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*Perpetual Restrictions on Land and the Problem
of the Future*

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December 2001

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Perpetual Restrictions on Land and the Problem of the Future

Julia D. Mahoney*

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* Associate Professor, University of Virginia School of Law. I would like to thank Lillian BeVier, Jon Cannon, Greg Edwards, Caleb Jaffe, Ed Kitch, Paul Mahoney, Tom Merrill, Chris Miller, Richard Revesz and participants at the Saving Nature Conference held at the University of Virginia School of Law for helpful comments on earlier versions of this paper. Logan Breed and Kevin Patchett provided excellent research assistance.

Each generation imagines itself to be more intelligent than the one that went before it, and wiser than the one that comes after it.

George Orwell, *The Collected Essays, Journalism and Letters of George Orwell*, Volume IV at 51

INTRODUCTION

Enthusiasm for conservation efforts is in large part rooted in the conviction that environmentally sensitive land should be preserved for the benefit of future generations.¹ Scholars and policy makers disagree, of course, about the precise contours of the obligations of present generations toward their successors.² Nevertheless, there is widespread support for the idea that current inhabitants of the earth should take into account the long-term effects of their behavior, thereby ensuring that future generations are not deprived of a full range of options.³ Many regard conservation as not simply an advisable course of action, but rather “something due

¹ See e.g. Statement of President William Jefferson Clinton on the acquisition of the Baca property in northern New Mexico (praising legislation authorizing the acquisition or protection of 95,000 acres of “unique, irreplaceable land..for future generations to enjoy”); Eric T. Freyfogel, *Bounded People, Boundless Lands* 14 (1998) (“One of the challenges facing humankind today-- the preeminent one, many think-- is to find ways of living that respect nature’s wholeness and that account for the needs and moral values of future generations”).

² See Richard Epstein, *Justice Across the Generations*, in *Justice Between Age Groups and Generations* 84-106 (Peter Laslett and James S. Fishkin, eds.) (arguing that “the debate on equity between the generations focuses too much on duty, and too little on practice and incentive...In general, if we continue to create sound institutions for the present, then the problem of future generations will pretty much take care of itself, even if we do not develop overarching policies..that target future generations for special consideration”); Daniel Farber, *Ecopragmatism* 154 (1999) (concluding that the “current generation is morally constrained by the interests of future generations” but that “members of the current generation need not maximize the income of their descendants”); Christopher D. Stone, *Earth and Other Ethics* 16-17 (1987) (describing the difficulties of articulating the obligations of present generations toward their descendants: “even if someone can develop a persuasive argument that we ought, in moral theory, to take present steps to modify distant futures, what would be a just intergenerational distribution of goods?”).

³ See e.g., World Commission on Environment and Development, *Our Common Future* 41-43 (1987) (detailing the concept of “sustainable development,” defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”); Jonathan Lash, *Toward a Sustainable Future*, 12 *Nat. Resources and Env’t* 83 (1997) (urging that society be organized so as to insure that economic and technological progress not “come at tomorrow’s expense”).

our descendants, something to be done for their sakes.”⁴

In the past two decades, a new method of land conservation has emerged and begun to rival older methods, such as command and control regulation and governmental acquisition of fee simple interests in land. Commonly known as conservation easements or conservation servitudes,⁵ these instruments are designed to preserve for a designated term or, more often, in perpetuity, lands of ecological, scenic or cultural significance.⁶ Conservation easements achieve their objectives by enabling landowners to divide up their property rights and transfer a nonpossessory interest, or servitude, to a qualified organization.⁷ The holders of these servitudes, typically governmental entities or independent nonprofit organizations, have the right to prevent or control the development of the burdened land. In exchange for surrendering conservation servitudes, owners of burdened properties receive tax benefits, or, less frequently, cash payments.⁸ Owners of land subject to conservation servitudes, moreover, remain in possession of the property, free to use the land in any way not inconsistent with the terms of the servitude. The

⁴ Joel Feinberg, *The Rights of Animals and Unborn Generations*, in *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (1980) (“Surely we owe it to future generations not to pass on a world that is a used up garbage heap”).

⁵ In this paper, the terms “conservation easement” and “conservation servitude” are used interchangeably. At common law, three different kinds of servitudes (nonpossessory interests in land) were recognized: easements, real covenants and equitable servitudes. See Susan French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261 (1982). Although servitudes designed to further conservation goals are often referred to as “conservation easements,” in fact these interests in land more closely resemble real covenants and equitable servitudes. See Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433 (1984) (expressing concern that the use of the label “conservation easement” could lead an “uncritical decision maker” to assume that the law of easements, not real covenants, is applicable). Conservation servitudes are also commonly referred to by a number of other terms, including conservation restrictions, preservation restrictions, preservation rights, and land use easements.

⁶ See e.g., *Pingree Forest Partnership, The Pingree Forest Easement: A Summary*, at www.neforestry.org, (stating that the purpose of a conservation easement covering over 750,000 acres in northern and western Maine is to “maintain the property forever in its present and historic primarily undeveloped condition as a working forest” and to “conserve and/or enhance forest and wildlife habitats..for present and future generations”).

⁷ See Jesse Dukeminier & James E. Krier, *Property* 856-57 (Fourth Edition 1998); John P. Dwyer & Peter S. Menell, *Property Law and Policy: A Comparative Institutional Perspective* 752-54 (1998). The Uniform Conservation Easement Act defines conservation easement as:

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

Uniform Conservation Easement Act, 12 U.L.A. 60 Section 1(1) (West Supp 1998).

⁸ See generally *Protecting the Land: Conservation Easements Past, Present and Future* (Julie Ann Gustanski & Roderick H. Squires, eds. 2000) (hereinafter *Protecting the Land*). On rare occasions, grantors of conservation easements fail to realize significant pecuniary benefits. See *infra*, Part I.

number of acres protected by conservation easements held by private, nonprofit organizations increased from 290,000 in 1988 to 1.4 million in 1998,⁹ a figure expected to continue to grow over the next few years. Environmental organizations,¹⁰ practicing attorneys,¹¹ legal scholars¹² and the popular press¹³ have all praised conservation servitudes. Because conservation easements involve the transfer of a property right from a landowner to the entity that will hold and enforce the easement, politically conservative analysts have hailed them as an attractive private ordering alternative to traditional command and control land use regulation.¹⁴ To date, conservation easements have attracted few detractors.¹⁵

Lost in the excitement over the advent of an innovative land preservation technique is an

⁹ See Land Trust Alliance, 1998 National Land Trust Census; Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands in Protecting the Land*.

¹⁰ See e.g., Public Incentives, Private Conservation: How the Nature Conservancy Works for Conservation-Friendly Public Policy, *The Nature Conservancy Virginia Chapter News*, Fall/Winter 1999 (detailing The Nature Conservancy's support for tax benefits designed to encourage landowners to donate conservation easements).

¹¹ See Jessica E. Jay, *Land Trust Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 *Envtl. Lawyer* 441, 451 (2000) (lauding conservation easements as "unique, dynamic tools used by private landowners and land trusts to preserve private lands" and discussing methods by which land trusts can enforce effectively the conservation interests they hold).

¹² See Federico Cheever, *Public Goods and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 *Denv. U. L. Rev.* 1077 (1996) (expressing support for conservation easements and offering constructive suggestions to ensure the continuation of the "magic" of privately negotiated perpetual conservation restrictions).

¹³ See e.g., Editorial, *Save Marin's Farmlands*, *San Francisco Chronicle*, April 5, 2001 (advocating the use of conservation easements to save Marin County's "200 working farms and ranches"); Editorial, *Hyder's Gift Will Leave Mountain Unspoiled*, *Asheville Citizen Times* (Asheville, N.C.), January 6, 2001 (expressing approval of the donation of conservation easements on 275 acres of mountain land and characterizing the gift as one that will benefit area residents "for generations to come"); Editorial, *Celebrate the Land Trust*, *The Post and Courier* (Charleston, S.C.), Nov. 19, 2000 (praising the acquisition of conservation easements by the Lowcountry Open Land Trust on the grounds that restricting development will enable property owners to "obtain the reassuring knowledge that the land they love – often land that has been in their families for generations—will be protected in perpetuity").

¹⁴ See, e.g., Robert Franciosi, *Preserving Open Space: The Private Alternative*, Goldwater Institute (February 1999) at <http://www.goldwaterinstitute.org/azia155.htm>, (Arizona Issue Analysis).

¹⁵ For the most spirited attack on conservation easements, see James Burling, *The Folly of Conservation Easements* (unpublished manuscript on file with author) (detailing the ways in which the creation of conservation easements contravenes "seven centuries of legal tradition" that have discouraged current property owners from exerting "dead hand" control over their lands but declining to address "the intricacies of conservation easements" or "the wisdom of attempting to decide today how land should best be managed many centuries in the future"). In general, critics of conservation easements express support for these instruments in theory while raising concerns about their possible detrimental effects. See e.g., Korngold, *Privately Held Conservation Servitudes*, *supra* note 5 at 442, 494.

understanding of the fact that conservation easements represent a subtle but important modification in the means used to safeguard the interests of Earth's future inhabitants. Conservation easements are explicitly designed to restrict the range of available land use options. In this respect, conservation easements differ from both standard land use regulation and outright purchases of land by nonprofit organizations or governmental entities, the other widely used strategies for restricting development. In the case of these older, more traditional methods, the present generation voluntarily foregoes the benefits of development in an attempt to bestow the benefits of non-development on both present and future generations. These decisions, however, do not seek to bind future generations and can be altered or reversed by regulatory or legislative change or land purchase and sale. Conservation easements, by contrast, impose significant potential costs on future generations by deliberately making nondevelopment decisions hard to change.¹⁶ This means that future generations either will be stuck with the land preservation choices made by their forbearers, which will almost certainly fail to reflect contemporary cultural values and advances in ecological science,¹⁷ or will have to expend resources to extinguish, or at the very least renegotiate or have declared invalid, the conservation servitudes that constrict their options. The expenditures required may prove nontrivial, given the potential costs of reassembling fragmented property rights.¹⁸ Some members of the present generation, on the other hand, reap significant benefits from the widespread use of conservation servitudes, including tax breaks and the emotional satisfaction of believing that their land use choices will prove eternal.

This Article examines the growing use of conservation servitudes and concludes that their imposition may further the interests of members of the present generation at the expense of future generations. In this Article, I argue that widespread support for conservation servitudes is based upon two widely held but erroneous assumptions, each of which fails to justify the use of these instruments. The first assumption is that today's landowners, together with the institutions that purchase and accept for donation conservation servitudes, are capable of making long-term land preservation decisions, and can and should identify particular parcels of land as deserving of

¹⁶ See *infra*, Part III.

¹⁷ See *infra*, Part IV.

¹⁸ See Michael Heller, *The Boundaries of Private Property*, 108 *Yale L. J.* 1163 (1999).

perpetual protection. As a result of this capability, the present generation has the right, perhaps even the duty, to engage in long-range conservation planning through the imposition of conservation easements that spell out (often in considerable detail) permissible land uses.¹⁹ In other words, the ability of the present generation to predict the needs and preferences of future generations is so good that the present generation should save their descendants trouble and transaction costs by making a substantial number of land use decisions for them. All available evidence, however, indicates that our competence does not extend that far.²⁰

The second assumption is that the present generation represents nature's last or near-to-last chance, because once land is developed, it will never or almost never go back to being undeveloped. Under this supposition, the only way to ensure that future generations have a sufficient supply of undeveloped land is to preserve as much land as possible today, and to construct legal institutions to make it hard to reverse decisions not to develop. But this inference, too, appears to be incorrect, due both to the lack of long-term effects of much land development and to the instability of the categories of "development" and "preservation."²¹

This Article is organized as follows. Part I traces the development of conservation servitudes, and describes the substantial modifications to existing property law that were needed for these new servitudes to be legally binding. Part I also explains why the use of these instruments to conserve land has risen so dramatically, and discusses the benefits available to landowners who agree to place perpetual conservation restrictions on their property. Part II examines the claim that conservation servitudes are desirable because they offer a flexible method of land preservation, and concludes that the flexibility of these instruments is of a limited kind. Conservation easements are not—and in all probability cannot be—designed to take account of the transformations in cultural attitudes and ecological understanding that are almost certain to occur. In addition, Part II argues that the belief that land development should be

¹⁹ See James Boyd, Kathryn Caballero and R. David Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 *Stan. Envtl. L. J.* 209 (2000) (noting that the terms of the typical conservation easement include "a detailed enumeration of land uses that are prohibited by the agreement," and that even in cases where future development is permitted, "allowances for development tend to be specifically delineated").

