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A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements

Daniel M. Filler
Drexel University - Thomas R. Kline School of Law, daniel.m.filler@drexel.edu

Carol Necole Brown
University of North Carolina (UNC) at Chapel Hill - School of Law, cbrown5@richmond.edu

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A TIME TO PRESERVE: A CALL FOR FORMAL PRIVATE-PARTY RIGHTS IN PERPETUAL CONSERVATION EASEMENTS

*Carol Necole Brown**

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* Associate Professor of Law, The University of Alabama School of Law. A.B., Duke, 1991; J.D., Duke, 1995; LL.M., Duke, 1995. I would like to thank Keith Aoki, Alfred L. Brophy, Daniel H. Cole, John S. Dzienkowski, Katherine Eddins, Bryan K. Fair, Steven H. Hobbs, Alfreda Robinson, Florence Wagman Roisman, James C. Smith, Serena M. Williams, the Second National People of Color Legal Scholarship Conference, and The Working Group on Property, Citizenship, and Social Entrepreneurism (PCSE) for their helpful comments. I also thank Penny Gibson, Creighton Miller, Dean Kenneth C. Randall, and the University of Alabama Law School Foundation for their generous research support. Special thanks are owed to Patty Lovelady Nelson for her valuable time and editorial assistance. I especially thank my parents, Allen S. Brown, Jr. and Valerie J. Brown.

I. INTRODUCTION

For more than a century, conservation easements[1] have been used in the United States to maintain open space or to protect the environment.[2] Such easements produce a public good.[3] They

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[1] "The term 'conservation easement' did not emerge until the late 1950s when journalist William Whyte advocated using private land use controls to accomplish landscape preservation . . . . By the time Whyte coined the term 'conservation easement,' the property interest he described was already relatively well established." CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 699 (2005); *see also* John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 325 (1997) (discussing Whyte and history of modern conservation easements). Confusion exists over the appropriate name for conservation interests that attempt to safeguard the environment by transferring some form of ownership interest from the fee simple owner of the servient tract to the beneficial holder of the servitude. Typical names include conservation servitudes, conservation easements, development rights, scenic easements and interests, and less-than-fee interests. For purposes of this Article, such interests shall be referred to as "conservation easements."

[2] *See* Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 9, 9 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (stating that first conservation easements in United States were created in 1880s); Jean Hocker, *Foreword* to PROTECTING THE LAND, *supra*, at xvii, xvii-xix (providing overview of evolution of conservation easement laws); *see also* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1262 (1982) ("Private arrangements that bind particular burdens or benefits to the occupier of land have been known to the common law since medieval times.").

[3] *See* Jay P. Kesan & Andres A. Gallo, *Optimizing Regulation of Electronic Commerce*, 72 U. CIN. L. REV. 1497, 1509 n.33 (2004). The authors explain as follows:

> Public goods are defined as those goods that have the characteristics of non-excludability and non-rivalry. These characteristics may be defined as follows: "Non-excludability: If the public good is supplied, no household can be excluded from consuming it, except, possibly, at infinite cost. Non-rivalry: Consumption of the public good by one household does not reduce the quantity available for consumption by any other."

Id. (citations omitted). For further explanation of public good, see Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 10 (2003) (stating that "non-excludability undermines provision of public goods"); Federico Cheever, *Environmental Law: Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1077-78 (1996) (finding that land trust movement furthers public good in multiple ways); Roderick H. Squires, *Preface* to PROTECTING THE LAND, *supra* note 2, at xxi (arguing that government intervention is needed to produce more public goods). The Western District of Texas explained its environmental concerns as follows:

> The reaping and reckoning in public health and quality of life which will come to our children and grandchildren will echo from what we incrementally sow into their environment and whether we come to an epiphany of the interdependence and interrelatedness played out in the mystery of the dance called life.

increase the amount of protected landscapes by shielding property from development inconsistent with the conservation easement, while allowing grantors the flexibility to negotiate the retention of development rights tailored to meet grantors' needs.[4]

My thesis posits that private parties should have a common law property interest in conservation easements sufficient to confer standing to seek injunctive relief. Such an interest would allow private parties to enforce conservation easements and to sue for damages when these easements are violated.[5] In this Article,

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Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 202 F. Supp. 2d 594, 597 (W.D. Tex. 2002).

[4] Squires, *supra* note 3, at xxi; *see, e.g.*, Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at *2 (Mar. 8, 2004) (describing how easement restrictions vary depending upon conservation purposes); Anthony DePalma, *In New Jersey; Conservationists Now Helping Developers*, N.Y. TIMES, May 8, 1983, § 8, at 10 (discussing New York Conservation Foundation's program designed to coordinate efforts between builders and environmentalists in special housing projects); Greg Lucas, *Preserving the High Sierra Valley*, S.F. CHRON., Sept. 27, 2004, at B1 (discussing retention of development rights, including rights to construct new homes and one-hundred-room inn, and stating that land trusts have ability to be flexible with regard to business and environmental needs, while insuring that goals of conservation easement contract are achieved); Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks with Few Curbs on Land Use*, WASH. POST, May 6, 2003, at A01 (discussing significant development and property rights that owners of conservation property retain); Natural Lands Trust, Model Conservation Easement (Sept. 19, 2002), http://www.epa.gov/owow/NPS/ordinance/documents/A2e-ModelLand.pdf (adopted from THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 156-61 (Janet Diehl & Thomas S. Barrett eds., 1988)) (providing model conservation easement agreement). *But see* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 787 (2002) (objecting to conservation easements precisely because they do serve antidevelopment purpose). Mahoney argues for limiting the current attempt to preserve property through perpetual conservation easements and relying upon future generations to make "sensible land use decisions." *Id.*

[5] A common law rule would create private-party standing in the absence of an express statutory provision. *See* Jeff Pidot, Reinventing Conservation Easements: A Work in Progress, Address Before the Georgetown University Law Center Continuing Legal Education Environmental Law & Policy Institute Conference on Regulatory Takings 16 (Oct. 14-15, 2004) ("Absent a statutory provision to the contrary, it is reasonably clear under the common law applicable in most states that private persons who are not parties to a conservation easement, including neighbors of the land covered by the easement, lack standing to enforce it."); *see also* VA. CODE ANN. § 10.1-1013 (2005) (stating that, among others, any person with standing under common law may bring action affecting conservation easement); *Tenn. Envtl. Council*, 2004 Tenn. App. LEXIS 155, at *3-*4, *8-*9 (interpreting TENN. CODE ANN. §§ 66-9-307 and 66-9-303 (2004) (amended 2005), and providing all citizens of Tennessee with private-party standing to enforce conservation easements); Craig Anthony Arnold, *Is Wet Growth Smarter Than Smart Growth?: The Fragmentation and Integration of Land Use and Water*, 35 ENVTL. L. REP. 10152, 10167 (2005) (discussing importance of private citizens, referred to as " 'private

private parties are defined as members of the public—either individuals or public-private entities—who are not owners of an interest in real property affected by a conservation easement, holders of conservation easements,[6] possessors of a third-party right of enforcement,[7] or individuals authorized by some other law to bring an action affecting conservation easements.[8] A common law property interest would be analogous to the third-party right of enforcement created by the Uniform Conservation Easement Act of 1981 (UCEA) and codified by many states.[9] The UCEA validates conservation easements where the circumstances lack privity of estate, the easements are in gross, or the easements fail to touch and concern the affected real property, along with other limited exceptions.[10] The UCEA expressly excludes private parties from its

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attorneys general,' " in enforcement of environmental laws against government as well as private violators); Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 343-44 (2002) [hereinafter Arnold, *Reconstitution of Property*] (observing that rights granted by statute may be subject to modification or termination in response to pressure from special interest groups).

[6] The Uniform Conservation Easement Act (UCEA) defines "holder" as follows:

> (2) "Holder" means:
> (i) governmental body empowered to hold an interest in real property under the laws of this State or the United States; or
> (ii) charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological, or cultural aspects of real property.

Unif. Conservation Easement Act § 1(2), 12 U.L.A. 170 (1996).

[7] UCEA § 1(3), 12 U.L.A. 170-71 (1996) (" 'Third-party right of enforcement' means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder."). The comment to section 1 of the UCEA states that a private person cannot possess a third-party right of enforcement; only trusts, associations, charitable corporations, and governmental bodies may qualify. *Id.* § 1 cmt. at 171.

[8] UCEA § 3(a), 12 U.L.A. 177 (1996) (defining who may bring judicial actions under Act).

[9] *Id.* § 3 cmt. at 177-78; *see also infra* notes 32-59 and accompanying text.

[10] UCEA § 4, 12 U.L.A. 179 (1996); *see also* Hollingshead, *supra* note 1, at 335-36 (discussing UCEA's elimination of several common law impediments); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 468-79 (1984) (examining categories of real covenants to "illuminate[ ] how courts have treated and ought to treat the policy concerns inherent in private conservation servitudes in gross").

definition of "third party right of enforcement,"[11] and most states have similarly denied private parties a third-party right of enforcement.[12] Although this Article is written from the perspective of someone defending conservation easements, the proposal for private-party standing should appeal to those who criticize conservation easements as well.

"Time creates complexities in the [easement] problem."[13] To reflect changing societal needs, some degree of flexibility is prudent. When a grantor evidences an intent to convey a perpetual conservation easement, however, the grantor's intent should be honored, except in very rare cases in which destruction of conservation easements is absolutely necessary.[14] The grantor's intent most clearly indicates what gave the grantor the greatest

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[11] UCEA § 1 cmt, 12 U.L.A. 171 (1996).

[12] *See, e.g.*, Burgess v. Breakell, No. CV 95 0068033, 1995 Conn. Super. LEXIS 2290, at *8 (Aug. 7, 1995) (denying neighbors standing to prosecute suit to enforce conservation easement); Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at *9 n.5 (Mar. 8, 2004) ("A number of states have enacted a form of the [*UCEA*]. Research indicates that in each instance third parties cannot enforce the easement unless the right is expressly granted. Tennessee appears, thus far, to be the only state to grant enforcement power to 'beneficiaries' of the easement." (citations omitted)); *see also* Knowles v. Codex Corp., 426 N.E.2d 734 (Mass. App. Ct. 1981) (holding that residents of town in which conservation land was located lacked standing to file action against developers). The court stated that, "[t]he present case raises no implication of private nuisance and does not fall within any of the narrowly defined classes of cases in which the Legislature has conferred standing on private individuals who may wish to litigate questions concerning the allegedly wrongful use of public or private lands." *Id.* at 737.

[13] Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 757 (1986).

[14] French, *supra* note 2, at 1316-17 (discussing grounds for relieving parties of servitude obligations: (1) obsolescence; (2) unduly burdensome affirmative obligations; or (3) obsolete, wasteful, or unreasonable economic arrangements attending servitude obligation). Heightened scrutiny should precede any such determination. Affording private parties standing would better ensure comprehensive decisionmaking and guard against self-dealing by holders and those with UCEA third-party rights who may be subject to undue influence by wealthy grantors. *See, e.g.*, Mo. Coal. for the Env't v. Conservation Comm'n, 940 S.W.2d 527, 528-31 (Mo. Ct. App. 1996) (discussing challenge by environmentalists to decision by commission to sell property subject to development restriction that property remain available for free use by public); Terry W. Frazier, *Protecting Ecological Integrity Within the Balancing Function of Property Law*, 28 ENVTL. L. 53, 71, 88 (1998) (discussing disproportionate influence of special interest groups on legislators and their ability to influence environmental decisionmaking); Melody Simmons, *Md. Sues on Plan for Farm on Shore; Group Had Decided to Allow Development of Protected Land*, BALT. SUN, July 10, 1998, at 1B (discussing challenge to holder's attempt to amend conservation easement which "undermined state efforts to preserve open space"). Holders of conservation easements are likewise susceptible to undue influence by wealthy grantors.

utility.[15] Protecting the grantor's right to maximize utility reinforces the importance of private property rights and strikes the appropriate balance between respecting private property rights in the ownership of "property affected with a public interest"[16] and the societal need to achieve the most efficient and socially optimal level of protection of designated natural resources.[17] When measuring the appropriate moment in time to modify or terminate a perpetual conservation easement, the calculus should represent the interests of the larger society. Conferring private-party standing would provide this representation.

Conservation easements impart value to society and are tailored to meet the needs of the interested parties.[18] Federal, state, and

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[15] *See* Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 48-64 (2003) (defining and discussing utilitarianism in context of voluntary and involuntary exchanges of property interests). "Economists refer to utility as the science of 'how individuals pursue happiness, satisfaction, and fulfillment,' and 'assume that people generally prefer more utility to less utility.' " *Id.* at 37 n.177 (citing DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 3 (1992)). For purposes of this Article, I am discussing primarily rule-utilitarianism—i.e., maximizing long-run welfare—as contrasted with the concern over maximization of immediate welfare that is the emphasis of act-utilitarianism. *See* Radin, *supra* note 13, at 741 (explaining differences between act-utilitarianism and rule-utilitarianism); *see also* Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 919-20 (1988) (discussing use of doctrine of changed conditions as legal tool used to invalidate parties' express contractual interests); Frazier, *supra* note 14, at 88 (discussing protection of individual's right to maximize utility in relation to maximization of social welfare).

[16] Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 701 (1986); *see also* Epstein, *supra* note 15, at 919-20 (arguing that freedom of contract through covenants should generally prevail over changes imposed by legal system).

[17] This Article builds on my earlier works by continuing to advocate for a robust private property regime. It describes the growing importance of conservation easements to society and articulates why a strong presumption against applying the doctrine of changed conditions to terminate conservation easements should exist. *See infra* notes 60-108 and accompanying text. Instead, a robust private property regime should protect the ability of private property owners to negotiate the transfer of perpetual conservation easements despite long-held concerns about over-fragmentation of real property through dead-hand control. *See* Brown, *supra* note 15, at 7 (asserting that ability to pursue regulatory takings claim is property that should be subject to negotiation and transfer by private property owners to successive property owners); John Walliser, *Conservation Servitudes*, 13 J. NAT. RESOURCES & ENVTL. L. 47, 114-15 (1997) (discussing judicial reaction to perpetual servitudes). This Article focuses on property theory and does not directly address the content of the bundle of property rights.

