

## Regulating Versus Paying Land Owners to Protect the Environment

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*The basic problem is to induce the private landowner to conserve on his land, and no conceivable millions or billions for public land purchase can alter that fact, nor the fact that so far he hasn't done it.*

Aldo Leopold<sup>1</sup>

Should we protect the ecological, open space, aesthetic and many other public values of private lands by restricting uses of land through regulation? Or should we pursue these objectives by paying owners who volunteer to place restrictions on their land? Or should we use both of these approaches in tandem, perhaps to address different challenges, in different circumstances or in different locations? If the latter, how should these different approaches be coordinated to avoid potential conflicts between them and improve the overall effectiveness of U.S. protection efforts?

These rank among the most fundamental and pressing questions in U.S. land use policy. A handful of thoughtful scholars have begun to explore this difficult topic.<sup>2</sup> But policymakers and advocates have largely failed to address these questions.<sup>3</sup> In practice, different government officials and conservation

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<sup>1</sup> Unpublished, undated fragment, Aldo Leopold Papers, University of Wisconsin Archives Series 10-6, Box 16.

<sup>2</sup> Professor Barton H. Thompson, Jr. has been a leader in conducting critical examinations of alternative approaches to environmental management. See Barton H. Thompson, Jr. *Conservation Options: Toward a Greater Public Role*, 21 VA. ENVTL. L.J. 245 (2002); *Providing Biodiversity Through Policy Diversity*, 38 IDAHO L. REV. 355 (2002); *The Trouble With Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601 (2004). Other thoughtful academics have also weighed in on the issue. See, e.g., Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat*, 38 IDAHO L. REV. 431 (2002); Nancy McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005); *The Role of Land Trusts in Biodiversity Conservation of Private Lands*, 38 IDAHO L. REV. 453 (2002); Leigh Raymond & Sally K. Fairfax, *The 'Shift to Privatization' in Land Conservation: A Cautionary Essay*, 42 NAT. RESOURCES J. 599 (2002); James Salzman, *Creating Markets for Ecosystem Services*, 80 N.Y.U. L. REV. 870 (2005).

<sup>3</sup> *But see* Samuel Hammill & Chris Sturm, *Smart Conservation: The 'Green' Side of Smart Growth* (New Jersey Future, Trenton, N.J.) Apr. 2003, <http://www.njfuture.org/index.cfm> (follow "Resources" hyperlink; then follow "Publications" hyperlink; then follow "Research Reports" hyperlink; then follow "Smart Conservation (April 2003)" hyperlink) (noting that "depending as much as we do on compensable programs for resource conservation, we risk undermining the potential of growth management measures and thus become the unwitting accomplice of the property rights movement.").

advocates tend to embrace one approach or the other, and supporters of each approach can be seen as engaging in a kind of friendly, and sometimes not so friendly, rivalry.<sup>4</sup> However, there has been little discussion among practitioners about whether one approach is superior to the other under certain circumstances, or how use of one approach might interact with the other. The primary purpose of this paper is to generate more public debate about these questions.

As the discussion that follows will show, weighing the pros and cons of these different approaches is a complex task that, so far at least, fails to produce pat answers. Nonetheless, this paper draws a cautionary conclusion about the long-term utility of the voluntary, publicly-financed approach to land protection, especially the use of conservation easements. Thus, in contrast with most of the other scholarship in this area, this paper presents a frankly skeptical perspective on what is arguably the most popular approach to land protection in the U.S. today. In particular, this paper raises the concern that widespread use of the voluntary, publicly-financed approach to conservation may undermine the viability of the regulatory approach. At worst, widespread use of the voluntary approach may have the ironic and unfortunate effect of setting back the cause of environmental protection itself by making it more difficult and expensive to protect the environment.

The first section of the paper offers some historical perspective by providing a thumbnail sketch of the recent evolution in U.S. practice and thinking on private land conservation. The next section lays out each of the major options (including some sub-options) for pursuing private land protection. The third section discusses how and to what extent the Takings Clause of the U.S. Constitution limits the policy options available. The fourth and fifth sections analyze the relative efficiency and fairness of the regulatory and voluntary approaches. The sixth section offers some observations on how well each approach succeeds in promoting transparent and publicly accountable government. The final section focuses on the question of whether widespread use of the voluntary approach, including easements, may have the long-term effect of undermining government's ability to regulate, not only as a practical matter but perhaps as a legal matter as well. The paper closes with a brief conclusion, including some recommendations on how to begin to think about minimizing conflicts between the different approaches to conservation.

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<sup>4</sup> Patrick Noonan, the former President of the Conservation Fund, has amused audiences for years with the story of his response to an environmental activist who complained about the use of 'tainted' money to buy conservation lands: "T'ain't enough!"

## I. THE NOT SO QUIET COUNTER-REVOLUTION IN LAND USE CONTROLS

In only a few decades, the philosophical premises and practical operations of land protection programs in the U.S. have undergone radical change. Some perspective on the recent evolution of our nation's approach to private land conservation will help lay the foundation for the subsequent analysis of the alternative approaches that are available.

Thirty-five years ago, the U.S. Council of Environmental Quality, under the leadership of Republican Russell Train, published two path-breaking reports, *The Taking Issue*,<sup>5</sup> and *The Quiet Revolution in Land Use Controls*.<sup>6</sup> The first report argued that the Takings Clause of the U.S. Constitution, properly interpreted in light of legal precedent and constitutional history, should not be an obstacle to far-reaching regulatory programs to protect the environment. The second report documented the then-burgeoning efforts at the state and local levels to enact programs expanding land use planning and regulation. While they were published to significant applause, the publication of these reports turned out to mark, not the beginning, but the zenith, of the U.S.'s commitment to using regulations to address land use problems.

The early 1970s saw the enactment of many far-reaching regulatory measures at the federal, state, and local levels. At the national level, the legislation that launched the nation's modern program of land and resource conservation, including the wetlands provision of the Clean Water Act,<sup>7</sup> the Endangered Species Act,<sup>8</sup> and the Coastal Zone Management Act,<sup>9</sup> were primarily regulatory in nature. Similarly, at the state level, such measures as the 1973 Oregon Senate Bill 100<sup>10</sup> and the 1971 Adirondack Park Agency Act,<sup>11</sup> also used the regulatory approach. All of these laws remain in place today and, generally speaking, continue to be effective in protecting significant land resources. However, contrary to widespread expectations at the time, they did not succeed in stimulating the adoption of a large number of other, equally far-reaching regulatory programs.

This reversal was the result, in significant part, of the rise of a substantial and vociferous property rights movement. The movement drew its principal intellectual inspiration from the writings of Professor Richard Epstein of the

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<sup>5</sup> Fred P. Bosselman, David Callies & John Banta, *The Taking Issue: A Study of the Constitutional Limits of Governmental Authorities to Regulate the Use of Privately-Owned Land without Paying Compensation to the Owners* (U.S. Council on Env'tl. Quality, 1973).

<sup>6</sup> Fred P. Bosselman & David Callies, *The Quiet Revolution in Land Use Controls* (U.S. Council on Env'tl. Quality, 1971).

<sup>7</sup> 33 U.S.C. § 1344 (2000).

<sup>8</sup> 16 U.S.C. §§ 1531-44 (2000).

<sup>9</sup> 16 U.S.C. §§ 1451-65 (2000).

<sup>10</sup> Senate Bill 100, 1973 Or. Laws 57, available at <http://www.oregon.gov/LCD/docs/bills/sb100.pdf>.

<sup>11</sup> Adirondack Park Agency Act, N. Y. EXEC. LAW §§ 800-20 (McKinney 2006).

University of Chicago School of Law.<sup>12</sup> In a remarkably successful “reframing” of the environmental debate, the property rights movement converted negative opposition to environmental and community protections into an affirmative campaign on behalf of personal liberties grounded in property ownership. Takings advocates have focused, with only limited success, on persuading the courts to adopt more expansive interpretations of the Takings Clause and, with somewhat greater success, on attempting to obtain enactment of legislative measures codifying the takings agenda.<sup>13</sup> However, the greatest success of the property rights movement has been indirect: creating a political environment that makes it difficult to advocate for, and even more difficult to enact, meaningful new regulatory programs.

Simultaneously with the rise of the property rights movement, the 1980s and 1990s witnessed the rise of the alternative approach of paying volunteers to protect the environment. The Nature Conservancy emerged as the largest and arguably most successful national conservation group. The Land Trust Alliance and the Conservation Fund encouraged the creation of hundreds of local and regional private land trusts around the country. One of the most important catalysts in the creation of the land trust movement was the addition of new provisions to the Internal Revenue Code, made permanent in 1980, allowing land owners to take tax deductions for gifts of easements to charitable institutions.<sup>14</sup> At the same, the land trust movement gained strength from the frustrations that conservationists frequently encountered in their efforts to expand, and sometimes even merely defend, regulatory programs.

The future direction of U.S. land use policy is difficult to predict. It remains to be seen whether the current, pervasive political hostility to the regulatory approach represents a long-term shift in thinking. Proponents of the voluntary approach, despite its recent popularity, face daunting challenges as they attempt to use this tool, originally championed by The Nature Conservancy as a way of conserving a limited set of biological “hot spots,” to protect large ecosystems and control urban sprawl. In the 1990s a seemingly inexhaustible supply of public and private dollars fueled enthusiasm for the voluntary approach; strained federal and state government budgets, and rapidly increasing land prices, have raised new questions about the limits of this approach. Finally, public skepticism about easements has been heightened by a series of articles in *The Washington Post* exposing egregious over-valuations of tax deductible land donations of questionable public value.<sup>15</sup> This series

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<sup>12</sup> RICHARD EPSTEIN, *PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

<sup>13</sup> See John D. Echeverria, *From a Darkling Plain to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 7 VT. J. ENVTL. L. (forthcoming 2006).

<sup>14</sup> See Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 10–18 (2004) (describing the evolution of the federal tax treatment of land donations).

<sup>15</sup> Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation: Donors Reap Tax Incentive by Giving to Land Trusts, but Critics Fear Abuse of System*, WASH. POST, Dec. 21, 2003, at A1.

prompted several congressional investigations,<sup>16</sup> and proposals for legislative reform,<sup>17</sup> the outcomes of which remain to be revealed.

## II. THE ALTERNATIVE APPROACHES TO LAND CONSERVATION

Defining the alternative approaches to private land protection immediately breaks down into two distinct issues.<sup>18</sup> One issue is whether the government pays land owners to advance environmental protection on private lands. The other issue is who decides what restrictions apply and where. As I shall explain, these two issues serve to categorize most of the current land protection programs operating in the U.S. today.

On the “who decides” axis, there are three basic alternatives: government unilaterally, owner unilaterally, and government and owner jointly. On the whether government pays axis, there are two alternatives: yes or no. These alternatives generate six basic models for the protection of land, depicted in the matrix set out below. To lay a clear foundation for the analysis that follows, it will be useful to describe briefly each of these options and provide a few examples of each approach. As I will explain, the lines between these categories are not completely distinct. Nonetheless, this matrix provides a conceptually useful breakdown of the potential alternatives.

### A. *Government Decides/Government Pays*

The first option is unilateral government decision making about what lands to protect, with government paying owners whose lands are protected. The most familiar example of this option is eminent domain, under which the government “takes” private property in exchange for payment of “just compensation.” The decision whether to exercise eminent domain is typically

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<sup>16</sup> See Committee on Finance, U.S. Senate, Report of Staff Investigation of the Nature Conservancy (June 2005) available at <http://finance.senate.gov/sitepages/TNC%20Region.htm>; Hearing to Review the Tax Deduction for Façade Easements: Hearing Before the Subcomm. on Oversight, Ways and Means Committee, 109th Cong. (June 23, 2005) available at <http://waysandmeans.house.gov/hearings.asp?formode=detail&hearing=426> (last visited Apr. 14, 2006).

<sup>17</sup> See Joint Committee on Taxation, Options to Improve Tax Compliance and Reform Tax Expenditures (Jan. 27, 2005) available at <http://www.house.gov/jct/S-2-05.pdf>.

<sup>18</sup> I am indebted to Professor Barton Thompson for this insight. See Thompson, *Conservation Options*, *supra* note 2, at 245, 270. However, Professor Thompson frames the choices somewhat differently than I do. He describes the “who pays issue” as a choice between an implicit government tax on land owners through regulation or government financing of conservation. I prefer to describe the choice as simply one between government paying or not paying, without making any assumption about how regulations affects land owners. Also, we describe the “who decides” issue somewhat differently. For example, Professor Thompson posits that leaving conservation decisions to the private sector, with no public financial subsidy, suggests the novel idea of government delegating its regulatory authority to the private sector. I believe that leaving conservation decisions to the private sector, with no public subsidy, is more naturally understood to refer to so-called “free market environmentalism,” the idea that citizens can achieve effective community conservation entirely through private transactions without government involvement.

made by elected public officials, such as members of a city council, or their appointees, such as heads of federal or state resource agencies.

