obligations such as requiring restoration projects. Alexander R. Arpad, Comment, *Private Transactions, Public Benefits, and Perpetual Control over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 112–21 (2002) (explaining that the affirmative aspect of conservation easements is often ignored). States often explicitly recognize both negative restrictions and affirmative duties in their state conservation easement statutes. See, e.g., ARIZ. REV. STAT. ANN. § 33-21(1) (2004); KY. REV. STAT. ANN. § 382.800 (West 2004); OR. REV. STAT. § 271.715(1) (2004); S.C. CODE ANN. § 27-8-20(1) (1976); WIS. STAT. ANN. § 700.40(1)(a) (West 2004).

216. This does not mean however that the concept is new. There have been many forms of easements and other servitudes in land, but bringing these ideas together under one workable concept is new.

being linked to the traditional notions of easements and other servitudes.

The following subsections describe the basic elements of conservation easements and explains the various components and requirements. Because state laws regarding conservation easements vary, these subsections merely present a general picture. Practitioners should always examine the particular statutes and common law in the state in which they are working.

1. *Four Methods for Creating Conservation Easements:
Donation, Sale, Eminent Domain, and Exaction*

Many landowners donate conservation easements burdening their land. They may do so for many reasons, including the desire to preserve the character of land and to receive a tax break as described below. Conservation easements, like other property rights, can also be sold. Because there is no clearinghouse for conservation easements, the percentage of conservation easements sold is unknown. The chief motivation for selling conservation easements is likely to be the money made from the sale, but landowners who sell conservation easements may also be motivated by the desire to retain the character of their land and their way of life, or to gain some property tax benefits.²¹⁷

Landowners voluntarily engage in the donation and sale of conservation easements. With conservation easements obtained through regulatory methods (taken and exacted conservation easements), however, government agencies play more significant roles. In some states, conservation easements may be "taken" using the power of eminent domain.²¹⁸ Numerous federal and state laws allow government entities to condemn conservation easements.²¹⁹ In such cases, the government agency taking the conservation easement pays the underlying landowner just compensation for the loss of the property right. Both federal and state governments have acknowledged that acquisition of conservation easements via eminent domain may be a neces-

217. PAUL ELCONIN & VALERIE A. LUZADIS, EVALUATION OF LANDOWNER SATISFACTION WITH CONSERVATION RESTRICTIONS 9-11 (1997).

218. For some introductory discussions of using eminent domain to create conservation easements, see Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 DRAKE L. REV. 477, 506 (1986); Michael Paul Stevens, *Historic Preservations: Prohibit Power of Eminent Domain from Creating, Altering, or Affecting Conservation Easements*, 10 GA. ST. U. L. REV. 207 (1993); John Casey Mills, Note, *Conservation Easements in Oregon: Abuses and Solutions*, 14 ENVTL. L. 555, 560 (1984).

219. See, e.g., JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 12:2 (2004); see also Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1277 (2005).

sary component of land conservation programs.²²⁰ However, a few states have specifically prohibited states and municipalities from using their eminent domain power to acquire conservation easements.²²¹

Increasingly, instead of being a private decision about the future of one family's farm, conservation easements are part of large development projects with complex permitting programs, giving rise to a fourth category of conservation easements: those exacted through a regulatory process. When developers and individual landowners want to make changes to the land, there are often local, state, and federal permit requirements.²²² Many of these permit programs require the permittees of larger projects to incorporate some type of conservation for mitigation.²²³ Conservation easements are one of the most common methods of meeting these mitigation requirements.²²⁴ These conservation easements are of a different sort than those donated or sold. Developers may be required to place some type of conservation easement on their own land or to purchase a conservation easement on someone else's land. Although they engage in the transactions willingly, the conservation easements should not be viewed in the same light as donated and sold conservation easements. Both the incentives and benefits of these types of conservation easements are very different from those associated with donated and sold conservation easements.

2. *Benefits of Conservation Easements*

Conservation easements emerged, not just because the time was ripe, but also because there are many benefits associated with the tool. Importantly, federal and state governments have been increasingly cognizant of the public benefits associated with conservation easements and have enabled tax breaks for conservation easement donors. This subsection discusses the benefits of conservation easements. These numerous benefits explain why conservation easements

220. See, e.g., *Racine v. United States*, 858 F.2d 506, 507 (9th Cir. 1988); *Bennett v. Comm'r of Food & Agric.*, 576 N.E.2d 1365 (Mass. 1991); see also *Kamrowski v. State*, 142 N.W.2d 793, 796 (Wis. 1966) (sustaining the eminent domain power to acquire scenic easements along the St. Croix River in Wisconsin).

221. See, e.g., ALASKA STAT. § 34.17.010(e) (2004); OR. REV. STAT. § 271.725(1) (2003); UTAH CODE ANN. § 57-18-7(1) (2005); ALA. CODE § 35-18-2(a) (2004). But see ALA. CODE § 35-18-2(e).

222. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 194–96 (2004).

223. See, e.g., General Policies for Evaluating Permit Applications, Clean Water Act § 404 Permit Regulations, 33 C.F.R. § 320.4(r); Endangered Species Act, 16 U.S.C. § 1539(a)(2)(A)(ii) (2004).

224. Interview with Clark Morrison, Partner, Morrison & Foerster, in Berkeley, Cal. (Oct. 8, 2003); Telephone Interview with David Nawi, Counsel, Shute, Mihaly & Weinberger, in Berkeley, Cal. (Nov. 17, 2003).

have proliferated. These benefits also echo sentiments of property rights advocates explained earlier in this Article honoring private locally-made decisions over federal government regulation. This Article focuses on the benefits of conservation easements because those benefits are what enable the tool to prosper. The picture is not completely rosy however; there are also many concerns associated with conservation easements, especially relating to their long-term viability and true public value. Those concerns are not discussed here, but explorations of such concerns are available elsewhere.²²⁵

a. Benefits to Conservation Easement Donors and Sellers

The benefits of conservation easements vary based on how the conservation easements were created. Because Part IV considers exacted conservation easements, here, I examine the benefits when a landowner either donates or sells a conservation easement. Although there is a slight difference in tax advantages, many of the same benefits are present for both donors and sellers.

i. Conservation Goals

There are many different personal incentives for creating conservation easements. Often private landowners create conservation easements to protect personal values. Property owners who do not want to see their land turned into a strip mall or who want to make sure that the family farm remains a farm look to conservation easements to protect their interests in the land. Some landowners may have pure conservation motives—a wish to protect a certain species or habitat, for example. Many people who donate conservation easements cite the ability to leave a lasting mark on the land as the strongest incentive.²²⁶ This type of altruistic incentive may also be influential for people who sell conservation easements on their land. Land conservation may be a primary goal,²²⁷ but may not be possible for some landowners unless they can sell a conservation easement.

ii. Tax Breaks

One of the chief benefits of donating or selling a conservation easement is the potential of significant tax benefits. Federal law provides tax breaks to landowners who donate conservation easements based on the value of the conservation easement as a charitable donation.²²⁸

225. See, e.g., Jessica Owley Lippmann, *Exacted Conservation Easements* (Dec. 19, 2005) (unpublished Ph.D. dissertation, on file with the NEBRASKA LAW REVIEW).