²⁰ See *infra*, Part II.

²¹ See *infra*, Part II.

regarded as permanent fails to take into account both the shifting definitions of development and the physical malleability of land itself. Part III explores the ways in which conservation servitudes represent a significant departure from previous land preservation strategies, one that has the curious effect of both expanding and potentially fragmenting the property rights of current landowners. Part III then examines the issue of ameliorating obsolete or ill-advised development restrictions, and describes how the widespread imposition of conservation servitudes may cause future generations to incur transaction costs before they are able to make their own land preservation decisions. Part IV discusses the lessons that can be learned from an examination of conservation easements, and argues that the problems inherent in conservation easements shed light on the challenges of moving from the “first generation” of environmentalism to the “next generation.” In conclusion, Part IV offers some thoughts on how present generations might take account of the projected needs and preferences of future ones.

I. Land Conservation and the Appeal of Perpetual Restrictions

The belief that present day actions have long-term consequences for the environment engenders a sense of obligation on the part of existing humans to take into account the needs and interests of future ones.²² Although there is no generally accepted, comprehensive theory of intergenerational obligations,²³ there exists at least some consensus that “present people have moral obligations vis-a-vis future generations.”²⁴ This sense of duty to individuals not yet in existence permeates the history of the American land preservation movement.²⁵ Although

²² See Ernest Partridge, Introduction, *in* Responsibilities to Future Generations: Environmental Ethics (Ernest Partridge, ed. 1980) (suggesting that “this generation has an unprecedented responsibility to the future”).

²³ See Peter Laslett & James S. Fishkin, Introduction, *in* Justice Between Age Groups and Generations 6-11 (Peter Laslett and James S. Fishkin, eds. 1992) (discussing obstacles to arriving at an understanding of what justice among different generations might entail).

²⁴ Richard T. De George, The Environment, Ethics and Future Generations, *in* Responsibilities to Future Generations: Environmental Ethics 158 (Ernest Partridge, ed., 1980).

²⁵ In this paper, “conservation” and “preservation” are used interchangeably to denote efforts that have as their stated goal the assurance that lands of ecological or aesthetic significance do not lose their unique nature. “Conservation” and “preservation” are sometimes distinguished on the grounds that “conservation” entails “the use of science and technology to achieve efficient use of land resources,” while “preservation” denotes efforts to preclude “any commercial use, efficient or otherwise.” See Karen A. Jordan, Perpetual Conservation: Accomplishing the Goals Through Preemptive Federal Easement Programs, 43 Case West. L. Rev. 401, 410 n. 45 (1993).

advocates for the preservation of environmentally sensitive lands at times invoke the well-being of the Earth itself and its living non-human inhabitants as providing sufficient justification for conservation,²⁶ appeals to the interests of future generations are a ubiquitous feature of assertions that particular tracts of land are unique and worthy of protection.²⁷

The movement to preserve unspoiled lands of exceptional value began to gather momentum in the mid-nineteenth century.²⁸ By 1872, the year Congress established the nation's first national park by setting aside two million acres for Yellowstone National Park, the notion that America's most spectacular lands should be protected from the "Gilded Age's rampant exploitation" enjoyed strong public support.²⁹ In the years since the establishment of Yellowstone, public commitment to land preservation has continued to grow. Currently, the National Park system comprises approximately 77 million acres, National Forests contain another 191 million acres, and the U.S. Fish and Wildlife Service manages 88 million acres of federally owned land for wildlife conservation.³⁰ State and local governments, as well as private, nonprofit organizations such as The Nature Conservancy, also acquire land, supplementing the preservation activities of the national government.

Until well into the twentieth century, however, the interests in land acquired for conservation purposes were almost invariably fee simple absolutes, or total ownership of the property. The use of a servitude designed to restrict land development was not a viable option, given the stringent restrictions the law of property placed on the creation of nonpossessory estates in land. At common law, courts recognized only three types of servitudes: easements, real covenants, and equitable servitudes. Because conservation servitudes do not fit easily into any of these traditional categories,³¹ courts would likely have held them unenforceable in whole or in

²⁶ See Christopher D. Stone, *Earth and Other Ethics* (1987).

²⁷ See e.g., William R. Lowry, *The Capacity for Wonder: Preserving National Parks* 3 (1994) (quoting the 1916 Organic Act establishing the National Park Service, stating that the NPS is to "conserve the scenery and the natural and historic objects and the wild life...and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations").

²⁸ See Roderick Nash, *Wilderness and the American Mind* 96-107 (Third Edition, 1982).

²⁹ Richard West Sellars, *Preserving Nature in the National Parks: A History* 7 (1997).

³⁰ Department of the Interior, 1996 Accountability Report: Stewardship Assets, at www.doi.gov/pfm/acct96/steward.html; U.S. Forest Service, USDA, Meet the Forest Service, at 222.fs.fed.us/pages/meeetfs.html; Report of the Government Accounting Office, March 2000.

³¹ At common law, the majority of easements consist of affirmative rights to enter upon the land of the grantor for a particular purpose. Negative easements, which empower the easement holder to *prevent* the possessor of the burdened land from engaging in proscribed conduct, do exist, but the common law has traditionally recognized only

part.³²

The practical impact of this doctrinal background was that property owners who favored conservation could elect not to develop their land, but had no authority to impose permanent restrictions on development that would bind subsequent holders of the land. Instead, owners (both public and private) of unique properties were limited to acting as stewards, caring for the land to the best of their knowledge and capabilities until the time came to turn over their property to the next group of caretakers. Under this system, each generation was empowered to make its own decisions regarding which lands to protect and what societal goals to promote. To be sure, individuals who endorsed preservation no doubt envisaged and hoped that particular tracts of land would remain in a pristine state forever, but the practical effect of preservation was to expand, not contract, the land use options available in the future.

As support for land conservation grew, land preservation advocates saw advantages to dividing fee simple interests in ways not permitted by traditional servitude law. In the 1930s, the United States Fish and Wildlife Service began to experiment with nonpossessory interests as a land conservation device, obtaining easements on properties in North Dakota, South Dakota and Minnesota for the purpose of protecting wildlife habitats.³³ These initial efforts were followed by the National Park Service's purchase of conservation easements covering scenic vistas along highways of exceptional aesthetic significance, such as Virginia and North Carolina's Blue Ridge Parkway and Wisconsin's Great River Road.³⁴ Having the government acquire only a nonpossessory interest, instead of the entire "bundle" of property rights, suited both the

four types of negative easements (light and air, flow of artificial stream, lateral and subjacent support) and courts have exhibited great reluctance to recognize additional negative easements in the absence of legislative authorization. See French, *supra* note 5 at 1266-69. Because conservation servitudes restrict the conduct of landowners, but do not fall within the four permissible negative easement categories, traditional common law courts would have been unlikely to have considered them to be easements. Even if such servitudes had been deemed to be easements, they would have faced another hurdle: the reluctance of the common law to enforce easements that were "in gross," meaning held by an individual or organization, rather than "appurtenant," or attached to a specific parcel of land. Conservation servitudes are held in gross, and would therefore run afoul of these restrictions. See Cheever, *supra* note 12. Conservation easements bear a greater resemblance to real covenants and equitable servitudes than to easements. However, the variety of arcane and unclear rules surrounding the enforceability of these instruments would, in the opinion of a number of commentators, jeopardize the enforcement of conservation easements. For one thing, conservation easements are unlikely to satisfy the "touch and concern" requirement. See Andrew Dana & Michael Ramsay, *Conservation Easements and the Common Law*, 8 *Stan. Envtl. L. J.* 1, 12 (1989).

³² *Id.* at 12-13.

³³ See Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin's Great River Road: A Progress Report on Perpetuity*, 66 *J. of American Planning Assoc.* 177, 178 (Spring 2000). The first known American conservation easements were imposed in the late 1880's, to protect the parkways in Boston designed by Frederick Law Olmstead, but other localities failed to follow Boston's example. See Gustanski, *supra* note 9.

³⁴ Brian W. Ohm, *supra* note 33, at 178.

conveying property owner and the governmental entity. The owner could continue to live on the property while receiving compensation for the transferred servitude, while the government had only to expend resources for the property rights it wanted. These actions did not alter existing legal rules, however, and accordingly a number of subsequent purchasers of burdened property claimed the restrictions were not legally binding on them.³⁵

The solution to the problem of the dubious legality of conservation servitudes was clear: state legislatures could pass statutes to supersede the common law's view of permissible servitudes. The first states to enact such laws were Massachusetts in 1956 and California in 1959, but the bulk of conservation easement statutes were not adopted until the 1980's, following the approval of the Uniform Conservation Easement Act ("UCEA") by the Uniform Commission on State Laws in 1981. Today, over 40 states have statutes permitting conservation easements, about half of which are a version of the UCEA. Although these statutes vary in certain respects,³⁶ all are designed to permit landowners to protect their property through the sale or donation of nonpossessory interests to an eligible holder, which means a governmental agency or a qualified charitable organization.³⁷

At the core of the appeal of conservation easements is the promise that the land preservation decisions made today will endure perpetually. Press reports stress that conservation easements protect land forever,³⁸ and information disseminated by land trusts assures landholders that conservation easements will render their land usage decisions permanent.³⁹ The rhetoric on

³⁵ See John Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 *Env'tl. Law.* 319 (1997).

³⁶ For example, while all conservation statutes permit the imposition of restrictions on the landowner, a number fail to expressly sanction the enforcement of affirmative obligations. See Todd D. Mayo, *A Holistic Examination of Conservation Easements*, in *Protecting the Land*, at 34-35. Another area of divergence is third-party enforcement rights: statutes modeled on the UCEA permit third parties who are eligible to hold conservation servitudes to sue to enforce them. *Id.* at 48-50.

³⁷ See e.g., UCEA §§ 1-6, 12 U.L.A. 163 (1996 & Supp. 1999); N.C. Gen. Stat. §§ 121-34 - 121-42; Alaska Uniform Conservation Easement Act, Alaska Stat. §§ 334.17.020 et seq.(2000); Idaho Uniform Conservation Easement Act, Idaho Code § 55-2101 et seq. (2000).

³⁸ See e.g., Beth Daley, *A Race to Save Maine Woods: Development Threat Spurring Push to Buy Land*, *Boston Globe*, September 18, 2000 (detailing efforts to preserve the North Maine woods, "New England's last wilderness," and stating that "conservationists are getting creative, buying up only the development rights on land to make sure no houses ever go up on them"); Steve Lipsher, *Ranchland Saved From Development*, *Denver Post*, January 5, 2001 (stating that due to conservation easements entered into by local officials and landowners, "nearly 6,000 acres of pine-rimmed hills and open hay meadows were established as rangeland forever").