In practice, the eminent domain power is rarely invoked for conservation purposes. A recent, widely publicized example involved acquisition of a key parcel to support restoration of the Florida Everglades.<sup>19</sup> But the conservation community's most recent, major land acquisition initiative in Congress, the proposed Conservation and Reinvestment Act,<sup>20</sup> eschewed reliance on eminent domain. It is not immediately obvious why the eminent domain power should be used relatively infrequently to advance conservation goals. Though rarely non-controversial, use of eminent domain to build roads and utility projects, for example, is well established and generally accepted. Holdouts can just as effectively interfere with implementation of a valuable conservation project as with construction of a new utility corridor. Indeed, the growing emphasis on ecosystem and landscape-level management arguably makes the use of eminent domain as much a practical necessity to advance conservation goals as it is to advance other public goals. The infrequent use of eminent domain for conservation purposes is probably best explained by the relative political weakness of the conservation lobby. It is obviously easier, in political terms, to get land conservation projects funded with the support of a landowner who has agreed to sell at a price acceptable to her than when the property is being acquired over the owner's opposition.

		Does the Public Pay?	
		YES	No
Who Decides?	GOVERNMENT	Eminent Domain	Regulation
	GOVERNMENT/ PRIVATE OWNER	Government purchases from "willing sellers"	"Zoning by petition"
	PRIVATE OWNER	Tax deductions and other public subsidies	"Free market environmentalism"

Another tool that falls into this category is transferable development rights (TDRs), where owners subject to government regulation are granted the option of exercising, or selling the right to exercise, development opportunities at

<sup>19</sup> *Fla. Man Accepts Check for Land Needed for Restoration Project*, GREENWIRE, July 6, 2005.

<sup>20</sup> Conservation and Reinvestment Act of 2000, H.R. 701, 106th Cong. (2000).

some location separate from their restricted land. The use of TDRs is generally not designed to be equivalent to constitutional “just compensation.” But it fits this general category because TDRs involve a government mandate accompanied by a type of payment. To date, TDR programs have been deployed fairly sparingly, apparently due to their administrative complexity.<sup>21</sup>

### *B. Joint Government and Landowner Decision/Government Pays*

The second option is joint decision making about what property to conserve by the government and private owners, with the public again making financial payments to the owners. Under this willing seller approach to land acquisition, the government deals with a private landowner in the same fashion that a private purchaser would. Government officials may take the initiative and identify the specific property they wish to conserve, but success in placing restrictions on the land depends on the agreement of a private owner. Government may negotiate with the owner to acquire fee simple interests or partial and/or temporary interests, such as easements or leases. This approach has been used frequently, for example, to make additions to units of the National Park System and the National Wildlife Refuge System. Because the transaction is consensual, the Constitution’s “just compensation” standard does not, strictly speaking, apply. Nevertheless, as a matter of policy, regulations governing property acquisitions commonly mandate use of the same “fair market” standard used in eminent domain proceedings. Funding for this approach is available at the federal, state and (sometimes) local levels. It is sometimes supported by direct legislative appropriations, sometimes by other means, such as ballot initiatives. Much of the land conservation activity of groups such as the Trust for Public Lands or the Conservation Fund is properly included under this option. Although these private groups may take the initiative in identifying lands for protection in the first instance, the success of most of their land projects ultimately depends on persuading government officials to embrace, finance, and ultimately take over the projects. Thus, while these groups are in a sense advocates before government, they also can be viewed as acting as agents for the government.

### *C. Landowner Decides/Government Pays*

The third option is unilateral, land owner decision making, accompanied by public payment. The most familiar example is the donation of a conservation easement to a charitable organization in exchange for a tax deduction. While the Internal Revenue Service has established broad standards

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<sup>21</sup> See Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 455 (1998).

for tax deductible donations, in practice virtually any type of donation is acceptable so long as it serves an arguable conservation purpose. Thus, the choice about what land to protect is, for all intents and purposes, delegated to private owners.<sup>22</sup> The benefit of a tax deduction, at least in principle, is less than the value of the charitable donation itself. But because the government exercises only loose oversight over the valuations used by land donors, there have been substantial abuses of the tax system, with the result that the values assigned to donated interests sometimes match or even exceed any plausible estimate of the fair market values of the interests.<sup>23</sup> Some of the farm conservation programs, such as the Conservation Reserve program, also provide for public payments to land owners while largely delegating the choice about what lands to protect to private owners.

#### *D. Government Decides/Public Does Not Pay*

The fourth option is government unilaterally deciding what to protect, but not paying the affected owners. This approach involves use of the traditional state police power (often delegated, either in gross or piecemeal, to local governments) or federal regulations under the Constitution's enumerated powers (often, the Commerce Clause). It includes zoning and subdivision controls, critical area protections, historic landmark designations, historic district ordinances, and other similar laws and regulations. Regulatory restrictions are generally adopted by, or established under the direction of, legislators or other elected officials who are politically accountable to citizens within the relevant jurisdiction. Under this approach, government chooses what lands to protect and in what fashion, and it may also reverse or amend the restrictions. While regulations typically do not provide for paying land owners, regulatory restrictions may be complemented by other measures that provide some type of public financial support, such as reductions in tax levels for restricted lands. Of course, all regulations are subject to challenge under the federal Takings Clause (and comparable state provisions). Thus, even if government officials may intend that a regulation not be accompanied by financial payment, the courts may, in the case of a severely restrictive regulation, require payment of compensation under the Constitution. In that

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<sup>22</sup> Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10226 (2004) ("While the government supports such transactions through tax incentives and the enforcing power of the courts, the level of control exercised by the government—through the restrictions and requirements in the easement-enabling statutes and the tax laws—is very general when compared to the controls imposed by traditional environmental regulations.").

<sup>23</sup> The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform: Hearing before the S. Comm. on Finance, 109th Cong. (June 8, 2005) (statement of Burnett R. Maybank III, Director, S.C. Dep't. of Finance), available at <http://www.finance.senate.gov/hearings/testimony/2005test/bmtest060805.pdf> (last visited Apr. 14, 2006).

event, government officials have the option of paying and continuing to enforce the regulatory program or (more likely) abandoning implementation of the program.

*E. Joint Government and Landowner  
Decision/Government Does Not Pay*

The fifth option, which apparently offers the fewest real world examples, involves the joint selection of conserved lands by the government and the public, with the government making no payment. One example of this approach is “zoning by petition” as practiced in the State of Montana.<sup>24</sup> Under this approach a super-majority of land owners within a county may voluntarily form a zoning district subjecting themselves to restrictions of their choosing. The land owners must petition for approval of their zoning proposal by the county, which evaluates, among other things, the consistency of the proposal with the county plan. This approach has been quite successful in establishing quite strong land use restrictions in certain parts of the state.<sup>25</sup>

*F. Landowner Decides/Government Does Not Pay*

The final option involves no government mandate and no government payment. Advocates of this “free market” approach to conservation, for example the libertarian Property and Environment Research Center,<sup>26</sup> contend that conservation should be left entirely to the operations of the private market. According to this view, government has no legitimate role to play in deciding how land should be allocated between conservation and development. Instead, if individuals or groups of citizens value dedicating land to conservation purposes, they should negotiate private conservation agreements with each other. Decisions about what to protect would be entirely private, and private transfer payments would be the norm. Ultimately, this model rests on faith in the capacity of the free market to allocate goods efficiently and maximize total public welfare. In its purest form, this approach rejects both regulation and taxpayer-financed acquisitions as fraught with special interest politics that risk delivering far more (or less) land protection than society really needs.<sup>27</sup>

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<sup>24</sup> MONT. CODE ANN. § 76-2-101 to 117 (2004).

<sup>25</sup> Tim Davis, *Zoning Is Only Real Protection*, HEADWATERS NEWS, Jan. 2004, available at <http://www.headwatersnews.org/012004davis.html> (last visited Apr. 14, 2006).

<sup>26</sup> See Prop. & Env't Research Ctr., *What is PERC?*, available at <http://www.perc.org/about.php?id=700> (last visited Mar. 30, 2006).

<sup>27</sup> Free market environmentalists have not necessarily been entirely consistent in their application of free market principles. Thus, in a letter to *The Washington Post* Terry Anderson objected to congressional reform efforts that would limit tax deductions for conservation easements. Jon Christensen & Terry Anderson, Editorial, *How to Stop Easement Abuses*, WASH. POST, Mar. 17, 2005, at A24.

Examples of this option include private clubs and associations formed to further common conservation (and perhaps other) objectives, such as duck clubs or homeowner associations. In addition, this option includes the purely eleemosynary actions of the (presumably) rare individual who establishes a conservation restriction and seeks no payment from the public.<sup>28</sup> Also arguably included under this option is so-called “commercial conservation,” where a landowner preserves an area in an effort to profit from the natural services supplied by the land, such as water filtration or habitat for commercially remunerative wildlife. Finally, acquisitions by land conservation groups such as the Conservation Fund or the Trust for Public Land also could be placed in this category, when their acquisitions are financed entirely with their own private funds. However, under that scenario the favorable tax treatment for the donations to the groups used to finance the acquisitions effectively makes the general taxpayer at least an indirect participant in the projects.

Also covered by this option, although it might not appear intuitively obvious, are so-called takings compensation measures, such as Measure 37<sup>29</sup> approved by Oregon voters in November 2004, and the Threatened and Endangered Species Recovery Act of 2005,<sup>30</sup> passed by the U.S. House of Representatives on September 29, 2005. On their face, these measures leave regulatory requirements in place, but require the government to pay to enforce the law. But they also authorize government officials to waive otherwise applicable restrictions if funds are not available to make payments. Because the measures provide no actual funding to pay claims, which would be both substantial and unpredictable in amount, the net effect of the measures is to compel government officials to abandon enforcement of the law. In the case of Measure 37, in the year following the measure’s adoption, local governments granted hundreds of waivers but did not make a single “compensation” award.<sup>31</sup> Thus, while seemingly more complicated, these measures, in actual operation, fall neatly into the category of no government payments and no government mandates.

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A comprehensive analysis of alternative strategies for pursuing land protection would address each of the options discussed above. To confine this project to manageable dimensions, I will focus most of my attention in the

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<sup>28</sup> One apparent case in point is Roxanne Quimby, a multi-millionaire business woman who recently used the proceeds from the sale of Burt’s Bees, Inc. to buy tens of thousands of remote forested acres in Maine with the stated goal of banning logging and all but low-intensity recreational uses. See Brian MacQuarrie, *At Loggerheads over Maine Woods Park Idea Collides with Rural Lifestyle*, THE BOSTON GLOBE, Dec. 21, 2003.

<sup>29</sup> 2005 Or. Laws ch. 1, available at [http://www.oregon.gov/LCD/measure37.shtml#Text\\_of\\_the\\_Measure](http://www.oregon.gov/LCD/measure37.shtml#Text_of_the_Measure) (last visited Apr. 14, 2006).

<sup>30</sup> H.R. 3824, 109th Cong. (2005).

<sup>31</sup> See Laura Oppenheimer, *Land-Use Hearing is a Hot Ticket*, THE OREGONIAN, Jan. 11, 2006.

remainder of the paper on the options of traditional regulation and voluntary, publicly-financed acquisitions of land, easements in particular. These two options helpfully frame the contemporary debate about land conservation strategies. Both efforts seek to achieve a balance between protection and appropriate development. They also represent polar opposites in terms of both “who decides” and “who pays.” Finally, they are the two most widespread approaches to private land conservation in the U.S. today. Nonetheless, while focusing on these two alternatives, it will be useful to keep in mind the full range of options available. At the conclusion of this paper, I will briefly suggest how in certain circumstances the alternative approaches might be superior to either regulation or easements.

One more variable deserves brief mention: time. Land use restrictions, whether established by regulation or on a voluntary basis, can be designed to be either indefinite in duration or to last for a specified period. Development moratoria are the classic example of time-limited regulations. Some voluntary conservation program, such as the Conservation Reserve Program administered by the U.S. Department of Agriculture, rely on term leasing arrangements. Donated easements are sometimes advertised as providing permanent protection, but easements are subject to modification as conditions change. On the other hand, regulations can theoretically be changed at virtually any time, but many regulations have exhibited a remarkable durability.

### III. CONSTITUTIONAL CONSTRAINTS

Before delving into the pros and cons of the different approaches to land protection, it will be useful to discuss what constraints, if any, the Constitution places on the policy choices. In particular, to what extent does the Takings Clause of the U.S. Constitution limit the scope of the regulatory option by requiring the public to pay “just compensation” as a condition of enforcing regulations? Of course, potential liability under the Takings Clause does not literally block government from regulating; the Constitution “does not prohibit the taking of private property, but instead places a condition on the exercise of that power,”<sup>32</sup> payment of financial compensation. However, if regulatory programs were to generate significant, recurring takings awards, the general expectation is that government would be forced to abandon the regulatory option. That, of course, is precisely the goal of some who have advocated an expansive reading of the Takings Clause.<sup>33</sup>

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<sup>32</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

<sup>33</sup> CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 183 (Simon & Schuster 1991) (“Attorney General Meese . . . had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake on federal and state regulation of business and property.”).