226. Lynn Asinof, *Conservation Easements Lighten Taxes*, WALL ST. J., Aug. 9, 1999, at C1.

227. ELCONIN & LUZADIS, *supra* note 217, at 9–10.

228. I.R.C. § 170 (2000). To calculate the value of the donation, take the value of the land before the conservation easement and compare it to the value of the land

There are also estate tax benefits because the fair market value of the land is reduced, and the federal tax code now allows a reduction of estate taxes for certain qualified easements.²²⁹ State tax benefits vary, but there are often reductions in property tax. The tax benefits encourage landowners to set aside their land and serve as a counterweight to development pressures. For landowners to reap all the possible advantages of conservation easements, they must conform to both state and federal rules.²³⁰

In 1964, changes to the Internal Revenue Code formally defined conservation easements at the federal level and allowed income tax deductions for conservation easements donated to charitable organizations.²³¹ The Internal Revenue Service allows a federal income tax deduction for qualified charitable contributions up to a maximum of thirty percent of the taxpayer's adjusted gross income.²³² However, the value of the conservation easement donation can be spread over five years.²³³ There are currently proposals in Congress to abolish this tax based on some recently recorded abuses.²³⁴ If Congress abolishes the charitable contribution deduction, there will likely be fewer donations of conservation easements.

Conservation easements may also reduce the fair market value of the underlying land. This may reduce land valuation for purposes of local property taxes. State conservation easement statutes are often very specific on this issue. Some statutes provide that the land will be taxed at the lessened value of the encumbered land²³⁵ while others do not allow a property tax deduction.²³⁶

when encumbered by the conservation easement. The difference is the value of the donation. For more about the valuation process and its potential problems, see McLaughlin, *supra* note 206 (explaining the difficulty in determining the appropriate value of the donation and the incentives for landowners to overestimate).

229. American Farm & Ranch Protection Act, I.R.C. § 2031(c) (2000). For a discussion of this provision and which conservation easements qualify for the deduction, see Stephen J. Small, *An Obscure Tax Code Provisions Takes Private Land Protection into the Twenty-First Century*, in *PROTECTING THE LAND*, *supra* note 208, at 55, 60–65.

230. Cheever, *supra* note 2, at 1084.

231. Pub. L. No. 88-272, 78 Stat. 19 (1964); *see also* FAIRFAX & GUENZLER, *supra* note 204, at 152.

232. I.R.C. § 170 (2000). The amount of a contribution exceeding thirty percent of the adjusted gross income in a given year can be carried over and deducted for the next five years.

233. Asinof, *supra* note 226; McLaughlin, *supra* note 206 (explaining various easement related tax incentives in detail).

234. Jay Cassell, *Protecting a Tax Break: Playing Wildlife Politics*, *TIME*, Oct. 3, 2005.

235. *See, e.g.*, S.C. CODE ANN. REGS. § 27-8-70 (2003); N.J. STAT. ANN. § 13:8B-7 (West 2004); MONT. CODE ANN. § 76-6-208(1) (2003).

236. *See, e.g.*, IDAHO CODE ANN. § 55-2109 (2004).

One of the most attractive tax breaks associated with conservation easements are those relating to estate taxes. High estate taxes make conservation easements attractive to landowners when they begin to make plans for passing on their land. Stephen Small, a Boston attorney specializing in conservation easements, identifies estate taxes as the driving force behind the rise in conservation easements.²³⁷ With the current level of estate taxes and the continuing increase in property values, many families find themselves selling their property to cover estate taxes.²³⁸ Conservation easements reduce the value of the land and therefore the corresponding estate tax. Furthermore, recent changes to the tax law allow additional estate tax deductions for landowners who place easements on property near metropolitan areas, national parks, wilderness areas, and urban national forests.²³⁹

b. Benefits to Conservation Easement Holders

Conservation easements offer benefits to conservation easement holders. Conservation easement holders generally fall into two categories: governmental entities and nonprofit organizations known as land trusts. Conservation easements represent a benefit when compared to alternative land protection measures. The alternatives to conservation easements are to regulate the land, purchase the land in fee simple, or refrain from conserving land. Private organizations do not have the ability to regulate, so their choices come down to buying land outright, buying (or receiving as a gift) a conservation easement, or pursuing alternative conservation strategies that may be less effective. Because the budgets for these organizations may be constrained, and few landowners donate their land, fee acquisition strategies may not be appropriate. And, of course, choosing not to conserve land or working through other methods like lobbying and public pressure may not yield the same results.

Government agencies have an additional tool in their repertoire because they can regulate landowners. At times, government regulation may be unpalatable to communities and lead to strong reactions from the polity. Additionally, crafting and passing legislation and accompanying regulations may be a cumbersome and time consuming process, operating at a time scale too slow to conserve needed lands and unlikely to garner the necessary political support. This subsection examines the benefits arising from these basic conservation choices showing why people interested in conserving land favor conservation easements.

237. Asinof, *supra* note 226.

238. *Id.*

239. I.R.C. § 2031(c) (2000); Asinof, *supra* note 226.

Conservation organizations value conservation easements as a land protection tool because they represent a less expensive way to protect a larger acreage. One need only purchase the rights required to protect the environmental benefits, and not the entire fee simple title to the land. Because conservation easements are often less costly, they may shield more total land area from development than fee simple purchases. Additionally, landowners may be more willing to donate a conservation easement and put a restriction on their land than to donate outright fee title to their land.

c. Benefits to Government

Conservation easements provide two benefits to government agencies. When the government agency is the holder of the conservation easement, they reap the benefits of increased land protection at a lower cost. Governments can also benefit when private organizations hold the easements.

Conservation easements are an attractive tool because, in their present form, they add relatively few new administrative burdens for government agencies. The recordation requirements call upon already existing agencies and government practices, and with a few exceptions, state agencies do not monitor or enforce the conservation easements. This is especially true when conservation easements are held by private organizations. When private land conservation organizations conserve land, the government benefits because the private organization takes on tasks normally delegated to government entities. This enables meeting societal goals through private means. This may be accompanied by many benefits, but of particular interest to government entities is the fact that they do not have to use their own resources and people power. Essentially, the federal government can pass its conservation duty on to nongovernmental organizations who then monitor and enforce federally mandated agreements.

When the government owns land, it must manage that land. If conserved land stays in the hands of private owners, those owners can take on the major maintenance duties. Additionally, if a land trust holds the easement, that organization takes on the duties of monitoring and enforcing the conservation easement. This means that government officials do not need to maintain and manage these lands. Additionally, because private-sector citizens are not constrained by the capacity of government agencies, there is no limit on the amount of land that can be conserved with conservation easements.