[18] Squires, *supra* note 3, at xxii-xxiii; *see also* Tenn. Envtl. Council, Inc. v. Bright Par 3 Assoc., No. E2003-01982-COA-R3, 2004 Tenn. App. LEXIS 155, at *2 (Mar. 8, 2004) (noting that conservation easement restrictions should be tailored to fit both long-term use plans of

local governments, as well as nonprofit organizations, are interested in protecting unique natural and historic resources and endangered species.[19] Owners of conservation property—who either convey conservation easements, thereby restricting property they already own, or purchase conservation property after the easement is attached—have present and future needs with respect to the conservation property. These needs reflect desires to (1) ensure preservation of the conservation property, (2) retain sufficient development rights to meet their personal needs, and (3) benefit from favorable federal and state tax provisions.[20] Moreover, private parties benefit from conservation easements. Private parties are "interest[ed] in [the] conservation of plant and animal life, natural landscapes and ecosystems, and agricultural lands, and in the preservation of historic sites and areas."[21] The considerable investment by the public in conservation easements—including national and state subsidies in the form of tax benefits,[22] funding for government purchase of conservation easements,[23] and provision of

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landowner and resource preservation goals of qualified grantee); French, *supra* note 2, at 1262 (commenting that private arrangements are used extensively to secure advantages to landowners); Seth McKee, *Conservation Easements to Protect Historic Viewsheds: A Case Study of the Olana Viewshed in New York's Hudson River Valley*, *in* PROTECTING THE LAND, *supra* note 2, at 102, 102-10 (discussing efforts to protect scenic landscape); DePalma, *supra* note 4 (discussing New York Conservation Foundation's program to coordinate efforts between builders and environmentalists in special housing projects); Stephens & Ottaway, *supra* note 4 (discussing significant development and property rights that owners of conservation property retain); Natural Lands Trust, Model Conservation Easement, *supra* note 4, § 1 (discussing permitted uses of lands under model conservation easement agreement).

[19] *See* Smith v. Town of Mendon, 822 N.E.2d 1214, 1221 (N.Y. 2004), *cert. denied*, 125 S. Ct. 2958 (2005) ("Ensuring perpetual protection for open spaces—along with the resources and habitats they shelter—from the vicissitudes of workaday land-use battles is hardly an inconsequential governmental interest.").

[20] *But see* Stephens & Ottaway, *supra* note 4 (discussing reforms that would end or significantly curtail tax breaks for easements).

[21] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. b (2000); *see also* Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 202 F. Supp. 2d 594, 597 (W.D. Tex. 2002) (discussing private-party interest in pristine wilderness); *see supra* note 3 and accompanying text.

[22] *See* Julia D. Mahoney, Conservation Easements—Perpetual Problems, Address Before Proceedings of the Seventh Annual New York Conference on Private Property Rights (Oct. 18, 2003), http://www.prfamerica.org/ConsEase-PerpetualProblem.html (stating that "large amounts of government money go to property owners often in exchange for not doing things on their land" and discussing, in addition to direct payments, tax benefits); Pidot, *supra* note 5, at 2 (discussing public as subsidizer of conservation easements).

[23] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. b (2000); *see, e.g.*, Richmond v.

supervision and management services to enforce conservation easements—evidences private-party interest in conservation.[24]

Preferences for protecting private property rights and safeguarding natural resources are not inconsistent. These preferences can be achieved through reconstitution of the traditional bundle of property rights[25] to recognize a common law property interest in conservation easements held by private parties. Alternatively, private-party interests in conservation easements may be analyzed under the public trust doctrine.

My proposal relates to that of Abraham Bell and Gideon Parchomovsky, who attempt to achieve the optimal level of land preservation by designing a private property regime that formalizes the de facto interests of neighbors of public parks "into full fledged property interests."[26] This Article argues that protecting the rights of property owners to transfer perpetual conservation easements and giving private parties legal property entitlements to enforce these easements are efficient and socially beneficial.

First, in Part II of this Article, I briefly describe the history and rationales underlying the creation and perpetuation of conservation

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United States, 699 F. Supp. 578, 579 (E.D. La. 1988) (discussing administration of facade easement by local governmental agency); *Conservation Success Story*, POST AND COURIER (Charleston, S.C.), Apr. 30, 2005, at 16A (discussing financing by South Carolina of conservation oriented land restrictions); Mahoney, *supra* note 22 (noting direct payment and tax benefits to landowners).

[24] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. b (2000); *see, e.g.*, *Conservation Success Story*, *supra* note 23, at 16A (explaining that South Carolina has established state Conservation Bank that "will help map a comprehensive conservation plan for South Carolina[,] by assisting in easements and purchasing development rights for key properties[ ] [and] can act on behalf of three state agencies . . . for land conservation that provides for public access"); Mahoney, *supra* note 22 (discussing government programs dedicated to preservation of land).

[25] *See* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 2-3, 82 (2000) (discussing bundle of property rights); Bell & Parchomovsky, *supra* note 3, at 46 (noting three most important rights in property bundle); Brown, *supra* note 15, at 37 n.175 (noting that most important right in bundle is right to alienate or transfer). *See generally* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980) (conceptualizing and chronologizing bundle of property rights); David D. Gregory, *The Easement as a Conservation Technique*, IUCN Environmental Law Paper No. 1, at 15 (1972) (discussing bundle of property rights and recognized limitations on owners' rights).

[26] Bell & Parchomovsky, *supra* note 3, at 5; *see also infra* notes 188-220 and accompanying text.

easements. I also discuss the close relationship between preservation and a strong private property regime.[27]

Second, in Part III, I discuss challenges to perpetual conservation easements under the doctrine of changed conditions as well as the importance of private-party standing to the defense of conservation easements.[28]

Third, in Part IV, I consider efficiency and social justice arguments in favor of a restricted application of the doctrine of changed conditions. I conclude that private parties should have a common law property interest in the conservation easement.[29]

Fourth, in Part V, I broaden my analysis to demonstrate that decentralizing property ownership interests by enforcing property owners' decisions to burden their property with perpetual conservation easements is consistent with a democratic property system. Decentralization allows grantors to assess their property fully, determine the market value of the conservation easement, and negotiate this property interest in commerce. Such negotiation maximizes social welfare from the perspective of the grantor, the government, and private property owners. Moreover, I contend that expanding the bundle of property rights to provide private parties with a formal interest in the conservation easement is also efficient and socially beneficial.[30]

Finally, in Part VI, I consider objections to my proposal and alternatives to aggressively defending perpetual conservation easements against challenges. I conclude that the proposals articulated in Parts IV and V will result in efficient and appropriate levels of conservation while promoting decentralization of private property ownership.[31]

II. CONSERVATION EASEMENTS—THE TIMELESS PURSUIT OF PRESERVATION AND A STRONG PRIVATE PROPERTY REGIME

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[27] *See infra* notes 32-59 and accompanying text.
[28] *See infra* notes 60-108 and accompanying text.
[29] *See infra* notes 109-87 and accompanying text.
[30] *See infra* notes 188-220 and accompanying text.
[31] *See infra* notes 221-307 and accompanying text.

Conservation easements are a type of servitude used to secure private contracts for the use of land.[32] They are nonpossessory interests in real property, imposing land use limitations and obligations on property owners to protect and preserve natural resources and sensitive habitats.[33] A written instrument in the form of a conservation easement or conservation deed creates and conveys conservation easements.[34] In order to further the grantor's conservationist and preservationist intents, grantors, who typically own a fee simple absolute interest in land, contract with grantees or holders to restrict the nature and amount of development that may occur on the grantor's land.[35] The written instrument conveys specific property rights for designated conservation purposes. The conservation easement may be structured to impose affirmative duties on either the owner of the affected property, the easement holder, or both.[36] Failure to fulfill an affirmative duty may result in

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[32] French, *supra* note 2, at 1262. The UCEA defines conservation easements as follows:

> (1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

UCEA § 1(1), 12 U.L.A. 170 (1996); *see also* Squires, *supra* note 3, at xxi-xxii (discussing use of conservation easements to ensure certain use of land); Gregory, *supra* note 25, at 9, 15 (discussing basic definition of easement).

[33] UCEA § 1, 12 U.L.A. 170-71 (1996).

[34] *See, e.g.*, UCEA § 2 (explaining creation, conveyance, acceptance, and duration).

[35] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6(1) (2000) (defining conservation servitude and listing conservation and preservation purposes); THE CONSERVATION EASEMENT HANDBOOK 5 (Janet Diehl & Thomas S. Barrett eds., 1988) (noting easements may be tailored for "particular property and . . . interests of the individual owner"). Grantors may convey conservation easements to private parties and noncharitable entities as well as to governmental entities and charitable conservation organizations qualifying as conservation easement holders under the UCEA. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. a (2000); *see also* UCEA § 1 cmt., 12 U.L.A. 171 (1996) (discussing identity and rights of holder of conservation easement); JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 12.02, at 12-2 to 12-3 (rev. ed. 1995) (discussing potential grantees of conservation easements and their rights). Conveyance of a conservation easement to other than a "qualified organization," however, will not qualify for certain tax benefits. *See, e.g.*, I.R.C. § 170(h)(3) (2004) (defining term "qualified organization" as used in context of "qualified conservation contribution").

[36] *See* UCEA § 4 cmt., 12 U.L.A. 179-80 (1996) (detailing affirmative duties); *see also* Richmond v. United States, 699 F. Supp. 578, 579 (E.D. La. 1988) (referencing commitments required of landowner who donated facade easement); Mahoney, *supra* note 22 (discussing

suits by owners of real property affected by conservation easements, holders of conservation easements, those possessing a "third-party right of enforcement," or such other parties as authorized by applicable state law.[37]

The concept of land transactions aimed at promoting land conservation emanated from two historical developments.[38] The first was the creation of land trusts,[39] which are nonprofit organiza-tions that seek to conserve open space for the public benefit.[40] Land trusts achieve this mission by becoming directly involved in land transactions—acquiring land through purchase or donation, acquiring and monitoring conservation easements, and partnering

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rights and duties of landowner and holder of conservation easements). In *Richmond*, plaintiffs conveyed a facade easement to the City of New Orleans to be administered by the Vieux Carré Commission (VCC), a governmental agency responsible for historic preservation in the French Quarter. *Richmond*, 699 F. Supp. at 579. "Before accepting the facade donation, the City of New Orleans, acting through the VCC, required a commitment that certain renovations be made to the real property." *Id.* The plaintiff's share of the renovation cost was nearly $59,000. *Id.* In *Missouri Coalition for the Environment v. Conservation Commission of Missouri*, the property had been restricted for use as an "unimproved 'green belt' area" by a federal court decree as a result of litigation commenced nearly twenty years earlier. Mo. Coal. for the Env't v. Conservation Comm'n of Mo., 940 S.W.2d 527, 529 (Mo. Ct. App. 1996). The court found that the deed did not dedicate the property to the public; "[r]ather, it merely reiterated the restrictions set forth in the federal decree and conveyed the property to the Commission." *Id.* at 531.

[37] UCEA § 3(a)(1)-(4), 12 U.L.A. 177 (1996); *see, e.g.*, TENN. CODE ANN. § 66-9-307 (2004) (amended 2005) (stating that conservation easements may be enforced by "holders and/or beneficiaries of the easement" which had been interpreted to include Tennessee residents); VA. CODE § 10.1-1013 (2004) (stating that actions affecting conservation easements may be brought by, among others, "person[s] with standing under other statutes or common law"); Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at *3-*4, *7-*8 (Mar. 8, 2004) (explaining identity of individuals or entities with rights to enforce conservation easements).

[38] KLEIN ET AL., *supra* note 1, at 686; *see* DANIEL H. COLE, POLLUTION & PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 60-61 (2002) (discussing resource preservation with land trusts and conservation easements).

[39] KLEIN ET AL., *supra* note 1, at 686; *see also* COLE, *supra* note 38, at 60 ("A land trust is created when a private property owner conveys her development rights either to a public agency authorized to hold land in trust for the public or to a private not-for-profit conservation organization."); Cheever, *supra* note 3, at 1078 (discussing impact of land trust movement).

[40] KLEIN ET AL., *supra* note 1, at 686; *see also* Nancy A. McLaughlin, *Questionable Conservation Easement Donations*, PROB. & PROP., Sept.-Oct. 2004, at 40, 41 ("Congress carefully crafted the 'conservation purposes test' to limit the deduction to donated easements that will provide significant benefits to the public."); Land Trust, Help Conserve Our Land and Natural Resources, http://www.possibility.com/LandTrust (last visited Aug. 16, 2005) (explaining purpose of land trust).

with private and governmental conservation agencies.[41] The second development in the land conservation movement was the creation, by state enabling legislation, of the conservation easement, which allowed land trusts to acquire preservation rights without purchasing use or possessory rights.[42]

Conservation easements are a function of both state and federal legislation. A majority of states have enacted legislation allowing for the creation of conservation easements; in fact, many adopted the UCEA or a modified version of the UCEA, while others enacted legislation that reflects the intent, although not the express wording, of the UCEA.[43] The UCEA facilitated state adoption and promulgation of conservation easement statutes by addressing some of the common law impediments to the conservation easement.[44] Further, some states have enacted legislation permitting or requiring consideration of restrictions in the form of conservation easements when establishing land value for real property tax assessment.[45] Federal legislation allows grantors of qualifying easements to realize additional federal income, estate, and property tax benefits.[46] These benefits may potentially equal or even exceed

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[41] KLEIN ET AL., *supra* note 1, at 686; *see also* Land Trust, *supra* note 40 (explaining functions served by land trusts).

[42] KLEIN ET AL., *supra* note 1, at 686; *see also* Gregory, *supra* note 25, at 15 (noting possibility of purchasing only certain interests).

[43] Roderick H. Squires, *Introduction to Legal Analysis*, *in* PROTECTING THE LAND, *supra* note 2, at 69, 71-72; *see also* Cheever, *supra* note 3, at 1080-81 (explaining that many state statutes are modeled, in whole or in part, on UCEA, promulgated in 1981).

[44] *See supra* note 10 and accompanying text; *infra* notes 221-60 and accompanying text.

[45] Hollingshead, *supra* note 1, at 359-60. States usually impose real property taxes on an *ad valorem* basis, which is based upon the fair market value of property. *Id.* at 359. This fair market value is generally calculated by ascertaining the value of property according to its "'highest and best' use" as opposed to its current use. *Id.* Because they are viewed as burdens on the estate to which they are attached, conservation easements generally have a depressing impact on the value of property and therefore reduce the real property tax assessment against the subject property. *Id.* at 359-60; *see also* COLE, *supra* note 38, at 62-64 (discussing how state property taxes promote land development and how conservation easements can respond by reducing costs of maintaining preservation property and lowering state property taxes); Walliser, *supra* note 17, at 50-51 (explaining tax reductions relating to conservation easements).