After struggling intensively with the meaning of the Takings Clause over several decades, the Supreme Court has arrived, at least temporarily, at a relatively stable, narrow interpretation. In particular, in the landmark cases of *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*,<sup>34</sup> and *Lingle v. Chevron U.S.A.*,<sup>35</sup> the Court greatly clarified the scope of the takings doctrine. In *Tahoe-Sierra* the Court resolved a long-running debate by strongly reaffirming the so-called parcel as a whole rule, reducing the likelihood that most regulations can give rise to viable takings claims. In *Lingle* the Court explained that all of the disparate tests<sup>36</sup> it has laid out for regulatory takings share a “common touchstone.”<sup>37</sup> The basic inquiry in every case is whether the government action is the “functional equivalent” of a classical taking—a direct expropriation of private property or a physical ouster of the owner from possession.<sup>38</sup> In all cases, the focus is on the “severity” of the burden imposed by the regulation.<sup>39</sup>

Even with this new, more unified version of takings doctrine, the Court has not set an explicit threshold of economic impact that will preclude a finding of a taking. Nonetheless, the Court has consistently said that takings recovery is limited to “extreme circumstances,”<sup>40</sup> and most decisions at all levels of the judicial system are consistent with that description. The results in specific Supreme Court cases over the years suggest that “diminutions in value” of over 90% are not necessarily sufficient to establish a taking,<sup>41</sup> and lower federal and state court decisions apply this rule of thumb fairly consistently.<sup>42</sup> A decision by the Colorado Supreme Court accurately summarizes takings precedent as “provid[ing] an avenue of redress [only] for a landowner whose property retains value that is slightly greater than de minimis,” a test reserved for the “truly unusual case.”<sup>43</sup>

More generally, the U.S. Supreme Court has affirmed that the Takings Clause is not intended to be a barrier to comprehensive community planning

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<sup>34</sup> 535 U.S. 302 (2002).

<sup>35</sup> 544 U.S. 528 (2005).

<sup>36</sup> *Id.* (referring to the per se test of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); the per se test of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and the multi-factor test of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985).

<sup>41</sup> *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980) (no taking with an eighty-five percent reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking with a 92.5% diminution in value).

<sup>42</sup> *See, e.g., Walcek v. United States*, 49 Fed. Cl. 248, 271 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir., 2002) (stating that the Court of Federal Claims generally has “relied on diminutions well in excess of 85 percent before finding a regulatory taking.”).

<sup>43</sup> *Animas Valley Sand & Gravel, Inc. v. Board of County Comm'rs of County of La Plata*, 38 P.3d 59, 65–66 (Colo. 2001).

and development controls. In *Tahoe-Sierra*,<sup>44</sup> for example, the Court applauded the regional planning agency's effort to "design a strategy for environmentally sound growth," referring to regulatory restrictions "as an essential tool of successful development" and an appropriate means of avoiding "inefficient and ill-conceived growth."<sup>45</sup> Similarly, in the earlier case of *Dolan v. City of Tigard*,<sup>46</sup> the Court said that "Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization."<sup>47</sup> Consistent with this Supreme Court direction, the lower federal courts have generally rejected takings challenges to growth management laws, wildlife protection rules, historic preservation ordinances, and forest and agricultural zoning districts.

Given the narrowness of regulatory takings doctrine, the choice between using regulatory restrictions and voluntary, publicly-financed easements is largely a matter of policy choice, not constitutional mandate. Except in extreme circumstances, regulatory restrictions will not be held to be takings and can proceed without the need to pay compensation to affected owners.

Furthermore, as suggested above, even if a regulatory program results in modest takings liabilities, there is no reason either in principle or in practice why the regulatory program cannot go forward. Because the Constitution merely requires payment of compensation, there can be no constitutional objection to enforcement of regulation that results in a taking so long as the government is willing to pay the compensation. An occasional takings award, based on rare and extreme circumstances, need not create such an enormous financial burden that it will derail a regulatory program entirely.<sup>48</sup> The impact of taking awards on the viability of regulatory programs will vary a great deal depending on the level of government involved, with the federal government far better able to absorb occasional takings awards than a state or local government.<sup>49</sup>

However, several qualifications must be made to this general conclusion that takings doctrine does not represent a major obstacle to regulatory programs. First, apart from the economic burden imposed by a regulation, the Supreme Court has said that another very important factor in takings analysis is the degree to which the regulation singles out a particular owner to bear a

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<sup>44</sup> 535 U.S. 302.

<sup>45</sup> *Id.* at 339.

<sup>46</sup> 512 U.S. 374 (1994).

<sup>47</sup> *Id.* at 396.

<sup>48</sup> The wetlands provision of the Clean Water Act has generated several successful takings claims. *See, e.g.,* *Cooley v. United States*, 324 F.3d 1297 (Fed. Cir., 2003); *Florida Rock Industries, Inc. v. United States*, 791 F.3d 893 (Fed. Cir. 1986). While these decisions have undoubtedly had some influence on the administration of the wetlands program, they certainly have not resulted in wholesale destruction of the program.

<sup>49</sup> Because of the "adverse selection" problem, takings liabilities are typically uninsured and uninsurable. *See* Lawrence Blume & Daniel J. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 595 (1984).

special burden, or instead applies broadly across the community. When a regulation applies to one or a few owners, there is a greater danger that the government is “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>50</sup> On the other hand, a broadly applicable regulation generally “secure[s] an average reciprocity of advantage,”<sup>51</sup> with the burdens imposed by a regulation counterbalanced by the benefits of enforcement of the same regulation to neighboring properties. The Court has never identified a specific metric for applying this factor, but it is clear that the less comprehensive the regulation the more likely a taking will be found.

Second, regulations authorizing a permanent physical occupation of private property, even if they cause little reduction in property value, will almost always be held to be takings.<sup>52</sup> This rule is based on the principle that infringing on an owner’s ability to exclude third parties destroys “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>53</sup> Thus, for example, regulations creating pedestrian walkways or bike paths across private property, or granting the public access to private beaches, raise serious, usually fatal, takings concerns.<sup>54</sup>

Finally, perhaps as much for cultural reasons as constitutional ones, regulations seldom attempt to mandate particular types of affirmative conduct by owners on their private property. Thus, while regulations commonly restrict uses of private property to protect endangered species, for example, it would stretch our customary understanding of the appropriate role of regulation to attempt to mandate that an owner maintain a particular age class of trees on the land, or systematically remove invasive species. This too represents an important limitation of the regulatory approach.<sup>55</sup>

#### IV. EFFICIENCY

Turning from constitutional issues to public policy considerations, the first criterion for comparing regulation with easements must be overall efficiency. By this I do not mean the tool that maximizes conservation results is necessarily optimal. There can be such a thing as too much conservation.

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<sup>50</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>51</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>52</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>53</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

<sup>54</sup> The Supreme Court has repeatedly emphasized that the *per se* takings rule for physical occupations established in *Loretto* applies only to “permanent” physical occupations of private property. Thus, for example, in *Boise Cascade v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), the U.S. Court of Appeals for the Federal Circuit ruled that a U.S. Fish and Wildlife service rule authorizing Fish and Wildlife officials to conduct occasional surveys for the presence of threatened and endangered species was not subject to the *Loretto per se* takings rule.

<sup>55</sup> See Thompson, *Providing Biodiversity*, *supra* note 2, at 364 (discussing the difficulty of trying “to require land owners to restore or create new habitat on their properties.”).

Indeed, as discussed below, easements may lead to conservation restrictions in the wrong place or for too lengthy a period of time. Regulations also may be too restrictive in some circumstances. Normally, I suspect, both easement and regulatory restrictions are below the socially optimal level. The fundamental point is simply that efficiency must logically encompass both benefits (environmental and otherwise) as well as the costs (primarily opportunity costs in terms of development forgone).

As will become apparent from the following, it is difficult, at least at this stage of our learning, to reach definitive conclusions about whether regulations or conservation easements are most likely to maximize social welfare. There are arguments for each approach. There is no handy formula for toting up all the benefits and costs of each option in order to compare them. Furthermore, the strength of the arguments for each approach varies a good deal depending upon the character of the natural resources at issue and the specific development threat presented. Absolute answers must await another day.

### *A. The Advantages of Regulation*

#### *1. Addresses the Collective Action Problem*

The most important advantage of the regulatory approach to land protection is its capacity to address the “collective action” problem. A well-ordered land use pattern can benefit a community and its members by maintaining critical ecosystem functions, reducing public infrastructure costs, minimizing conflicts between different land uses and producing a healthier and more livable community. But if each citizen, left to his or her own devices, can refuse to join in the common effort to maintain the community, pursuing these beneficial goals frequently will become impossible. Each citizen would benefit if he could selfishly pursue her individual self interest, and “free ride” on the contributions of others. In the absence of an external constraint allowing citizens to coordinate their efforts, the pursuit of narrow self-interests will frequently prevail over the common interest. Specifically, an individual owner within an historic district could destroy a building that is critical to the integrity of the district, build an unsightly structure in the middle of a scenic vista, or degrade the habitat of an endangered species.

Regulations address the collective action problem by creating a mechanism to ensure that individual citizens’ contributions to the common welfare will be effective and not exploited by others. They also ensure that citizens’ actions for the public welfare will be matched by contributions of others, generating more confidence, and more willing participation, in community protection efforts.

By contrast, voluntary conservation easements plainly confront a serious collective action problem. If the goal is to preserve the rural character of an

agricultural area, the entire project could be thwarted if some owners agree to put their lands under easement but other owners do not agree. Ironically, the conservation efforts of some land owners may make other owners less inclined to restrict their lands because the restrictions may preserve scenic amenities and reduce the supply of developable land, making development of unrestricted land more profitable. Environmentalists generally decry a voluntary approach to controlling global warming or addressing air and water pollution. A voluntary approach to land conservation appears to be no more workable in many cases.

The significance of the “holdout” problem will vary depending on the nature of the environmental issue. The problem is likely to be especially significant if the environmental resources are relatively unique, such as the last known habitat of some rare and endangered species. Likewise, it is likely to be a particular problem where regulations seek to maintain the connectivity of some natural resource function, such as the migratory pathway for some species of wildlife. On the other hand, the holdout problem will be relatively modest if not insignificant in other contexts. For example, preservation of a specific ecosystem function or protection of some species might require conservation of a certain quantity of natural lands. But the amount of land available might, at least for the time being, exceed the minimum needed to achieve the conservation goal. Furthermore, the resources may be fungible in the sense that protection of the ecosystem service or preservation of the species may depend on the aggregate quantity of conserved lands, rather than on the protection of any particular parcel. In these circumstances, the collective action problem may not be a significant obstacle to achieving conservation goals.<sup>56</sup>

Biologists have increasingly come to recognize the importance of addressing environmental issues on a large scale and, accordingly, conservationists have turned their attention from parcel by parcel protection to conservation of larger geographical areas.<sup>57</sup> Given the capacity of regulations to overcome the collective action problem, regulations are much better adapted to address conservation at the landscape level than voluntary approaches. Not surprisingly, therefore, some of the most significant and most successful landscape-level conservation efforts in the U.S., such as the programs protecting the Adirondack Park region and the New Jersey pinelands,<sup>58</sup> have

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<sup>56</sup> Professor Thompson, in a major recent article discussing alternative approaches to species conservation, posited a case where habitat is both expendable and fungible. Thompson, *Conservation Options*, *supra* note 2, at 288. While this type of condition may sometimes exist in the context of species conservation and certain other natural resource managements issues, his use of this example tends to obscure the seriousness of the collective action problem generally.

<sup>57</sup> See Cheever & McLaughlin, *supra* note 22, at 10220 (observing that the land trust movement “has begun to focus its efforts on protecting larger, contiguous blocks of land—a process often referred to as ‘landscape preservation.’”).

<sup>58</sup> See New Jersey Pinelands Commission, *Pinelands Comprehensive Management Plan*, at <http://www.state.nj.us/pinelands/cmp/> (last visited Mar. 27, 2006).

relied largely on the regulatory approach. By contrast, the voluntary approach is not as well suited for pursuing conservation on a landscape level. As Professor Nancy McLaughlin has acknowledged, “The voluntary nature of the sale or donation of conservation easements to land trusts . . . and the myriad of land trusts with diverse objectives that acquire easements make it difficult to incorporate such easements into any coordinated” program.<sup>59</sup> Few if any landscape level conservation efforts have proceeded in a comprehensive fashion using a purely voluntary approach.<sup>60</sup> Instead, protection strategies using voluntary easements generally tend to focus on smaller geographical areas, or proceed in scattershot fashion.

While the basic argument for regulation based on the collective action problem is initially straightforward, it turns out, upon analysis, to be somewhat more complicated. In the first place, public financing of conservation under the easement approach can be viewed as a means of overcoming the collective action problem. The tax system arguably provides an enforceable method of ensuring that all citizens contribute to the pursuit of common social objectives, including conservation. But the critical political process for conservation purposes is not the decision to collect taxes but rather the decision how to allocate tax revenues. Because of the collective action problem, one would anticipate that the conservation-minded public would have difficulty competing for public dollars with more discrete and well-organized interest groups. This prediction appears to be borne out by the relatively small amount of taxpayer dollars devoted to land conservation. On the other hand, one would anticipate that relatively well organized groups of land owners would lobby to shape conservation programs in order to maximize the financial rewards for land owners and to minimize the burdens. This too appears borne out in practice, especially in the farm conservation programs.