There are also tax revenue benefits—when land is publicly owned, no one pays taxes on the land. By keeping the possessory property rights privately owned, the land stays on the tax rolls. Even if the taxes are reduced based on a reduced value of the land, local governments still benefit from the taxes they do receive. And, as mentioned

above, some states do not even allow a reduced tax rate for encumbered lands.²⁴⁰

d. Benefits of Conservation Easements to the Public

Even though not usually directly engaged in conservation easement transactions or formulations, the public at large benefits from the existence of conservation easements when they work to conserve environmental amenities. Everyone gains the benefit of increased environmental amenities and healthy functioning ecosystem services. Additionally, many landowners can have access to this tool. Its mere existence may be comforting to people, giving them an option for their land.

As explained above, using conservation easements to meet environmental goals keeps land on the tax rolls. We all benefit by greater revenues. Because state and local governments use taxes to meet the needs of the public, everyone benefits from property taxes. Because schools are often dependent on property taxes, for example, it helps provide quality education to local communities. If the land were instead held in fee simple by either a tax-exempt nonprofit or a government agency, there would be no such revenue.

V. EMERGENCE OF EXACTED CONSERVATION EASEMENTS

Now that we have seen how conservation easements emerged, the next step is to understand the origin of exacted conservation easements. Exacted conservation easements are coercive tools very different from the charitable donations discussed above. The story related above focuses on ideals like minimal government involvement and voluntary agreements aimed at conserving land. Although surprising, this background led to a tool used by all levels of government to regulate land.

This Part explains how exactions work generally and describes changes to environmental laws that led to the growth of exactions of conservation easements. Generally, conservation easements were such a successful, popular tool that their use spread to areas not originally contemplated by drafters of conservation easements statutes. These exacted conservation easements emerged from background principles that they do not actually end up embodying. This divergence may have significant impacts on monitoring and enforcement. Additionally, eagerness to use conservation easements because they seem such a market and politically friendly tool may lead to the use of conservation easements in inappropriate circumstances.

240. See *supra* note 236 and accompanying text.

A. Exactions Generally

Government agencies often condition permit issuance on exactions. An exaction occurs when a unit of government requires a property owner to contribute money or dedicate land to a municipality as a condition of the municipality granting the owner a permit to develop land.²⁴¹ Exactions enable local governments to transfer the costs associated with new development to developers and to future residents of projects.²⁴² Exactions for streets, sidewalks, and utilities within a subdivision are common examples.

The United States Supreme Court has validated the use of exactions as an implementation of a zoning authority's police power as long as the condition substantially furthers governmental purposes that would justify denial of a building permit.²⁴³ In the 1994 *Dolan v. City of Tigard*²⁴⁴ case, the Court further specified that the relationship between permit conditions and anticipated impacts of development must reflect a measure of intensity that is "roughly proportional."²⁴⁵ Thus, as long as exactions are roughly proportional to the impact of the development, and there is a nexus between the exactions and the proposed project's impacts, exactions are valid exercises of police power.

B. Rise of Exacted Conservation Easements

Once the validity of conservation easements was solidified by state conservation easement statutes, governments at all levels began to exact conservation easements in conjunction with permitting programs. Some federal government agencies had already been using conservation easements in conjunction with federal programs and were familiar with the tool. It was an easy extension for these agencies to begin requiring conservation easements. Importantly, exactions of conservation easements represented a land preservation alternative cheaper than using eminent domain that could be narrowly tailored to specific properties. However, one of the most influential reasons for expansion of conservation easements is tied to increased environmental and

241. Elaine Spencer, *A Developer's Perspective on Government Exactions in the Wake of English Church v. Los Angeles and Nollan v. California Coastal Commission*, C356 A.L.I.-A.B.A. 449, 453 (1988).

242. Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 69 (1987); John P. O'Connor, Jr., Note, *Extortion Loses a Synonym Thanks to Court Ordered Accountability in Land Use Exactions Programs: Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), 57 U. CIN. L. REV. 397 (1988).

243. *Nollan v. Cal. Coastal Comm'n*, 438 U.S. 825, 837 (1987).

244. 512 U.S. 374 (1994).

245. *Id.* at 396 (articulating the "rough proportionality" test); see Jonathan M. Davidson, Ronald Rosenberg, & Michael C. Spata, "Where's Dolan?": *Exactions Law in 1998*, 30 URB. LAW. 683 (1998).

land-use regulation requiring mitigation for environmental harms. Governments exact conservation easements to meet these mitigation requirements. These factors all combined to lead to the rise of exacted conservation easements.

1. *Tradition of Government Use of Conservation Easements Easily Expanded to Include Exactions*

There is a history of government agencies using conservation easements to protect land. The State of Massachusetts authorized acquisition of rights in land as early as 1893. Since then many states, municipalities, and government agencies have used conservation easements as tools to protect open space, conservation, and scenic values.²⁴⁶ Notably, the federal government has been acquiring interests in land since the 1930s. There is a strong tradition of governmental use of conservation easements. After becoming familiar with the tools, it was a small step to begin using conservation easements in conjunction with permitting requirements.

The federal government has been using partial interests in land to protect federal conservation interests since 1928 when Congress passed the Federal Rights in Land Act.²⁴⁷ This statute gave the National Capital Park and Planning Commission the authority to acquire "permanent rights in land adjoining park property sufficient to prevent the use of the land in certain specified ways which would essentially impair the value of the park property for its purposes."²⁴⁸

Federal acquisition of conservation easements burgeoned in the 1930s with both the Fish and Wildlife Service ("FWS") and the National Park Service ("NPS") acquiring conservation easements. As at least one commentator has noted, the NPS has been "something of a pioneer in the use of easements."²⁴⁹ In the 1930s, the NPS began acquiring easements along scenic highways.²⁵⁰ It had 2,500 acres of

246. FAIRFAX & GUENZLER, *supra* note 204, at 42, 156.

247. Federal Rights in Land Act of 1928, 40 U.S.C.A. § 8732 (2005) (formerly cited as 40 U.S.C. § 72A).

248. 40 U.S.C.A. § 8732(a)(2) (2005).

249. RUSSELL L. BRENNEMAN, SHOULD "EASEMENTS" BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS?: A STUDY FOR THE NATIONAL PARK SERVICE 38 (1975).