[46] *See* I.R.C. §§ 170(h) and 2031(c) (2004) (detailing allowable federal tax deductions for charitable contribution and gifts and defining gross estate for federal estate and gift tax purposes); *see also* 16 U.S.C. §§ 3837-3837f (2005) (discussing federal wetland reserve program); COLE, *supra* note 38, at 63 (discussing how federal inheritance taxes promote land development and how conservation easements can respond by reducing costs of maintaining

the cost of preservation, which is expressed in terms of reduction in land value attributable to land restrictions, maintenance expenses, and lost development opportunities.[47]

Conservation easements are critical to balancing the protection of significant, private property resources with property owners' needs to maintain the future economic viability of their land.[48] The proliferation over the past century and a half of public land use regulations restricting private property rights has increased the prevalence and popularity of conservation easements.[49] Government limitations imposed through exercise of the police power and eminent domain and which restrict property owners' rights to use and enjoy their private property are well established and recognized.[50] As property owners grew acclimated to the concept of

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land in its undeveloped state); Gustanski, *supra* note 2, at 22 (discussing Tax Reform Act of 1976 and Tax Treatment Extension Act of 1980 and their beneficial impact on use and success of conservation easements); Francine J. Lipman, *No More Parking Lots: How the Tax Code Keeps Trees Out of a Tree Museum and Paradise Unpaved*, 27 HARV. ENVTL. L. REV. 471, 475, 491-94, 507 (2003) (explaining tax incentives for qualified conservation easements).

[47] *See, e.g.*, COLE, *supra* note 38, at 62 (discussing incentives for private landowners to convey conservation easements); Lipman, *supra* note 46, at 475, 491-94, 507 ("The income, estate, and property tax benefits a forest landowner can derive from a conservation easement can equal or exceed the cost . . . of the easement.").

[48] McKee, *supra* note 18, at 112; *see also* Joan Youngman, *Conservation Easements: The Interaction of Land Policy and Taxation*, 10 LAND LINES 8-3 (May 1998), *available at* http://www.lincolninst.edu/pubs/pub-detail.asp?id=418 [hereinafter Youngman, *Conservation Easements*] (describing conservation easements as "innovation that can address . . . fiscal goals of landowners); Joan Youngman, *Easements, Covenants and Servitudes: Traditional Limitations and Future Trends*, 13 LAND LINES 6, *available at* http://www.lincolninst.edu/pubs/pub-detail.asp?id=223 (Nov. 2001) [hereinafter Youngman, *Easements, Covenants and Servitudes*] (discussing benefits of conservation easements to private landowners with "strong sense [of land's] value as open space").

[49] *See* Brown, *supra* note 15, at 8 n.6 (citing Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851), as one of first cases addressing police power and public regulation of private land); *see also* French, *supra* note 2, at 1262-63 (explaining that advent of increased governmental land use regulation in twentieth century increased private land use arrangements); Lazarus, *supra* note 16, at 668 ("The relationship of the sovereign police power to private property has been marked by the steady erosion of private property sanctity in the face of the sovereign police power's growth."); Youngman, *Easements, Covenants and Servitudes*, *supra* note 48, at 668 (noting significance and fast growth in use of conservation easements).

[50] Brown, *supra* note 15, at 16-17; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (2000) (discussing increase of public land use control throughout twentieth century); French, *supra* note 2, at 1262-63 n.6 (explaining that private land use arrangements "protect against uncertainty of government land use regulation"); Youngman, *Easements, Covenants and Servitudes*, *supra* note 48 (noting government limitations on use of private property).

these restrictions, they increasingly resorted to conservation easements as a means of achieving limited regulation, tailored to achieve specific land protection goals.[51] "The advent of comprehensive governmental land use regulation in the twentieth century actually increased the incidence of private land use arrangements for two reasons: public regulation itself often uses private servitudes as tools of regulation; and the inherent shortcomings of public regulation encourage private arrangements."[52]

Conservation easements represent a welcomed compromise between government regulation through eminent domain and no governmental protection of the conservation and scenic values of historically or ecologically significant lands.[53] Government has the power to exercise eminent domain and acquire either a fee simple absolute interest or a lesser interest such as an easement.[54]

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[51] *See* Squires, *supra* note 43, at 69 (stating that total of forty-five states as well as District of Columbia had enacted legislation allowing nonprofit entities to hold conservation easements); *see also* KLEIN ET AL., *supra* note 1, at 699 (noting use of "conservation easements" was "well established" by 1950s); Cheever, *supra* note 3, at 1080 (stating that Massachusetts adopted oldest recognized conservation easement statute in 1956 followed by California in 1959); French, *supra* note 2, at 1262-63 (analyzing increased implementations of private land use arrangements in twentieth century); Hollingshead, *supra* note 1, at 333-34 (discussing earliest use of modern conservation easement which predated its adoption by state statutes and discussing primary motivation for growth in use of conservation easement).

[52] French, *supra* note 2, at 1262-63; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (2000) (stating that demand in twentieth century for environmental control caused increased acceptance of private land use arrangements). In his discussion on reformation of conservation easements, Jeff Pidot writes:

> The relationship of [the] increase in conservation easements to the reduction in new acquisitions of public lands . . . must be seen as highly related. The exponential growth of the former, in some measure appears to be an outgrowth of increased political pressure in recent years to avoid outright public acquisitions of land as well as currently prevailing, negative public attitudes concerning land use regulation in many communities.

Pidot, *supra* note 5, at iv; *see also infra* notes 221-307 and accompanying text.

[53] *See* Squires, *supra* note 3, at xxii-xxiii (discussing benefits of conservation easements); *see also* Gregory, *supra* note 25, at 15-18 (discussing basic use of easement device); Mahoney, *supra* note 22 (stating that there are compelling reasons for preferring conservation easements over government "command and control regulation").

[54] *See* Brown, *supra* note 15, at 8-9 ("The power of eminent domain and the related power of government, by exercise of its police power, to take private property free of the obligation to pay just compensation for the property taken, are central powers necessary for government to function and serve the public's best interest."); Gregory, *supra* note 25, at 17 (detailing initial use of easements by government for utilities and transportation). *See generally* ARK.

Conservation easements keep property in the private market, whether in the hands of private individuals, governmental organizations, or charitable organizations,[55] thereby promoting decentralized property ownership.[56] They also keep property on the

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CODE ANN. § 27-69-104(4) (2003) (authorizing Arkansas State Highway and Transportation Department or other departments of state to exercise right of eminent domain and convey condemned land or waters to the United States for, among other things, conservation purposes). In contrast, several states limit governmental use of conservation easements. The Alabama Code, for example, states the following:

> (a) Except as otherwise provided in this chapter, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements. *A conservation easement may not be created or expanded under this chapter by any state, county or local governmental body through the exercise of the power of eminent domain.*
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> . . . .
>
> (e) Nothing in this chapter shall be construed to impair or diminish in any way the rights of any person, entity, or governmental body authorized by the laws of this state or under federal law to acquire property interests through the exercise of eminent domain or condemnation. *A conservation easement may be condemned or appropriated through eminent domain in the same manner as any other property interest.*

ALA. CODE § 35-18-2(a), (e) (Supp. 2004) (emphasis added); *see also* FLA . STAT. § 704.06(2) (2003) (stating that conservation easements shall not be acquired by condemnation or eminent domain); W. VA. CODE § 20-12-5(c) (2004) ("A holder, governmental entity or other person may not exercise the right of eminent domain or the power of condemnation to acquire a conservation easement without condemning or exercising the right of eminent domain as to the entire fee interest of the property."); BRUCE & ELY, *supra* note 35, at 12-5, 12-6 (stating that at least two states, Oregon and Utah, prohibit exercise of eminent domain to acquire scenic or conservation easements and discussing state and federal law expressly authorizing use of eminent domain to acquire scenic easements and other types of conservation easements).

[55] *See* National Conference of Commissioners on Uniform State Laws, *Prefatory Note* to UCEA, at 3 (1981), *available at* http://www.law.upenn.edu/bl/ulc/fnact99/1980s/ucea81.pdf ("[T]he American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States."); Squires, *supra* note 3, at xxi (recognizing that land protection is public good, not merely private one, and that benefits of land protection are shared widely); Walliser, *supra* note 17, at 54 (discussing societal goal of benefit equaling burden); *see also infra* 109-187 and accompanying text (discussing those with an interest in consensually transferred conservation easements).

[56] *See* SINGER, *supra* note 25, at 2, 7 (describing historical preference for and protection of private property rights); Squires, *supra* note 3, at xxi-xxii (stating that private individuals retain ownership of land through conservation easements); *see also infra* notes 109-87 and accompanying text.

state and local tax rolls and avoid the higher costs of exercising the power of eminent domain.[57]

"Private property . . . is not just a placeholder for nongovernmental ownership. It evokes a vision of a world that values liberty and equality while promoting an appropriate accommodation between freedom of action and security."[58] Voluntary exchanges of property by competent participants, particularly when the exchange serves to protect resources important to the public, allow property owners to use their private resources in a manner that is both efficient and consistent with principles of social justice.[59] The notion of freedom of alienation regarding real property coincides with the freedom of property owners to decide that they want certain obligations to run with the land for conservation purposes. Undermining a property owner's intent to impose a perpetual conservation easement on the owner's property substitutes the desires of future property owners for the desires of present property owners. Such a policy effectively diminishes a property owner's present property rights by weakening the owner's ability to negotiate the transfer of a valuable property interest.

III. PERPETUAL CONSERVATION EASEMENTS, THE DOCTRINE OF CHANGED CONDITIONS, AND THE IMPORTANCE OF PRIVATE-PARTY STANDING

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[57] *See, e.g.*, Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (discussing inability of government to regulate land use if every such regulation entitled owner to compensation); Squires, *supra* note 3, at xxii (noting that privately owned property stays on tax rolls); Elmer Ploetz, *Protecting Orchard Park's Turf; Controversial Tax Breaks Have Allowed Town to Stave Off Development*, BUFF. NEWS, Jan. 29, 2005, at A1 ("At first glance, the 'conservation easements' look like a green space miracle, a preservation tool that is less expensive than purchasing development rights or land . . . .").

[58] SINGER, *supra* note 25, at 144.

[59] *See* BARNES & STOUT, *supra* note 15, at 3 (discussing voluntary exchanges and how they can increase utility by redistributing resources efficiently); Brown, *supra* note 15, at 51 n.240 (defining efficiency from utilitarian concept as scarce resource allocation that results in maximum personal happiness and utility); *see also infra* notes 163-87 and accompanying text.

A. PERPETUAL CONSERVATION EASEMENTS AND THE DOCTRINE OF CHANGED CONDITIONS

The doctrine of changed conditions[60] reflects intergenerational conflict about the propriety of placing perpetual preservation restrictions on land.[61] Grantors view conservation easements as a tool for achieving their preservationist goals while simultaneously reducing their tax burden.[62] Successive property owners often perceive conservation easements as imposing undesirable limitations on their property rights in the form of development restrictions.[63]

The doctrine of changed conditions states that a restrictive covenant, such as a conservation easement, is unenforceable, at least without modification, when the environmental and social conditions

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[60] Historically, the doctrine of changed conditions was reserved to the law of real covenants and equitable servitudes and was not applied with frequency to easements. Presently, courts and commentators acknowledge the applicability of the doctrine of changed conditions to easements and, more specifically, to conservation easements. *See, e.g.*, AKG Real Estate v. Kosterman, No. 04-0188, 2004 Wisc. App. LEXIS 883, at *23-*25 (Wis. Ct. App. Nov. 3, 2004) (stating that easement, original purpose of which was to provide landlocked property with ingress and egress, was subject to termination or modification according to doctrine of changed conditions upon proper showing of completion or cessation of purpose for which easement was created); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 cmt. a (2000) (stating that rule regarding doctrine of changed conditions "applies to easements as well as covenants and other types of servitudes"); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000) (allowing for modification or termination of "conservation servitude[s] held by a governmental body or conservation organization . . . because of changes" as set forth in section); BRUCE & ELY, *supra* note 35, at 10-14 ("[T]he cessation of purpose doctrine covers those situations in which no language indicates defeasance, but in which the easement has been rendered worthless by a change in circumstances.").

[61] *See* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1358-68 (1982) (arguing that, as between present owners and their successors, present owners' freedom to contract and convey perpetual conservation easements should defeat their successors' claims of entitlement to property free of voluntarily negotiated conservation easements); Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 350-54 (1995) (discussing legal scholarship concerning intergenerational equity); *see also supra* notes 60-108 and accompanying text.

[62] *See supra* notes 45-46 and accompanying text; *infra* notes 132-50 and accompanying text.

[63] *See* Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 898-99 (1988) ("Advocates of the changed conditions doctrine and its analogues in other corners of property law (such as the *cy pres* doctrine in the law of trusts) have argued that we should impute to the original contracting parties an intention that the covenant expire if and when it becomes valueless."); Mahoney, *supra* note 4, at 767, 785 (explaining inflexibility imposed on subsequent landowners by conservation easements).

existing at its creation become inapplicable.[64] Effectively, "the doctrine of changed conditions allows the courts to expunge covenants from the records, or at least modify their provisions, once the court determines that the covenants no longer serve the purposes for which they were first introduced."[65] Courts may apply the doctrine to invalidate or modify conservation easements even when the original contracting parties express an intent to be bound by the conservation easement "in perpetuity unless released by contrary unanimous agreement."[66]

Some states' laws provide that, when applying the doctrine of changed conditions, "terms and conditions" may be included if such are necessary to insure an equitable resolution and protect the public interest.[67] These conditions and terms may include, but are not limited to, monetary adjustments intended to dissuade property owners from realizing windfalls by reaping the tax benefits associated with granting qualified conservation easements and then litigating to regain the same property rights for which they were compensated.[68] Other states expressly prohibit application of the

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[64] Epstein, *supra* note 15, at 919; *see also* UCEA § 3 cmt., 12 U.L.A. 178 (1996) (explaining doctrine of changed conditions); William R. Ginsberg, *Term and Termination: When Easements Aren't Forever*, *in* THE CONSERVATION EASEMENT HANDBOOK, *supra* note 35, at 129, 133 (discussing applicability of doctrine of changed conditions to conservation easements).