One potential response to this argument is that the creation of strong regulatory programs itself logically raises a collective action problem. Even if it is correct that regulatory programs, in operation, can help overcome this problem, how is it that environmentalists are able to overcome the collective action problem and manage to get strong regulatory programs enacted in the first place? The best answer, suggested by Professor Daniel Farber,<sup>61</sup> is that the legislative branch is apparently intermittently capable, in response to a distinct public crisis, to establish comprehensive regulatory programs. While the

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<sup>59</sup> McLaughlin, *The Role of Land Trusts*, *supra* note 2, at 462; *see also* Cheever, *supra* note 2, at 449 (observing that the requirement of a “willing seller” under the voluntary approach to conservation “raises the specter of an arbitrary patchwork of preserved land reflecting the idiosyncrasies of owners rather than the needs of wildlife.”).

<sup>60</sup> One noteworthy example of an effort to use conservation easements to protect land at the landscape-level is the multi-organization effort to protect the “ACE Basin,” a 350,000 acre-region near Charleston, South Carolina. *See* Cheever & McLaughlin, *supra* note 2, at 10230.

<sup>61</sup> *See* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 7078 (1992).

collective action problem remains a chronic obstacle to environmental progress, the public can periodically enact effective regulatory programs. Thus, the collective action problem is less of an obstacle for regulatory programs because statutes only need to be enacted (or re-enacted) periodically. On the other hand, publicly-financed conservation, aside from tax deductible gifts of conservation lands (discussed below), requires virtually constant political combat over government appropriations. All in all, regulations appear to provide a better, surer way of overcoming the collective action problem.

### *2. Encourages Adaptive Behavior*

Another advantage of the regulatory approach is that it creates an incentive for owners (and potential property investors) to peer into the future to identify, and take steps to avoid, potential conflicts between their activities and public environmental protection priorities. In other words, if citizens see a potential environmental problem on the horizon, and know that government has the power and the will to regulate private activities in order to address such a problem, companies and individuals will make investment decisions with a view to minimizing potential conflicts. In this fashion, the regulatory approach, over the long term, encourages private behavior that reduces conflicts between private activities and public priorities. Equally important, by encouraging early avoidance of such conflicts, regulatory programs enlist private initiative to help reduce the total social costs of pursuing public conservation goals.

On the other hand, a policy of paying to eliminate conflicts between private actions and public conservation priorities creates a so-called “moral hazard,” an incentive for companies and citizens to *overinvest* in activities that will produce conflicts with public policies. If public indemnification is routinely available to resolve environmental conflicts with private land owners, owners and investors will not seek out ways to avoid conflicts. Indeed, if the public financing of conservation goals is sufficiently generous, it will actually encourage private investment in environmentally sensitive lands. This phenomenon is clearly at work, for example, in the recent rise of large investor funds focused on private timberlands of interest to the conservation community.<sup>62</sup>

### *3. Provides for Relatively Strong Enforcement*

Another advantage of the regulatory approach in terms of overall efficiency is that regulatory programs typically include relatively strong

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<sup>62</sup> See The Lyme Timber Company, at <http://www.lymetimber.com/> (last visited Mar. 27, 2006) (noting that “An important part of [The Lyme Timber Company’s] forestland investment strategy is to seek out properties with high conservation values, often in partnership with non-profit conservation organizations or government agencies”).

enforcement mechanisms. Regulatory agencies can invoke administrative, civil, and even criminal enforcement powers to compel compliance with regulatory standards and impose penalties for non-compliance. In addition, many federal as well as state environmental laws include citizen-suit provisions allowing citizens, acting as private attorneys general, to go to court to enforce regulatory standards. Citizen suit provisions have proven quite effective in improving the level of compliance with environmental laws.<sup>63</sup>

By contrast, the tools available for enforcing voluntarily negotiated conservation easements are far weaker.<sup>64</sup> In many states, the only party with clear authority to sue to enforce an easement is the holder of the easement, such as a private land trust. The land trust may be reluctant to press a landowner over enforcement issues for fear of gaining a hard-nosed reputation that drives away potential future contributors of land.<sup>65</sup> Smaller land trusts may lack the financial resources to mount effective enforcement actions in court. Even if it has the resources to bring an enforcement action, the land trust may face competing demands on limited financial resources, possibly leading the trust to forego enforcement to pursue other priorities. Moreover, the land trust may cease to exist at some point in the future, because of financial difficulties or other reasons.<sup>66</sup>

Some, but apparently not most, easements include provisions granting back up enforcement authority to larger land conservation organizations. The state attorney general, under the authority to safeguard public charitable trusts, may have the legal authority to enforce conservation easements, but policing of private easements must compete with numerous other law enforcement priorities. In addition, the extreme variability among easements complicates the enforcement challenge, and requires extensive resources even to monitor easement compliance.

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<sup>63</sup> See generally Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits To Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353 (2004).

<sup>64</sup> The many weaknesses of the present system for enforcing conservation easements are catalogued in detail in a recent report published by the Lincoln Institute of Land Policy. See Jeff Pidot, *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform* (Lincoln Institute of Land Policy) (2005).

<sup>65</sup> Conflict of interest rules in the administration of conservation easements appear to be quite weak. In the case of one of the largest easements established to date, involving land in Maine, a stockholder of the company that holds the fee interest sits on the board of the non-profit organization that holds and is responsible for enforcing the easement. See James N. Levitt, *The Next Level: The Pingree Forest Partnership as a Private Lands Conservation Innovation at the Harvard Forest*, in *The Program on Conservation Innovation at the Harvard Forest* (Oct. 2003) at 14, available at [http://www.ashinstitute.harvard.edu/Ash/Pingree\\_ITG\\_Case.pdf](http://www.ashinstitute.harvard.edu/Ash/Pingree_ITG_Case.pdf) (last visited Apr. 14, 2006).

<sup>66</sup> See Sherry Teresa, *The Demise of the Environmental Trust*, (The Katoomba Group's Ecosystem Marketplace) (2006), available at [http://ecosystemmarketplace.com/pages/section\\_landing.opinion.php](http://ecosystemmarketplace.com/pages/section_landing.opinion.php) (follow "The Demise of the Environmental Trust" link under "Latest Editorials") (recounting the events leading up to the bankruptcy filing of The Environmental Trust in California on July 29, 2005) (last visited Apr. 14, 2006).

Finally, regardless of whether conservation easements are expressly authorized by state law, judicial willingness to enforce easements may founder because of the judiciary's deeply ingrained hostility to "dead hand" controls on the use of land. For all of these reasons, there is substantial reason to think that private enforcement of conservation easements, at least as they are currently designed and administered, will be less effective than public (and third party) enforcement of regulations.

#### *4. Permits Timely Public Response*

The government can at least theoretically use the regulatory approach to address quickly a new or emerging public problem. If the goal is to forestall a serious environmental harm, such as the extinction of a species, or defer some fateful development decision, the government can, with sufficient political will, stop or at least delay the action using regulatory authority. By contrast, negotiating separate agreements between government and individual land owners necessarily represents a much more time-consuming process. In practice, of course, the environmental law-making process can sometimes become quite calcified, as exemplified by the policy gridlock on environmental issues in Congress for the past decade.

### *B. The Advantages of Easements*

#### *1. Fosters Cooperative Conservation*

The primary efficiency argument in favor of the voluntary, publicly-financed approach to land protection is that it rewards environmentally beneficial behavior by private land owners and thereby encourages and promotes more such behavior. By making friends with, rather than waging war on, land owners this approach encourages owners to support rather than oppose conservation programs. In addition, the argument proceeds, once they become invested in conservation, owners will develop and help implement innovative environmental protection strategies that centralized government bureaucracies would overlook.

These advantages of the voluntary, publicly-financed approach to conservation stand in sharp contrast, according to advocates of volunteerism, to the sometimes perverse incentives created by regulation. Owners are said to be encouraged by regulations to avoid coverage by environmental laws, such as by developing an area before it is placed under more restrictive zoning. One version of this argument is that owners faced with burdens imposed under the Endangered Species Act will have an incentive to "shoot, shovel and shut up." Rather than being willing, innovative partners in conservation, regulated owners will consistently resist and seek to evade engagement in conservation

programs. In economic terms, according to this argument, the investment of time and effort in evading the law will produce “deadweight loses,” reducing the overall efficiency of conservation efforts.

While plainly not frivolous, there are a number of responses to this argument. One general problem with relying on public financing of conservation efforts is that the government taxation needed to support such programs creates its own economic inefficiencies. According to traditional economic theory, taxes cause companies and individuals to take certain actions, or refrain from taking certain actions, simply to minimize taxes. While difficult to quantify, these costs are undoubtedly substantial. These costs counterbalance, to some indeterminate degree, the dead weight social losses associated with regulation.<sup>67</sup>

A second objection to this argument is that the allegedly perverse environmental costs of the regulatory approach are probably overstated by regulation’s critics. As a practical matter, numerous steep hurdles, primarily economic, stand in the way of development of natural lands. The possible additional incentive for a developer in avoiding potential future regulatory requirements (which the developer might be able to satisfy in any event) is unlikely in most cases to tip the balance in favor of immediate development. Of course, the actual impact of a potential new regulatory initiative will vary with the costs of removing different areas from regulatory jurisdiction by developing them; cutting commercial timber is one thing, filling a swamp is quite another.

The prospect that land owners might simply violate environmental laws—the so-called “shoot, shovel, and shut up” syndrome—is both more plausible and more troubling. Certain owners have an economic incentive to violate environmental laws, and in many circumstances, such as in rural areas, violations may be difficult to detect. However, it is distinctly unsettling to speak of basing public policy on the premise that companies and individuals may routinely violate the law because it is in their financial interest to do so. Perfect compliance with the law is generally unattainable and unnecessary to achieve the law’s purposes. But we do not ordinarily frame policy on the assumption that citizens will consistently break the law. Or at least we normally do not do so without inquiring whether the penalties for legal violations are high enough and whether government is being sufficiently vigorous in prosecuting violators.

Third, logic and experience indicate that voluntary, publicly-financed conservation programs make it difficult to maximize conservation results and, therefore, risk expending substantial public resources for relatively modest

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<sup>67</sup> See Thompson, *Conservation Options*, *supra* note 2, at 294 (observing that “neither regulation nor government financing is inherently more effective in this regard”). *But see id.* at 298 (arguing that the social costs of investing in conservation are less with tax deductions than with direct grants because the direct costs to the government are lower using tax deductions).

conservation gains. It is reasonable to presume that those most likely to volunteer to accept financial incentives will be those for whom incentives are most nearly pure windfalls. In other words, land owners most likely to donate or sell an easement on their property will be the most unlikely to develop their property in the foreseeable future. On the other hand, those with specific development plans are the least likely to participate in such programs, regardless of the relative importance of their land for conservation purposes. By contrast, regulatory programs, because their implementation is under government control, can be targeted much more efficiently to protect the most threatened lands.

As Professor James Salzman and others have observed, the serious targeting problems with the voluntary approach could be reduced through use of “reverse auctions” in which land owners are forced to compete for scarce public financing.<sup>68</sup> While targeting of some government-funded conservation programs has apparently improved in recent years, forcing land owners to compete for conservation subsidies based on “price” is not the norm. It would, of course, require a remarkable restructuring of the tax code to introduce competition into the largest federal conservation financing program, the deductibility of gifts of land for conservation purposes from federal taxes.

Finally, as Professor Federico Cheever has astutely observed, the “cooperative” spirit of conservation easements turns out to be distinctly time-bound.<sup>69</sup> At the outset, a willing seller of an interest in property for conservation purposes may view the transaction as a positive event, especially if the seller who received the financial reward shares the conservation objectives of the group acquiring the interest. But as Professor Cheever explains, as years and decades pass and title to the underlying property changes hands, new owners of the underlying fee, who did not receive any direct financial reward for the easement, may view the easement as a costly encumbrance. The new owners will have a financial interest in seeking out opportunities to cancel or evade the restrictions imposed by the easement. In this respect, a successor in interest to the original conservation donor might have the same antagonistic attitude about the easement restrictions as many land owners are said to have about the Endangered Species Act. In sum, while the grant of an easement might appear to be a form of win-win, cooperative conservation, over time the enthusiasm is likely to wane considerably.

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<sup>68</sup> Salzman, *supra* note 2, at 905.

<sup>69</sup> 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, 1078 (1996).

## 2. *Internalization of Social Costs*

A second efficiency argument for paying owners to accept restrictions voluntarily is that this approach appropriately requires the public to internalize the social costs of conservation. According to this argument, if the public is permitted to enjoy only those regulatory benefits it is actually willing to pay for, the degree of regulatory protection will tend to equilibrate at the socially optimal level. By contrast, the argument continues, regulation leads to over-restriction because regulators operate under the “fiscal illusion” that regulation is cost-free and therefore impose more restrictions than can be justified under a public welfare test.