250. Whyte, *supra* note 1, at 12. The NPS held over 177 easements along the Blue Ridge Parkway in the 1950s. *Id.* Because these conservation easements were often over land to which the government held adjoining fee title, these were not necessarily easements in gross. Additionally, one could characterize the burden and the benefit as running with the land. As such, these agreements may have been permissible under traditional servitude law regarding easements and covenants. However, some courts may have found it significant that the NPS held the easements in its regulatory capacity—which may be different from holding the benefit as a landowner. I do not address this question here; I use this example merely to illustrate the federal government's use of nonpossessory partial interests in land aimed at protecting scenic and conservation values.

scenic easements along the Blue Ridge Parkway and 5,000 acres along the Natchez Trace.²⁵¹ These easements generally involved restrictions on building new structures, prohibitions against dumping, and regulations about landscaping and erecting billboards.²⁵²

Under the Migratory Bird Treaty Act,²⁵³ the FWS purchased conservation easements over wetland and prairie potholes throughout the Midwest. The FWS has over 500,000 acres of easements protecting wildfowl habitat throughout the Midwest. Courts have upheld the validity of these easements including specifically their perpetual nature.²⁵⁴ Although those were purchased and not exacted, they still set the stage for government agencies using conservation easements as a regulatory tool. Other federal agencies also hold and manage partial interests in land in the form of flowage, safety, navigation, and clearance easements.²⁵⁵

State and local governments have also been acquiring and using conservation easements for a long time. The Boston Metropolitan Park Commission began acquiring easements for park purposes in 1893.²⁵⁶ States also acquire scenic and conservation easements. Wisconsin has used the tool extensively to protect the Great River Road along the Mississippi. Many regional authorities and municipalities use conservation easements. For example, the Northern Virginia Regional Park Authority protected the Potomac shore with conservation easements.²⁵⁷

This long tradition of protecting public values through partial interests in land shows the extensive experience of governments at various levels. This experience, especially where the conservation easement programs were successful, may have contributed to the eager adoption of conservation easements and deed restrictions as a method of mitigating for environmental harms associated with development projects.

2. *Exacting Conservation Easements as an Alternative to Exercising Eminent Domain.*

When it comes to protecting land for conservation values, governments can take two main routes. First, governments can use their inherent police power to regulate the land to protect the health, safety, and welfare of the government's citizens. This is most often done

251. BRENNEMAN, *supra* note 249, at 10.

252. *Id.* at 35.

253. Migratory Bird Treaty Act, 16 U.S.C. §§ 701–718k (2005).

254. *See, e.g.,* North Dakota v. United States, 460 U.S. 300 (1983); United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974).

255. BRENNEMAN, *supra* note 249, at 40.

256. *Id.* at 10.

257. *Id.* at 40.

through the zoning power, which is a realm of traditional state regulation.²⁵⁸ Zoning and land-use regulations emerge from state and local governments. Regulations of these types control land use on a broad scale often resulting in a comprehensive planning agenda and processes. The United States Supreme Court has upheld the constitutional validity of zoning and land-use planning.²⁵⁹ Federal environmental laws can also place restrictions on activities.²⁶⁰ The federal government has the power to make environmental laws based on its constitutional powers over commerce and treaty making.²⁶¹ Land-use restrictions and environmental regulations are often politically unpalatable. As discussed earlier, American notions of property rights are very protective of an individual's right to act on his own land. This attitude has led to a reluctance to pass comprehensive environmental and land-use regulations.

Federal, state, and local governments also have another land conservation tool at their disposal—the power of eminent domain. When exercising the power of eminent domain, governments pay landowners just compensation for the land they acquire. The land must be acquired for a valid public purpose. Government entities can use this broad reaching tool to obtain land crucial to conservation and open space goals. However, this approach may be expensive depending on the value and extent of lands desired. Additionally, eminent domain may be a cumbersome process resulting in litigation and creating resentment. For political and financial reasons, governments may wish to restrain their use of this tool.

Conservation easements can represent a more palatable alternative to these two options. Costonis and early commentators noted that purchase and acceptance of conservation easements could avoid the takings claims brought about by land-use regulations.²⁶² Whyte be-

258. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

259. *See, e.g., Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

260. The distinction here is a tricky (but perhaps meaningless) one. Land-use regulation is a realm of state power, but the federal government can pass *environmental* regulations. The line between land-use regulation and environmental regulation is a hazy one that would be difficult to draw. The Court tackled this question in *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987), but it is long from settled which regulations fall into which camp. The debate is not important for the purposes of this Article. The point is merely that multiple levels of government can create valid laws that restrict activities of landowners. If the courts decide that the federal government's regulations have moved from a federal to state realm, they may invalidate environmental statutes. If that were to happen, the enforceability of the conservation easements negotiated under those laws may be called into question.

261. Other constitutional hooks may also enable federal environmental regulations. For example, the Property Clause of the United States Constitution paves the way for regulation of federal lands including, at times, activities that take place beyond the borders of federal lands.

262. COSTONIS ET AL., *supra* note 41.

lieved that conservation easements should be an extension of the eminent domain power.²⁶³ He argued that governments should use their eminent domain power to acquire conservation easements instead of full fee title because it would be cheaper. Whether the government is purchasing conservation easements, accepting them from donors, or merely allowing private organizations to use the tool to protect land, conservation easements represent a more politically friendly tool for achieving land conservation.

In this context, we can see how exacted conservation easements can easily slide into the game. Instead of taking land by eminent domain, governments can require permit applicants to create conservation easements. This is cheaper for the federal government than later buying the land. Additionally, applicants may prefer creating and purchasing conservation easements to dedicating fee simple title to the land.

3. *Direct Outgrowth of State Conservation Easement Statutes*

The creation of state conservation easement statutes hastened the advent of the exacted conservation easement. These statutes had a lot of narrative power. First, they cleared up uncertainties with the tool. They established the assignability and validity of conservation easements. They swept away common law impediments that prevented restrictions from being assignable. They allowed the agreements to run with the land regardless of the beneficiaries' status. Conservation easement statutes allowed government agencies and land trusts to conserve land in an old way with new assurances. Now that the assignability of conservation easements was assured, their use has proliferated. Importantly, these state statutes also clarified a stick in the property rights bundle. The standard incidents of ownership now include the right to develop your land. Creating specified sticks restricting certain land uses changes the way we think about land.²⁶⁴ The conservation easement tool became very popular. It was seen as a way to protect land that was not overly intrusive and drew upon market forces. Because of its popularity, governments grew more comfortable with its use and people began to use it to meet land conservation needs in many contexts.

4. *Mitigation Mandates*

Since the 1970s, environmental laws have influenced land-use decisions. Two important structures emerged out of the 1970s frame-

263. Whyte, *supra* note 1.

264. Property rights advocates who generally praise tools related to private contracts and freedom to let owners make decisions about their land dislike conservation easements because such easements further fracture property rights in their eyes.

work of increased environmental regulation: (i) a surge in permitting programs; and (ii) requirements for comprehensive environmental review. Although governments have long required permits for activities impacting land use, environmental laws have created more complex permitting structures. Permitting programs operate on the local, state, and federal levels. When developers want to begin a new project, they will likely find themselves applying for multiple permits from multiple government agencies at multiple levels of government—local planning regulations need to be in tune with state environmental permitting programs that best not run askance of federal law.

Permitting programs require close examination of environmental impacts of proposed projects. Generally, one must also show how detrimental environmental impacts will be minimized and mitigated. The mitigation requirements are one of the key assets of these laws and often represent the real teeth of the permit and review requirements. With the new need for mitigation, multiple mitigation structures have developed and permit applicants and processors have come up with new flexible mitigation tools including ones that do not appear to be related to mitigation on their face.²⁶⁵

This rise in permitting programs and increased flexibility of mitigation tools within the programs represents an acknowledgement that environmental protection must operate in the context of a developing world where landscape and local needs change frequently. This is a way to approach environmental problems in a world with other desires and pressures. This concept is permeating its way through environmental laws as policymakers seek ways to make environmental regulation more flexible. This drive for flexibility has assisted the rise of less traditional mitigation programs like land preservation programs.