[65] Epstein, *supra* note 15, at 919. The changed conditions doctrine has historically been asserted by parties seeking to terminate a covenant affecting property located within a subdivision; *see, e.g.*, Western Land Co. v. Truskolaski, 495 P.2d 624 (Nev. 1972) (providing example of attempt by owners of lot in residential subdivision to terminate certain covenants restricting subdivision to single family use). In *Western Land*, the court found that, although conditions outside the subdivision had changed since the covenants were created, the plaintiff failed to demonstrate that the increasingly commercial activity outside of the subdivision made the properties inside the subdivision (and subject to the restrictive covenants) unsuitable for residential use. *Id.* at 626-27.

[66] Epstein, *supra* note 15, at 919; *see also* Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595, 620 (2002) (noting that application of doctrine departs from "general principles governing the interpretation of contracts"). Most courts require that the changed conditions have an impact on the conservation property in order for the owner of the conservation property to benefit from the termination of the conservation easement. Walliser, *supra* note 17, at 110; *see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmt. a (2000) ("If no conservation or preservation purpose can be served by continuance of the servitude, the public interest requires that courts have the power to terminate the servitude *so that some other productive use may be made of the [servient] land*." (emphasis added)).

[67] UCEA § 3 cmt., 12 U.L.A. 178 (1996).

[68] *Id.*; *see also* Mahoney, *supra* note 4, at 776-77 (explaining state law restrictions on terminating conservation easements).

changed conditions doctrine to terminate conservation easements.[69] I contend that the doctrine should be applied very conservatively when owners of conservation property seek to modify or terminate validly granted perpetual conservation easements.[70]

"Conservation easements have become 'the single most important tool to protect privately owned land across the nation.' "[71] Their private property and public benefit aspects make conservation easements unique.[72] Conservation easements acknowledge society's interest in preserving certain land as undeveloped, recognizing that some land is most valuable in an undeveloped state.[73] In most instances, changes in surrounding areas make perpetual

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[69] *See, e.g.*, N.Y. GEN. MUN. LAW § 247 (McKinney 1999) (stating that acquisition of rights in real property for open space and conservation shall constitute public purpose and that such interests shall not be defeated because of, among other reasons, "change in character of the surrounding neighborhood"); TENN. CODE ANN. § 66-9-306 (2004) ("No conservation easement shall be held unenforceable because of privity of estate or contract or lack of benefit to any other land, whether or not appurtenant to the servient land. No conservation easement shall be held automatically extinguished because of violation of its terms or frustration of its purpose.").

[70] *See* Epstein, *supra* note 15, at 919-20 (advocating as well for "modest" doctrine). Epstein argues the following:

> The battleground here is a familiar one: should the doctrine of changed conditions operate as a plausible default rule or as a rule of public regulation? I have already taken the position that it should fill the former, and more modest, office once the recordation system gives all parties notice of the relevant conditions. So long as all the original parties have themselves taken into account the need for future change it is highly unlikely that the legal system, which operates with very inexact knowledge of their private preferences and subjective costs, can find a rule that works better than the one that the parties themselves have agreed upon.

Id. (citations omitted); *see also* Ginsberg, *supra* note 64, at 133 (stating that the doctrine of changed conditions was not originally intended to apply to conservation easements). *But see* Mahoney, *supra* note 4, at 778-79 (arguing against heightened protection for perpetual nature of conservation easements).

[71] Lipman, *supra* note 46, at 491 (quoting Gustanski, *supra* note 2, at 9); *see also* National Conference of Commissioners on Uniform State Laws, *supra* note 55, at 3 (stating that "the American legal system generally regards private ordering of property relationships as sound public policy"); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmt. a (2000) (discussing public interests involved in servitudes, particularly those held by public bodies or conservation organizations); Bell & Parchomovsky, *supra* note 3, at 3-4 (discussing generally dispersed public benefits of conservation lands as well as more direct public benefits of such lands to third parties abutting property owners); Korngold, *supra* note 10, at 440 (stating that servitudes achieve "critical goal of conserving the environment and encourag[ing] private associations to act").

[72] Bell & Parchomovsky, *supra* note 3, at 3-4.

[73] *Id.* at 39 (stating that "nonuse is, at times, the optimal use of property").

conservation easement purposes and objectives more important, not less.[74]

Generally, conservation easements are designed to protect property in perpetuity by prohibiting the use of conservation property in a manner that alters the property's ecological, open, natural state, or scenic quality.[75] Achieving these conservation purposes almost necessarily requires that conservation easements exist in perpetuity.[76] For this reason, a property owner's contribution of a conservation easement may qualify as a deductible charitable donation under federal law only if the restriction is perpetual.[77] The majority of conservation easements expressly state whether the easement's duration is intended to be perpetual or for a limited period.[78] Most states have established by statute a default rule favoring a presumption of perpetual easements cases of in doubt.[79] This approach is similar to that of the UCEA, which

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[74] *See* Ginsberg, *supra* note 64, at 133 ("Clearly it should not apply in most instances, since it is highly unlikely that the purposes of a conservation easement will be frustrated by changes in the surrounding neighborhood."). In his article, Korngold explains the following regarding the importance of conservation easements:

> The assumption underlying many conservation [easements] is that open-space land is beneficial in its own right. If the realty surrounding the servient parcel becomes developed, the servitude's purpose will be even better served. In such cases, the changed conditions doctrine is inapplicable. Further, even if the surrounding noise and pollution harm the flora, wildlife, and topography of the parcel, it is difficult to say in most cases that it is "impossible to secure to a substantial degree the benefits" of the covenant. As one court said, "[A]n island is not made a swamp simply because waves lick at its shores." Finally, the changed conditions theory simply does not apply if no change in circumstances occurs, even if relaxation of the servitude is warranted for reasons of dead hand control, flexibility, or democracy.

Korngold, *supra* note 10, at 485-86 (citations omitted).

[75] *See* I.R.C. § 170(h)(4) (2004) (defining conservation purpose); Bell & Parchomovsky, *supra* note 3, at 65 (defining conservation easement); Cheever, *supra* note 3, at 1083 (comparing land trusts with conservation easements); *see also supra* notes 32-59 and accompanying text.

[76] *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEEDINGS IN COMMITTEE OF THE WHOLE, UNIFORM CONSERVATION EASEMENT ACT 13 (Aug. 4, 1981) (explaining that section 2(c)'s rebuttable presumption of perpetual grant was intended to extend duration of conservation easements beyond limits permitted by typical laws).

[77] I.R.C. § 170(h)(2)(C) (2004); *see also* Lipman, *supra* note 46, at 492-93 (explaining congressional requirements for conservation easement to qualify as charitable donation).

[78] *See* Korngold, *supra* note 10, at 479-80 (discussing duration of conservation servitudes).

[79] Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* PROTECTING THE LAND, *supra* note 2, at 40.

provides that conservation easements shall be of unlimited duration unless the conservation easement instrument provides otherwise.[80]

Some conservation easements should be modified or terminated; this Article, however, suggests that courts should err on the side of preservation when distinguishing "the easements that really no longer serve a significant public purpose from those for which someone is merely motivated to argue a lack of public purpose for personal financial reasons."[81] Further, permissive application of the changed conditions doctrine undermines the reasons many property owners enter into conservation agreements. Many property owners convey conservation easements precisely because they cannot anticipate the full extent of future environmental changes and land development patterns.[82] In the presence of this uncertainty, some property owners voluntarily contract to convey conservation easements "in the hopes of not only maintaining the present non-use of [their] land, but also to retain that non-use in the face of future development."[83]

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[80] UCEA § 2(c), 12 U.L.A. 173 (1996).

[81] Cheever, *supra* note 3, at 1100; *see also* Epstein, *supra* note 15, at 924 ("While there is doubtless some small place for the doctrine of changed conditions to operate on agreements that are incomplete, it should have at best a tiny importance once governance structures are in place."). The Restatement (Third) of Property: Servitudes establishes special rules for modification and termination of conservation easements held by governmental bodies and conservation organizations. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000). The Restatement has also promulgated rules pertaining to termination and modification of conservation easements held by private parties. *Id.* § 7.10. The rules pertaining to privately held conservation easements are less stringent because they are perceived as lacking the same level of public interest that attends conservation easements held by governmental entities and conservation organizations. *Id.* § 7.11 cmt. a. The principal difference between applying the changed conditions doctrine to privately held conservation easements under section 7.10 and by government or conservation organizations under section 7.11 is the entitlement to damages. *Id.* § 7.11 cmt. c. According to the Restatement, if the particular conservation purpose for which the conservation easement was created becomes impracticable to achieve, the conservation easement may be modified according to the *cy pres* doctrine to permit its use for other conservation purposes. *Id.* § 7.11(1). If the conservation easement can no longer be used to achieve any conservation purpose, it may be terminated upon payment of appropriate restitution and damages. *Id.* § 7.11(2). Under the Restatement, changes in the value of the conservation property for development purposes are not sufficient to warrant modification or termination of conservation easements. *Id.* §7.11(4).

[82] Walliser, *supra* note 17, at 50, 113; *see also* COLE, *supra* note 38, at 62 (discussing costs and benefits of conservation easements). One of the principal reasons conservation organizations enter into conservation agreements is to bypass "impermanent governmental regulation" through private agreements. Walliser, *supra* note 17, at 50.

[83] Walliser, *supra* note 17, at 113.

B. THE SIGNIFICANCE OF PRIVATE-PARTY STANDING

It is difficult to predict the degree of judicial resistance conservation property owners will meet when attempting to avoid conservation easements.[84] The durability of conservation easements has not been challenged by significant numbers of owners of conservation property, but the possibility of challenges remains a viable threat to holders of conservation easements, preservationists, and private parties interested in defending against termination or undue amendment of conservation easements.[85] Additionally, the increasing complexity of environmental concerns and natural resources law raises questions about the ability of courts to protect the environment.[86] Formalizing private-party standing is tantamount to creating a property interest in the maintenance of conservation property in its protected state.[87] Private parties are

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[84] Mahoney, *supra* note 4, at 779; *see also* Epstein, *supra* note 61, at 1366 (framing issue as one of whether judicial determinations are superior to privately agreed-upon ones). "The original parties can provide for changed conditions if they so desire at the time when servitudes are created. And when disputes arise there is no apparent reason to consider judicial coercion superior to consensual renegotiation." Epstein, *supra* note 61, at 1366.

[85] *See* BRUCE & ELY, *supra* note 35, at 12-10, 12-11 (noting small amount of litigation in this area); Bell & Parchomovsky, *supra* note 3, at 29 (arguing that development interest in challenging conservation interest is often stronger and better organized than preservation interest); Mayo, *supra* note 79, at 45 (noting that termination of conservation easement is real possibility).

[86] Lazarus, *supra* note 16, at 712-13; *see also* Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 202 F. Supp. 2d 594, 633 (W.D. Tex. 2002) (suggesting that courts should give deference to agencies acting in realm of environmental law); Epstein, *supra* note 15, at 924-25 (stating arguments in favor of and against institutional competence of courts and ability of judiciary to reach more efficient decisions than private parties to conservation easement contracts); Walliser, *supra* note 17, at 56 (discussing impropriety of substituting judicial judgment for that of parties and ambiguous judicial response to conservation easement challenges). Epstein asserts that termination or modification of covenants, even under the changed conditions doctrine, should be rare when there is a governance structure established to address substantive decisions. Epstein, *supra* note 15, at 924-25. Typically, conservation easements expressly provide for dispute resolution procedures, thereby establishing the structure referenced by Epstein. *See, e.g.*, Land and Community Heritage Investment Program Model Conservation Easement, ¶ 11 Resolution of Disputes, http://www.lchip.org/Reference/modelconseasement.htm (last visited Aug. 2, 2005) (sample alternative dispute resolution provision); Natural Lands Trust Model Conservation Easement, ¶ 6 Grantee's Remedies, http://www.stormwatercenter.net/Model%20Ordinances/model$conservation$easement.shtm (last visited Aug. 2, 2005) (explaining procedure for grantee who determines that grantor is violating terms of easement).

[87] *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1119-21 (1972) (discussing

"arguably in [the] better position to determine when a servitude restriction should in fact be enforced, being more sensitive to the needs of the locale and less willing to pursue servitudes that no longer provide a definite benefit."[88]

Recognition of private-party standing could alter the focus of the changed conditions analysis. Instead of determining the viability of a conservation easement challenge based upon the impact of changed conditions on the burdened property,[89] decisionmakers would include in their decisionmaking process an analysis of the benefit of the conservation easement to private parties.[90] Equally important, recognition of a property interest in a conservation easement would give private parties the necessary standing to maintain an enforcement action independent of whether the holder or an entity with a third-party right of enforcement pursued a cause of action.[91] Section 3 of the UCEA provides that owners of interests in conservation property, conservation easement holders, persons having a third-party right of enforcement,[92] or other persons

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effect of decisions to invest entitlements in conflicting parties in context of right to engage in inconsistent environmental activity); Pidot, *supra* note 5, at 2-3 (discussing public stake in conservation easements).

[88] Walliser, *supra* note 17, at 81. Jeff Pidot explains as follows:

> Conservation easement monitoring may be a particularly costly task where the property [involved] is large, difficult to access, or becomes divided in the future so that the number of landowners and monitoring efforts multiply. In some cases, endowments and other financial resources are set aside by the easement holder for easement monitoring and stewardship purposes, . . . but there are no legal requirements to do so and many holders make modest or no such provision. This work, so essential to conservation easement maintenance, has none of the fundraising or political glamour associated with acquisition.

Pidot, *supra* note 5, at 21 (citations omitted). Thus, in certain instances, private parties may be the only, or the best, source of monitoring to ensure that conservation purposes are being fulfilled.

[89] *See supra* note 65 and accompanying text.

[90] *See* Walliser, *supra* note 17, at 112 (noting that under changed conditions doctrine, benefit analysis will include consideration of private parties); *supra* note 65 (discussing traditional application of changed conditions doctrine in subdivision context).

[91] *See, e.g.*, Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., L.P., No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at *1 (Mar. 8, 2004) (recognizing that private party has standing in litigation where city was grantee of conservation easement but was not party to litigation).