There are a number of flaws in this argument, which is basically a variant of the basic property rights argument against regulations articulated by Professor Richard Epstein and his followers. One response is that the so-called “fiscal illusion” problem is itself largely illusory. As Professor Barton Thompson has observed, “the traditional argument—that land owners are systematically at a disadvantage in defeating regulations that are not cost justified—appears wrong both as a matter of theory and empirical evidence.”<sup>70</sup> Land owners and developers represent discrete, well-organized interest groups that are well equipped to defend their interests in the political arena and ensure government does not over-regulate. Even though real estate interests may be outnumbered by the general populace that benefits from strong conservation programs, the diffuse public is no match for land owners and developers in political warfare. Thus, reliance on easements cannot be justified on the ground that it avoids the risk of systematic over-restriction based on government regulations.

Furthermore, the internalization argument suffers from a fatal asymmetry.<sup>71</sup> Assuming government officials can be made to feel the effect of the economic burdens associated with restrictions by forcing them to make monetary payments to land owners, the benefits of government action cannot be “internalized” in the same fashion. Government actions that contribute to a more attractive community, to superior environmental health, and so on, will produce some general, positive political benefits for politicians. But that positive effect is likely to be relatively inconsequential compared to the burden officials usually face in finding actual cash in limited government budgets to pay land owners. Thus, to the extent the compensation approach is supported by an internalization argument, this argument logically leads to systematic under-investment by the public in conservation.

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<sup>70</sup> Thompson, *Conservation Options*, *supra* note 2, at 289.

<sup>71</sup> See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 350 (2000).

While rejecting the fiscal illusion argument, Professor Thompson advances a related, somewhat more subtle argument for why government regulation can be expected to lead to an inefficient level of restriction. In his view, the regulatory approach, by focusing on legal “rights,” creates a decision making environment that is “antithetical to a reasoned discussion of costs and benefits.”<sup>72</sup> By contrast, he argues, when the government makes a financial investment in conservation, such expenditures are “subject to several possible legislative checkpoints,” at each of which “multiple competing interests, by lobbying for their own interests and asking tough questions, help reduce the chances that the government will over-invest in conservation.”<sup>73</sup> In sum, according to Thompson, a public acquisition strategy is more likely than a regulatory approach to reflect an intelligent balancing of costs and benefits.

This argument is debatable on at least several grounds. First, for the reasons discussed above, given the inability of political actors to fully internalize the benefits of conservation, the cost-benefit calculus envisioned by Professor Thompson would be perpetually skewed. Second, even if this argument has some weight when government directly expends funds for land conservation, it has no relevance to tax deductible gifts of conservation lands. Today, there is effectively no oversight of tax expenditures on conservation, either in particular or in gross. Indeed, apparently no one has any idea how much is “spent” each year through the tax code on conservation purposes.

Furthermore, even as to direct expenditures, the level of public political oversight may be minimal. In a broad sense, because there are significant constraints on government budgets, direct expenditures on conservation purposes are relatively visible and therefore carefully policed through the political process. But just as concentrated land owner interests can generate effective political opposition to restrictive regulations, land owners and developers, sometimes supported by environmentalists, can effectively lobby government to pay, and sometimes overpay, for specific conservation projects.<sup>74</sup> At the project-specific level, contrary to Professor Thompson’s description, there is seldom any significant lobbying counter-force to question the public benefit served, or the price paid, for a specific parcel of property.

More fundamentally, and this goes as much to the issue of fairness (discussed below) as it does to conservation efficiency, it will often be very difficult to ascertain whether restrictions on the use of property impose significant economic burdens on land owners, much less accurately quantify

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<sup>72</sup> See Thompson, *Conservation Options*, *supra* note 2, at 289.

<sup>73</sup> *Id.* at 254, 288–89.

<sup>74</sup> Office of the Inspector General, U.S. Department of Agriculture, *Natural Resources Conservation Service, Wetlands Reserve Program, Compensation for Easements*, Report No. 10099-3-SF, ii (Aug. 2005) available at <http://www.usda.gov/org/webdocs/10099-3-SF.pdf> (concluding that USDA’s use of faulty appraisal techniques resulted in over-payments of at least \$159 million for easements over 5 fiscal years in the 13 states evaluated).

the extent of the burdens. As a result, there is a substantial risk with publicly-funded conservation that the government, rather than internalizing the costs of government action, will actually confer considerable windfalls on property owners. Some of the well-publicized, egregious abuses in valuation of conservation easements hint at the potential size of the problem.<sup>75</sup> Furthermore, leaving the potential for abuses aside, easement restrictions may not adversely affect value because the burdens may be counterbalanced by the benefits of easement restrictions on nearby properties. Finally, in some instances the highest and best economic uses of property may well be consistent with easement restrictions, as in the case of some rural vacation properties.

### 3. *Providing Permanent Protection*

According to easement advocates, another valuable feature of this tool is that it ensures “permanent” protection of the land.<sup>76</sup> Indeed, land trusts typically highlight protection in “perpetuity” as the most distinctive aspect of their work. Land trust advocates routinely contrast the benefits of “permanent” easements with regulatory controls, which they characterize as being subject to elimination or modification through the political process at virtually any time.

There are a variety of responses to this argument, which raises quite complex issues.<sup>77</sup> First, regulations are not nearly so impermanent as easement advocates contend. To be sure, as a theoretical matter, land use regulations can be repealed by a vote of elected officials at virtually any time. But the practical reality is quite different. A major political struggle is often required to get a new regulatory program established. Once regulations are in place, however, and especially after a few years have passed, regulatory programs often become quite impervious to change. In addition, land owners subject to regulations adapt to the restrictions, to take advantage of certain aspects of the program, and make accommodations to minimize conflicts with others. Thus, for example, zoning restrictions, once established, typically take on a substantial, arguably even counter-productive, solidity. Likewise, many historic district and agriculture districts appear to be essentially permanent. Thus, it is simply incorrect to claim regulatory programs are subject to change at virtually any time.

In addition, the advantages of permanent land protection are often overstated. It is undoubtedly true, as a physical matter, that reversing the effects of development will generally be far more difficult than reversing the effects of conservation. But it goes too far to suggest that every development

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<sup>75</sup> See Joe Stephens & David B. Ottaway, *supra* note 15.

<sup>76</sup> Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENV'T 244, 245 (2001).

<sup>77</sup> See generally Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002).

action is completely irreversible, and that a developed resource is necessarily “destroyed forever.” The science of ecological restoration is a large and growing field for a reason: ecological restoration is possible. Across the country, environmentalists are recreating free-flowing rivers by removing antiquated dams. Some development may, for all practical purposes, be forever, but not all of it.

Furthermore, even assuming all development were essentially irreversible, permanent prohibitions against development cannot be defended as optimal in every context. Perhaps the most obvious example is presented by management of land development along the urbanizing fringe. Permanent easements are sometimes described as an antidote to the problem of “sprawl” development.<sup>78</sup> But permanent restrictions on land use at the urbanizing fringe, even if they appear worthwhile in the short term, may well turn out to be ill-advised over the long term, as the demands of a growing population generate the need for more housing and other development. Even more significant, because land use restrictions along the urbanizing fringe may deflect land development pressures out from the urban center, easements ostensibly designed to curb sprawl may actually exacerbate the problem.

Another reason “permanent” easement restrictions may not necessarily be optimal is that the ecological conditions of land will change over time, making it difficult to anticipate whether it will be valuable to safeguard certain portions of the landscape from development. While dynamic change is inherent in natural systems, there is an emerging scientific consensus that global warming will produce dramatic shifts in ecological conditions across the landscape. As a result, one cannot confidently predict whether a patch of coastal wetlands, or habitat currently used by an endangered species, will have any ecological importance a hundred years from now. In the face of accelerating ecological change, a strategy focused on “permanently” locking away portions of the landscape appears both naive and wasteful.

In dealing with constantly changing ecological conditions, regulations that are expressly “temporary” have some obvious advantages. Precisely because regulations do not purport to be permanent, they are ideally suited to facilitating the gradual, orderly transformation of land on the urbanizing fringe to development uses. As one commentator has observed, down-zoning may be a better option on the urban fringe “because zoning is a matter of public regulation that may be adjusted relatively quickly through the legislative process.”<sup>79</sup> By contrast, permanent conservation easements, which are designed to be “perpetual, inflexible, and unmoved by public debate,”<sup>80</sup> lack

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<sup>78</sup> Hocker, *supra* note 76, at 247 (“History has proven the strengths of private, nonprofit land trusts. The lands they protect will not be paved over or fall victim to sprawl.”).

<sup>79</sup> Gwenann Sezec, *Effective Policies for Land Preservation: Zoning and Conservation Easements in Anne Arundel County, Maryland*, 23 VA. ENVTL. L.J. 479, 493 (2005).

<sup>80</sup> *Id.*

the same adaptability. Likewise, regulations offer some advantages in addressing a dynamic landscape. Investing in permanent protection of constantly receding ocean shorelines is oxymoronic. By contrast, regulations provide more appropriate temporary protection for these areas. A well-designed regulatory program could mandate a gradual retreat of development from the shoreline as erosion proceeds.

Finally, even if placing permanent restrictions on the use of land is socially useful, the current conservation easement system appears incapable of delivering fully on its promise of permanence. Easement instruments commonly include provisions permitting amendments of the restrictions under certain conditions and in various ways upon agreement of the easement holder and the owner of the underlying land. How this type of amendment option will be exercised remains to be seen. But it is fair to assume that the same level of creative energy that land owners expend in negotiating remunerative easements will likely be expended by some of their successors in interest seeking remunerative escapes from easement restrictions. Furthermore, even if there is the will to enforce easements, there are, as discussed above, significant practical obstacles to their effective enforcement. Most of these obstacles are likely to become more challenging the longer an easement remains in force.

One thoughtful response by easement advocates to concerns about the feasibility and desirability of “permanent” easement restrictions has been to acknowledge that the “in perpetuity” slogan of the land trust movement has been overdone. They recognize the need to establish formal standards and procedures to address the likelihood that certain conservation easements may outlive their usefulness. For example, Professor McLaughlin has argued for frank acknowledgment that easement restrictions on certain properties may no longer be justified in the future.<sup>81</sup> She argues that state courts are well equipped, using the *cy pres* doctrine, to regulate the amendment and termination of easements, like any other charitable trust, in response to changing social needs and values. In this fashion, easement restrictions can be lifted from land where they are no longer needed, and the funds earned from developing the property can be rededicated to other conservation purposes. To help ensure conservation interests are not disadvantaged over the long-term, Professor McLaughlin has argued that the portion of a property’s market value assigned to conservation purposes should be based, not on the value of the property’s development rights at the time of the original donation, but based on the value of the development rights on the date of easement termination.<sup>82</sup>

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<sup>81</sup> See McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 2, at 424; see also Susan Fletcher French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, UCLA Sch. of Law Research Paper No. 05-36 (Dec. 2005), at <http://ssrn.com/abstract=853145> (last visited Apr. 14, 2006).

<sup>82</sup> See McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 2, at 482–84.

While the acknowledgment that easements are not necessarily permanent reflects a welcome dose of reality, proposals for reform along the lines suggested by Professor McLaughlin appear to beg the basic question of why conservationists should rely on easements at all. According to easement advocates, as discussed above, the primary problem with regulations, which easements are supposed to solve, is that they are impermanent. If it turns out that impermanence is both unavoidable and valuable, at least in certain circumstances, then a primary argument for using easements in the first place is undermined. Stated differently, if what we really need is a land management tool that permits restrictions to be modified as circumstances change, then we already have in hand a good tool for that purpose, traditional regulation.

A second potential objection to the idea of relying on legal doctrines governing the modification of charitable trusts to manage extinguishment and amendment of easement restrictions is that the courts are not well suited to making land use decisions. Judges lack the institutional competence to evaluate whether certain types of restrictions continue to serve a valuable conservation purpose, and how they might be modified to better advance conservation goals. In addition, while parties interested in potential easement terminations can seek to intervene or file friend of the court briefs, courts are not set up to manage the kind of intensive, elaborate public participation process that characterizes local land use decision making in this country. As Professor Cheever has said, judicial supervision of conservation easements does not provide a “governance structure” to manage easements over the long-term, or “a forum in which to debate changes in conditions and values.”<sup>83</sup>

#### 4. *Safeguarding Future Options*

Another asserted advantage of conservation easements, which is related to but distinct from the perpetuity argument, is that easements preserve options for future generations. Even if easements do not guarantee permanent protection, easements are at least more difficult to alter or amend than regulations. Furthermore, the argument continues, development and property subdivision, if not completely irreversible, are certainly less easily reversed than a decision to conserve land. As a result, mistakes in the direction of conservation are less socially costly than mistakes in the direction of development. Thus, easements can be viewed as an indirect way of optimizing efficiency by making unilateral development decisions relatively hard to make.<sup>84</sup> In Professor Thompson’s terminology, easements serve a “lock box”

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<sup>83</sup> Cheever, *supra* note 2, at 450.

<sup>84</sup> See Cheever & McLaughlin, *supra* note 22, at 10231 (observing “development has a much greater likelihood of reducing the choices available to future generations”).

function, removing conservation choices from the risk they will be overturned needlessly or thoughtlessly.<sup>85</sup>

There is undeniable force to this argument. It may well be that easements, even with some costly inefficiencies, help save us from ourselves by keeping conservation options alive. The unstated premise of this argument, however, is that easements, if not genuinely permanent, are at least more permanent than regulations, and that they are actually more difficult to overturn than regulations. But for the reasons discussed above, there is a substantial question whether easement restrictions, even though they involve a formal transfer of title, can be effectively enforced over the long term. In some cases easements may not be more permanent than regulations. If easements are not as permanent as regulations, the lock box function can be served as well or better by regulations.