There are two main ways to mitigate environmental harms: creation and enhancement. Creation involves constructing replacements for destroyed amenities. For example, if a development project fills in a wetland, a permit applicant could mitigate that harm by creating a new wetland. Creation as mitigation has problems, however. At its base is the notion that environmental amenities are fungible: a wetland is a wetland is a wetland. This is not necessarily true from an ecological standpoint.²⁶⁶ It is not always easy to duplicate Mother Nature, and not all wetland creation projects have been successful. Of course, as the use of creation for mitigation progresses, restoration ecologists may learn how to make improvements on their past mistakes. To compensate for potential problems with creating wetlands,

265. See David C. Levy & Jessica Owley Lippmann, *Preservation as Mitigation Under CEQA: Ho-Hum or Uh-Oh?*, 14 ENVTL. L. NEWS 18 (2005).

266. A wetland in a new spot is not the same as an old wetland fifty feet away if no one tells the newts how to get to their new breeding ground.

permit applicants may get more credit for wetlands that are near the converted wetlands. They may also have to replace more acres of wetlands than they destroy. Permit applicants work closely with permitting agencies to determine what level and style of creation will meet the needs of the project.

Beyond creating new environmental amenities, project proponents may also enhance existing amenities to mitigate for harm their projects will cause. Although this can be as difficult ecologically as creating new amenities, this approach acknowledges that current land uses and habitats can be increased. Enhancement is a useful tool where marginal or threatened lands of a similar category are nearby. For example, if there is marginal coastal sage scrub habitat available, a developer could propose to rejuvenate and protect that habitat in return for converting coastal sage scrub elsewhere. The enhanced sage scrub would be able to provide greater environmental amenities than the marginal habitat that was there before.

Creation and enhancement are the only two meaningful mitigation techniques available. However, many environmental laws define mitigation more broadly to include avoidance, minimization, and preservation.²⁶⁷ Although these three techniques are worthwhile and should be pursued under any conservation program or development project, they are not proper “mitigation.” Avoidance of harm and minimization of impacts should be steps taken prior to engaging in a harmful activity. Mitigation projects should compensate for the harm remaining after avoidance and minimization strategies have been used to their utmost.

Although preservation should not qualify as mitigating environmental harm, it is one of the most popular mitigation techniques. It is used to meet mitigation requirements under numerous laws and in many contexts. Preservation involves setting aside existing environmental amenities and ensuring that they are not harmed or destroyed. Therefore, preservation means essentially sacrificing some environ-

267. This usually happens at the regulation or implementation stage instead of in the statute. For example, the ESA requires HCPs to “minimize and mitigate” impacts. 16 U.S.C. § 1539(a)(2)(A)(ii) (2004). This would seem to indicate that minimization is something different from mitigation. The regulations also appear to differentiate between avoidance and mitigation. *See, e.g.*, 22 C.F.R. § 216.5 (2005). Indeed, many environmental laws appear to intend that the impacts of projects first be minimized. The agencies promulgating the regulations then conflate the concepts and include avoidance, minimization, and preservation under the umbrella of mitigation. In the case of the ESA, this conflation occurs in the *HCP Handbook*. Such a definition is especially alarming in the ESA context. The ESA prohibits habitat destruction or adverse modification. Therefore, no habitat should be converted. To allow habitat destruction in exchange for protecting other habitat areas, leads to overall habitat destruction—a net loss of habitat. Essentially one landowner gets “credit” for protecting other land that is already restricted by the ESA.

mental amenities for assured protection of other areas. Preservation techniques often draw upon conservation easements. Specifically, permitting agencies often require preservation via conservation easements in exchange for permission to impact land. This is the essential example of an exacted conservation easement.

C. Exacted Conservation Easements and State Conservation Easement Statutes

The drafters of the UCEA and state conservation easement statutes did not appear to contemplate exacted conservation easements. Very few statutes mention exactions out right, and those that do discuss them unfavorably.²⁶⁸ The legislative history of the UCEA shows no discussion of exactions. Indeed, most conservation easements appear to be designed around donated conservation easements with applications to sold easements sometimes included. This lack of consideration means that the legislators did not consider or plan for the easements to be used as they are being used.

There is a “dog did not bark” argument here. Because no one talked about exactions, we assume that they did not plan for these to be exactions. The lack of legislative history in this situation is telling. It is a big enough diversion from a donation that we would expect there to be a legislative history on this issue. Some states must have directly contemplated using conservation easements as exactions, because they directly or indirectly mention exactions in their state conservation easement legislation. Arizona, for example, specifically prohibits trading conservation easements for any type of entitlement.²⁶⁹ Thus, Arizona specifically prohibits the use of conservation easements as exactions.

California specifically prohibits exactions by local governments and declares that conservation easements must be “voluntary.”²⁷⁰ This begs the question—what would make a conservation easement *involuntary*? The only two clear options appear to be taking of conservation easements by eminent domain and potentially exactions. Whether exactions are voluntary is unsettled, but the Supreme Court seemed to say that they are not.²⁷¹

268. ARIZ. REV. STAT. § 33-272(A) (LexisNexis 2004) (“[C]onservation easements shall be voluntarily created and shall not be required by a political subdivision or government entity.”); CAL. CIV. CODE § 815.3(b) (West 2004) (“No local governmental entity may condition the issuance of an entitlement for use on the applicant’s granting of a conservation easement pursuant to this chapter.”).

269. ARIZ. REV. STAT. § 33-272(A).

270. CAL. CIV. CODE § 815.3(b).

271. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

D. Comparison to Conservation Easements

Although largely similar to other conservation easements, exacted conservation easements differ in three key ways. First, the motivation behind exacted conservation easements is different from the motivation giving rise to traditional conservation easements. Second, exacted conservation easements are always part of a larger regulatory structure. Third, exacted conservation easements may not adhere to state conservation easement statutes. This section describes and explains the effects of each of these three differences.

1. *Factors Motivating Creation of Exacted Conservation Easements and Traditional Conservation Easements Differ*

The main difference between conservation easements and exacted conservation easements is the motivation behind the agreements. Traditional conservation easements stem from voluntary agreements while exacted conservation easements are coerced. Although I consider exacted conservation easements coerced, it is not clear whether others will necessarily view them that way.²⁷² They could be considered *involuntary* because a permit holder must create them if he is to receive a permit. Alternatively, one may think of them as *voluntary* because a landowner or project proponent engages in the permitting process willingly. The landowner is choosing to develop or change the land of his own free will.