[92] UCEA § 1(3), 12 U.L.A. 170-71 (1996). Section 1(3) states: " 'Third-party right of enforcement' means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable

authorized by law may bring an action affecting a conservation easement.[93] Thus, private parties currently lack standing to bring enforcement actions under the UCEA and the laws of most states.[94]

Tennessee Environmental Council v. Bright Par 3 Associates demonstrates the importance of private-party standing. There, conservationists in Tennessee challenged landowners seeking to develop land adjoining property affected by a conservation easement.[95] The conservationists alleged that the landowners' development and construction activities threatened to unlawfully and adversely affect the easement.[96] The lower court dismissed the conservationists' complaint after holding they lacked standing to enforce the easement.[97]

On appeal, the court considered whether the individual plaintiff had standing to enforce the conservation easement.[98] According to the court, the plaintiff provided lengthy testimony regarding her (1)

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trust, which, although eligible to be a holder, is not a holder." *Id.*; *see also* Bell & Parchomovsky, *supra* note 3, at 64-65 (discussing standing in context of antiproperty easements and antiproperty rights in third parties). Formalization of neighbors' third-party interests in antiproperty easements would provide them with legally recognized standing, enabling them to pursue antidevelopment claims in court. *Id.* Doing so would also create a new property element analogous to a network of antiproperty rights. *Id.*

[93] UCEA § 3 cmt., 12 U.L.A. 177-78 (1996); *see also* Burgess v. Breakell, CV 95 0068033, 1995 Conn. Super. LEXIS 2290, *8 (Aug. 7, 1995) (stating that neighbor lacked standing to prosecute suit to enforce conservation easement where neighbor merely owned land adjacent to burdened property and was not owner of conservation easement); Knowles v. Codex Corp., 426 N.E.2d 734, 738 (Mass. App. Ct. 1981) (stating that "in towns which have conservation commissions, it is they rather than private individuals who are to 'manage and control' the public's interests in lands which are subject to conservation restrictions and easements"); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 reporter's note (2000) (stating that to maintain action to enforce conservation easement, claimant must either be current beneficiary of easement or obtain standing from another source, such as statute); Thomas Grier, *Conservation Easements: Michigan's Land Preservation Tool of the 1990s*, 68 U. DET. MERCY L. REV. 193, 212-15 (1991) (noting that standing is traditionally granted to property owners adjacent to or nearby eased property, but is more problematic in actions to enforce general conservation or preservation interests).

[94] *See supra* notes 5, 92 and accompanying text.

[95] *Tenn. Envtl. Council*, 2004 Tenn. App. LEXIS 155 at *4. The complaint alleged that the property that was the subject of objectionable development contained or adjoined wetland and conservation easement areas. The court noted that it was unclear from the conservation easement deed what exact quantum of land was affected by the easement. *Id.* at *1 n.1. The court determined that certainty regarding the specific land affected was not necessary to resolve the issue of the plaintiffs' standing to sue to enjoin violation of the easement. *Id.*

[96] *Id.* at *10.

[97] *Id.* at *6.

[98] *Id.* at *5.

environmental concerns, (2) "dedication and devotion to the preservation of the flora and fauna of the property described in the easement,"[99] (3) work as an independent consultant in the area of environmental education, (4) service on behalf of environmental organizations such as the Board of the Tennessee Environmental Council, and (5) use and enjoyment of the conservation easement property for nature walks and related enjoyable activities.[100]

The court evaluated the plaintiff's testimony in light of Tennessee's Conservation Easement Act as codified in the Tennessee Code.[101] Pursuant to section 66-9-307 of the Act, "[c]onservation easements may be enforced by injunction or proceedings in equity by the holders and/or beneficiaries of the easement, or their bona fide representatives, heirs, or assigns."[102] Section 66-9-303 states that conservation easements are "held for the benefit of the people of Tennessee."[103] Reading these provisions together and applying a commonly accepted definition of "beneficiary," the court interpreted the state statutory law as conferring standing upon any resident of Tennessee to bring an action to enforce a conservation easement.[104]

Although the court made no findings regarding the substance of the case, implicit in the court's holding is the acknowledgment that any resident of Tennessee may potentially suffer an injury sufficiently distinct, severable, and redressable by judicial remedy to allow the resident to sue to enforce a conservation easement.[105]

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[99] *Id.*

[100] *Id.* at *5.

[101] *Id.* at *6-*8.

[102] TENN. CODE ANN. § 66-9-307 (2004) (amended 2005); *see infra* notes 106-07 and accompanying text (discussing 2005 code amendment).

[103] TENN. CODE ANN. § 66-9-303(1)(A)(i) (2004) (amended 2005).

[104] *Tenn. Envtl. Council*, 2004 Tenn. App. LEXIS 155, at *8. "The word 'beneficiaries' has a commonly accepted dictionary meaning: 'those who benefit from the act of another.' " *Id.* Construing the word beneficiary liberally, the court concluded that the term included the plaintiffs. *Id.*

[105] *See, e.g.*, Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville and Davidson County, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992) (holding that residents of Tennessee who sustain injury have standing to bring suit to test city's compliance with law prohibiting government bodies from conducting public business in secret). The court explained:

> Standing is a judge-made doctrine used to determine whether a party is entitled to judicial relief. It requires the court to decide whether the party has a sufficiently personal stake in the outcome of the controversy to warrant the exercise of the court's power on its behalf. To establish

Assessing the extent of any such injury would necessarily require inquiry into the nature of the benefits conferred upon a resident by the conservation easement and the extent of the injury to the resident resulting from a violation of the easement. A resident could only suffer an injury attributable to the violation of a conservation easement if a court could properly consider the public nature of conservation easements, the general public benefits conferred by such easements, and the particular benefits conferred upon the resident.

In 2005, section 66-9-307 was amended to remove the language giving beneficiaries a right of action with respect to conservation easements granted on or after July 1, 2005.[106] As for conservation easements predating July 1, 2005, easement beneficiaries retain an express statutory right of enforcement.[107] The comments to the statute do not provide a rationale for the amendment. The decision to amend Tennessee's statute, though, was a move in the wrong direction for the reasons articulated in this Article.

States take varying positions regarding who may bring actions to enforce, modify, or terminate conservation easements.[108] Recognition of a private-party common law property interest in conservation easements would establish the right of such individuals

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> standing, a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give.

Id. at 615 (citations omitted).

[106] TENN. CODE ANN. § 66-9-307 (2005) states:

> (a) An action affecting any conservation easement granted on or after July 1, 2005, may be brought by:
> (1) An owner of an interest in the real property burdened by the easement;
> (2) A holder of the easement;
> (3) A person having third-party right of enforcement;
> (4) The attorney general, if the holder is no longer in existence and there is no third-party right of enforcement; or
> (5) A person authorized by law.
> (b) Conservation easements granted before July 1, 2005, may be enforced by the holders or beneficiaries of the easement, or their bona fide representatives, heirs, or assigns.
> (c) Conservation easements may be enforced by injunction, proceedings inequity, or actions at law.

[107] *Id.* § 66-9-307(b).

[108] *See supra* notes 5, 11 and accompanying text.

to bring actions affecting conservation easements and free them from ambiguous state laws.

IV. CONSERVATION EASEMENTS—EFFICIENCY AND SOCIAL JUSTICE RATIONALES

A. EFFICIENCY MAXIMIZATION

Property rights arise when it becomes economically rational for affected persons to internalize external costs and benefits.[109] Perpetual conservation easements are the product of measuring their external costs and benefits and of a subsequent decision to internalize these costs and benefits by creating limited societal ownership interests in them.[110] Compelling utility and efficiency rationales underlie the argument for creating private-party standing to enforce perpetual conservation easements. Laws that measurably maximize societal and individual benefits, typically in economic terms, are preferable.[111] Utilitarianism considers legal rules and allocative mechanisms from the perspective of the social consequences produced.[112] "To judge an act by its consequences for utility is, from the standpoint of the time of making the decision, to rest rightness on prediction."[113] Rule-utilitarianism seeks to maximize welfare over an extended period of time, in contrast to act-utilitarianism's focus on immediate welfare.[114] "[I]n rule-utilitarianism we are always cognizant of systemic concerns: How will any given choice affect the entire system of entitlements and

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[109] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354 (1967).

[110] *See id.* ("Communal ownership means that the community denies to the state or to individual citizens the right to interfere with any person's exercise of communally-owned rights.").

[111] *See* Brown, *supra* note 15, at 48 (explaining law and economics approach to legal analysis).

[112] JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 19 (2d ed. 1997) [hereinafter SINGER, PROPERTY LAW]; *see also* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 14-15 (2001) [hereinafter SINGER, INTRODUCTION] (describing utilitarian approach to analysis); Brown, *supra* note 15, at 49 (explaining focus of utilitarianism on consequences of legal rules on individual behavior).

[113] Radin, *supra* note 13, at 741.

[114] *Id.*

expectations as it produces and maintains welfare over time? Thus, time is embedded at the heart of rule-utilitarianism."[115] When measuring utility maximization, the relevant qualities include the extent to which society derives satisfaction, pleasure, or happiness from a given allocation of property.[116] Relatedly, "[e]fficiency in a utilitarian context means allocating scarce resources 'in a fashion that maximizes the happiness or utility people derive from them.'"[117] Thus, to determine whether perpetual conservation easements are efficient and utility-maximizing, it is necessary to define the relevant geographic areas and, in so doing, the affected participants.[118]

Is society concerned only about the owner of the conservation property, the holder of the conservation easement, and their successors; or is society concerned with achieving efficiency on a larger scale?[119] Because of the overwhelming public interest in conservation, the relevant group for gauging efficiency should not be

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[115] *Id.* Radin explains further:

> Indeed, its temporal heart harbors its deepest puzzles. How long is the long run? Does it include future generations? If so, how do we attribute utility (or whatever) to them, and how do we compare it with the utility of people alive today? Is the utility of people who are not alive today but were alive yesterday of any relevance? If so, at what point does the utility of the dead cease to count?

Id.

[116] BARNES & STOUT, *supra* note 15, at 11; *accord* Brown, *supra* note 15, at 49 (defining utility maximization).

[117] Brown, *supra* note 15, at 51 n.240 (citing BARNES & STOUT, *supra* note 15, at 4); *see also id.* at 49 n.228 ("Scarcity is defined as the state of limited resources in relation to human wants.") (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (5th ed. 1998)). An alternative measure of efficiency to utility maximization is wealth maximization. *Id.* at 58 n.272. Efficiency advocates often measure utility and gauge the costs and benefits of transactions with wealth to determine what affected participants are willing and able to pay for specific entitlements dependent upon their resources. *Id.* at 49 (citing BARNES & STOUT, *supra* note 15, at 8). One criticism of wealth maximization as the measure of efficiency is that it does not account for existing allocations of resources which affect the ability and willingness of persons to pay for benefits and entitlements. *See* Brown, *supra* note 15, at 59 n.275 (discussing criticism of Pareto and Kaldor-Hicks approaches).

[118] *See* MARGARET JANE RADIN, REINTERPRETING PROPERTY 117 (1993) (discussing difficulty of defining relevant "jurisdiction" for maximizing welfare); *see also* Julie Ann Gustanski, *Land Trusts and Conservation Decision Making: The Integrated Land Conservation Decision-Support Model*, *in* PROTECTING THE LAND, *supra* note 2, at 453, 459-64 (describing decisionmaking problems faced by preservation organizations resulting from difficulty in valuing use of land).

[119] *See infra* notes 132-50, 162-87 and accompanying text.

narrowly construed.[120] Certainly, the larger community has an interest in maintaining open spaces and preserved land.[121] For example, successors to the conservation property are not the only future generations affected by perpetual conservation easements. Private parties are also among the "future generations," and an efficiency analysis should therefore consider their interests in the conservation easement as well as the intergenerational effect of perpetual conservation easements.[122]

Land possesses unique qualities attributable not only to its particular physical characteristics, but also to its relationship to other, surrounding parcels of land.[123] Thus, conservation property benefits not only its owner, but also has significant economic and social implications for the surrounding community and its citizens.[124] The public benefits flowing from conservation efforts demand that an efficiency analysis include the larger community and region in which conservation property is located.[125] At a minimum, the most

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[120] Radin, *supra* note 13, at 756-57. Radin discusses the issue as follows:

> [I]n order to decide whether a package of servitudes is welfare-maximizing, we must consider whether we are trying to maximize only the welfare of those in the tract covered by the servitudes, or the welfare of the suburb in which the tract is located, or the welfare of the whole city or region, etc. In other words, in order to know whether a servitude package is optimal, one of the things we have to know is whether it creates significant externalities, and in order to know what are to count as externalities, we have to know the "jurisdiction" over which we are maximizing welfare . . . . To make matters worse, the optimal jurisdiction is likely to vary over time and there is no reason to suppose that it will be coextensive with political boundaries, still less with the extent of land owned by any given grantor-developer imposing servitudes.

Id.

[121] *See supra* note 3 and accompanying text.

[122] *See* Radin, *supra* note 13, at 741 (raising questions of whether and how future generations are taken into account in rule-utilitarianism); *Preservation Deal to Keep Jefferson's Plantation Intact*, TUSCALOOSA NEWS, Dec. 26, 2004, at 9B (" 'The easement shows the foundation is looking to the future by protecting Jefferson's legacy for future generations.' ").

[123] Erin Ryan, Student Article, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 338 (2002).

[124] *See* Gustanski, *supra* note 118, at 453 (acknowledging variety of considerations land trusts must address in deciding how to use limited resources); Leslie Reed-Evans, *A Limited Development and Conservation Success Story*, *in* PROTECTING THE LAND, *supra* note 2, at 117, 117-23 (describing one example of conservation restrictions benefiting both grantors and grantees).

[125] *See, e.g.*, Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., L.P., No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at *8 (Mar. 8, 2004) (stating that entire state of Tennessee was relevant geographic area and all of its residents were relevant group for

conservative approach would certainly include the interests of abutting property owners. A more liberal and preferred approach, however, would recognize the interests of more distant property owners and the value that nonproperty owners receive from conservation property.[126]

Property owners exist in a social system that defines efficiency, social justice,[127] and social life largely through the content and structure of property law.[128] Thus, the law of property is about the entitlements and obligations of property owners in relationship with society.[129] In this sense, society consists of (1) the parties to the conservation easement transaction;[130] (2) state, local, and federal governments; (3) private property owners; and (4) nonproperty owners who perceive themselves as affected by the decisions of property owners regarding the use and disposition of their land.[131]

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purposes of defining conservation easement beneficiaries); *see also supra* notes 3, 120 and accompanying text.

[126] Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1197-98 (1999) (describing boundaries of private property as existing on continuum ranging from full exclusion [anticommons] to open access [commons] and including limited access, sole ownership, and limited exclusion as other boundary forms for private property); *see also supra* notes 104-05 and accompanying text.