³⁹ See e.g., Natural Lands Trust, *The Conservation Easement: A Flexible Tool for Preserving Family Lands*, at <http://www.natlands.org/library/consease.html> ("The landowner, through the easement, decides what the future uses of the land will be...Easements offer permanent protection, applying to all future landowners"); The Land Trust of Napa Valley, *Introducing the Benefits of Conservation Easements*, at <http://www.napalandtrust.org/CE.html> ("When you enter into a conservation agreement with The Land Trust, you permanently determine the land's future

this point is pervasive and unnuanced. Advocates for conservation servitudes also argue that the easements should not be restricted to a small number of lands of paramount environmental or aesthetic value, but should instead have the potential to extend to a significant percentage of the nation's land.⁴⁰

These arguments appear to have had a substantial impact. Many landowners are delighted by the thought that the land to which they have formed emotional attachments will remain as they know and love it.⁴¹ Some even take comfort in the belief that the imposition of conservation easements will eliminate the potential for friction among their descendants about whether to develop the land.⁴² The motivations for granting conservation servitudes, however, are not entirely, or even primarily, altruistic. In exchange for the conveyance, landowners receive either direct cash compensation or indirect compensation in the form of tax benefits.⁴³ In fact, these tax advantages have fueled the popularity of conservation easements.⁴⁴ While federal law provides that, in general, a donor of property must convey her entire interest in order to claim a deduction for a charitable contribution on her income tax,⁴⁵ it contains an exception for partial interests in real estate that meet the requirements for a qualified conservation interest. The applicable regulations define a qualifying interest as “an interest in real estate given in perpetuity for the purposes of land preservation, public education or recreation, protection of a natural habitat, preservation of open space, or furthering government conservation policy.”⁴⁶ Other significant federal tax benefits include reductions in estate taxes for certain property owners

use...Future owners will be bound by the agreement's terms”).

⁴⁰ See Gustanski, *Protecting the Land*, supra note 9.

⁴¹ See Jay, *Land Trust Management*, supra note 11 at 455 (noting that “landowners genuinely may be motivated to protect their environmentally unique property and devoted to the promise of preserving their land in its present state for perpetuity”).

⁴² See e.g., Natural Lands Trust, *The Conservation Easement: A Flexible Tool for Preserving Family Lands*, supra note 39 (asserting that conservation easements “can reduce the potential for disagreement over future uses when lands are passed on to the next generation”).

⁴³ A small number of property owners do not obtain significant compensation, usually because their incomes and estates are insufficient for the available tax benefits to be of much value.

⁴⁴ See Dwyer & Menell, *Property Law*, supra note 7 at 754 (1998) (noting that “the popularity of conservation easements is sensitive to the availability of tax benefits for such grants”).

⁴⁵ 26 U.S.C. § 170 (1994).

⁴⁶ Ian Bowles, et al., *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 *Duke Envtl. L. & Pol'y F.* 209 (1998).

whose wills provide for the donation of a conservation easement.⁴⁷ In addition, because conservation easements generally reduce the fair market value of land, their use can reduce state and local property taxes assessed against the property.⁴⁸

The great advantage of conservation servitudes, advocates of their widespread use maintain, is their flexibility.⁴⁹ This claim is correct in several pivotal respects, for conservation easements are enviably malleable, affording contracting parties a wide variety of options. Landowners need not choose between selling or donating the entire fee simple or retaining all the rights associated with their property, but instead have a range of intermediate choices. Government agencies have an important new tool with which to hammer out private agreements with the owners of environmentally sensitive property, affording them an alternative to traditional regulation.

Given these advantages to landowners and governments, the future of conservation servitudes is, upon first impression, a bright one. Conservation easements are widely used by government agencies and are an important instrument in the construction and design of the habitat conservation plans that landowners and the United States Fish and Wildlife Service enter into under the Endangered Species Act.⁵⁰ At first glance, then, expanding the roster of permissible servitudes to include conservation easements appears to be a good idea, one that will continue to yield environmental benefits for the foreseeable future.

II. Flexibility and the Constant of Change

The fact that conservation servitudes offer flexibility to the parties who are initially involved in their negotiation does not mean that their flexibility is infinite. Indeed, the inflexibility with which they bind future owners is fundamental to the idea of conservation easements, for these instruments embody the conviction that present generations should be able

⁴⁷ See 26 U.S.C. § 2031(a) (1994).

⁴⁸ See Hollingshead, *supra* note 35 at 357.

⁴⁹ See e.g., John B. Wright, Reflections on Patterns and Prospects of Conservation Easement Use, in *Protecting the Land* (“The fundamental strength of conservation easements is their flexibility”); Melissa Waller Baldwin, Conservation Easements: A Viable Tool for Land Preservation, 32 *Land & Water Rev.* 89 (1997).

⁵⁰ See Dwyer and Menell, *Property Law*, *supra* note 7 at 754.

to constrain forever the acceptable uses of the property. But the assumption that the present generation is competent to engage in perpetual land use planning reflects an unduly bounded conception of the changes that are likely to occur in nature itself, in scientific knowledge, and, last but certainly not least, in cultural attitudes. Conservation servitudes are ill-suited to adapt to such changes. Indeed, there is a certain irony in the fact that the number of acres under conservation easement has been growing rapidly at a time when old conceptual models of natural and cultural stability have begun to give way to more dynamic ones.

A. *Changes in Nature*

The notion that the natural world is essentially in balance has an old and distinguished lineage in the history of western thought. In ancient Greece, Parmenides taught that change was impossible, and over the course of the next two millennia mankind was fascinated with the idea of the immutable and eternal.⁵¹ Until recently, ecological science accepted the tenets of the “homeostasis” model, whereby the equilibria between living organisms and their surroundings are “maintained by factors that resist change in the system as a whole.”⁵² Since nature, left to her own devices, would maintain a state of balance, one important goal of conservation was to prevent humans from upsetting these delicate harmonies. In the words of Aldo Leopold’s often quoted dictum: “A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community; it is wrong when it tends otherwise.”⁵³

Even in ancient times, however, the idea of equilibrational nature had competition. Parmenides’ great rival, Heraclitus, argued that impermanence, not constancy, was the order of the cosmos.⁵⁴ Over the past two decades, the Heraclitian perspective has emerged triumphant, as the conviction that nature is in a constant state of flux has displaced the formerly dominant homeostatic vision.⁵⁵ As Michael Soule explains, “living Nature is not equilibrational, at least not on

⁵¹ See Dorion Sagan & Eric D. Schneider, *The Pleasures of Change*, in *Forces of Change: A New View of Nature* (2000).

⁵² Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 *Chi.-Kent L. Rev.* 847 (1994) (quoting Eugene P. Odum, *Fundamentals of Ecology* (1959)).

⁵³ Aldo Leopold, *Sand County Almanac* 224-25 (1989).

⁵⁴ Sagan & Schneider, *supra* note 51. Only small pieces of the writings of Heraclitus have survived. His most famous aphorism was, “You can never step into the same river twice.”

⁵⁵ See J.B. Ruhl, *Book Review, Working Both (Positivist) Ends Toward a New (Pragmatist) Middle in Environmental Law*, 68 *Geo. Wash. L. Rev.* 522 (2000) (reviewing Daniel Farber, *Eco-Pragmatism: Making*

a scale that is relevant to the persistence of species... Current ecological thinking argues that nature at the level of local biotic assemblages has never been homeostatic. The principle of balance has been replaced with the principle of gradation-- a continuum of degrees of disturbance."⁵⁶ According to this new paradigm, fluctuations of climates and habitats are inevitable, and it is not within the power of humans to maintain the Earth in its present state, even if they were willing to devote enormous resources to that objective.

Significant transformations in the natural world occur not just over longer time periods such as centuries and millennia, but also over shorter ones, meaning that a single individual may witness significant changes in her lifetime. The varieties of trees in a forest may change, or the forest may disappear altogether.⁵⁷ Average regional temperatures can shift abruptly, as paleoclimatologists now conclude they have done on a number of occasions throughout the world's history.⁵⁸ The fact that the earth is in a warm interglacial period, as opposed to a cold ice age, means that in the next hundred years humans could face massive droughts as well as a greater number of damaging hurricanes, natural disasters that could cause massive upheavals in the earth's landscapes.⁵⁹

Adding a layer of complexity to the changes that nature undergoes on its own are the environmental effects of human activities. Nature and man cannot be regarded as separate, distinguishable entities, for every group of human beings has interacted with its environs, often changing the surrounding landscape.⁶⁰ The power to transform his environment is not and never

Sensible Environmental decisions in an Uncertain World (1999)).

⁵⁶ Michael Soule, *The Social Siege of Nature*, in *Reinventing Nature* (Michael Soule & Gary Lease, eds., 1995).

⁵⁷ See Daniel Botkin, *Discordant Harmonies: A New Ecology for the Twenty-First Century* (1990). See also *Returning America's Forests to Their Roots*, 287 *Science* 573 (2000) (discussing the possibility that some of the significant changes that have occurred in North American forests in the past century are due not to human behavior, but to climate fluctuations).

⁵⁸ See Jonathan Overpeck, *Climate Surprises*, in *Forces of Change* 39-40 (stating that "the paradigm of gradually changing or stable climates began to fade into history" about a decade ago, replaced by "a new realization: rather than shifting smoothly from one set of conditions to another, the world's climate systems tend to change abruptly").

⁵⁹ *Id.* at 40.

⁶⁰ See J. Baird Callicott, *The Wilderness Idea Revisited: the Sustainable Development Alternative*, in *The Great New Wilderness Debate* 348-49 (Callicott & Nelsons, eds. 1997) (criticizing the "simple, popular idea of wilderness" that "assumes, indeed, enshrines, a bifurcation of man and nature," thereby ignoring "the role that *Homo Sapiens* has played historically practically everywhere").

has been the province of “civilized” or “industrialized” man. A recent survey of the archeological evidence relating to the activities of ancient humans concluded that “local environments, in virtually all cases, have been significantly altered by human presence.”⁶¹

The history of New England’s forests illustrates the impacts that different human activities can have on the natural world. The woods that seventeenth century European settlers encountered were not examples of pristine, untouched nature. Rather, they had been shaped by the hunting, farming and fishing activities of the region’s indigenous peoples.⁶² Upon taking control of the region, the new arrivals proceeded to cause their own changes in the land, cutting down trees for fuel and clearing large tracts of forest to make the land suitable for their style of farming.⁶³ Later, as farming in New England declined, shifts in human behavior caused the land to undergo yet another transformation, as stone walls crumbled and trees began to take root in old pastures and fields.⁶⁴ In short, the New England landscape has undergone several dramatic transmutations over the course of only a few centuries, due in large measure to shifts in human uses of the land.

In general, legal regimes affecting the environment are based upon the old, outmoded model of nature as static and unchanging, and fail to reflect the new paradigm of a dynamic, continually changing world. As Dan Tarlock and Fred Bosselman observe:

Current environmental law..rests on a simple ecological paradigm which science has now rejected and replaced with a more complex, open ended model. The idea that “Nature knows best: leave her alone” fit with the secular-spiritual preservation movement which transformed itself into environmentalism in the 1960’s. “Leave her alone” principles derive from classical ecological theories, which posited equilibrium as the highest state of natural systems and viewed ecosystems as inherently fragile and thus vulnerable to human degradation.⁶⁵

⁶¹ Charles L. Redman, *Human Impact on Ancient Environments* 215 (1999).

⁶² See Botkin, *supra* note 57; William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (1983).

⁶³ Cronon, *supra* note 62.

⁶⁴ See Bill McKibben, *An Explosion of Green: The Reforestation of the Eastern United States*, 275 *The Atlantic Monthly* 61, 63 (Number 4) (1995).

⁶⁵ Bosselman and Tarlock, *supra* note 52. See also E. Donald Elliott, *Toward Ecological Law and Policy*, in *Thinking Ecologically: the Next Generation of Environmental Policy* 170-188 (Chertow and Esty, eds., 1997) (hereinafter *Thinking Ecologically*) (observing that “most of today’s environmental law violates the basic principles of ecology...[m]ost current-generation law regulates separate pollutants with little consideration for ecosystems as a whole”); Daniel Botkin, *Adjusting Law to Nature’s Discordant Harmonies*, 7 *Duke Env’tl. L. & Pol’y F.* 25 (1996).

The arguments in favor of conservation servitudes draw on this tradition. In declaring that specific lands should be earmarked for nondevelopment in perpetuity, the terms of conservation easements implicitly assume that protected lands will be immutable. Indeed, the constant assurances that conservation servitudes will guarantee that particular landscapes remain *forever* as they are, in the state that has inspired the love and reverence of their present day owners, would be impossible to make if the dynamic paradigm of nature enjoyed broad acceptance. To envision the real prospect of physical changes in the land – whether as a result of naturally occurring phenomena, human action, or a combination of the two—is to understand that the eternal prohibition of residential subdivisions, commercial activity and other “development” may turn out to be foolish. Yet information disseminated by land trusts, along with press reports of conservation efforts, consistently fails to mention the possibility that shifts in the ambient climate or surrounding topography may render the chosen land utterly different from its current state. Ignoring this unpleasant reality allows landowners, land trusts and the general public to imagine that current uses of undeveloped land will continue to be both desirable and feasible.