### 5. Customizing Protection

Another asserted advantage of easements is that they can be tailored to protect the specific environmental attributes of a particular piece of property. By contrast, government regulations commonly impose uniform standards on many different properties. Modern innovations such as performance zoning and development agreements sometimes permit the use of more-site specific regulatory restrictions, and their use is apparently increasing, but they are still not the norm. Thus, the more customized nature of easement restrictions arguably means that better land management can be achieved with easements than with regulations.

On the other hand, the customized nature of conservation easements also creates major pitfalls. As Jeff Pidot of the Maine Attorney General's office highlighted in a report for the Lincoln Institute of Land Policy, the extreme variation in easement terms creates serious challenges in terms of interpretation, monitoring and enforcement of easements.<sup>86</sup> To the extent each easement is different, it is difficult to predict how, in the event of a legal dispute, the courts would interpret easement terms and resolve conflicts over easement administration.

In addition, variability in easements makes easement valuation extremely difficult. The most reliable way of estimating the value of easements is to compare the sales prices of properties subject to easements. However, this type of sales data has little value if easements vary greatly in terms of the kinds of development that can occur, at what intensity, and in what locations. Even

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<sup>85</sup> See Barton H. Thompson, Jr., *The Trouble With Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RES. J. 601, 614 (2004).

<sup>86</sup> See Jeff Pidot, *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform*, LAND LINES (Lincoln Institute of Land Policy), Oct. 2005, at 15.

seemingly slight variations in easement terms can sometimes have major effects on the market value of properties subject to easements.

Finally, variations in easement terms raise the specter of competition between different land trusts seeking to claim credit for, and exercise control over, specific land conservation projects. One of the primary ways in which land trusts compete is in terms of the amount of development and other activity they are willing to accept under an easement. As a result, competition between land trusts over specific projects has created an unseemly “race to the bottom.”<sup>87</sup> Two of the largest and most highly publicized easement projects in recent years have both showcased this phenomenon. The owners of the Hearst Ranch north of Los Angeles recently negotiated an easement covering a major portion of the property with the American Land Conservancy, but only after abandoning earlier negotiations with The Nature Conservancy.<sup>88</sup> Similarly, the Pingree family in northern Maine, the owners of tens of thousands of acres of forest land, declined to sell a conservation easement to The Nature Conservancy, reportedly on the ground that the TNC was too demanding in terms of the restrictions it sought for the land.<sup>89</sup> Instead, the family opted to convey the easement to the New England Forestry Foundation, which markets itself as “landowner friendly.”<sup>90</sup> Not surprisingly, both transactions have attracted a good deal of critical attention.

## V. FAIRNESS

The second criterion for comparing regulations and easements is fairness. The fairness debate in the land use context often tends to focus, sometimes exclusively, on the question of fairness to property owners. But fairness should be measured in a comprehensive fashion, considering not only owners whose use of land is restricted, but also effects on neighboring owners, the community at large, and taxpayers.

### A. *Regulations and Fairness*

The primary fairness objection to the regulatory approach is well known. Restrictions on the use of private property are said to economically burden property owners to advance a public purpose. Accordingly, the argument

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<sup>87</sup> McLaughlin, *The Role of Land Trusts*, *supra* note 2, at 463 (“The proliferation of land trusts raises questions about counter-productive competition for projects as well as human and financial support”).

<sup>88</sup> See Glen Martin, *A Pivotal Time for Coastal Wonders; Conservationists, Hearst Corp. Negotiate over Ranch*, S. F. CHRON., May 30, 2004, at B1.

<sup>89</sup> JAMES N. LEVITT, *THE PINGREE FOREST PARTNERSHIP AS A PRIVATE LANDS CONSERVATION INNOVATION* (Harvard University Program on Conservation Innovation at the Harvard Forest) (2003).

<sup>90</sup> New England Forestry Found., at <http://www.newenglandforestry.org/> (last visited March 27, 2006).

continues, as a matter of fairness the general public should compensate those who are burdened by regulations.

There are two fundamental objections to this fairness argument. First, the argument depends on problematic assumptions about the baseline allocation of property entitlements possessed by each property owner. If one starts from the premise that an individual has the right to engage in a certain activity, then a government regulation restricting that activity can be viewed as imposing an unfair burden for public benefit. However, an owner cannot claim unfairness as a result of a bar on engaging in an activity that the owner has no right to engage in to begin with.

The critical question is how to define the baseline of entitlements rooted in the concept of private property.<sup>91</sup> Based on current law, it can be argued that property owners lack a property entitlement for, among other things, activities that cause nuisances (such as polluting the air or water), harm the public's wildlife, or degrade tidelands subject to the traditional public trust doctrine.<sup>92</sup> Similarly, those granted a privilege to exploit resources on public lands arguably cannot claim an entitlement to continue this use.<sup>93</sup> In all of these circumstances, paying restricted owners would not represent payment of "compensation" for a burden imposed for public benefit, but rather the conferral of a windfall on individuals who have no property right to engage in the activity. To the extent regulations merely enforce these background principles of property law, the fairness objection to regulation is not persuasive.

It might be objected that background principles of property law themselves unfairly impair private property rights. But it appears to be universally acknowledged, even by extreme libertarians, that property rights are restricted, at a minimum, by the duty not to harm others. Thus, the debate involves, at most, a matter of degree. The basic idea is that certain limitations on the use of property, often based on the common law, but potentially rooted in statute as well,<sup>94</sup> are so well settled that one can conclude categorically that land owners' expectations will not be frustrated by enforcement of the limitations. These inherent limitations are subject to change over time as society evolves, but apparently only at a relatively glacial pace. Just as this type of background principles argument can be raised as a defense in takings litigation, it also can appropriately be raised in the policy arena as a defense of the fairness of regulatory action.

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<sup>91</sup> See generally ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003).

<sup>92</sup> See Michael C. Blumm, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005).

<sup>93</sup> See *United States v. Fuller*, 409 U.S. 488 (1973) (permit to graze cattle on public lands does not represent a protected private property interest).

<sup>94</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) ("[W]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law.").

The second objection is that, even if a regulation restricts one or more sticks in the bundle of property rights society is prepared to recognize as legitimate, the question whether a regulation imposes an unfair burden remains complex. Even though regulations limit what an owner can do with her property, they help support, and in some instances actually increase, property values, including the values of properties subject to the restrictions.<sup>95</sup> A property's value is based not only on the permitted uses of the property, but also on the actual and potential uses of neighboring properties. As discussed, regulations that protect against conflicting uses of other properties create a "reciprocity of advantage" among affected land owners, counterbalancing burdens with corresponding benefits. Furthermore, regulations create greater certainty about the potential future uses of other properties in the community, and this in turn can help sustain the value of all properties in the community. Finally, regulations create a scarcity of development opportunities, meaning that regulatory restrictions will generally make remaining development opportunities more valuable.

Substantial empirical economic research confirms that land use regulations, applied broadly across the community, can have neutral or even positive effects on the per acre-value of properties subject to the restrictions.<sup>96</sup> Zoning and historic district regulations, which typically apply relatively uniform restrictions across a broad area, probably create the most significant reciprocal benefits.<sup>97</sup> In accord with the economic research data, the U.S. Supreme Court has long recognized that regulations produce both burdens and reciprocal benefits. In *Agins v. City of Tiburon*, the Court rejected a takings challenge to a zoning ordinance, stating:

The zoning ordinance benefits the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision of open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinance. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with

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<sup>95</sup> Seznec, *supra* note 79, at 492 ("[E]xperience has shown that there is no evidence that down zoning results in any loss of land value.").

<sup>96</sup> See C. Ford Runge, *The Congressional Budget Office's Regulatory Takings and Proposals for Change: One-Sided and Uninformed*, GEO. ENVTL. L. POL'Y INST. (1999) available at <http://www.law.georgetown.edu/gelpi/papers/budget.htm> (last visited Apr. 14, 2006).

<sup>97</sup> Susan Straight, *Cashing In on Cachet: Historic Listing Can Boost Home Value*, WASH. POST, Sept. 14, 2002, at H01 (citing various studies).

any diminution in market value that the appellants might suffer.<sup>98</sup>

The Court has sounded the same theme in numerous other decisions.<sup>99</sup>

Regulations are not, of course, completely costless for land owners. Some regulations so strictly limit the use of property and/or so specifically target particular lands, that the owners suffer a special burden as a result of the regulation. Designation of individual historic landmarks represents an obvious example of regulation that can potentially single out individual owners to bear serious, disproportionate burdens. This no doubt helps explain why *Penn Central Transp. Co. v. City of New York*, involving a taking claim based on the designation of Grand Central Terminal as an historic landmark, was and remains a difficult and controversial case.

Finally, even if a particular regulation singles out an owner to bear a special burden, the question of whether the owner is being treated unfairly needs to be addressed in a larger context. The burden imposed by a specific regulation may be counterbalanced by benefits generated by other regulations. For example, an owner may be burdened by a species conservation law, but may benefit from the application of wetlands, flood plain, or historic preservation regulations to her neighbors. More broadly, regulatory burdens are offset by the full range of benefits conferred by governments, from farm subsidy programs to the postal service.<sup>100</sup> At the limit, essentially all regulatory restrictions can be viewed as fair on the theory that they represent the price of living in a civilized society.

### B. Easements and Fairness

For essentially the same reasons that regulations often do not unfairly burden land owners, easements often risk unfairly conferring windfalls on owners at taxpayer expense. The extent of the potential windfall will depend

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<sup>98</sup> 447 U.S. at 255, 262 (1980).

<sup>99</sup> In the seminal *Mahon* case, Justice Holmes said the fact that a regulation “secure[s] an average reciprocity of advantage . . . has been recognized as a justification of various laws.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also* *Tahoe-Sierra Preserv. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 341 (2002) (“[A]t least with a moratorium, there is a clear ‘reciprocity of advantage,’ because it protects the interests of all affected land owners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted” (quoting *Mahon*, 260 U.S. at 415)); *see also* *Lingle v. Chevron U.S.A.*, 125 S. Ct. 2074, 2084 (2005) (emphasizing the importance in regulatory takings analysis of “how any regulatory burden is *distributed* among property owners”) (emphasis in original); *Cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 101718 (1992) (stating that, outside of the total takings context, the Court decides cases based on “our *usual assumption* that the legislature is simply ‘adjusting the benefits and burdens of economic life’ in a manner that secures an ‘average reciprocity of advantage’ to everyone concerned”) (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (emphasis added)).

<sup>100</sup> *See* Edward Thompson, Jr., *The Government Giveth*, 11 ENVTL. FORUM, 22–26 (Mar/Apr. 1994).

on the character of the property, the nature of the restriction, and the magnitude of the public payment.

First, just as with regulations, if easements apply to many neighboring properties, they can sometimes create the type of reciprocity of advantage characteristic of broadly applicable regulations. As a result, easement restrictions may not produce any significant reductions in property values and may actually increase property values. Thus, as Professors Raymond and Fairfax have observed:

In many communities, land values on properties under conservation easement appear to go up significantly, in part because of the guaranteed amenities of open space. Thus, land owners may well be receiving double compensation for their transaction, first as tax credits or payments for the easement, second as increased value on the remainder interest in their property. The equity implications of this kind of outcome are troubling, to say the least, given the involvement of public funds in financing the original transactions.<sup>101</sup>

While Raymond and Fairfax point to a very real phenomenon, the voluntary nature of conservation easements means that they are less likely to apply broadly across the community than regulations and, therefore, are less likely to produce a significant reciprocity of advantage. Thus, easements are more likely than regulations to produce net negative effects on property values.

Professors McLaughlin and Cheever have seized on this point in an effort to defend the fairness of publicly-financed conservation easements.<sup>102</sup> They concede that regulations applied broadly across the community may not impose a significant economic burden, and that land owners would receive a significant windfall if they were compensated for such restrictions. But they argue that paying for easements is not subject to the same criticism because easements, which often apply less comprehensively, do not tend to generate the same level of reciprocal benefits. This argument looks at fairness only from the owner's perspective, and ignores fairness from the taxpayer standpoint. Paying for easements may appear fair when easements are viewed in isolation, but it is unfair to the taxpayer to rely on expensive easements when regulations could serve the same conservation goal, produce a fair result for land owners, and

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<sup>101</sup> Raymond & Fairfax, *supra* note 2, at 637.

<sup>102</sup> Cheever & McLaughlin, *supra* note 22, at 10227 ("It is quite possible that studies [showing that restrictions have neutral or even positive effects on land values] analyzed the effect on per-acre land values of down-zoning entire areas or regions, which can be expected to be markedly different from the effect on per-acre land values of the grant of a conservation easement, which restricts the development and use of only one parcel of property").

save taxpayers an unnecessary expense. In other words, fairness for all will sometimes be advanced best by using regulations rather than easements.