[127] *See infra* notes 162-87 and accompanying text.

[128] *See* Brown, *supra* note 15, at 56 n.259 (citing David Hume for proposition that absence of stabilized private property possession will result in societal disintegration); *see also* Vandevelde, *supra* note 25, at 325 (referencing argument that property is "the indispensable foundation of the free individual in the modern welfare state").

[129] *See infra* notes 162-75 and accompanying text.

[130] Certainly, government may be a party to a conservation easement transaction. *See supra* notes 6, 7.

[131] In the context of property and social relations Joseph William Singer argues the following:

> While it is plausible to claim that owners retain whatever rights they do not give away, it is also important to recognize that the legal rights created by human behavior must be defined with reference to common understandings and considered judgments about which expectations are reasonable. . . . We should adopt legal rules that acknowledge claims based on reasonable expectations because a society in which they are protected is a better, more secure, more dignified place to live than one in which people are free to betray trusts. . . .
>
> . . . But only by examining the social context of the transactions between the parties, and the character of the relationship they had established, are we reminded that the legal rules we choose may have deep and lasting effects on our social world. In order to make decisions and craft rules that will promote social justice, we must consider those consequences.

1. Parties to the Conservation Easement Transaction and Government[132] *Achieve Efficient Outcomes Through Perpetual Conservation Easements.* Proponents of economic approaches to the law apply several efficiency related theories.[133] In this Article, "efficiency" is used in the Kaldor-Hicks sense of the term.[134] A "reallocation is Kaldor-Hicks efficient if those who gain from the reallocation value their gain in an amount that is greater than the losers from the reallocation value their losses."[135] Society's interests are furthered and efficiency increased when government upholds and enforces voluntary contracts for the transfer of perpetual conservation easements, especially when these contracts promote not only the interests of the contracting parties, but also the public good.[136]

The efficient outcome allows property owners to measure the costs of transferring a perpetual conservation easement against the gains. If the gains exceed the costs, the owner should be allowed to negotiate its transfer while assuring the holder that the perpetual nature of the easement will be enforced, even against successors in

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SINGER, *supra* note 25, at 137-38; *see also* Bell & Parchomovsky, *supra* note 3, at 5 (using Manhattan's Central Park to make observation that public, particularly people neighboring conservation-appropriate property, should have formally recognized interest in conservation property that constitutes public goods); Cheever, *supra* note 3, at 1092 (stating that federal, state, and local governments are participants in market for open space, thereby demonstrating government interest, at all levels, in conservation and preservation); Gustanski, *supra* note 118, at 453 (asking to what extent those interested in conservation consider local and regional long-range plans when making land-use decisions); McKee, *supra* note 18, at 104 (noting importance of considering visual context for visitors of historical sites).

[132] Pursuant to section 1 of the UCEA, governmental bodies may qualify as holders of conservation easements and be granted a third-party right of enforcement. UCEA § 1(2)(i), (3), 12 U.L.A. 170-71 (1996). Thus, to the extent "government" is referenced separately from holders and those with third-party right of enforcement, recognizing that government has a stake in the debate even when it fits neither position ensures a comprehensive analysis.

[133] *See also* Brown, *supra* note 15, at 58-64 (discussing Pareto and Kaldor-Hicks efficiency standards). *See generally* Jules L. Coleman, *The Economic Analysis of Law*, *in* NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 83 (1982) (analyzing Pareto optimality, Pareto superiority, and Kaldor-Hicks efficiency theories).

[134] *See* Brown, *supra* note 15, at 58-64 (discussing impracticalities inherent in using Pareto criteria to determine efficient reallocations). The analysis of land transactions under an efficiency model is more difficult to construct when the exchange is involuntary, such as when government imposes regulation, as opposed to when the exchange is voluntary, as in the conveyance of a conservation easement. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 15 (6th ed. 2003).

[135] Brown, *supra* note 15, at 60; Coleman, *supra* note 133, at 83-89.

[136] *See supra* notes 3, 55-59 and accompanying text.

title.[137] The property owner can only command the highest price for the conservation easement if the easement holder is confident of its enforceability.[138] Even in situations where the conveyance of the conservation easement is gratuitous, all parties benefit from the certainty that voluntarily negotiated conveyances of perpetual easements will be upheld.[139] Rules allowing courts broad discretion to undo these types of consensual contracts "introduce[ ] a degree of uncertainty that ex ante works against the interests of all concerned."[140]

Property owners are equipped to account for the future costs associated with the conveyance of a conservation easement and to adjust their agreements to reflect these costs.[141] If a property owner intends to convey a perpetual conservation easement, knowing that successors to the property will be disadvantaged, and if she understands and accepts that, as a consequence, the future market value of the property will be reduced to reflect the development and use restrictions attending the conservation easement, why should this choice be condemned or undone?[142]

Moreover, aside from the estate and tax benefits associated with qualified conservation easements, conveying a conservation easement may avoid direct government regulation through eminent domain.[143] Direct government regulation is generally less desirable

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[137] Epstein, *supra* note 15, at 907-08.

[138] *Id.* at 908; *see also* Brown, *supra* note 15, at 65 n.295 (citing Professors William A. Fischel and Perry Shapiro's compelling argument against making property entitlements inalienable in context of takings, which may also apply in context of perpetual conservation easements).

[139] *See infra* note 187 and accompanying text.

[140] Epstein, *supra* note 15, at 913.

[141] *See, e.g.*, Epstein, *supra* note 61, at 1360 (questioning touch and concern requirement of servitudes on ground that original parties to transaction can take into account future costs in drafting agreement). Certainly there are some instances in which grantors come to regret the deal they struck when conveying the conservation easement. *See, e.g.*, Steve Luttner, *Move to Protect Land Works – All Too Well; Son Wants Conservation Easement Changed To Sell Property Parents Sought To Preserve*, PLAIN DEALER (Cleveland, Ohio), Aug. 3, 2000, at 1B (stating that grantors of conservation easement ultimately asked holder to rescind easement, which was denied).

[142] *See* Epstein, *supra* note 61, at 1360 (noting that seller who insists on personal covenant that binds land is aware that doing so reduces purchase price); *see also infra* notes 253-54 and accompanying text.

[143] *See supra* notes 50, 53-57.

than private negotiation of a conservation easement.[144] A strong conception of private property, along with a desire to maintain property in individual as opposed to government possession, creates a perception that when land is dedicated to preservationist purposes, the property owner is voluntarily granting away an entitlement that the owner possesses.[145] The alternative is to create the perception that the government has imposed its preservationist will upon the owner for the public good and divested the owner of a valuable property interest.[146]

Government regulation also entails the risk that government will condemn a greater interest than needed to achieve its conservation purpose and that the compensation paid the property owner will be less than the owner's perception of the value of the interest taken.[147] Establishing the criteria for measuring efficiency gains is subjective; empirical evidence, however, suggests that property owners generally demand more in the way of compensation when asked to surrender an entitlement already in their possession than they would be willing to pay to acquire the very same entitlement had it not been originally assigned to them.[148] Thus, property owners would likely place a higher value on the ability to negotiate a perpetual conservation easement than the government would place on the ability to condemn a conservation easement or fee interest.

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[144] *See supra* notes 49-59 and accompanying text; *infra* notes 188-220 and accompanying text.

[145] *See, e.g.*, Epstein, *supra* note 61, at 1359-62 (arguing that property owners' intentions regarding voluntary land restrictions should be honored).

[146] *See* Arnold, *Reconstitution of Property*, *supra* note 5, at 300, 353 (noting propensity of bundle of rights conception of property to alienate people from nature); Calabresi & Melamed, *supra* note 87, at 1090 (discussing role of government power in setting property rights); Cheever, *supra* note 3, at 1086 (discussing backlash against environmental protection because of burdensome government regulation).

[147] Gregory, *supra* note 25, at 11, 15.

[148] Brown, *supra* note 15, at 52 (citing Jack L. Knetsch & J.A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q. J. ECON. 507, 507 (1984) for proposition that value of entitlements is greater when measured in terms of compensation required than in terms of willingness to pay); *see also* William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD., 269, 278 (1988) (explaining "offer/ask" disparity in measuring efficiency gains); James D. Marshall et al., *Agents' Evaluations and the Disparity in Measures of Economic Loss*, 7 J. ECON. BEHAV. & ORG. 115, 125 (1986) ("[P]eople will demand more money to give up a good thing than they will pay to keep it.").

Exercising its power of eminent domain inevitably results in government's divestment of the property owner's ability to negotiate the alienation of the conservation easement.[149] Moreover, eminent domain may entail significantly greater financial outlays than acquiring conservation easements.[150] Government and other holders of conservation easements would be limited in their ability to engage in land preservation if required to expend substantial sums condemning or otherwise purchasing entire fee estates.

2. Private Parties—Both Property Owners and Nonproperty Owners—Achieve Efficient Outcomes Through Perpetual Conservation Easements. Professor Craig Arnold acknowledges, and this Article argues for, an approach to the modern concept of property that "heralds the comparative benefits of private property rights over government regulation in achieving environmental protection and good stewardship of nature."[151] Property rules should reflect the unique characteristics of land and other natural resources.[152] A common law rule establishing private-party standing to enforce perpetual conservation easements is one example of the

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[149] Brown, *supra* note 15, at 52.

[150] *See* Hollingshead, *supra* note 1, at 322 (discussing efficiency of conservation easements); Korngold, *supra* note 10, at 443-47 ("Purchases of fee interests for conservation purposes involve three costs: escalating acquisition costs of real estate, indirect costs, and management expenses. Indirect costs include lost productivity of private lands taken for public use and lost tax revenues."); Youngman, *Conservation Easements*, *supra* note 48 (noting efficiency and certainty of conservation easements); Youngman, *Easements, Covenants and Servitudes*, *supra* note 48 (noting benefits of land remaining in private hands). *But see* Korngold, *supra* note 10, at 443-44 (questioning cost-effectiveness of conservation easements). It is sometimes difficult to fully assess the costs associated with acquiring fee interests outright. Available data is limited, and in some instances, owners donate fee interests to the government and land trusts so that the fee interest is acquired without any financial outlay. *See* Ploetz, *supra* note 57 (noting that conservation easements are less expensive than purchasing land or rights to land).

[151] Arnold, *Reconstitution of Property*, *supra* note 5, at 318; *see also* Jonathan H. Adler, *Free & Green: A New Approach to Environmental Protection*, 24 HARV. J. L. & PUB. POL'Y 653, 668 (2001) (describing environmental problems as " 'essentially property rights problems' which are solved by the extension, definition, and defense of property rights in environmental resources"). *But cf.* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1877-87 (1987) (discussing risks attending rhetoric of commodification). In other words, the risks attending erroneous application of a cost-benefit market analysis may lead to harmful results. *Id.* at 1878. Radin also confronts various conceptions of commodification of property from a freedom of contract perspective as well as from an inalienability perspective. *Id.* at 1888-91.

[152] Arnold, *Reconstitution of Property*, *supra* note 5, at 318.

"contextualized" assessment of rights and duties that Professor Arnold advocates.[153]

Conservation easements are valuable to neighboring property owners because in addition to receiving the general public goods produced by conservation easements,[154] these owners realize unique benefits attributable to their physical proximity to the conservation property.[155] Even the most developed and intensely used property benefits from certainty regarding the permissible uses to which neighboring property may be subjected.[156] In most instances, the value of neighboring property will increase to reflect the certainty that development on adjoining property will be restricted.[157] The existence of open and undeveloped space often increases the value of surrounding properties.[158] The added value of open space, development restrictions, and other preservationists measures can be assessed by comparing properties that abut conservation property with properties that do not.[159]

Although open space requirements and other conservationist restrictions benefit adjacent property in the manner discussed above, nonproximate property owners and citizens who do not own any property realize distinct, tangible environmental benefits from conservation property as well.[160] Scenic views and historic places are

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[153] *Id.* at 319.

[154] *See supra* note 3.

[155] *See, e.g.*, Brown, *supra* note 15, at 70-71 n.311 (discussing average reciprocity of advantage concept, which acknowledges that development restrictions on one piece of property may benefit neighboring property through certainty that accompanies such restrictions); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 407 (2002) ("[T]he spatial fixity of individual parcels of real property causes the value of those parcels to be necessarily dependent on the uses made of neighboring parcels.").

[156] *See* Brown, *supra* note 15, at 48-72 (discussing increases in property value that result from certainty regarding permissible uses on surrounding property); Walliser, *supra* note 17, at 87 ("Allowing for the specific enforcement of conservation servitudes reinforces fundamental policies found in the law: Including the preservation of the original parties' expectations, and providing for relative certainty in economic investment and land agreements.").

[157] Bell & Parchomovsky, *supra* note 3, at 20-23.

[158] *Id.* at 20.

[159] *Id.* at 20-21.

[160] Brown, *supra* note 15, at 20-23; *see, e.g.*, Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., L.P., No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at *7-*8 (Mar. 8, 2004) (stating that residents of Tennessee are beneficiaries of conservation easements); Martin P. Bromser-Kloeden, Letter to the Editor, *Benefits of Easements*, WASH. POST, Mar. 11, 2004, Loudon Extra, at 21 ("A conservation easement is a double win for the taxpayer. Future

public goods; their benefits are felt community-wide, and their conservation value is tangible.[161] Not only do conservation easements provide economic benefits to the conservation easement grantor in the form of reduced tax liability and social benefits, expressed as the fulfillment of conservationist objectives, they also benefit neighboring property owners, the public at large (including nonproperty owners), and state and local governments. These tangible and intangible benefits have significant and determinable economic value. The value of conservation easements to the larger community should be considered when addressing challenges to conservation easements.

B. SOCIAL JUSTICE AND A CIVIC-MINDED CONCEPTION OF PRIVATE PROPERTY

When evaluating a request to terminate or modify a perpetual conservation easement, it is appropriate to consider the impact of the conservation easement not only from an economic perspective, but also from a social justice perspective and civic conception of property.[162] Socializing relationships allows society to capture value that might otherwise be ignored or underappreciated in traditional efficiency and utility theories.[163] After all, conservation easements typically do not benefit a discrete parcel of land or a discernable estate in land.[164] Usually, their benefits "extend to neighboring landowners, and the entire community as well."[165]

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developmental costs are permanently avoided while valuable scenic, historic or environmental resources are protected, often without expenditure of tax dollars.").