B. Advances in Scientific Knowledge

Knowledge regarding many aspects of the earth’s ecology is in its infancy. In fact, humans are not even at the point of *collecting* adequate information on important matters such as the magnitudes and rates of ecosystem change that result from human activities.⁶⁶ As scientific knowledge grows, we will gain a fuller understanding of how ecosystems function, enabling us to figure out how to balance potentially conflicting environmental objectives, such as wilderness preservation and the promotion of biodiversity.⁶⁷ But greater knowledge brings into question the wisdom of cherished principles and policies.⁶⁸ Almost certainly, new information will lead to a

⁶⁶ See Gretchen C. Daily, *Developing a Scientific Basis for Managing Earth’s Life Support Systems*, *Conservation Ecology* 3 (2): 14 (1999) (describing the need for “the establishment of standard metrics and systematic monitoring of the magnitude and rates of change of human impacts on ecosystems” and observing that “in a number of discussions, I have found my economist colleagues appalled at how little systematic monitoring there is in ecology”).

⁶⁷ See Sahotra Sarkar, *Wilderness Preservation and Biodiversity Conservation: Keeping Divergent Goals Distinct*, *Bioscience*, May 1999 (concluding that not only can wilderness preservation not serve as a surrogate for biodiversity conservation, the two “may be in conflict”).

⁶⁸ See A. Dan Tarlock, *Environmental Law: Ethics or Science?* 7 *Duke Envir. Law. & Policy Forum* 193 (1996).

desire to revise land use choices. Trees from a mature forest might yield a life saving cancer medication, leading to a reevaluation of how that forest should be managed. Additional information on the consequences of farming⁶⁹ and ranching⁷⁰ may cause future generations to want to convert farms and ranches to other uses, so as to lessen the detrimental environmental impacts of pesticides, fertilizers and animal waste. New data concerning global warming might point to the conclusion that land designated for “open space”⁷¹ should instead be planted with a forest designed to reduce atmospheric carbon dioxide levels. Indeed, future changes in transportation technology could make it environmentally desirable to site some residential and commercial activity in currently rural landscapes and to turn some of today’s suburbs back into farmland or forest.

This modest level of current ecological understanding means that we lack the technical competence to make land use decisions for future generations. Ideally, legal regimes governing land use will be designed to have the capacity to incorporate the leaps in scientific knowledge that are continually occurring. The ability of many conservation servitudes to adapt to scientific advances is in serious doubt, because of the danger that their fundamental purpose, such as ensuring that a parcel of land remains in agricultural use,⁷² will turn out to be misguided.

Even if the terms of conservation servitudes are sufficiently flexible to allow future owners of burdened properties to replace ranchland with forest, or convert farmland into meadow, those changes are unlikely to address adequately the issues that advances in scientific understanding will raise. At the core of every conservation easement, after all, is the conviction that the land uses that are currently classified as “development” are aesthetically objectionable or

⁶⁹ See J.B. Ruhl, Farms, Their Environmental Harm, and Environmental Law, 27 *Ecol. L. Q.* 263, 266 (2000) (summarizing the detrimental effects of farming activities, including the pollution of ground water, surface water and air, the erosion of soils and the depletion of water resources).

⁷⁰ See e.g., Thomas L. Fleischner, Ecological Costs of Livestock Grazing in North America, 8 *Conservation Biology* 629, 629-642 (1994) (describing detrimental environmental impacts of grazing livestock).

⁷¹ See e.g., Marin Agricultural Land Trust, Sample Agricultural Conservation Easement 1 (available at www.malt.org) (reciting that the purpose of the easement is the preservation of the “open space and scenic values of the Property” through the “continuation of the agricultural and ranching uses that have proven historically compatible with such values”).

⁷² See e.g., Marin Agricultural Land Trust, Sample Agricultural Conservation Easement, *supra* note 71 at 2, 9 (stating “it is the purpose of the Easement to enable the Property to remain in agricultural use..by preserving and protecting in perpetuity its agricultural values, character, use and utility” and expressly permitting landowners to “use agrochemicals, including..fertilizers and biocides in those amounts and with that frequency of application necessary to accomplish reasonable grazing and agricultural purposes”).

potentially injurious and therefore merit prohibition or strict limitation, while those that fall under the rubric of “preservation” and “conservation” promote the public interest and should be encouraged. But this conviction is not even supported by the *current* state of scientific knowledge.⁷³ There is every reason to believe that additional research will further undermine this arbitrary taxonomy, which leads to easement terms that interdict some human interactions with the landscape, such as the erection of “new buildings..other than those..related to agricultural activity” and the “cutting or removal of trees, shrubs or other vegetation, except as necessary for fire protection..and similar protective measures” while expressly permitting landowners to engage in others, such as “agricultural practices“ and the “restoration” of damage caused by fire, floods, storms and “earth movements.”⁷⁴

C. Transformations of Cultural Values

Although scientific knowledge can guide land use and preservation decisions, human cultural values will in the end determine the contours of land regulation. As Eric Freyfogel observes, “even a nature-based land ethic requires a human translator to jump from the is of nature to the ought of human conduct...A community must draw its own lessons from nature and somehow translate its new values into legal form.”⁷⁵ Landscapes that are now thought beautiful may be deemed not worth the cost of preserving, given the competing desires of citizens for economic growth and public amenities such as schools and hospitals. Conversely, less cherished lands may be highly valued. Historian Simon Schama has traced the evolution of European attitudes toward mountains, illustrating the ways in which a landscape once regarded as unattractive became, over the course of several centuries, admired for its transcendent majesty.⁷⁶ The United States’ own Grand Canyon provides another striking example of the divergent reactions that a “timeless” landscape can elicit. Mid-nineteenth century explorers regarded the

⁷³ See *infra*, Part IIE.

⁷⁴ Land Conservancy Sample Easement 3 (available at www.special-places.org/mod_ease.htm).

⁷⁵ Eric T. Freyfogel, *The Owning and Taking of Sensitive Lands*, 43 *UCLA Law Rev.* 77, 135-36 (1995). See also William Cronon, Foreword, *in Uncommon Ground: Rethinking the Human Place in Nature* 21 (William Cronon, ed. 1996, Paperback edition): “Far from inhabiting a realm that stands completely apart from humanity, the objects and creatures and landscapes we label as natural are in fact deeply entangled with the words and images and ideas we use to describe them.”

⁷⁶ See Simon Schama, *Landscape and Memory* 411-42 (1995).

Grand Canyon and its environs as “altogether valueless,” but by the turn of the century what had seemed a harsh and barren landscape became a source of wonder and inspiration.⁷⁷

Changes in cultural values will not, in all probability, simply be a matter of aesthetics. What today appear to be self-evidently correct conservation goals may strike later generations as absurd or even offensive. In 1963, the Leopold Report to the United States Secretary of the Interior recommended that “as a primary goal” the biotic associations within each national park “be maintained, or where necessary recreated, as nearly as possible in the condition that prevailed when the area was first visited by the white man. A national park should represent a vignette of primitive America.”⁷⁸ From the vantage point of the beginning of the twenty-first century, only one generation later, the Leopold report appears outdated, even ludicrous, for its implicit endorsement of the then widely prevalent belief that “uncivilized” humans were part of nature, while the “white man” stood apart from nature.⁷⁹

Conservation easements embody the shared cultural attitudes of the contracting landowner and the easement holder and identify particular landscape features such as “riverfront land, wildlife habitat, farmland, woods and creeks, productive forests, scenic vistas, historic sites, and urban gardens” for permanent protection.⁸⁰ But as time passes, many of the purposes of existing easements will become as obsolete as the recommendations offered by the Leopold Report. Indeed, one can argue that easements designed to preserve landscapes of small-scale farming⁸¹ or to ensure that a community retains a “cowboy feel”⁸² are not, in spirit, far removed

⁷⁷ See Stephen J. Pyne, *How the Canyon Became Grand* (1999) (tracing the transformation in American attitudes toward the Grand Canyon region).

⁷⁸ A. Starker Leopold, S.A. Cain, C.M. Cottam, I.N. Gabrielson and T.L. Kimball, *Wildlife Management in the National Parks* (1963); See also Gary Nabhan, *Cultures of Habitat* 155 (1997).

⁷⁹ See also Alison Byerly, *The Uses of Landscape: the Picturesque Aesthetic and the National Park System*, in *The Eco-Criticism Reader* (J. Baird Callicott, ed. 1997) (noting that “the essential goal” of the policies outlined by the Leopold report was that “the park *appear* to be a natural wilderness..the park must sustain the illusion of a natural, primeval state” so as to “emblemize a vanished past, presenting a perfect picture of the lost American wilderness”).

⁸⁰ Georgia Environmental Policy Institute, *A Landowner’s Guide: Conservation Easements for Natural Resource Protection 2*, at www.State.ga.us/dnr/wild/heritage/LOGCO/consease.htm.

⁸¹ See e.g., Jim Doyle, *Land of Milk and Money: Land Trust Appeals for Funds to Preserve Marin’s Farms and Dairies*, *San Francisco Chronicle*, September 18, 2000 (describing the acquisition of conservation easements to protect nearly 30,000 acres on 43 family farms by the Marin Agricultural Land Trust).

⁸² See Steve Lipsher, *Steamboat Springs: Cooperative Effort Saves Four Thousand Acres*, *Denver Post*, Sept. 15, 2000 (describing the Yampa Valley Land Trust’s acquisition of conservation easements designed to maintain the

from plans to restore parkland to the state in which it was first viewed by European-American eyes, for both objectives are rooted in a conviction that a particular population's experience of nature should be the one enjoyed in the future. Strongly encouraging future generations to continue to interact with the natural world in specified ways, such as ranching activities reminiscent of the romantic Old West, is an attempt to transform the landscape into a sort of memorial or monument to the preferences and attitudes of the generation that imposed the restrictions.⁸³ The stark, albeit to some unpalatable, reality is that ways of life have changed throughout human history, with succeeding generations choosing to live differently from their parents and ancestors. Preservationists should question whether striving to prolong forms of social organization is a sensible goal.⁸⁴

How cultural attitudes will shift over the next few decades is, of course, a matter of conjecture. But it is important to note that the strong antipathy toward development that has fueled support for conservation easements⁸⁵ is itself not immutable. The desire to ensure that land is forever free from commercial and residential uses must be regarded within the context of the aesthetic disaster that characterizes much of modern day commercial and residential development. To many Americans living in the early twenty-first century, development has become synonymous with flattened land, razed mature trees, and architecturally undistinguished buildings plunked down without regard for the surrounding landscape.⁸⁶ But future generations may prove more successful at land planning, resulting in development that generates fewer

“cowboy feel” of Steamboat Springs, Colorado).

⁸³ See Sanford A. Levinson, *Written in Stone: Public Monuments in Changing Society* 7 (1998) (taking note of the “combination of hubris and pathos in the attempt by the monumentalizing generation to speak to, and, ultimately, control the consciousness of their successors”).

⁸⁴ See, e.g., John B. Wright, *The Santa Fe Conservation Trust: Protecting Northern New Mexico's Complex Land Tenure Patterns* in *Protecting the Land* 447-48 (describing the conservation activities of the Santa Fe Conservation Trust and asserting that organization believes that “maintaining traditional ways of land and life in rural New Mexico” is “just as crucial as protecting the ecological characteristics of particular parcels of land”).

⁸⁵ See Gustanski, *supra* note 9 at 17 (asserting that frustration and disillusionment at “the failings of various government programs to adequately protect cherished lands from sprawling development” has played “a significant role in the phenomenal growth of land trusts”).