Second, even isolated easement restrictions may have little or no adverse effect on property values in some circumstances. In particular, easement restrictions will not depress property values if the highest and best use of the property is consistent with easement restrictions. This is likely to be the case in locations remote from urbanizing pressures where there is demand for such uses as hunting clubs or rural retreats for the well-to-do. Indeed, in those circumstances the fact that the property is subject to a conservation easement may have a positive effect on the value of the property because the easement may convert the property into a luxury good. Lastly, the ability of land owners to carefully craft voluntary easement restrictions to minimize interferences with valuable development uses of the property increases the likelihood that easement restrictions will not reduce property values.

Scattered anecdotal evidence confirms that easements may have little or no adverse effect on property values. At the 2005 Stegner Conference on Private Land Conservation, Ann Price of the U.S. Forest Service offered the following example. The Forest Service purchased an easement under the Forest Legacy program on a scenic ranch in southern Utah for \$1,500,000, ostensibly leaving the owner with a residual value of \$800,000, based on an estimate that the ranch's fair market value was \$2,300,000. Three or four years later, the owner of the property fell ill and decided to sell, subject to the easement, which he succeeded in doing for \$2,800,000. In other words, the property sold for more than three times its supposed residual value. At a minimum, these figures suggest that placing the easement on the property may have depressed the value of the property far less than the Forest Service believed. According to Ms. Price, it was impossible to test how representative this example was because there were no other recent examples of Forest Legacy lands sold shortly after being placed under easement protection.<sup>103</sup>

Finally, easement restrictions quite clearly have little or no adverse effect on property values when the easements simply duplicate restrictions already placed on the property by regulation. The best known example involves donation of "facade easements" in historic districts where the alteration of building exteriors is already tightly controlled by government regulation. While the Internal Revenue Service has permitted donations of facade easements, the limited empirical data available suggest that easement donations do not reduce the value of already regulated properties.<sup>104</sup> Even the National Trust for Historic Preservation, generally a strong supporter of

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<sup>103</sup> In line with this anecdotal evidence, trophy ranches in the Northern Rockies subject to conservation easements apparently sell for the same price or higher prices than comparable properties not subject to conservation easements. Interview with Thomas J.P. McHenry, President, West Boulder Reserve (Dec. 2003).

<sup>104</sup> See Joe Stephens, *Loophole Pays Off on Upscale Buildings*, WASH. POST, Dec. 12, 2004, at A1.

easements, has acknowledged the need for reform of the tax treatment of gifts of facade easements in regulated historic districts.<sup>105</sup>

## VI. DEMOCRATIC ACCOUNTABILITY

A third criterion for evaluating alternative approaches to private land protection is the extent to which each approach promotes transparent and publicly accountable government decision making. For this purpose, it will be useful to address separately regulations, purchased easements, and donated easements.

### A. Regulations

Regulatory restrictions are generally created through relatively painstaking and transparent decision making processes. Congress or state legislatures have directly established many of the basic terms of the major U.S. land use regulatory programs. Local land use plans and regulatory restrictions are typically produced by city councils, boards of selectman, county commissioners, or other elected officials. Legislative hearings and other forums typically provide extensive opportunities for public comment. Elected officials who vote on land use programs can be held accountable at the ballot box.

In his famous concurring opinion in *Pennell v. City of San Jose*, Justice Antonin Scalia suggested, in a variation on the “fiscal illusion” argument, that regulation is relatively immune from political accountability precisely because it requires no public payments.<sup>106</sup> “The politically attractive feature of regulation is . . . that it permits wealth transfers . . . to be achieved ‘off budget’ with relative invisibility and thus relative immunity from normal democratic processes.”<sup>107</sup> But, as discussed above, because the objects of regulatory action tend to be discrete and relatively well organized, they generally can ensure that major regulatory initiatives affecting their interests are anything but invisible.

Decisions regarding regulatory programs may become less transparent and less subject to democratic control as their implementation is delegated to administrative agencies. The major federal land use laws, including the Clean Water Act wetlands provision and the Endangered Species Act, have not been revisited by Congress for many years because of the sharp ideological conflicts over how the laws should be modernized. The result has been that the U.S. Army Corps of Engineers and the Secretary of the Interior have been left,

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<sup>105</sup> See Hearing before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 109th Cong. (June 23, 2005) (Statement of Paul W. Edmundson, Vice Pres. & Gen. Counsel, Nat’l Trust for Historic Preserv.).

<sup>106</sup> 485 U.S. 1, 22 (1988).

<sup>107</sup> *Id.*

through rulemakings and less formal policymaking, to play outside roles in defining the direction of these programs.

Furthermore, many land use programs involve a considerable amount of discretion by administrative officials in site specific implementation of the law. While some ad hoc land use decisions undoubtedly attract a good deal of public attention, the routine administration of variances, rezonings and exactions is a relatively low visibility process.<sup>108</sup>

### *B. Purchased Easements*

Funding of easement purchases, like regulations, is generally a relatively transparent process. The federal appropriations process entails sharp political competition over the amount of money allocated from the federal budget for conservation purposes and, more specifically, between individual acquisition projects. Members of Congress are required to make concerted, relatively visible efforts to obtain funding for their favorite projects. At the state level, high government officials or public boards generally make land acquisition decisions through an open, competitive process.

At the same time, the negotiation of easements, in advance of the funding decision, is not necessarily an open process. Easements are often negotiated not by government officials but by representatives of non-profit conservation organizations that lack any meaningful accountability to the public.<sup>109</sup> The negotiations over easement terms are commonly conducted behind closed doors with little or no public input. While accountable political actors typically make the ultimate decision whether to fund individual projects, they often come into the process late and are compelled to act on specific projects on a take it or leave it basis.

### *C. Donated Easements*

In contrast to both regulations and purchased easements, there is essentially no public review process for donated easements. Under the Internal Revenue Code, individual land owners, acting on their own, are permitted to decide whether and on what terms to restrict land uses. In general, neither the federal government, the state nor the municipality in which a project is located has any formal role in reviewing the easement. An individual citizen in the

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<sup>108</sup> The relatively low visibility of ad hoc permitting decisions, and hence the potential for abuse in this context, undoubtedly explains in part why the Supreme Court has adopted an elevated level of scrutiny for the review of regulatory exactions under the Takings Clause. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>109</sup> *Raymond & Fairfax*, *supra* note 2, at 599 (“[T]hese private groups and individuals are, for most purposes, significantly removed from public scrutiny, public accountability, and public participation.”).

community likewise has no opportunity to comment, except possibly to raise potential tax irregularities with the Internal Revenue Service.

Easement advocates justify the confidentiality surrounding donated easements in part based on the fact that individual citizens are exercising discretion to make a gift of their own property for conservation purposes. However, every donated easement is paid for in part with taxpayer funds in the form of tax revenue foregone, seemingly entitling the public to some say in when and how this tool should be deployed. Moreover, the community and individual citizens have a legitimate interest in decisions to place easements on private property. Easements have the potential to foreclose certain land uses that may be a priority for the community, and they certainly can shape long-term community development patterns. Decisions by private owners to develop their property are subject to extensive public review in regulatory processes, and it appears illogical for private owners' decisions to place parts of a community off limits to development to be essentially immune from public scrutiny.

Jeff Pidot has suggested that other states should follow Massachusetts's lead in requiring public review and approval before easements are established.<sup>110</sup> This type of review process would certainly help ensure that easements are consistent with community conservation and development plans and probably would not significantly detract from landowner enthusiasm about easements. Nonetheless, this proposal will likely encounter opposition from easement advocates who view landowner control as a key ingredient to successful conservation efforts involving easements.

## VII. INTERACTIONS BETWEEN ALTERNATIVE APPROACHES TO LAND PROTECTION

The most difficult and potentially controversial question is how the different approaches to land protection may interact with each other and whether the use of one approach has the potential to undermine the availability of the other. If each tool operated independently, the choice between tools could be made in straightforward fashion based on the pros and cons of each approach in given circumstances. Unfortunately, that is not the case. Instead, the widespread use of voluntary easements appears to threaten the viability of the regulatory tool as a matter of policy, and perhaps ultimately the legal availability of this tool.

First, at the level of public rhetoric, advocates of each approach tend to trample on each other's message and contradict each other's agenda. Some conservation advocates defend and promote easements by characterizing

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<sup>110</sup> See Jeff Pidot, *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform* (POLICY FOCUS REPORT 2005).

regulatory restrictions as being subject to repeal or modification at a moment's notice. On the other hand, some defenders of regulatory programs challenge paying land owners to accept restrictions as conferring an unfair windfall at taxpayer expense. Advocates of the different approaches also tend to present opposite pictures of the landowners who are the focus of this debate—the rapacious developer in the case of regulations, or the beleaguered land steward in the case of conservation easements.

At the practical policy level, it seems clear that widespread use of voluntary, publicly-financed easements is making it more difficult to develop and implement regulatory programs. For example, the public policy menu effectively offers farmers the options of selling development rights or having their property subjected to zoning restrictions. Not surprisingly, even moderately self-interested farmers have a strong preference for being paid rather than not. Whatever political response to the regulatory option one might otherwise expect, the possibility that the government can be induced to pay to establish land use restrictions creates a powerful incentive for farmers to support the payment option instead of regulation. Indeed, farm groups appear to sometimes oppose regulatory initiatives politically in order to increase the chances that they will be paid for the same restrictions that might be imposed through zoning.

Attempting to make simultaneous use of both the regulatory approach and the voluntary, publicly-financed approach also raises serious questions of equity. If farmers A, B, and C are being paid to voluntarily not develop their lands, on what basis can government plausibly demand that farmers D through Z accept a government mandate to protect their lands with no payment? While voluntary payment programs may result in windfalls at taxpayer expense, similarly situated land owners who do not share the same windfalls inevitably feel discriminated against.

Looking at the issue from a slightly broader perspective, the widespread use of voluntary, publicly-financed easements likely affects land owners' attitudes about the nature of property rights and the scope of government authority to regulate private land uses. There is a danger that routinely paying owners to protect the land will create the impression that any public limitation on property use infringes on private property rights.<sup>111</sup> In practice, it is fair to presume that once land owners have been paid for one set of restrictions, they will expect to be paid for other restrictions imposed on their land.<sup>112</sup> In this

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<sup>111</sup> Cheever & McLaughlin, *supra* note 22, at 10228 (2004) (“There clearly is a danger that paying land owners full fair market value for conservation easements, or even paying them only a modest percentage of such value in the form of tax incentives for donated easements, will reinforce the prevailing view that private property ownership consists primarily of compensable rights.”).

<sup>112</sup> One example is provided in a report by the Harvard Program on Conservation Innovation evaluating the major conservation easement placed on timberlands owned by the Pingree family in northern Maine. Commenting on the possible need for future restrictions on timber practices, the report assumes that, just as with the easement, the Pingrees would be compensated for any additional restriction on their ability to

fashion, promotion of easements feeds into and indirectly supports the arguments of “property rights” advocates who contend that the government should be barred from regulating except on the condition that the government is willing to pay affected land owners.

Easements also have the potential to undermine the regulatory approach by increasing the number and intensity of landowner conflicts with regulatory authorities. By broadcasting the message that public payments will be available to protect environmental values on private lands, the use of easements encourages greater private investment in environmentally sensitive private lands. In addition, those who already own property will fail to tailor their development plans, as well as their profit expectations, to avoid conflicts over environmental issues. The seemingly inevitable result is that government authorities will face a growing tide of landowner resistance to efforts to protect the environment using regulations.

The conflicts between the regulatory and easement approaches appear to be significant and growing. For example, in Oregon, land use advocates are struggling, in the face of an extreme, voter-approved property rights measure, to defend forest-use zones as part of the state’s comprehensive land use program.<sup>113</sup> Across the country, in Maine, other land use advocates are negotiating to pay millions of dollars to forest land owners to preserve the land as working forest.<sup>114</sup> Similarly, the Army Corps of Engineers, with mixed success, is using its regulatory authority under the Clean Water Act to prevent wetlands destruction,<sup>115</sup> while conservation advocates are simultaneously trying to accomplish the same thing by placing easements on wetlands.<sup>116</sup> As a practical matter, it appears to be a virtual impossibility that both these approaches can be pursued simultaneously over the long term.

Finally, there is the question of whether the widespread use of voluntary easements might ultimately undermine regulatory programs by encouraging, over time, a change in the standard for a constitutional taking and making it impossible to enforce certain kinds of regulations without paying “compensation” under the Takings Clause. In other words, is there a risk that repeated efforts to resolve land use conflicts with the handy lubricant of public money could eventually convert environmental protection into a hostage

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exploit the property. “If desired by the family and in exchange for appropriate compensation, further layers of restrictions or management practice guidelines can be applied to the landscape over time.” LEVITT, *supra* note 65, at 47.

<sup>113</sup> See generally 1000 Friends of Oregon, *Farm, Forest, and Range Land Preservation*, <http://www.friends.org/ffr.html> (last visited Mar. 31, 2006).

<sup>114</sup> See generally New England Forestry Found., <http://www.neforestry.org>.

<sup>115</sup> U.S. Army Corps of Eng’rs, Regulatory Program Overview, <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/oceover.htm> (last visited Mar. 31, 2006) (describing the Clean Water Act section 404 regulatory program).