272. This dispute may seem like mere academic or semantic arguments until one looks more closely at specific state statutes. In California, for example, the state conservation easement statute defines the arrangements as “voluntary.” If exacted conservation easements are *not* voluntary, then they may not be enforceable under California’s conservation easement statute. Although this would not automatically invalidate an agreement, it would bring into question the long-term viability of exacted conservation easements in California. Additionally, this term may prove important when assessing circumstances in which an exaction of conservation easements may qualify as a taking under the Takings Clause of the Fifth Amendment. Generally, a voluntary grant is not deemed a taking. *Meredith v. Talbot County*, 560 A.2d 599 (Md. Ct. Spec. App. 1989). In *Meredith*, a developer entered into an agreement to restrict land with a county’s planning officer. The developer received immediate plat approval in exchange for his promise not to develop endangered species habitat. *Id.* at 601–02. Later, the developer claimed that the environmental restriction on his land was a taking in violation of the Fifth Amendment because his promise to forego development was made involuntarily (i.e., under duress). *Id.* The court concluded that although the developer’s decision was made under some threat of adverse governmental action, the fact that the developer stood to receive something in return for his promise gave rise to the inference that the agreement was not made under duress. *Id.* at 604. Therefore, because the developer had voluntarily agreed to allow the county to restrict the use of his property, the county did not “take” his property in violation of the Takings Clause. *Id.*

"The definition of 'voluntariness' is fraught with conceptual and linguistic challenges."²⁷³ Some legal scholars characterize exactions as voluntary,²⁷⁴ and others see them as coercive land-use controls.²⁷⁵ Professor Kathleen Sullivan describes two schools of thought regarding exactions: universal consensualism and universal coercionism. Universal consensualism considers all exactions voluntary. Any arms-length transaction based on full information in a competitive market is "obviously voluntary" according to this theory. But Professor Sullivan points out that "so is the surrender of money to a highwayman who says 'your money or your life.'"²⁷⁶ Alternatively, universal coercionism draws upon the writings of Robert Hale and views all exchanges as coerced.²⁷⁷ Both viewpoints would find the discussion here futile because attempting to distinguish coercive and noncoercive exchanges is meaningless.²⁷⁸ Professor Sullivan aptly explains that the border between coercion and voluntary exchange is "elusive."²⁷⁹

Professor Andrea Peterson explains that whether one characterizes an exaction as "involving either a forced deprivation of property or a voluntary exchange depends upon one's view of what property the claimant own[s]."²⁸⁰ She further explains that, under her proposed definition of property, development exactions do not constitute a "voluntary exchange." This holds true even where the exchange appears voluntary. She provides the following example: "[S]uppose a local government enacted a law that provided, in effect, 'If you pay a fee to support childcare centers, we will let you construct an office building downtown.'"²⁸¹ Professor Peterson argues that despite appearances this is involuntary because "the law deprives the developer of property because it restricts her economically valuable freedom of action."²⁸² This would be a forced transfer because it constrains the developer's choices. She is left with the option of either (i) not developing and thereby avoiding the childcare fee or (ii) paying the fee and developing

273. Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 35-36 (1991).

274. See, e.g., Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719 (2001).

275. See, e.g., RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 4 (1985).

276. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1446 (1989).

277. *Id.* at 1447.

278. *Id.*

279. *Id.* at 1456.

280. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 77 (1991).

281. *Id.* at 79.

282. *Id.*

her office building. Her freedom of action is constrained because she cannot simply construct the office building as she would otherwise have a right to do. Professor Peterson describes this as restricting the freedom to use one's land in an "economically valuable manner."²⁸³

The Supreme Court appeared to reject the notion that an exaction is a voluntary exchange in *Nollan v. California Coastal Commission*.²⁸⁴ In *Nollan*, James and Marilyn Nollan objected to the permit condition imposed by the California Coastal Commission. The couple sought permission to rebuild their house, which was on beachfront property. The Coastal Commission offered the Nollans a building permit on the condition that they grant an easement across their property for public access to the beach.²⁸⁵ The Court, in an opinion written by Justice Scalia, invalidated the condition because it did not contain a sufficient nexus between the permit condition and the governmental purpose behind the Coastal Commission's building restriction.²⁸⁶ In the Court's discussion of the permit, it explained that exactions are not voluntary exchanges.²⁸⁷ Justice Scalia emphasized that unless exactions have a clear nexus, they are not "valid regulations of land use but 'an out-and-out plan of extortion.'"²⁸⁸

In dissent, Justice Brennan asserted that the Nollans voluntarily exchanged an easement for the right to build on their land. He analogized the Nollans' situation to that of the pesticide manufacturers in *Ruckelshaus v. Monsanto Co.*²⁸⁹ In that case, Monsanto voluntarily exchanged confidential data for the economic advantages of pesticide registration. The majority in *Nollan* agreed that *Monsanto* involved a voluntary exchange, but asserted that *Nollan* did not. Justice Scalia does not describe why he views the *Nollan* exaction as involuntary.²⁹⁰ Later cases have not taken on this discussion nor have they sought to define "voluntary." However, subsequent scholarly writings have accepted Justice Scalia's framework and described exactions as involuntary.²⁹¹

283. *Id.*

284. 483 U.S. 825, 834 n.2 (1987).

285. *Id.* at 827.

286. *Id.* at 837.

287. *Id.* at 833 n.2 ("[T]he announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing [a] voluntary 'exchange . . .'" (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984))).

288. *Id.* at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

289. 467 U.S. 986 (1984).

290. As least one scholar has called the *Nollan* Court's characterization of exactions as involuntary, "a radical reconception" of exactions. Kayden, *supra* note 273, at 37.

291. See, e.g., Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 DENV. U. L. REV. 893, 903-04 (1995). In describing the exactment at issue in *Nollan*, Laitos notes that "[s]ince the permit-for-a-right exchange was involuntary, and since the government had a

Regardless of one's view of the voluntary nature of exactions, it is clear that exacted conservation easements are not driven by the same factors as traditional conservation easements. Studies of landowner motivation for establishing conservation easements show that environmental values and a desire to preserve the landscape are the chief reasons for creating conservation easements.²⁹² A desire to develop or change the land runs directly counter to these foundational justifications. Although a transaction may be a willing one, the exacted conservation easements are created because someone else is dictating the activities of the landowner/developer.

2. Exacted Conservation Easements Always Operate Under a Larger Regulatory Structure

Exacted conservation easements, unlike traditional conservation easements, always link to another law. This may be a local law, like a zoning ordinance; a state law, like California's Environmental Quality Act; or a federal law, like the Endangered Species Act. Donated and sold conservation easements do not necessarily have these ties. Decisions regarding their management and enforcement do not necessarily extend into larger schemes of regulation and conservation. When conservation easements are exacted however, they carry out the purposes of a regulatory scheme. This link between exacted conservation easements and regulatory schemes changes the character of conservation easement management and enforcement. Conservation-minded citizens and policymakers may be more interested in these conservation easements, how they look, and how they function because of this interaction. Government entities are now using this tool to meet larger conservation goals like clean water and habitat protection. It is important that these tools work towards achieving these important goals by being both viable and enforceable.