⁸⁶ See Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck, *Suburban Nation: the Rise of Sprawl and the Decline of the American Dream* (2000) (condemning the modern American suburban landscape as physically unattractive as well as injurious to social well-being); Bruce Katz and Amy Liu, *Moving Beyond Sprawl: Toward a Broader Metropolitan Agenda*, 18 *Brookings Review* (2) 31(2000) (cataloguing frustration with sprawling development patterns among large segments of the American population).

objections. The successes that the “smart growth” movement has already achieved⁸⁷ points to a possible world in which land development exhibits sensitivity to its surroundings, leading conservation-minded landowners not to equate all varieties of development with the destruction of that land’s character. Designating significant portions of land as perpetually off limits to development, however, may have the unfortunate consequence of frustrating innovations in land planning.⁸⁸ Indeed, it is easy to imagine conservation servitudes having the unintentional effect of exacerbating one of the problems -- “sprawl”-- they are ostensibly intended to alleviate, as development leapfrogs over lands subject to conservation servitudes, resulting in pockets of open space in the midst of populated areas.⁸⁹ And even this assumes that “sprawl” will remain forever a byword for undesirable, rather than desirable, development.

D. The Instability of “Conservation” and “Development”

In addition to confidence in the present generation’s faculty for identifying lands that merit perpetual preservation, support for conservation servitudes is undergirded by the assumption that “conserved” land is protected from degradation and kept safe for future generations, while “developed” land is always or nearly always lost forever. Under this train of thought, even if the first key assumption – that the present generation can and should identify lands deserving of eternal conservation -- turns out not to be entirely correct, conservation servitudes are nonetheless an excellent idea. Because we do not know for certain which lands will turn out to be the most desirable preservation targets, goes the reasoning, the prudent course of action is to err on the side of caution so as to build up a “land base” for future generations. According to this theory, preserved lands can always be released for development later, but

⁸⁷ See Robert Freilich, *From Sprawl to Smart Growth* (1999).

⁸⁸ See Andrew P. Morriss & Roger Meiners, *The Destructive Role of Land Use Planning*, 14 *Tul. Envtl. L.J.* 95, 117-19 (2000) (noting that restrictions on development may fail to provide for the “green space” that people want, because “values are constantly changing, so that a snapshot of values today is not reflective of value tomorrow”).

⁸⁹ For example, the Santa Fe Conservation Trust holds a conservation servitude on a 19-acre parcel inside the city of Santa Fe. Appraised at \$4.2 million before the imposition of the conservation easement restricting further development, this property has spectacular views of two different mountain ranges. See Wright, *supra* note xx at 447. The ban on subdivision of the property, however, raises a number of complex and important questions. Why should the experience of living on this beautiful land be restricted to one (affluent) individual or family, rather than made available to a larger group? And why should land within the city limits be set aside for open space, rather than being made available for infill development? Open space within city limits, after all, can have detrimental as well as beneficial effects. See generally, Jane Jacobs, *The Death and Life of Great American Cities* (Reissue edition, 1993).

developed land cannot be converted back into preserved land.⁹⁰ Developing land that should have been preserved is therefore a serious error, one that will impossible to rectify, while preserving land that would have been better off developed is easily remedied.

But the notion that what the present generation defines as “development” is irreversible, while land that under current usage “preservation” is not, is wrong. Development and preservation are fluid categories, not fixed ones. Except at the extremes of the preservation/development continuum, the meanings of these terms fluctuate with shifts in cultural values and ecological understanding. Land preservation measures, including conservation servitudes, are designed to mandate or encourage a wide range of land uses, all of which are considered to be uses of the land that “preserve” it from “development.” The vocabulary in use, however, fails to reflect the tremendous variety of human interactions with the natural world that fall within the definition of preservation. Some protected lands, such as National Wilderness Areas, are completely or almost completely off-limits to activities that could have a significant impact. But the bulk of land that is categorized as “undeveloped” is used by humans for specific purposes, and involve human activities that affect the condition of the land. Moreover, the detrimental environmental impact of “preserving” land for uses such as agricultural enterprises⁹¹ or golf courses,⁹² to list but two popular goals of conservation servitudes, can be every bit as great or even greater than the impact of development.⁹³ To suggest that all lands that happen to fall within the current definition of preserved lands are part of a “land base” that is being safeguarded for future generations makes no sense, given the arbitrary boundary between the two categories of preservation and development.

Indeed, the more closely the categories of “preserved” and “developed” land are scrutinized, the more evanescent the distinction becomes. Lands contained in the nation’s

⁹⁰ See e.g., Defenders of Wildlife, Statement on Permanent Conservation Funding, September 21, 2000 (available in LEXIS, News, Crnws) (praising the proposed Conservation and Reinvestment Act of 2000, which provided for substantial expenditures to acquire conservation easements, on the grounds that the legislation has the “potential to protect for future generations millions of acres of parks, forests” and other lands “before they are lost forever to sprawl and development”).

⁹¹ See *infra* text accompanying notes xx.

⁹² See, e.g., Bryan Rourke, Aquidneck Land Trust Welcomes “Huge” Deal, *The Providence Journal-Bulletin*, December 24, 2000 at 1C (reporting that “in its biggest deal to date,” a Rhode Island based land trust negotiated a conservation easement on a 299-acre parcel of land owned by the Newport National Golf Club to ensure that “the land will always be golf courses, or, if the courses fail, open space”).

⁹³ See Ruhl, *supra* note 69 (detailing the environmental dangers posed by farms).

national park system are firmly placed in the “preserved” column, despite their extensive road networks, vast parking lots, and building complexes.⁹⁴ By contrast, residential construction, even on a limited scale, is regarded as development, as shown by controversial efforts to restrict permissible activity in the woods of Northern Maine. The common denominator of lands allocated to today’s preservation category is their aesthetic appeal to those who make the classifications. But the fact that today’s decision makers find particular landscapes congenial or attractive has no bearing on how difficult or costly “undoing” today’s land choices and converting the lands to other uses will prove.

Future generations will no doubt have their own conceptions of which land use choices count as “development” and which represent “preservation.” One can imagine a world in which a secluded north Maine woods lake shore with limited residential housing is regarded as a “preserved” landscape, but a forest where logging activity takes place is considered “developed.” In a similar vein, a media mogul’s working Montana ranches might be viewed as “developed” properties because the appearance and contours of the land have been molded by a century of “unnatural” human activity. To be sure, future generations will not necessarily view every landscape differently. It is entirely plausible, for example, that the Washington D.C. area’s historic Alexandria and Georgetown sections might continue to be thought of as examples of “preservation,” even if commercial activity and residential density increase significantly.

Only at the ends of the preservation/development spectrum is it likely that there will be a significant level of stability. The nation’s designated wilderness areas are unlikely to be labeled “developed,” just as suburban strip malls and industrial sites that have suffered environmental damage not susceptible to remediation are unlikely to be regarded as “undeveloped.” But these examples should not distract attention from the vast amount of land that falls in the middle of the spectrum, and can reasonably be thought of as belonging to either category. How future generations classify land uses, after all, is likely to be a function of their aesthetic preferences as well as the anticipated environmental impacts of such uses. As more is understood about the impacts, both short term and long term, of dedicating land to farming, ranching, golf courses, houses, apartment buildings, city gardens, and commercial and industrial purposes, perceptions about how best to characterize these uses will shift. In fact, the categories of “development” and

⁹⁴ See Sellars, *supra* note 29 at 27 (1997) (noting that although the “national park idea embraced the concept of nurturing and protecting nature,” the concomitant commitment to accommodating the public through “resort-style development” has been a “persistently influential force in national park affairs”).

“preservation” may themselves become obsolete, to be replaced by groupings that reflect a more nuanced view of possible land uses.

Moreover, even if these categories do continue to be used and are stable, tracts of land will still migrate from one category to another. Meadows are routinely converted into office parks, but office parks can be converted back to meadows, too. Even lands degraded by industrial or agricultural uses can be, in some cases, rehabilitated in order to provide lands for the promotion of biodiversity.⁹⁵ It is tempting for modern humans to imagine, like Ozymandius,⁹⁶ that their works will endure forever, but history teaches otherwise. Stone structures erected by the Romans have sunk into European fields, once booming mining towns in the American west are now ghost towns, and disintegrating urban neighborhoods are plowed under to make way for new construction or even city parks.

Of course, the amount of time and the cost required to erase signs of previous human activity will vary, depending on the nature of the land, the type and magnitude of human development and the technologies available to future generations.⁹⁷ The consequences of some human actions will prove very expensive or even impossible to undo, while reversing the effects of others will be comparatively easy. What is important to bear in mind is that reversing the “development” of the present generation to make way for the “preservation” of future generations will not necessarily be harder or more expensive than replacing today’s “preservation” with future “preservation.” Moreover, even if undoing development will, on average, prove more expensive than undoing conservation easements, that does not explain why saddling land with long-term restrictions is superior to not developing the land, and letting future generations make their own decisions. That way, if the land is no longer needed for its current use, there will be no need to incur costs to reassemble scattered property rights, to persuade a court that development restrictions should not be enforced, or to persuade a state legislature to change the laws governing conservation servitudes.

⁹⁵ See Andy P. Dobson, A.D. Bradshaw and A.J.M. Baker, *Hopes for the Future: Restoration Ecology and Conservation Biology*, 277 *Science* (5325) 515-522 (1997).

⁹⁶ Percy Bysshe Shelley, *Complete Poems* 589 (1994). In this well-known poem, Shelley describes a traveler from an “antique land” passing through a barren and desolate environment. In the middle of this vast wasteland, the traveler spots the ruins of a monument. “And on the pedestal, these words appear:/My name is Ozymandius, King of Kings/Look on my works, ye Mighty, and despair!/Nothing beside remains. Round the decay/Of that colossal Wreck, boundless and bare/ The lone and level sands stretch far away.”

⁹⁷ See James A. Harris, et al., *Land Restoration and Reclamation* 16-18 (1996).

E. The Limits of Flexibility

Conservation servitudes are flexible instruments in the hands of their creators. But changing property law to expand the conservation options of present day landowners detracts from the flexibility of subsequent owners. When all the property rights associated with a piece of land remain with a single owner, that owner retains the ability to respond promptly and effectively to changes in nature, scientific understanding and cultural attitudes. Unlike the owner of property subject to conservation servitudes, who is bound by contractual obligations and must in many instances enter into negotiations with the easement holder in order to change his land conservation practices,⁹⁸ these holders are not constrained by an earlier vision of whether and how the land should be preserved. By contrast, the owner of a property burdened by a conservation easement has a greatly reduced capacity to react to change.

This reduction of flexibility is deliberate, for conservation servitudes can achieve their goals if and only if the future options of owners of burdened land are constrained. Without the power to shape the land use choices of future generations, conservation servitudes would be meaningless, for future landowners could simply opt not to abide by the restrictions, without fear of reprisals. In sum, the justification for adding conservation servitudes to the menu of available preservation options is that flexibility is a good thing when enjoyed by present day landowners, but a bad thing to make available to future owners.⁹⁹

The conviction that today's owners are better equipped to target lands worthy of preservation than their children and grandchildren will be is understandable. What generation, after all, has not considered itself more trustworthy and responsible than the ones that will follow? But all available evidence indicates that this assumption of superior competence is flat out wrong, for there is no reason to think that today's landowners and conservation organizations enjoy a unique, privileged perspective that affords them superior insights into how best to protect nature. Succeeding generations will possess superior scientific knowledge, along with decision making abilities that are at least the equal of those of their ancestors. Measures designed to

⁹⁸ See Amending Easements: the Question of Accommodating Change *in* The Conservation Easement Handbook: Managing Conservation and Historic Preservation Easement Programs 121-25 (Janet Diehl and Thomas S. Barrett, eds. 1988) (discussing the conservation easement amendment process and exhorting easement holders to amend easements "sparingly").

⁹⁹ What amount of control present landowners should exercise over future uses of their property, of course, is a long-standing controversy in the law of property. See *infra*, Part IVA.

prevent tomorrow's owners from reversing today's conservation decisions may yield emotional satisfaction for the existing individuals who impose them,¹⁰⁰ but fail to help their alleged beneficiaries.