[161] *See, e.g.*, Hollingshead, *supra* note 1, at 323 (discussing various ways in which conservation easements are efficient). *See generally* Epstein, *supra* note 15 (comparing covenants to constitutions in terms of their societal benefits).

[162] *See* SINGER, *supra* note 25, at 124 (explaining that efficiency analysis in land transactions does not prohibit, nor is it inconsistent with, accounting for losses of trust, negative environmental community impacts, and thwarted private party expectations); Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?*, 31 ARIZ. ST. L.J. 391, 392 (1999) (asserting that vigorous private property rights are not inapposite to sense of responsibility to one's social and natural community).

[163] *Cf. supra* note 161 (discussing co-existence of efficiency and social justice concerns in conservation context).

[164] *See supra* note 3 and accompanying text.

[165] Walliser, *supra* note 17, at 61; *see also* SINGER, *supra* note 25, at 137-38 (discussing choice of legal rule as question "of defining the obligations of members of a community to each

According to the Hegelian theory of property acquisition, one achieves property ownership by inserting one's will into the property.[166] A modern-day extension of the Hegelian theory suggests that, over time, private parties' claims to a justiciable interest in a perpetual conservation easement strengthen as these private parties become increasingly attached to the property.[167] The public's interest in conservation and preservation is enduring and eventually gives rise to property expectations that should be protected.[168] Private-party standing is one such form of protection.

The notion that private property ownership and American property norms reflect civic and public dimensions is not new to American legal thought.[169] Property and property ownership are "complex and fundamentally social" means of structuring human relationships.[170] Social justice focuses on the relational and social connection between people and property.[171] The social aspect of property includes the duty to avoid nuisance and waste, the duty to use property in such a manner as to allow other individuals to exercise their property entitlements,[172] and the effect of private property on social relationships.[173] Similarly, according to the civic conception of property, "the core purpose of property is not to satisfy

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other").

[166] Radin, *supra* note 13, at 741.

[167] *Id.* "Conversely, the claim to an object grows weaker as the will (or personhood) is withdrawn." *Id.*

[168] *See* Arnold, *Reconstitution of Property*, *supra* note 5, at 328 (discussing viewpoints on reasonable expectations); Bernard E. Jacob, *The Law of Definite Elements: Land in Exceptional Packages*, 55 S. CAL. L. REV. 1369, 1370 (1982) (noting evolution of novel land-use restrictions dating back to nineteenth century); Radin, *supra* note 13, at 741 (discussing Hegelian theory); Walliser, *supra* note 17, at 86 (stating that law of easements developed, in part, to respond to public interest in land conservation and open space preservation).

[169] Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature's Boundaries*, 73 S. CAL. L. REV. 927, 998 (2000); *see also* Frazier, *supra* note 61, at 319-20 (discussing role of property law in balancing desire for individual autonomy in private property relationships and need for integrity in land communities).

[170] GREGORY S. ALEXANDER, COMMODITY & PROPRIETY 321 (1997).

[171] *See id.* at 325 (discussing Richard Ely's "analysis of the institution of private property as a dialectic between the individual and social dimensions").

[172] *Id.* at 312.

[173] SINGER, *supra* note 25, at 15; *see also* Frazier, *supra* note 61, at 346-57 (discussing social responsibility according to "Green Property" theory). Green Property theory "recognizes not only the interdependent relationships between human neighbors in political communities, but also the vast network of interdependent relationships between human and non-human neighbors in land communities." Frazier, *supra* note 61, at 301.

individual preferences or to increase wealth but to fulfill some prior normative vision of how society and the polity that governs it should be structured."[174] Both social and civic property norms intentionally and rightfully consider noneconomic and nonefficiency values.[175]

When private property owners voluntarily negotiate the perpetual alienation of a conservation easement, the transaction reflects a simultaneous concern for individual rights as well as for the local community and the general society.[176] This type of market transaction, in which private property is voluntarily dedicated to an important public service, serves private rights and public interests simultaneously. Certainly, successors to the conservation property may object to the deal struck by their predecessors.[177] The present economic, environmental, and property entitlements of the parties to the conservation easement conveyance, however, should outweigh the future interests of successors. Grantors have economic and social incentives to account for value when they convey perpetual conservation easements. For instance, they may eventually want to sell the property, make a gift of it, or transfer it upon their death.[178] These incentives sufficiently motivate grantors to make responsible

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[174] ALEXANDER, *supra* note 170, at 2.

[175] Butler, *supra* note 169, at 998; *see also* SINGER, *supra* note 25, at 95-139 (discussing property and social relations). Specifically, Singer observes that "[i]f we base legal rules *solely* on market measures, we may not count, or may not count adequately, the loss that follows from discarding informally based expectations or other factors that are difficult to quantify." SINGER, *supra* note 25, at 125 (emphasis added).

[176] Walliser, *supra* note 17, at 86. Walliser explains as follows:

> Since the preservation of environmentally sensitive land and historical landmarks are deemed to be within the public interest so as to justify the exercise of a state's regulatory power . . ., there should be no objection to permitting the public to achieve similar objectives by purchase of less than a fee interest.

Id. (quotation omitted and citation omitted); *see, e.g.*, *LTA Lauds Senate Action; Senate Approval of Conservation Tax Incentives*, U.S. NEWSWIRE, Apr. 9, 2004, *available at* http://www.releases.usnewswire.com/getrelease.asp?id=14746 (last visited Aug. 29, 2005) [hereinafter *LTA Lauds*] (observing that donation of conservation easement equates to gift to community).

[177] *See supra* notes 119-22 and accompanying text; *infra* note 223 and accompanying text. *But see* Epstein, *supra* note 15, at 924 (explaining that certain successors also may *not* object to covenants, resulting in cost associated with not respecting covenants that some successors would have wanted and valued).

[178] Epstein, *supra* note 15, at 924; *see also supra* notes 4, 20 and accompanying text (discussing desires of property owners to retain sufficient development rights to fulfill their economic and other needs).

decisions when negotiating the extent of the perpetual restriction they are willing to impose on their property.[179] If one believes these incentives are insufficient to promote responsible decisionmaking, "then there is an argument not only for overriding private agreements on the problem of changed conditions, but also for socializing all other forms of investment."[180]

Private conveyances of conservation easements are voluntary transactions, negotiated agreements between grantors and holders, each pursuing their environmental or economic interests, or both.[181] Legal counsel likely represents participants, who are therefore presumably knowledgeable of their rights and have a realistic appreciation of the restrictions resulting from the grant.[182] The parties to conservation easement transactions should and arguably do "deal with the contingency of future uncertainty, just as they must deal with all other contingencies. Doubts that might exist in the event of contractual silence are eliminated when the parties have addressed the issue one way or another."[183] Once the parties expressly provide for a perpetual conservation easement, or remain silent, understanding that the presumption will be in favor of construing the grant as perpetual,[184] the consensual negotiations of the parties should prevail.

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[179] *See* Epstein, *supra* note 15, at 925 (stating that "the present generation thinks that future value of a common development will be maximized if it takes . . . an intermediate approach to the problem of changed conditions").

[180] *Id.*

[181] *See, e.g.*, Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., L.P., No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at *2 (Mar. 8, 2004) (defining conservation easement); COLE, *supra* note 38, at 65-66 (discussing advantages of conservation easements over traditional forms of environmental protection); Epstein, *supra* note 61, at 1359-60 (recognizing that freedom to create private servitudes satisfies individual interests); *LTA Lauds*, *supra* note 176 (discussing tax incentives for landowners who create conservation easements).

[182] *See* Epstein, *supra* note 61, at 1365 ("[M]ost servitudes are not casual affairs. If they are recorded, there is a strong likelihood that the property in question is of sufficient value that both sides have been represented by lawyers."). *But cf.* Andrew C. Dana, *The Silent Partner in Conservation Easements: Drafting for the Courts*, THE BACK FORTY, THE NEWSLETTER OF LAND CONSERVATION LAWS (Alachua County Envtl. Prot. Dep't Land Conservation Program, Gainesville, Fla.), Jan.-Feb. 1999, http://environment.alachua.fl.us/Land$Conservation/Download$Files/the$back$40.htm (last visited Sept. 2, 2005) (stating that, in author's experience as conservation real estate lawyer, land trust personnel sometimes negotiate and draft conservation easements themselves without assistance of legal counsel).

[183] Epstein, *supra* note 61, at 1365.

[184] *See supra* notes 79-80 and accompanying text.

Conservation easements are most appropriately characterized as creating relationships not only between the contracting parties, but also on a broader social scale that includes the community in which the conservation property is located. Some forms of community control seem inequitable, inefficient, or even illegitimate, perhaps because they confer undue windfalls on the community, bind parties to relationships that were unanticipated by one or more parties at the inception of the agreement, or unduly restrict personal liberty.[185] The community control accompanying private-party standing to enforce perpetual conservation easements is not susceptible to the aforementioned concerns.

The use of conservation easements persists because governments recognize the public benefits emanating from conservation easements, and they have provided tangible incentives that encourage property owners to commit their property to this public service. Property owners who convey conservation easements and those who come to own conservation property after its dedication are aware of the public interest in conservation easements and, even more, the public's expectation that it is a beneficiary of the conservation easement. Some private parties are certainly more direct beneficiaries than others, but all members of the relevant community receive some benefit.[186] Community-wide benefits resulting from conservation easements are the source of reasonable community expectations that should be protected.[187]

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[185] *See* SINGER, *supra* note 25, at 139 (noting that some community controls seem illegitimate because they inhibit liberty).

[186] *See supra* notes 154-61 and accompanying text.

[187] *See* SINGER, *supra* note 25, at 137, 142 (discussing importance of protecting conservation interests). Singer explains as follows:

> We should adopt legal rules that acknowledge claims based on reasonable expectations because a society in which they are protected is a better, more secure, more dignified place to live than one in which people are free to betray trusts. If we do not, we will be encouraging people to be distrustful in their dealings not only with strangers but even with friends and neighbors, and we will be licensing them to renege on agreements reached by mutual understanding with the other party whenever it is convenient for them to do so.

Id. at 137; *see also* Brown, *supra* note 15, at 35-36 n.165 (discussing Professor Richard Epstein's critique of notion of reasonable investment-backed expectations in context of regulatory takings context and maximizing social welfare).

V. DECENTRALIZATION—ANTIPROPERTY THEORY AND PRIVATE-PARTY RIGHTS

Decentralization of private property is essential for a functioning democratic system in which citizens enjoy a reasonable amount of liberty and dignity.[188] To have an effective private property regime, private property must be decentralized, not only out of government hands, but also dispersed among people.[189] "Contrary, perhaps, to popular belief, this means that one of the purposes of property systems must be to distribute ownership widely. . . . Decentralization of power is achieved by establishing conditions under which ownership is widespread."[190] The system of property rules, likewise, must create opportunities for citizens to own real property and interests in real property. A strong presumption in favor of perpetual conservation easements decentralizes property ownership.[191] Private-party standing similarly decentralizes property ownership by creating in private parties a recognized property right in conservation.

This Article does not advocate forced decentralization of property. Rather, it considers the current constitution of the bundle of property rights in the context of conservation easements. It suggests expanding the traditional notion of the bundle of property rights to achieve the sustained conservation of privately owned property while remaining sensitive to efficiency and social justice concerns. One way to decentralize property ownership is to allow property owners to participate in the market for conservation easements and then to recognize in the public, which is widely understood to be a beneficiary of conservation easements,[192] a property interest in the conservation easement. This property interest would assume the

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[188] *See* SINGER, *supra* note 25, at 141, 144 ("Decentralization promotes justice by recognizing the dignity and equal worth of each individual. It promotes the utilitarian goal of maximizing human satisfaction by creating the conditions necessary for economic efficiency and social welfare. These justice and utilitarian goals often go together."); Brown, *supra* note 15, at 46-47 (noting necessity of decentralization of property to distributive justice).

[189] *See* SINGER, *supra* note 25, at 2-4, 82, 144 (describing virtues of decentralization of property).

[190] *Id.* at 144.

[191] Mahoney, *supra* note 4, at 771-72.

[192] *See supra* notes 3, 155, and 164 and accompanying text (discussing public versus private nature of conservation easements and public goods they provide).

form of private-party standing to enforce and defend against challenges to perpetual conservation easements.

The ability of private citizens to acquire, possess, and dispose of land, arguably the most valued form of property,[193] is an enduring and important indicator of a democratic society, one distinguished by individual liberty and a concern for social welfare.[194] The property bundle metaphor is useful when discussing and thinking abstractly about the rights existing in land and inuring to property owners. It does not, however, fully anticipate the ever-increasing complexity of the social relationship between private property owners and society, particularly in the environmental preservation and natural resources context.[195] The bundle of rights metaphor does not adequately account for the important relationship between humans and the natural environment.[196] "In particular, the modern concept of property as a bundle of rights diminishes the importance of the natural environment . . . ."[197]

The late nineteenth century and early twentieth century marked the decline of Sir William Blackstone's notion of property, which emphasized things and the relationship of people with things.[198] The

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[193] Brown, *supra* note 15, at 7 n.3; *see also* SINGER, *supra* note 25, at 2-3, 7 (defining property generally and acknowledging that one cannot offer simple definition of property without making value judgments).

[194] *See* SINGER, *supra* note 25, at xii, 140, 144 (stating that access to property is fundamental to social justice); Brown, *supra* note 15, at 34 (advocating for recognition of expanded notion of private property broad enough to recognize takings claim as property interest susceptible to alienation).

[195] *See* Arnold, *Reconstitution of Property*, *supra* note 5, at 281 (highlighting incompatibility of bundle of sticks metaphor with essential principles of environmentalism); Butler, *supra* note 169, at 966 (stating that solving problems of environmental degradation and compromised ecological integrity will require reexamination of traditional private property norms).

[196] Arnold, *Reconstitution of Property*, *supra* note 5, at 281; *see also* Heller, *supra* note 126, at 1188-89 (noting interactive relationship and stating that "the modern bundle metaphor suggests more fluidity then appears in existing property relations").