3. Exacted Conservation Easements May Not Need to Adhere to State Conservation Easement Statutes

When federal agencies exact conservation easements, they want to be sure that the exacted conservation easements meet the needs of the federal law that they are being created in conjunction with. Unfortunately, agencies are not always as careful about making sure the conservation easements follow state property law.²⁹³ For example, if the

monopoly on the supply of permits, there was no real consent to the waiver of the right." *Id.*

292. ELCONIN & LUZADIS, *supra* note 217, at 9.

293. For example, I have heard anecdotal evidence that attorneys who negotiate federal permits do so based on federal goals and schemes. This seems to include crafting perpetual conservation easements as a matter of course without looking to whether that perpetuity element makes the conservation easement invalid

FWS exacts conservation easements as part of a Habitat Conservation Plan, it will generally want to ensure that those exacted conservation easements adequately protect endangered species habitat. The goal of those conservation easements should be to protect the land in a stringent enough manner and for a long enough time to help continue the long-term viability of the species in question. This may mean that the FWS will want to negotiate perpetual conservation easements, or perhaps restrict recreational access to the parcel in question. It also seems likely that the FWS would want to prevent mining in sensitive habitats. Unfortunately, state statutes regarding conservation easements may directly conflict with these goals. The question then becomes what the FWS does when state conservation easement statutes directly conflict with the goals or desires of federal environmental laws using conservation easements.

It may not be necessary for exacted conservation easements based on a federal scheme to follow state statutes. Unfortunately, the case law addressing this issue is minimal and not very clear. In *United States v. Albrecht*,²⁹⁴ the Eighth Circuit held that conservation easements negotiated and held by the FWS did not have to conform to state law because they were part of a federal scheme. The conservation easements at issue were created under the Migratory Bird Hunting Stamp Act (the "Duck Stamp Act"). The Duck Stamp Act authorizes the FWS to hold partial interests in land to protect the habitat of migratory birds.²⁹⁵ Based on that authorization, the FWS purchased conservation easements over prairie potholes and other types of wetlands throughout the Midwest. The Albrechts acquired fee title to land encumbered by a waterfowl management easement.²⁹⁶ Although they were not originally party to the easement agreement, they had actual and constructive notice of the restrictions when they took ownership.²⁹⁷ The restriction, entitled an "Easement for Waterfowl Management Rights," prohibited draining and permitting draining of designated waterfowl protection areas. Essentially, prairie potholes on the Albrechts' land would fill with water and serve as

under state conservation easement statutes. This would not necessarily mean that the instrument is unenforceable or nontransferable, it simply means that the state conservation easement statute cannot serve as a basis for enforcing the law. Instead, to enforce such agreements one would have to look to state statutes regarding easements, equitable servitudes, and restrictive covenants. If there are no statutes in these areas because these are traditionally common law realms, then one would look to state common law to see if the servitude is enforceable.

294. 496 F.2d 906 (5th Cir. 1974).

295. 16 U.S.C. § 718d(c) (2005) (authorizing the Secretary of the Interior to acquire "small wetland and pothole areas [and] interests therein" for the purpose of protecting bird habitats).

296. *Albrecht*, 496 F.2d at 908.

297. *Id.*

habitat for migratory birds. At some point, these potholes were drained²⁹⁸ thereby robbing them of significance as meaningful waterfowl habitat.²⁹⁹

The Albrechts argued the waterfowl easement was invalid because it was not specifically allowed under North Dakota law.³⁰⁰ The court characterized the restriction as “an easement in gross for the benefit of the United States and to run indefinitely”³⁰¹ Despite this designation however, the court felt that determining the appropriate label for the restriction was “immaterial.”³⁰² The court did not concern itself with the state law questions, and thus did not determine whether North Dakota law does indeed permit only statutorily defined rights in land, nor did it determine whether North Dakota servitude law prohibited the specific agreement in question. Instead, the court concluded that federal law applied because it believed that where state law is “aberrant” or “hostile” to federal property rights, it is not controlling.³⁰³ The Eighth Circuit found it unnecessary to explore the state law questions because if they were at all hostile to the federal property rights in the waterfowl easement, they would not have precluded the conveyance of the disputed property right. The court stated:

We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right. To hold otherwise would be to permit the possibility that states could rely on local property laws to defeat the acquisition of reasonable rights to their citizens’ pursuant to 16 U.S.C. § 718d(c) and to destroy a national program of acquiring property to aid in the breeding of migratory birds. We, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein. Section 718d(c) specifically allows the United States to acquire wetland and pothole areas and the interests therein.³⁰⁴

298. *Id.* at 909. The use of passive voice here is purposeful. Many of the potholes in the region had been drained via an excavated drainage ditch running through multiple properties. The FWS was unable to determine who had created this ditch and did not accuse the Albrechts of causing the drainage. However, the easement not only prohibits draining the waterfowl habitat, but also says that the landowner cannot permit draining.

299. *Id.*

300. *Id.* Although North Dakota law may not specifically allow such an easement, it is not clear if it is specifically forbidden. The Albrechts argued that North Dakota law only permits statutorily established rights. The Eighth Circuit did not rule on whether this was an accurate interpretation of state law.

301. *Id.* at 910.

302. *Id.*

303. *Id.*

304. *Id.*

The Supreme Court of the United States has supported the idea that federally negotiated conservation easements do not need to adhere to state law. In *North Dakota v. United States*,³⁰⁵ the Court assessed the validity of a North Dakota law limiting the FWS' ability to negotiate desired waterfowl easements. Congress amended the Duck Stamp Act in 1958 to enable the FWS to acquire partial interests in land such as the waterfowl easement at issue in *Albrecht*. Although North Dakota originally consented to this process, hostility toward the federal government led the North Dakota legislature to pass a law restricting these easements in 1977.³⁰⁶

The law established three restrictions. First, it required the governor to submit proposed wetland acquisition for approval by the board in the county where the wetland is located. Associated with this approval, both the FWS and the county (with funding from FWS) must provide a "detailed impact analysis." If the county does not approve the acquisition, the governor cannot approve it. Second, the statute authorized landowners to negotiate easement terms, specifically enabling owners to restrict the duration of the easement. Further, the statute permits landowners to "drain any after-expanded wetlands or water area in excess of the legal description."³⁰⁷ Third, the statute restricted the easements to a maximum term of ninety-nine years.³⁰⁸ These rules essentially prevented the FWS from acquiring any interests in wetlands post 1977.

The FWS sought declaratory judgment that North Dakota's statute was invalid because it was hostile to federal law.³⁰⁹ The Supreme Court held that North Dakota could not restrict the federal government's ability to acquire easements and prohibited the North Dakota legislature from placing any restrictions on acquisition that directly conflict with federal goals.³¹⁰ Essentially, the federally negotiated and held easements conflicted with the state law. But, the state law was preempted by the federal law because it directly conflicted with it. Significantly, the Court based its analysis on the fact that the governor of North Dakota had consented to the federal government's ability to acquire easements. The governor's attempt to withdraw consent and the North Dakota Legislature's attempt to limit the easement agreements were invalid. Where state and federal law conflict, federal law takes precedence.³¹¹ This bodes well for exacted conservation easements.