In planning for the future, humans engage in two distinct forms of prognostication. Not only do they try to predict the future consequences of present actions, they formulate predictions about future preferences for these consequences.¹⁰¹ But individuals encounter trouble predicting their *own* responses to future events, which calls into question how accurate guesses about the needs and preferences of future generations are likely to be.¹⁰² All available evidence militates for the conclusion that members of future generations will prefer other land use restrictions, and think about the categories of "preservation" and "development" differently, to the extent they employ those terms at all. Moreover, they are likely to have good reasons for doing so. The present generation should recognize that our definition of development is unlikely to be their definition of development, just as our conclusions about which land uses pose the greatest threats of environmental harm will not be theirs. As a result, we would do well to give serious attention to what will happen when (not if) present-day determinations about which lands merit preservation are revisited.

III. The Future of Conservation Easements

One possible response to conservation easements is to dismiss their imposition as manifestations of hubris and myopia, and assume that future generations will simply ignore today's restrictions. From that perspective, the belief that some lands should be earmarked for perpetual preservation, and that in setting them aside we are building up a land bank for our descendants, is nothing more than a harmless delusion. Future generations will make their own decisions, essentially unconstrained by the goals enunciated by land trusts and property owners in 2001, just as today's preservationists feel unconstrained by earlier visions of how to save nature.¹⁰³

¹⁰⁰ See *infra*, Part I.

¹⁰¹ James March, Bounded Rationality, Ambiguity, and the Engineering of Choice. *Bell Journal of Economics* (1978).

¹⁰² George Loewenstein and Shane Frederick, Predicting Reactions to Environmental Change, *in* *Environment, Ethics, and Behavior* (Bazerman, et al., eds. 1997).

¹⁰³ To offer but one example, policy makers today do not feel bound by the comprehensive summary of national park management policies contained in a famous letter sent in 1918 by then Secretary of the Interior Franklin Lane

There are two problems with this response. The first is that conservation servitudes are engineered to be hard to undo. Both the terms of the instruments creating them and applicable legal rules pose obstacles for those whose aim is to unburden lands subject to conservation easements. While the formidability and durability of these obstacles is as yet a matter of conjecture, there is good reason to worry that the costs of reversal will not be trivial. Future generations may have to expend substantial resources in order to deal with outmoded restrictions. The second reason not to shrug off conservation easements as a modern folly, one destined to fade away within a decade or two, or likely to be undone when conditions change, is that their creation is being subsidized through tax deductions and direct payments by governmental entities. It makes sense, therefore, to examine what the public is receiving in exchange for its money. If conservation servitudes will *not* endure for perpetuity, then it is only reasonable to ask why present day property owners should be compensated for promises that will not be binding.

A. The Burdens of Undoing Conservation Easements

To understand fully why future generations may have to incur substantial costs in order to make their own conservation choices, one must recall how American property law has traditionally limited the ways in which property owners can divide up their sets of property rights.¹⁰⁴ The law constrains the ability of landowners to fragment their property rights through a variety of doctrinal rules.¹⁰⁵ For example, the owner of an estate can split her fee simple estate into a life estate and a remainder, or into a burdened fee simple estate and an easement, but her options are limited to the forms of estate recognized by property law, and she may not apportion her land into new varieties of estate of her own design.¹⁰⁶ In the area of servitudes, the common

to Stephen Mather, the first Director of the National Park Service. Known as the “Lane Letter,” this missive was intended to serve as the National Park Service’s “basic creed.” Although the Lane Letter stressed that the National Park Service should maintain parks in “essentially their natural state,” it also termed the parks a “national playground system,” and recommended that the National Park Service not attempt to develop its own scientific expertise. See Sellars, *supra* note 29 at 56-57. Over time, this “basic creed” has undergone substantial modification. *Id.* at 290.

¹⁰⁴ See Heller, *supra* note 18 at 1174-76.

¹⁰⁵ See Heller, *supra* note 18 at 1176 (noting that at a “basic level,” property law “sharply restricts” the ability of owners to divide up their fee simple absolute interests).

¹⁰⁶ See Thomas W. Merrill and Henry E. Smith, Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle, 110 *Yale L. J.* 1 (2000); Frank Michaelman, Ethics, Economics and the Law of Property, in *Nomos XXIV: Ethics, Economics and the Law* (Pennock and Chapman, eds., 1982); Bernard Rudden, Economic Theory v. Property Law: The *Numerus Clausus* Problem, in *Oxford Essays in Jurisprudence* 239 (John Eekelaar and John Bell, eds. 3d ed. 1987).

law permitted the creation of easements, real covenants, and equitable servitudes, but placed strict limitations on the power of landowners to bind future owners through burdening their lands with these interests.¹⁰⁷ Despite some commentators' enthusiasm for extending to parties to land transactions the same degree of freedom of contract accorded to participants in other transactions,¹⁰⁸ the freedom of property owners to create servitudes that restrict uses of their land in the future remains far from absolute.¹⁰⁹

By expanding the range of restrictions landowners may impose on their property, laws authorizing conservation easements have subtly transformed the property rights associated with the ownership of a piece of land. The ability to transfer a conservation interest can be thought of as an addition to the allowable forms of basic property ownership, one that empowers property owners to divide up their bundles of rights in a new way in order to impose their conservation choices on future landholders.¹¹⁰ Conservation servitudes thus represent both an expansion and a modification of the property rights of present day landowners. Moreover, conservation servitudes divide up property rights in order to pursue a goal that differs from those traditionally promoted by American property law. Property law is generally designed to facilitate the maximization of the value of land, while conservation easements are designed to frustrate that purpose.¹¹¹

But inhibiting the freedom of owners to derive the highest possible economic return from their property comes at a cost. This reduction in value creates an incentive for landowners to think about strategies for freeing their land from the development restrictions, in order to increase its value.¹¹² Consequently, many owners of properties subject to conservation

¹⁰⁷ See *infra*, Part I.

¹⁰⁸ See Richard Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. Cal. L. Rev. 1353, 1354 (1982) (arguing that “the only need for public regulation” of servitudes voluntarily entered into is “to provide notice by recordation of the interests privately created”).

¹⁰⁹ See Stewart E. Sterk, Freedom from Freedom of Contract: the Enduring Value of Servitude Restrictions, 70 Iowa L. Rev. 615, 659 (1985) (detailing the limitations that the law places on the ability of landowners to impose servitudes and offering justifications for these doctrines on economic and other grounds).

¹¹⁰ See Dana & Ramsay, *supra* note 31 at 2.

¹¹¹ See Dwyer and Menell, Property Law, *supra* note 7 at 753 (noting that “the conservation easement runs counter to a longstanding policy of ingrained principles of American property law”).

¹¹² See Cheever, *supra* note 12 at 1092-97 (describing various tactics that owners of lands burdened by conservation servitudes might pursue in order to be free to pursue development options).

easements can be expected to want to acquire the easement in order to extinguish the development restrictions, to amend the terms of the easement to make the restrictions less onerous, or to persuade a court not to enforce the easement.¹¹³ But if landowners succeed in their efforts to increase their wealth by ridding their properties of conservation restrictions, the whole purpose of conservation easements will be negated.

Land trusts and other supporters of conservation servitudes are acutely aware that future landowners will mount challenges to development restrictions.¹¹⁴ The obvious solution is to construct elaborate defenses to ensure that landowners who try to free their lands from such restrictions will fail. A careful examination of the most common means of eliminating or modifying servitudes suggests that the architects of conservation servitudes may well have succeeded in their efforts to make these instruments hard to reverse.

1. Alienation and Extinguishment of Conservation Easements

Most easements are perpetual. But the creators of traditional easements do not elect perpetuity out of a desire to make the land use arrangement contained in the easement last forever. Rather, perpetuity is the default duration because the original parties are not sure, at the time of their agreement, when the easement will cease to be desirable. When that day arrives, the law provides for a variety of ways to extinguish the easement. Although getting rid of obsolete easements is not entirely costless --- there are expenses associated with any deal, and the parties may have trouble reaching accord for a variety of reasons-- for the most part these methods work reasonably well.

The most common means of extinguishing easements is for the easement holder to execute a written release to the owner of the property burdened by the easement.¹¹⁵ Because easements are interests in land, the usual means of accomplishing this release is through a deed that conveys the easement.¹¹⁶ For example, suppose that X and Y own adjoining properties, and

¹¹³ In fact, land trusts have already reported numerous incidents of violations of conservation easements. See Jay, *supra* note 11 at 458 (reporting that “a written national survey of 209 land trusts, conducted by the Land Trust Alliance, identified 498 conservation easement violations”) (footnote omitted).

¹¹⁴ See Jay, *supra* note 11 at 458-59 (noting that the “land trust community is aware that although the use of conservation easements and the creation of land trusts is increasing drastically, some future owners likely will be disgruntled by the easement restrictions placed on their property”).

¹¹⁵ See Grant S. Nelson, William B. Stoebuck and Dale A. Whitman, *Contemporary Property* 761-62 (1996).

¹¹⁶ *Id.* at 762.

the value of Y's property Ocher Acre will be increased by \$20,000 if X conveys to Y the right to cross X's property, Vermilion Acre. The reduction in value to Vermilion Acre is only \$10,000, so there is plenty of room for X and Y to come to a mutually satisfactory agreement. Suppose they agree on a price of \$15,000, and X duly grants the easement to Y for the benefit of Ocher Acre. For a while, everyone is happy, but over the course of a decade, the local municipality constructs a new road abutting Ocher Acre, so the easement across Vermilion Acre is no longer useful and does not increase the worth of Ocher Acre. The existence of the easement, however, continues to have a detrimental effect on the value of Vermilion Acre. This problem has a simple and straightforward solution: X and Y (or their successors in interest) will be free to bargain over the terms of the transfer of the easement, leading to the alienation and extinguishment of the easement.

This straightforward method of removing an unwanted servitude, however, is precluded by the express provisions of some applicable state statutes.¹¹⁷ In addition, the terms of numerous conservation easements strictly limit permissible transfers of conservation easements. The language of the sample easement contained in a recently published book promoting conservation servitudes is representative. The easement holder "may not subsequently transfer the Easement created by this Grant and Declaration, whether or not for consideration," unless the easement holder "as a condition of the subsequent transfer, requires that the conservation purposes which this Grant and Declaration is intended to advance, shall continue to be carried out."¹¹⁸ Moreover, "subsequent transfers shall be restricted to organizations qualifying, at the time of the subsequent transfer, as eligible donees of qualified conservation contributions..."¹¹⁹ In other words, the original grantees are precluded from assigning the benefits of the easement to any entity other than government agencies and qualified nonprofit firms that pledge enforce the terms of the easement in perpetuity.

The reasons to include such provisions are obvious. Aside from the fact that such a limitation on transfer ensures that the federal tax deductions of the grantor are not endangered, restricting alienation prevents the owner of the burdened land from defeating the easement's

¹¹⁷ See, e.g., Cal Civ. Code Section 815.3 (Deering 2001).

¹¹⁸ Grant of Conservation Easement and Declaration of Restrictive Covenants *in* Protecting the Land at 520-21.

¹¹⁹ *Id.* at 521. See also, Marin Agricultural Land Trust, Sample Agricultural Conservation Easement 6-7 (available at www.malt.org/sampleea.htm) ("Grantee may assign its interest in this Easement only to a 'qualified organization'..which is authorized to acquire and hold conservation easements under California law...").

purpose by reacquiring it. As noted above, in general owners of land burdened with conservation servitudes will have strong incentives to free their land from development restrictions. The greater the reduction of value of the property due to the conservation easement, the more fervently the landowner is likely to pursue extinguishment or modification. With traditional easements, the strong desire of the burdened landowner to be terminate the easement serves as evidence that the easement may no longer serve any socially beneficial purpose. But in the case of a conservation easement, the desire of the landowner to terminate the easement has an ambiguous meaning. On the one hand, changes in the land, advances in scientific values or shifts in cultural attitudes may well have rendered the conservation easement a white elephant, one that fails to promote or even impedes conservation objectives. On the other hand, the wish of the owner to remove the development restrictions through acquiring the easement might reflect nothing more complicated than the owner's desire to better his financial position.