<sup>116</sup> See Env’t Def. Fund, Center for Conservation Incentives, <http://www.environmentaldefense.org/cci.cfm> (2006) (describing Environmental Defense’s Center for Conservation Incentives).

beyond the reach of our elected representatives in any way other than paying for it?

On one level, widespread use of easements can be expected to change judicial doctrine because “judges read newspapers.” If the judiciary came to understand that the norm is to pay land owners subject to restrictions designed to protect the environment, judges might feel increasingly comfortable in interpreting the Constitution as mandating payment of compensation.

There is also a more purely legal side to the issue. The reasonableness of an owner’s investment-backed expectations is a central factor in the Supreme Court’s regulatory takings analysis.<sup>117</sup> If owners routinely receive financial assistance when they participate in new conservation programs, that pattern would arguably make it more reasonable for owners to anticipate that they would not be subjected to new regulatory constraints without being compensated. As Professor Cass Sunstein has observed, legislation can have not only a direct policy effect, but also an “expressive effect” that influences the evolution of social norms.<sup>118</sup> Thus, programs that provide payments to land owners for conservation purposes can be expected, over time, to influence society’s understandings about where land owners’ responsibilities end and where their rights begin.<sup>119</sup> Evolving social norms, in turn, can be expected to influence the direction of constitutional takings doctrine, at least at the margins.<sup>120</sup>

Confirming that there is some substance to this theory, some courts have stated that both the existence of voluntary, publicly-financed conservation, on the one hand, and the vigor of regulatory policies, on the other, should influence the outcome of regulatory takings cases. For example, in *Lucas*,<sup>121</sup> Justice Scalia, speaking for the Court, justified the conclusion that regulations denying the owner economically viable use of property should be regarded as takings based in part on the existence of various federal programs for the acquisition of property for conservation purposes:

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<sup>117</sup> See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (stating that the “primary” considerations in a regulatory takings case include “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations”).

<sup>118</sup> Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2012, 2024–25 (1996).

<sup>119</sup> See Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233, 238 (2003) (observing that environmentalists’ “most fundamental concern [with economic incentives] is the long-term one that, over time, paying people for environmentally responsible behavior may erode the societal desire to conserve, so that even if we are willing to undertake the burden of environmental protection today, our successors will not willingly do so tomorrow.”).

<sup>120</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992) (justifying the takings rule announced in that case on the ground that it was consistent with the “the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”).

<sup>121</sup> *Id.*

The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.<sup>122</sup>

While Justice Scalia used this reasoning to justify the narrow *per se* takings rule announced in *Lucas*, his reasoning has broader implications. For example, the fact that conservation easements typically involve the acquisition of narrow real property interests could be used to support an expansive “partial regulatory takings” theory.<sup>123</sup>

In the same vein, Justice O’Connor, in her influential concurring opinion in *Palazzolo v. Rhode Island*,<sup>124</sup> suggested that the government’s past pattern in implementing a regulatory program might influence the reasonableness of an owner’s expectations about how the program will be applied to him. Describing the various ways in which the degree of interference with investment expectations could influence the takings analysis, Justice O’Connor stated, “For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner.”<sup>125</sup> Her implication appears to be that while a pattern of government non-enforcement could not create an absolute right to compensation, it could influence the likelihood that a regulatory taking claim

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<sup>122</sup> *Id.* at 1018–19. Justice Scalia provided a string citation to a sampling of these “many statutes.” *See id.* (“*See, e.g.*, 16 U.S.C. § 410ff-1(a) (authorizing acquisition of ‘lands, waters, or interests [within Channel Islands National Park] (including but not limited to scenic easements)’); § 460aa-2(a) (authorizing acquisition of ‘any lands, or lesser interests therein, including mineral interests and scenic easements’ within Sawtooth National Recreation Area); §§ 3921–3923 (authorizing acquisition of wetlands); N.C. Gen. Stat. § 113A-38 (1990) (authorizing acquisition of, *inter alia*, ‘scenic easements’ within the North Carolina natural and scenic rivers system); Tenn. Code Ann. §§ 11-15-101 to 11-15-108 (1987) (authorizing acquisition of ‘protective easements’ and other rights in real property adjacent to State’s historic, architectural, archaeological, or cultural resources.)”).

<sup>123</sup> Other courts have relied on the existence of voluntary, government-financed conservation programs to support regulatory takings claims. In a case brought by Louisiana oyster farmers claiming a taking based on the effects of coastal restoration projects on the productivity of their leases, a Louisiana appellate court justified a finding of taking in part based on the fact that other oyster farmers had been the beneficiaries of a government buyout in similar circumstances. *See Avenal v. Louisiana*, 858 So.2d 697, 702 (La. App. 2003), *rev’d*, 886 So.2d 1085 (La. 2004), *cert denied*, 125 S. Ct. 2305 (2005). Similarly, the U.S. Court of Federal Claims found that revocation of a federal fishing license constituted a taking, reasoning that plaintiff’s “expectation of being able to use its vessel to fish . . . was . . . reasonable,” given that the plaintiff was “aware that, in the past, buyback programs such as that created by Sustainable Fisheries Act, had been established when the government desired to reduce fishing capacity.” *See Am. Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 49 (2001), *rev’d*, 379 F.3d 1363 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 2963 (2005). Defenders of regulatory programs can take solace in the fact that the takings awards in each of their decisions embracing this reasoning were overruled on appeal.

<sup>124</sup> 533 U.S. 606 (2001).

<sup>125</sup> *Id.* at 634 (O’Connor, J., concurring).

would succeed. Justice O'Connor's message to government, apparently, is that it must use its regulatory authority or risk losing it.

Presenting a quite different point of view, Professors Cheever and McLaughlin have suggested that government-financing of conservation, far from exacerbating property rights conflicts, may actually pave the way for social acceptance of environmentally protective regulation. The idea is that a pattern and practice of restricting private lands through conservation easements, even if publicly subsidized, may make owners "more comfortable with, and accepting of, a view of private property ownership that contemplates responsibilities as well as rights."<sup>126</sup> For the purpose of this argument, they distinguish between outright public purchases of easements at fair market value and conservation gifts that are partly publicly subsidized through the tax code. They acknowledge that outright purchases of conservation easements are likely to work against the development of a culture of stewardship and generate ever increasing landowner demands for compensation. But they suggest that tax deductions can help form a culture of environmental stewardship because they encourage gifts of land that involve some financial sacrifices by the donors.

Unfortunately, this vision of the potentially educative function of conservation easements appears too optimistic. As discussed, one of the critical distinguishing features of the easement approach is that it depends on voluntary action. Over the long-term, use of voluntary landowner agreements, subsidized in whole or in part by the public, appears unlikely to build acceptance for programs that depend on government's coercive power. Furthermore, even if gifts of land are not underwritten completely by the public, the key point seems to be that the government pays to achieve conservation goals, not exactly how much it pays. Thus, tax deductions for land donations are likely to generate demands for more payments, not induce landowners to accept restrictions unaccompanied by any public payment. Finally, for all of the reasons discussed above, it is questionable to what easement donations actually involve the kind of genuine economic sacrifice which, according to McLaughlin's theory, is the linchpin of easements' asserted educative function.

Over fifty years ago, Aldo Leopold, the great American conservationist, reached the conclusion that paying to induce land owners to become good stewards of the land was a losing proposition. As Professor Eric Freyfogle has explained, Leopold, a professional forester, a professor, and wilderness advocate, explored a variety of tools for preserving land, including buying land and economic incentives, over his long career.<sup>127</sup> Based on literally decades of

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<sup>126</sup> See Cheever & McLaughlin, *supra* note 22, at 10229.

<sup>127</sup> See ERIC FREYFOGLE, *BATTLING OVER LEOPOLD'S LEGACY* (Georgetown Environmental Law & Policy Institute 2004).

thought and a great deal of practical experience, Leopold ultimately came to the conclusion that the solution to the problems with land use in America depended upon the development of what he called a land ethic, an internal sense of owner responsibility towards the land and the larger community. In a succinct statement of his philosophy, offered near the time of his death, Leopold wrote:

The average citizen, especially the landowner, has an obligation to manage his land in the interest of the community, as well as his own interest. The fallacious doctrine that government must subsidize all conservation not immediately profitable for the private landowner will ultimately bankrupt either the treasury or the land or both. The nation needs and has a right to expect the private landowner to use his land with foresight, skill, and regard for the future.<sup>128</sup>

Somewhere along the way, we seem to have lost track of this wisdom.

#### VIII. CONCLUSION

It appears inevitable that regulations and easements will remain part of the panoply of tools used for protecting private lands in the U.S. The practical challenge is to begin to figure out how to deploy these different tools in a fashion that takes advantage of the strengths of each approach while minimizing counter-productive conflict. Some preliminary suggestions follow.

Given the capacity for the use of incentives to undermine and crowd out the regulatory option, it is essential to define appropriate boundaries around the use of conservation easements (and other incentive approaches). Even strong defenders of conservation easements have suggested the need for carefully considered boundaries,<sup>129</sup> Professor Peter Byrne, in a recent article, suggested that land acquisition dollars should be limited to the following purposes: “where public management of a resource would be preferable, where public access should be secured, where the resource has a unique character, where time is of the essence, or where effective private competition to produce an environmental benefit can be gained.”<sup>130</sup> I am not prepared to offer my own list, but I am persuaded that such a list is absolutely essential.

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<sup>128</sup> ERIC T. FREYFOGLE, *THE LAND WE SHARE* 150 (2001) (quoting 1946 unpublished manuscript).

<sup>129</sup> Cheever & McLaughlin, *supra* note 22, at 10233 (“Given that we can never expect to reach a socially desirable level of land protection through the use of financial incentives alone, it is imperative that some carefully considered boundaries be placed on the use of such incentives”).

<sup>130</sup> J. Peter Byrne, *Property and Environment: Thoughts on an Evolving Relationship*, 28 HARV. J.L. & PUB. POL’Y 679, 688 (2005).

Second, it seems clear that one high priority use for public dollars, whether devoted to fee or easement acquisitions, should be ensuring public access for recreational purposes. As discussed, for better or for worse, the Supreme Court has drawn a hard and fast line between restrictions on use of property and government mandates that owners grant the public access to private property, holding that virtually every government-mandated occupation is a taking. The rationality of this sharp line certainly can be questioned. It protects land owners from sometimes modest, even inconsequential burdens on property ownership at enormous public sacrifice in terms of lost opportunities to enjoy the outdoors on private lands. On the other hand, relatively far more burdensome restrictions on the use of property will not support takings awards under current precedent. While the Court might be persuaded at some point in the future to reexamine its approach to public access issues under the Takings Clause, the Court's most recent decisions offer little encouragement.<sup>131</sup>

Given this state of legal affairs, we appear to have little choice but to purchase access to private property even if, for all the reasons discussed, this strategy would reinforce land owners' (conceivably contestable) legal claims to control access. At the same time, physical access can readily be distinguished from use restrictions, and therefore investing public dollars in public access has little potential to undermine the regulatory tool for controlling land uses. Our growing population and increasing needs for recreational opportunities appear to make expending scarce public dollars on access a sound investment.

Third, it is appropriate to draw a distinction between incentives for land owners not to use their property in ways that are harmful to the environment and incentives to induce owners to take pro-active management steps to improve environmental conditions. As discussed, for practical reasons and as matter of custom, regulations are ill suited to compel environmentally positive behavior. At the same time, it is relatively easy to distinguish between encouraging positive management and prohibiting actions with negative environmental consequences. Public and private conservation organizations should consider using public dollars primarily to support pro-active management activities while using regulatory tools to block and limit environmentally harmful actions.<sup>132</sup>

Fourth, it is worth exploring ways to mix regulatory and compensated approaches to conservation. Conservationists of all stripes share a common,

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<sup>131</sup> See *Lingle v. Chevron U.S.A. Inc.*, 125 S.Ct. 2074, 2081 (2005) (stating, in unequivocal terms, that "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.").

<sup>132</sup> See David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303 (1995) (proposing a combination of strict enforcement of regulations and stewardship payments to encourage pro-active ecological management).

growing interest in achieving protection at the landscape level. In contrast to scatter shot conservation, protection at the landscape level tends to produce significant reciprocal economic benefits for land owners. As a result, pursuing landscape level protection using the voluntary, compensated approach risks conferring unfair and expensive windfalls on owners. On the other hand, depending on the character of the regulation and other factors, even a broadly applicable regulatory program may impose some economic burdens. Transferable development rights provides one, somewhat cumbersome, way of splitting the difference between no compensation and “fair market” compensation.

Finally, as suggested by the two by three matrix of land protection strategies on page 6, traditional regulation and voluntary, publicly-financed acquisition are not the only options. Eminent domain is widely used for transportation and utility projects and there is no policy justification for eschewing the use of eminent domain to implement large-scale environmental restoration and protection projects. Selectively, environmental advocates should consider making a stronger push for using eminent domain when hold out problems threaten to derail important environmental projects. In addition, zoning by petition, based on the Montana model, appears to provide an imperfect, but politically appealing model for land protection that relies on bottoms-up political support and emphasizes the common benefits for land owners in adopting strong regulatory protections.