305. 460 U.S. 300 (1983).

306. N.D. CENT. CODE §§ 20.1-02-18.1 to -18.2 (1978), as amended by 1979 N.D. Laws ch. 553 § 11.

307. *Id.*

308. N.D. CENT. CODE § 47-05-02.1.

309. *North Dakota*, 460 U.S. at 309.

310. *Id.* at 319.

311. This principle arises out of the Supremacy Clause of the Constitution, which provides: "This Constitution, and the laws of the United States which shall be made

One could draw upon the theories from *Albrecht* and *North Dakota* to argue that federally negotiated exacted conservation easements that conflict with state law should nonetheless be valid agreements.³¹² However, the argument may not be persuasive without the two elements that unify these cases. First, the Duck Stamp Act specifically mentions and authorizes partial interests in land.³¹³ Second, these easements not only arose under a federal program, but they were held by the federal government. Other federal statutes involved in conservation easement exaction do not generally even mention conservation easements. The first references to conservation easements are usually in the regulations, and sometimes, they are not even mentioned there. Under the Endangered Species Act, for example, conservation easements do not appear in the statute or the regulations. They are not mentioned until regulatory guidance in the form of the HCP Handbook, issued in 1996. It is difficult to argue that such conservation easements preempt state law when the federal statutes themselves do not discuss conservation easements. The Duck Stamp Act is one of the few laws that specifically authorizes partial interests in land. This specific mention of partial interest in land in the Duck Stamp Act may be enough to preempt state law.³¹⁴

Also persuasive, however, is the fact that the federal government held the conservation easements at issue.³¹⁵ Thus, the Property Clause of the Constitution came into play. The federal government's rights as an owner are different from those of ordinary proprietors.³¹⁶ Unfortunately, the language of the decision is not clear enough to determine what would happen if the federal government were not the holder but the conservation easements were based on a federal

in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

312. See also *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) (holding that state mining law did not apply to reservations agreed to by the United States).

313. See *supra* note 298.

314. Accord U.S. Army Legal Servs. Agency, *USALSA Report: Environmental Law Division Notes: Land Use Control and Federal Common Law in Real Property Transfers*, 2000 ARMY LAW. 43 (2000) (endorsing the idea that these cases may provide some basis for allowing federally held conservation easements that conflict with state law, but cautioning against relying on this argument in absence of a federal law specifically mentioning partial interest in land).

315. This conclusion is supported by the Eighth Circuit in *United States v. Johansen*, 93 F.3d 459, 463 (8th Cir. 1996) ("State law will generally govern the interpretation of a real property conveyance instrument . . . so long as it is neither aberrant nor hostile to federal property rights." (citing *Little Lake Misere Land Co.*, 412 U.S. at 591-96)).

316. Richard H. Cowart & Sally K. Fairfax, *Public Lands Federalism: Judicial Theory and Administrative Reality*, 15 *ECOLOGY L.Q.* 375 (1988).

scheme. There is a good argument that any conservation easements negotiated under a federal scheme may conflict with state law if the conflict is necessary to meet the goals of the federal statute involved. This follows the reasoning of the doctrine of conflict preemption.

Conservation easements exacted under state laws may also be able to escape adherence to state property laws based on their status as exactions. This will vary by state. Thus, we see that traditional conservation easements and exacted conservation easements differ in a few key aspects. First, they stem from very different justifications. Second, exacted conservation easements *always* arise in a larger regulatory context. There is an undeniable intersection with exacted conservation easements and environmental and land-use laws. Traditional conservation easements may grow out of a regulatory framework also. Indeed, they may operate directly in support of environmental law goals. However, they do not necessarily do so. It is not a requirement for a traditional conservation easement as it is for exacted conservation easements. Finally, exacted conservation easements do not always adhere to state conservation easement laws. Drafters of exacted conservation easements may be more focused on meeting the goals of the underlying land-use regulation than satisfying state property law requirements. Further, where the underlying law is a federal one, there is a tenuous argument that the exacted conservation easements need not conform to state law in order to be enforceable. These key differences heighten enforceability and enforcement concerns. The difference in motivation may mean that landowners are not as keen to make sure the agreements stay in place and are adhered to. The involvement of the regulatory structure argues for heightened public interest in enforcement because exacted conservation easements represent public programs. Finally, the intersection between exacted conservation easements and state conservation easement laws may trigger enforceability concerns. When exacted conservation easements do not adhere either to state conservation easement laws or to other state property law, their enforceability is less certain. Even where based on federal law, the circumstances where exacted conservation easements can defy state law appear limited. Thus, these differences between traditional conservation easements and exacted conservation easements lead directly to significant concerns with the tool.

VI. CONCLUSION

If conservation easements are voluntary, private agreements made by groups or individuals seeking to protect land outside of a governmental context, *exacted* conservation easements are the opposite. Exacted conservation easements do not arise out of personal motivations to protect land or conserve species. Exacted conservation easements

do not result in charitable tax deductions. Instead, exacted conservation easements are a government tool—negotiated and often held by government entities. They are not entered into willingly; landowners are coerced into creating or contributing to these conservation easements.

As we can see, the differences between conservation easements and exacted conservation easements means that exacted conservation easements do not further the goals that served as the basis for the emergence of conservation easements. Exacted conservation easements do not generally represent freedom of contract because they are direct outgrowths of environmental and land-use regulation. There is heavy government involvement in the creation of exacted conservation easements. Exacted conservation easements further the goals of federal environmental statutes. These are the very statutes that were seen as dissatisfying and overly intrusive by the original champions of conservation easements. Conservation easements were a tool used to avoid federal regulation. Now, the tool is an aspect of federal regulation. Many of the reasons why state legislatures created conservation easements statutes and why their use proliferated are in exact opposition to the basis of exacted conservation easements.

If, as I argue above, conservation easements have emerged as a popular tool in part because of the desirability of private tools to conserve land, exacted conservation easements directly conflict with that sentiment. Do people want conservation easements because they believe that individuals should be able to make private agreements in perpetuity regarding their land? Because conservation easements represent agreements between private individuals where government need not interfere? If so, then owners would not like exacted conservation easements. If, however, conservation easements are merely an acknowledgement of property being a series of rights that can be held by different parties, then exacted conservation easements make sense. They are not private agreement but public agreements.

One of the most disruptive elements of the difference between exacted conservation easements and more traditional conservation easements is the fact that conservation easements are being exacted without examining these differences. There is a sharp interplay here between freedom of contract and property rights that has gone unstudied. Many different groups favored conservation easements and their use extended into different areas without consideration of whether that extension was appropriate. Conservation easement statutes did not contemplate these exactions, and state legislators largely did not discuss the implications. Governments are using this traditional tool in a new way extensively throughout the country, without consideration of the appropriateness or long-term viability of the resulting agreements.