Whether and to what extent restrictions on transfers of conservation servitudes will prove enduring is open to question. Traditionally, courts have viewed restrictions on alienation of property interests with suspicion.¹²⁰ Total restraints on the alienation of fee simple interests have consistently been ruled to be unenforceable,¹²¹ on the grounds that the free alienation of property furthers important societal goals. Among these goals are promoting the dispersal of property so that land ownership is not concentrated in a small number of wealthy families, ensuring that resources are controlled by the current owners rather than past ones, and facilitating the transfer of property to the owner who values the resource most highly.¹²² Conservation servitudes, it can be argued, contravene each one of these important goals. However, they do so in pursuit of other goals that state legislatures have explicitly concluded to be of paramount importance.

The emerging modern trend is for courts to enforce reasonable restraints on alienation.¹²³ For example, Section 3.4 of the Restatement (Third) of Property states that servitudes that impose direct restraints on the alienation of a burdened estate are invalid if “unreasonable, “ with reasonableness to be determined by “weighing the utility of the restraint against the injurious

¹²⁰ See Richard Collins, *Alienation of Conservation Easements*, 73 *Denv. U. L. Rev.* 1103 (1996).

¹²¹ See Ralph Boyer, Herbert Hovenkamp and Sheldon F. Kurtz, *The Law of Property: An Introductory Survey* 131 (4th ed. 1991).

¹²² See Joseph Singer, *Property Law: Rules, Policies and Practices* 572 (2nd ed. 1997)

¹²³ *Id.* at 573.

consequences of enforcing the restraint.”¹²⁴ Of course, the direct restraint on alienation contemplated by conservation easements is not a restriction of transfer of the burdened property-- the owner remains free to sell his property, albeit at a price that reflects the reduced value-- but of the servitude itself. Nevertheless, courts could invoke Section 3.4 as strong evidence that direct restraints on alienation are acceptable in some circumstances. The strong support for conservation servitudes expressed elsewhere in the Restatement (Third) of Property (Servitudes)¹²⁵ suggests that the limitations on transfer are likely to be binding.

Even if restrictions on alienation are held unenforceable, it is not clear under what circumstances the easement and underlying property will be reunited. Holders of conservation easements are not private entities, who can be reasonably expected to pursue the objective of maximizing their wealth, and whose behavior is therefore fairly predictable. Nonprofit organizations and governmental entities will pursue their own agendas, which will be in large part a function of the interests and preferences of their respective constituencies, and may or may not coincide with broader societal interests.¹²⁶ Moreover, even if a mutually satisfactory transfer eventually occurs, the parties involved will incur transaction costs to reunite the fragmented property rights.

2. *Agreements Between the Parties to Modify or Terminate the Easement*

Conservation easements can, of course, be terminated or modified through the mutual agreement of the parties. But here again, conservation servitudes differ in crucial respects from other servitudes. First and foremost, clauses that facilitate the amendment or termination of the conservation easement can have the unfortunate effect of jeopardizing the easement grantor’s tax deductions.¹²⁷ As with alienation of easements, if modification and termination is cheap and easy, a landowner may be able to take advantage of the offered tax deductions, and then enter into negotiations to regain the very property right she was compensated for surrendering. Such

¹²⁴ Restatement (Third) of Property (Servitudes), Section 3.4. According to the comment on Section 3.4, “direct restraints include absolute prohibitions on some or all types of transfers, including leases, prohibitions on transfer without the consent of another, prohibitions on transfer to particular persons, requirements of transfer to particular persons, options to purchase land, and rights of first refusal.”

¹²⁵ See Section 7.11.

¹²⁶ See Jerry Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (1998) (summarizing evidence that environmental organizations function as an interest group promoting the welfare of its members, rather than the public interest).

¹²⁷ See Dana & Ramsay, *supra* note 31 at 34.

modifications or terminations could result in a windfall for the property owner.

Consequently, holders of conservation servitudes regard their amendment as an unusual step, rather than as a normal and understandable response to inevitable changes.¹²⁸ The information disseminated by the Vermont Land Trust cautioning prospective donors of conservation servitudes is typical: “While an easement can, in theory, be amended with the consent of the Land Trust, such changes are extremely rare and only occur where the amendment does not reduce the protection of conservation values.”¹²⁹ Some applicable state laws provide that conservation easements cannot be terminated by mutual agreement without some form of public approval.¹³⁰

Negotiating modifications and terminations of easements will create transaction costs. In addition, the fact that the easement holders are governmental or nonprofit entities will affect amendments to the easements in the same way as alienations. The goals of easement holders are complex and go beyond their own economic interests, which means they might reject certain modifications and terminations that a private party (such as an individual or a profit-seeking firm) could be expected to accept. But the fact that easement holders will on occasion *not* pursue their economic interests cannot be taken as evidence that their actions further the public interest. A local land trust controlled by a small group of large landowners, for example, might refuse to enter into negotiations to modify or extinguish a conservation easement if doing so could adversely affect the property values of the landowners, irrespective of the burdened parcel’s low conservation value or the locality’s need for land for a school, hospital or low-income housing project.

3. *Changed Circumstances and Termination and Modification by Judicial Action*

In addition to agreements between the parties, conservation servitudes can be effectively modified or terminated by courts, who have broad equitable powers to decline to enforce servitudes. The most likely grounds for nonenforcement of a conservation servitude is the doctrine of changed circumstances, also known as the doctrine of changed conditions. The

¹²⁸ See Amending Easements: the Question of Accommodating Change *in* The Conservation Easement Handbook: Managing Conservation and Historic Preservation Easement Programs 130 (Janet Diehl and Thomas S. Barrett, eds. 1988) (“When the terms of an easement are negotiated,” both parties should consider “these provisions as unchangeable...No organization or property owner should ever agree to a conservation easement with the idea that its terms will be changed later”).

¹²⁹ Vermont Land Trust, Conservation Easements: Guide to the Legal Document (available at www.vlt.org).

¹³⁰ See e.g., Neb. Rev. Stat. 76-2,113 (2000); N.J. Stat. Ann. 13:8B-6 (2001).

doctrine of changed conditions is easy to state: a covenant is unenforceable if conditions have so changed since its inception that “it is no longer possible to secure in substantial measure the benefits originally contemplated.”¹³¹ In general, courts will invoke the changed circumstances doctrine when changes in the land uses of surrounding property have rendered the restrictions obsolete or unreasonably burdensome.¹³²

Applying the doctrine to conservation servitudes, however, promises to be problematic. For example, suppose that a conservation easement is intended to help preserve the rural character of a farming area, but that over a period of years the surrounding parcels are subdivided. An owner resisting enforcement of the servitude could argue that the goals of the servitude can no longer be achieved, because the rural ambience has been destroyed. But the easement holder could argue that the changed conditions of the neighboring land renders enforcement of the servitude all the more important, because the burdened parcel represents the final vestige of the old landscape.¹³³

The availability of the doctrine of changed conditions is further cast into doubt by the terms of many conservation servitudes. Language in a number of these instruments makes clear that the drafters intended for only the most extreme changes in conditions to extinguish the servitude. In the words of Michigan Model Conservation Easement: “This Conservation Easement may be extinguished only by an unexpected change in condition which causes it to be impossible to fulfill the Conservation Easement’s purpose.”¹³⁴ By providing that only impossibility will discharge the restrictions, these instruments seek to ensure that future landowners will not be able to unburden their properties by simply arguing that the conservation servitude has become unduly burdensome.

The conviction that land subject to conservation easements should be released only if conditions change so as to render it *impossible* for the land to serve any conservation purpose is also a feature of the recently issued Restatement (Third) of Property (Servitudes).¹³⁵ Section

¹³¹ Glen O. Robinson, Explaining Contingent Rights: The Puzzle of “Obsolete” Servitudes, 91 Colum. L. Rev. 546 (1991).

¹³² See Dana and Ramsay, *supra* note 31 at 39.

¹³³ See Korngold, *supra* note 5 at 485.

¹³⁴ Michigan Model Conservation Easement 10 (available at www.landtrust.org/lrc/mmce1.html).

¹³⁵ See Restatement (Third) of Property (Servitudes), Section 7.11, Comment a: “The rules stated in this section are designed to safeguard the public interest and investment in conservation servitudes to the extent possible, while

7.11 of the Restatement contains special provisions for modifications and terminations of conservation servitudes due to changed conditions, which are intended to afford conservation servitudes greater protection than other servitudes. The comment to Section 7.11 defends this approach on the grounds that the “strong public interest” in such servitudes justifies a higher level of protection.¹³⁶

B. What if Conservation Servitudes Are Not Durable?

Because conservation easements have been imposed on land in large numbers only since the 1980's, it is impossible to know for certain how difficult it will be to modify or terminate these instruments. The future, as this Article emphasizes, is not predictable. But even if it could be said with a high degree of confidence that conservation servitudes will not prove hard to undo, their proliferation should still raise concerns. The direct payments made to landowners, as well as the property assessments that form the basis for the available tax benefits, are all based upon the assumption that the restrictions will prove perpetual. If what land owners are surrendering in exchange for payments and tax breaks are really promises not to engage in specified forms of development for a limited term of years, then surely their level of compensation should reflect this shorter time horizon. To assert that conservation servitudes are *not* permanent is, in effect, to admit that the programs amount to a government giveaway for owners of eligible lands. Because most of the owners of land burdened by conservation easements are affluent, or even rich, the prospect of such a giveaway raises serious distributional concerns.

Of course, the longer a conservation servitude endures, the smaller the gap will be between what the owner was compensated not to do and what the owner actually fails to do. For servitudes that last for two decades or more, this difference will be small. Nevertheless, even if the giveaway to each individual landowner proves modest, citizens might still be unhappy, given that a large number of small benefits can amount to a significant public burden.

assuring that the land may be released from the burden of the servitude if it becomes impossible for it to serve a conservation or preservation purpose.”

¹³⁶ Id. (asserting “there is a strong public interest in conservation and preservation servitudes” and that “their importance, underscored by statutory requirements that they be perpetual, will continue to increase as population growth exerts ever-greater pressures on undeveloped land, ecosystems and wildlife”).

C. Possible Modifications

The problems with conservation servitudes stem from the unquestioned assumption that today's conservationists are capable of engaging in long-range planning, and that their competence is of such a high degree that they can and should determine which lands merit perpetual protection. This promise of perpetuity, although likely to prove illusive, is an integral component of the appeal of conservation servitudes.¹³⁷ Any effective legal regime involving conservation easements, however, must be based on a firm comprehension of the probability that many conservation decisions will be revisited. This means that if conservation servitudes are to be a useful mechanism for controlling the use of land, they should at a minimum be limited in duration.¹³⁸ In addition, supporters of conservation easements should think about designing these instruments so that land can be easily freed from obsolete or injurious restrictions. Designing such modifications is likely to be hard, given the reality that any provision that renders the conservation servitude easy to undo or relax should conservation values change may also render it less effective for its stated purposes.

IV. Conservation Easements and the Next Generation of Environmental Policy

Conservation servitudes provide a cautionary case study of the challenges of moving beyond the "first generation"¹³⁹ of environmental policy. Initially, environmentalism concentrated on alleviating imminent harms to identifiable individuals, generally through command and control regulation imprecisely tailored to the problems at hand. These early environmental measures achieved some impressive successes, including substantial reduction of urban air pollution and the restoration of fish and other wildlife to rivers.¹⁴⁰ But the techniques

¹³⁷ See *infra*, Part I.

¹³⁸ The majority of states allow conservation easements to be either perpetual or for a specified number of years, but have a presumption of perpetuity if the terms of the instrument fail to specify a duration. See Todd D. Mayo, A Holistic Examination of the Law of Conservation Easements, *in* *Protecting the Land*, at 40. California, Colorado, Florida and Hawaii require conservation easements to be perpetual.

¹³⁹ See Daniel C. Esty and Marian Chertow, Introduction *in* *Thinking Ecologically* (discussing the "first generation" of environmental policy).

¹⁴⁰ See J. Clarence Davies and Jan Mazurek, *Pollution Control in the United States: Evaluating the System* (1998).

of the “first generation” are not suited to addressing all environmental problems.¹⁴¹ Over the past decade, numerous policy makers, scientists, economists, ethicists and community members have begun to think about how the “next generation” of environmental policy can craft solutions to problems relating to the protection of biodiversity, the prevention of global warming, and the preservation of nature.¹⁴²

Growing comprehension of the complexity and interconnectedness of the natural world has convinced many that to be successful, the next generation of environmental policy must “move beyond the regulatory and organizational barriers that single-media, single-species, single-substance and single life cycle stage approaches created to a more holistic and longer-term consideration of environmental threats.”¹⁴³ Also, there is strong support for exploring the feasibility of property rights-based solutions, which are viewed as attractive because they promote environmental values by harnessing the forces of self-interest to encourage the efficient use of resources, rather than by using the power of the state to coerce individuals and institutions.¹⁴⁴ Conservation servitudes contain elements of both these approaches. Because their duration is meant to be perpetual, conservation servitudes promise to save nature-- or at least selected pieces of nature -- for some period of time that extends far beyond the immediate future. Moreover, the protections they confer are accomplished through voluntary transfers of rights, not government regulatory fiat. But bridging the gap between appealing ideas and effective solutions is far from easy.

A. *Long-Term Solutions and Future Generations*

For many policy makers, the concept of crafting long-term solutions to environmental problems exerts an undeniable pull. After all, many known or suspected environmental hazards

¹⁴¹ See Daniel A. Mazmanian and Michael E. Kraft, *The Three Epochs of the Environmental Movement*, in *Toward Sustainable Communities: Transition and Transformations in Environmental Policy* 15 (Daniel A. Mazmanian and Michael E. Kraft, eds., 1999) (noting that during the epoch when environmental policy largely consisted of laws and regulations promulgated by the federal government “it became clear” that “government alone, especially the federal government,” could not “shoulder the all the responsibility for stimulating innovative responses to environmental problems”).

¹⁴² See Daniel Farber, *Eco-Pragmatism* 199 (1999).

¹⁴³ Charles W. Powers and Marian Chertow, *Industrial Ecology*, in *Thinking Ecologically*.

¹⁴⁴ See Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights and the Takings Doctrine*, 53 *Wash. & Lee L. Rev.* 265 (1996) (describing the potential usefulness of property concepts in the protection of environmental resources).

may cause significant problems decades, centuries or millennia from now, and one could argue that members of the present generation would be remiss if they failed to take these potential consequences into account.¹⁴⁵ But the difficulties of promoting the interests of future generations as well as present ones are enormous, perhaps insurmountable. Even if we are convinced by the controversial argument that humans who are *temporally* separated from us merit the same level of concern as those who are *geographically* removed from us,¹⁴⁶ the practical reality remains that effective methods exist for determining the needs and preferences of living, albeit distant, individuals, but not of future ones.¹⁴⁷ Future generations have no voice, only self-appointed representatives, who, inevitably, will be mistaken in many of their assessments regarding what those who come after us will want and need.

Difficulties in determining the interests of their constituents is by no means the sole reason that the self-selected advocates of future generations may fail to be effective representatives. In the realm of political activity, agents often choose to pursue their own self-interest instead of promoting the interests of their principals.¹⁴⁸ In cases where principals are unable to monitor the behavior of their agents, this danger is especially acute. Because future generations are in no position to supervise or discipline their agents, the invocation of their welfare may present an attractive rationale for policies that benefit members of the present generation.

The danger that putative defenders of future humans will instead advance their own cause should cause policy makers to scrutinize carefully who the winners and losers are likely to be, both now and in the future, from any proposed policy measure. Particularly close scrutiny is warranted in the absence of any generally accepted method of evaluating the magnitude of the

¹⁴⁵ See Richard Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 *Colum. L. Rev.* 941 (1999) (addressing issues relating to environmental hazards that threaten to cause harms to existing humans at a future date or to or as yet unborn individuals).

¹⁴⁶ See Derek Parfit, *Reasons and Persons* 480-86 (1984) (maintaining that just as we “ought to give some weight to the effects of our acts on mere strangers, we ought not to give less weight to effects on our own descendants...We ought to be equally concerned about the probable effects of our acts whether these will occur in one, one hundred or a thousand years”).

¹⁴⁷ See Bruce A. Ackerman, *Social Justice in the Liberal State* 216-17 (1980) (acknowledging the challenges of determining the values and preferences of future generations and arguing that one of the benefits of a liberal education is that it helps citizens determine the “probable range” of such values and preferences).

¹⁴⁸ See James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962).

benefit or harm under consideration. In the case of conservation servitudes, it appears plausible that the real beneficiaries are members of the present generation, rather than future individuals. Architects of the next generation of environmental policy might ask whether a similar phenomenon is likely to occur in other contexts, with the idea of long-term planning yielding emotional satisfaction or financial benefits to the planners, but little or even negative benefits to the future “beneficiaries.”

Conservation servitudes illustrate another problem of long-range planning, namely the curious confidence that humans tend to exhibit that ecological understanding is at last at hand, and that modern day science yields enduring truths instead of contingent hypotheses.¹⁴⁹ This tendency to overestimate the competence of the present generation can lead policy makers to forget that their plans will almost certainly need revision. In the ordinary course of events, such failures to imagine that current knowledge will soon be outdated is of limited consequence, because future generations will have the unambiguous power to change policies that have outlasted their usefulness. When long-range plans are deliberately designed to thwart future modification, however, implicit assumptions that today’s ecological science is correct can no longer be dismissed as the inevitable hubris of each generation, but instead should be recognized as a potential source of harm.

Finally, there remains the question of how many choices present generations *ought* to try to make for their descendants, even in the face of sincerely held convictions that their choices are good ones. In assuming that the influence of present generations should extend well beyond their lifetimes, advocates of conservation servitudes have departed from the more modest ambitions of earlier land preservation efforts: namely, to take good enough care of the Earth to pass it on to the next generation with a clear conscience.

Tension between the interests of present and future generations is, of course, hardly a novel phenomenon. In the area of property law, the appropriate balance of power between current and future owners has proved a recurring theme. As Robert Gordon observes, “the freedom to do anything one likes with property implies the freedom to create restraints on it, and thus to bind one’s own hands or the hands of one’s transferees.”¹⁵⁰ Over the centuries, the law of

¹⁴⁹ See Daniel Farber, *Eco-Pragmatism* 178 (1999). Notes Farber: “It is tempting to think that *now* we finally understand environmental risks and need only find appropriate solutions. The reality is that we are faced with a high degree of uncertainty.”

¹⁵⁰ See Robert W. Gordon, *Paradoxical Property*, in *Early Modern Conceptions of Property* 102 (John Brewer and Susan Staves, eds. 1996).

property has sought, through a variety of doctrines, to place sensible limits on the ability of property holders to control the future.¹⁵¹ In passing statutes empowering land owners of land to transfer perpetual servitudes for the express purpose of curtailing development, state legislatures have altered this delicate equilibrium. A genuine concern for the interests of future generations, coupled with an understanding of the limitations of the predictive capacity of the present generation, should trigger a reevaluation of the decision to augment the powers of current owners of property.

B. Property Rights

Although property rights and environmental protection are sometimes regarded as being “at loggerheads” with each other,¹⁵² a system of well functioning property rights can promote environmental goals.¹⁵³ For one thing, the owner of a resource has incentives not to mismanage or neglect his property, because he will internalize the consequences of doing so.¹⁵⁴ One need only look to the environmental damage done to the former Soviet republics and eastern bloc countries for evidence of the detrimental consequences of the absence of clearly defined private property rights.¹⁵⁵

To be effective, however, property rights based approaches must be designed with care, for more property rights are not necessarily better.¹⁵⁶ Conservation servitudes make use of

¹⁵¹ See Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 *Yale L.J.* 601, 603 (noting the widespread understanding of the “pervasive and serious qualifications on exclusive dominion”).

¹⁵² Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights and the Takings Doctrine*, 53 *Wash. & Lee L. Rev.* 265 (1996).

¹⁵³ See generally, Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 *N.Y.U. L. Rev.* 1495, 1572 (1999) (“ensuring that there exists a legal system that delineates and enforces property rights over environmental resources can provide an important foundation for improved pollution control and resource management”); Richard A. Epstein, *Too Pragmatic by Half*, 109 *Yale L.J.* 1639 (detailing how, under a number conditions, government recognition of private property rights can help secure environmental protection).

¹⁵⁴ See Terry L. Anderson and Donald R. Leal, *Free Market Environmentalism* (1991) (arguing that a “system of well-specified property rights to natural resources” imposes a discipline on resource users “because the wealth of the resource user is at stake if bad decisions are made...The further a decision maker is removed from this discipline-- as when there is political control-- the less likely it is that good resource stewardship will result”).

¹⁵⁵ See Thomas M. Parris, *The Environmental Sites of Central and Eastern Europe*, 3 *Environment* (April 1997) (noting that “the world was stunned by the magnitude of the environmental degradation unveiled in Central and Eastern Europe after the fall of communism in 1990”).

¹⁵⁶ See Michael Heller and Rebecca Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *Science* 698 (1998) (describing the recognition of a plethora of property rights in biomedical research

property rights to achieve preservation goals, but in doing so engineer the fragmentation of the rights associated with a particular tract of land, thereby reducing flexibility for later landowners. In essence, conservation easements ensure that a given tract of land will not have a single owner, thereby foregoing the powerful advantages of single ownership.

In structuring property rights regimes, planners should take account of the dangers of permitting multiple parties to have property rights in the same resource. The point is that achieving environmental goals through property rights strategies is not a panacea, and that the details of the particular property rights involved will make the difference between success and failure. Property rights approaches to environmental protection will not necessarily prove more flexible and adaptable than traditional “command and control” regulation.

V. Conclusion

The preservation of nature has long been a primary goal of the environmental movement.¹⁵⁷ Achieving this objective is complicated, however, by the fact that both nature itself and the meaning of preservation are constantly changing. The challenge for the next generation of environmental policy is to design institutions and strategies that take account of the instability of ecological knowledge, cultural values and the natural world itself.

From this perspective, the extensive use of perpetual restrictions on land use as a conservation strategy looks far from promising. A heavy reliance on conservation servitudes makes sense if today’s decision makers are capable of specifying which lands merit permanent protection and correct in striving to impose current land preservation preferences on the future. Neither proposition bears scrutiny, given our anemic powers of prediction and our inability to justify our wish that future generations share our aesthetic and ecological values. Unless the original parties to the servitudes are able to predict with astonishing accuracy the needs and preferences of the next and subsequent generations, substantial amendments and extinguishments of conservation servitudes are going to be necessary. Built into the structure of many conservation servitudes, however, are mechanisms designed to frustrate such modifications by rendering revisions to their terms impracticable or expensive.

and suggesting that “a proliferation of intellectual property rights upstream may be stifling life-saving innovations further downstream”); Norbert Schulz, Francesco Parisi, and Ben Depoorter, *Duality in Property: Commons and Anticommons*.

¹⁵⁷ See Daniel Farber, *Eco-Pragmatism* 199 (1999) (stating that environmentalism’s “key norm” is that all are “presumptively entitled to a safe environment and the preservation of nature”).

In sum, there is reason to suspect that instead of helping us to avoid “meriting the curses of our successors,”¹⁵⁸ the extensive use of conservation servitudes as an anti-development tactic may create ecological, legal and institutional messes for later generations to deal with. Members of the present generation may be forced to conclude that their nature cannot be saved, because the natural world they know and love will not outlast them indefinitely. Instead, the best strategy may well be to make sensible land use decisions, with the hope and expectation that future decision makers will do the same. Such an approach would compel today’s preservationists to abandon the illusion that they can save nature through calculated efforts to restrict the options of future generations. Their descendants, however, might thank them.

¹⁵⁸ Annette Baier, *For the Sake of Future Generations* in *Earthbound: New Introductory Essays in Environmental Ethics* 215 (Tom Regan, ed. 1984) (noting that “it has been a normal wish that future generations will not curse their predecessors, but rise up and call them blessed”).