[197] Arnold, *Reconstitution of Property*, *supra* note 5, at 281; *see also* ALEXANDER, *supra* note 170, at 319 (discussing three key insights of metaphor); Brown, *supra* note 15, at 21-24 (discussing noncategorical, regulatory takings and reasonable investment-backed expectations test). Discounting the human interest in property could result in finding few, if any, reasonable investment-backed expectations on the part of private citizens, which would have a negative impact on a citizen's effort to thwart certain takings challenges. Brown, *supra* note 15, at 21-24. Relatedly, a finding that private parties do not have recognizable property interest in conservation easements would preclude them from challenging government intrusions upon conservation property as physical or regulatory takings. *Id.*

[198] *See* Arnold, *Reconstitution of Property*, *supra* note 5, at 282 (explaining that

Blackstonian notion of property consisted of two principal elements: "(1) the physicalist conception of property that required some 'external thing' to serve as the object of property rights, and (2) the absolutist conception which gave the owner 'sole and despotic dominion' over the thing."[199]

Wesley Newcomb Hohfeld's conception of property substituted the modern bundle of property rights for the established Blackstonian "thing-ownership" conception of property.[200] The Hohfeldian notion emphasized the legal connections among individuals and de-emphasized the perception of property as involving absolute rights and dominion over things.[201] Hohfeld's conception of property allowed property owners to alienate certain portions of their rights in land without affecting their remaining rights and relationships in the same land.[202] Thus, the Hohfeldian notion of property proved to be more functional than the Blackstonian model and was expressly adopted by the United States Supreme Court for the first time in

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Blackstone's conception of property was in decline at close of nineteenth century although its influence persisted into twentieth century); Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY, at 81 (J. Roland Pennock & John W. Chapman eds., 1980) (noting political implications of historical shift from thing-ownership conception of property to bundle of rights theory). Blackstone described man's relationship with property, stating:

> There is nothing which [s]o generally [s]trikes the imagination, and engages the affections of mankind as the right of property; or that [s]ole and de[s]potic dominion which one man claim and exerci[s]es over external things of the world, in total exclusion of the right of way other individual in the univer[s]e.

2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A REPRINT OF THE FIRST EDITION WITH SUPPLEMENT 2 (William S. Hein & Co. 1979) (1765-1769).

[199] Vandevelde, *supra* note 25, at 331; *see also* 2 BLACKSTONE, *supra* note 198, at 2, 16 (defining property in terms of domination over things); Heller, *supra* note 126, at 1177 (discussing principles of Blackstone's conception of property).

[200] Heller, *supra* note 126, at 1191 (noting that shift from Blackstonian, "thing-ownership" conception to bundle of rights relationship occurred in late 1800s and that Hohfeld is attributed with modern version of theory, although he never actually references bundle of rights); *see also* Arnold, *Reconstitution of Property*, *supra* note 5, at 287 (discussing history of bundle of rights conception of property); Grey, *supra* note 198, at 69, 71, 81 n.40 (discussing Hohfeld's concept of property rights); Jacob, *supra* note 168, at 1375 (discussing modern shift to bundle of rights theory of property).

[201] *See* Arnold, *Reconstruction of Property*, *supra* note 5, at 287 (discussing shift from Blackstonian model to bundle of rights theory); Jacob, *supra* note 168, at 1375 (discussing changes in property theory following shift from Blackstone's thing-ownership concept).

[202] Arnold, *Reconstitution of Property*, *supra* note 5, at 303 (explaining that Hohfeld's conception of rights and duties as correlating captured social nature of property and its inherent "regulatory, public-regarding limits on private rights").

United States v. General Motors.[203] The new conception of property focused not on absolute or fixed rights, but instead on private rights appropriate for the particular situation.[204] Despite the advances of the property bundle metaphor over the "thingness" focus of the Blackstonian era, some still contend that the metaphor insufficiently develops "the concepts of interconnection, thingness (object-regard), and the uniqueness of the objects of property," and that it does not go far enough "to articulate a conception of property that integrates both its humanness and its thingness."[205]

Craig Arnold contends that the bundle of property rights metaphor has a divisive impact on human relationships. First, he criticizes the modern bundle of rights concept for "rejecting the importance of things and person-thing relationships."[206] According to Arnold, this rejection results in a conceptualization of property that alienates property holders from other people by "diminish[ing] the human relationships and forms of community that are constituted or partially constituted by relationships between property owners and the objects of their interests."[207] In addition, the bundle of rights concept disaggregates the sticks in the property bundle in a manner that emphasizes the "rights, claims, duties, and responsibilities" that individuals hold against one another, instead of emphasizing their shared interest in that which is the subject of their property rights.[208]

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[203] 323 U.S. 373, 377-78 (1945); *see also* Heller, *supra* note 126, at 1193 (stating that Court subsequently retreated somewhat from its position in *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945)).

[204] *See* 323 U.S. at 377-78 (noting new emphasis on certain rights); ALEXANDER, *supra* note 170, at 321-22 (discussing shift in emphasis of property theory to certain private rights as absolute rights); Jacob, *supra* note 168, at 1375 (discussing decline of fixed rights theory of property); Vandevelde, *supra* note 25, at 357 (explaining functional change in focus of property theory).

[205] Arnold, *Reconstitution of Property*, *supra* note 5, at 283-84; *see also* Grey, *supra* note 198, at 78 ("[W]e no longer have any coherent conception of property encompassing both simple thing-ownership, on the one hand, and the variety of legal entitlements that are generally called property rights on the other."); Heller, *supra* note 126, at 1193-94 (discussing need to integrate better, more complete metaphor into property theory, one that "distinguish[es] things from fragments, bundles from rights, and private from nonprivate property").

[206] Arnold, *Reconstitution of Property*, *supra* note 5, at 297.

[207] *Id.* at 299.

[208] *Id.*

Reconstituting the bundle of rights metaphor to allow for greater protection of conservation property recognizes the public's interest in conservation easements and the public goods produced by conservation property. Private-party standing makes citizens stakeholders in the conservation process, thereby emphasizing the shared interests among conservation property owners, conservation easement holders, citizens, and government.

Abraham Bell and Gideon Parchomovsky advocate for decentralization of property interests through creation of antiproperty rights in private parties.[209] Antiproperty rights, also called antiproperty easements, are formalized negative easements consisting of "veto rights over the use of an asset that are granted to a large number of private actors."[210] Bell and Parchomovsky propose granting certain property owners an antiproperty easement that would vest them with a right to veto proposed development of the designated property.[211] Effective antiproperty easements must be decentralized to generate transaction and holdout costs that make it difficult for private parties to act collectively in order to alter the use of the property.[212]

Bell and Parchomovsky's antiproperty easement corresponds to this Article's suggestion of a formal private-party interest in conservation easements. Both the antiproperty easement and private-party standing decentralize oversight and enforcement by empowering private property owners to monitor and enforce conservation efforts.[213] Private parties are better equipped than government and conservation organizations to ensure conservationist purposes are accomplished for several reasons: (1) their proximity to conservation property and the tangible and uniquely concentrated benefits inuring from their ownership, in the case of neighboring property owners;[214] (2) their diminished susceptibility to undue influence from wealthy grantors or special

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[209] Bell & Parchomovsky, *supra* note 3, at 5.

[210] *Id.*

[211] *Id.* at 31-37.

[212] *Id.* at 5.

[213] *Id.*; *see also supra* notes 32-108 and accompanying text.

[214] *See* Bell & Parchomovsky, *supra* note 3, at 20-23 (discussing proximate property value); *see also supra* notes 154-61 and accompanying text.

interest groups;[215] and (3) the general benefits that all members of society, property owners or not, receive from the creation and dispersion of public goods. Both antiproperty rights and private-party standing allow neighboring property owners to be proactive and bring claims to preserve positive externalities produced by conservation property instead of reacting to negative externalities through nuisance suits.[216] Private parties are uniquely situated to oversee and monitor conservation property. Thus, by formalizing private-party rights, conservationists' efforts benefit from both national and local oversight.

Despite their common, decentralizing effect on property ownership, antiproperty rights and private-party standing differ conceptually. Private-party standing arises when private property owners burden their property by transferring nonpossessory interests to what is typically a public or quasi-public organization.[217] Antiproperty rights result from government's creation of a private property interest in public or quasi-public property.[218] The distributive justice concerns that arise when government benefits some private property owners to the exclusion of other property and nonproperty owners by giving them a heightened property interest in public or quasi-public property are not present with conservation easements and private-party standing.[219] Conservation easements arise from private negotiations and concern purely private property, and although the conservation easement creates public benefits, the property itself never loses its private property qualities.[220] The

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[215] *See supra* note 14. The widespread decentralization of property interests in conservation easements to private parties would dilute the ability of such groups to exert undue influence because of the costs associated with uniting all stakeholders and overcoming the holdout effect.

[216] Bell & Parchomovsky, *supra* note 3, at 61-62.

[217] *See id.* at 66 (stating that private property owners "generally cede non-possessory rights in . . . green spaces to public . . . or quasi-public . . . organizations").

[218] *See id.* at 10-11, 66 (discussing pure and impure public goods).

[219] *See id.* at 61 (discussing distributional effects of antiproperty rights).

[220] Reich, *supra* note 17, at 771. Reich discusses the function of property as follows:

> Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without.

private-party standing advocated by this Article attaches to the same private property that is the subject of the easement. Thus, distributive justice concerns that might arise when property owned by a public entity is transferred into selective private hands are not applicable in the conservation easement context.

VI. SOME COMPELLING OBJECTIONS TO PRIVATE-PARTY STANDING

The objections to private-party standing are numerous and persuasive. Perpetual easements, it is claimed, (1) perpetuate dead hand control, indirectly restrain alienation, and overly fragment property; (2) fail to respond to developing community needs; (3) confer windfalls upon undeserving parties; and (4) disrupt well-established, legally recognized property rights. This list of objections is not exhaustive. Below, I have suggested ways to conceptualize and to respond to these more persuasive arguments.

A. DEAD HAND CONTROL, INDIRECT RESTRAINTS ON ALIENATION, AND THE ANTICOMMONS

Opponents contend that conservation easements result in dead hand control and indirectly restrain alienation, resulting in the fragmentation of property such that it becomes vulnerable to underutilization—the problem of the anticommons.[221] The

> Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done.
>
> Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.

Id. Thus, the private nature of the property subject to the conservation easement allows for the voluntary creation of such easements.

[221] *See* Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Mode of Property Rights*, 64 WASH. U. L.Q. 723, 734-35 (1986) (stating that by using utilitarian theories and models, one can demonstrate that benefits of restrictions on land

fragmentation concern, in its various forms, is an argument about maintaining markets for real property. An underlying assumption of this argument is that the more unified the bundle of property rights, the more viable the market for property.

1. Dead Hand Control and Indirect Restraints on Alienation. A fundamental principle underlies the assertion that one way to decentralize property rights and entitlements is to expand private-party standing. Conservation and preservation of real property by private citizens and government is socially beneficial and should be encouraged and rewarded.[222] Some reject this assertion, at least insofar as it suggests that property owners and government should be able to impose their preservationist ambitions on future generations.[223] Those who hold this view contend that, as with the property rules that traditionally governed the estates system, property law should discourage fragmentation of property for extended periods of time and instead encourage the retention and transfer by present owners of the fee simple absolute.[224] More specifically, advocates for this perspective often refer to problems attending over-fragmentation of land and the sometimes insurmountable costs associated with reunification.[225]

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decline over time and that costs of these same restrictions increase over time so that eventually, the costs exceed benefits); Heller, *supra* note 126, at 1197 (describing tragedy of anticommons as wasting of property resources attributable to excessive fragmentation of private property which allows too many decisionmakers to have right to exclude people from resource); *see also* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 51-52 (2000) (describing anticommons concern as one of "excessive fragmentation"). *But see* Ellickson, *supra*, at 734 ("[Richard Epstein] condemns, as inconsistent with fundamental rights of alienation, . . . the doctrine that changed neighborhood conditions warrant the termination of covenants, and similar doctrines that nullify consensually created land restrictions.").

[222] *See, e.g.*, Hollingshead, *supra* note 1, at 321 ("Open space is not the absence of something harmful; it is a public benefit in its own right, now, and should be primarily justified on this basis.") (quoting WILLIAM H. WHYTE, JR., SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 7 (1959)); Korngold, *supra* note 10, at 442 (noting "increased public concern over the natural environment and growing commitment to conservation").

[223] *See, e.g.*, Mahoney, *supra* note 4, at 744 (noting limits on benefits of conservation easements); Walliser, *supra* note 17, at 100-01 (discussing impact of conservation efforts on future generations).

[224] SINGER, *supra* note 25, at 148; *see also infra* notes 261-70 and accompanying text.

[225] *See* Arnold, *Reconstitution of Property*, *supra* note 5, at 304 (explaining implications of fragmentation of land); Heller, *supra* note 126, at 1166-67 n.8, 1221-22 (discussing problem of anticommons resulting from conservation efforts); Parisi, *supra* note 66, at 595 (discussing

The estates system restricts an owner's absolute autonomy to disaggregate the property bundle as the owner desires.[226] It decentralizes property ownership to some degree by giving owners, the present possessors, control over their property, thereby dispersing power over property.[227] Private-party standing would further decentralize property entitlements by making it more difficult to terminate or modify the perpetual nature of an easement and by increasing the class of individuals recognized as beneficiaries of the conservation easement.

The dead hand argument asserts that defeasible estates and other temporal fragmentation of real property "lock the use of land in an inefficient or obsolete use, possibly where the beneficiary of the servitude agreement is so far removed in interest that it can no longer be said that the promisee is still deriving any valuable benefit from the servitude."[228] The concerns regarding dead hand control that shaped the development of the estates system are inapposite to conservation easements and to their holders.[229] The gradual abrogation of both the fee tail[230] and the Rule Against Perpetuities[231] (the Rule) is evidence of society's recognition of the inappropriateness of arbitrary rules governing the duration of temporal and other restrictions on property.

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impact of fragmentation costs on future generations).

[226] SINGER, *supra* note 25, at 151.

[227] *See* Bell & Parchomovsky, *supra* note 3, at 5 (discussing decentralization of property by transferring antiproperty rights to large numbers of private parties in form of formal negative, antiproperty easements); *see also* Frazier, *supra* note 61, at 339-40 (discussing decentralization of land ownership from perspective of empowering local governments with control over ecosystem management and diminishing role of federal government).

[228] Walliser, *supra* note 17, at 100-01.

[229] *See* UCEA § 1, 12 U.L.A. 170-71 (1996) (defining "holder").

[230] Heller, *supra* note 126, at 1177. Heller explains the function of the fee tail: "By putting property in tail, owners attempted to control resources beyond their lifetimes, thereby placing the costs of the resulting decrease in productivity on future generations and on society." *Id.* Elimination of the fee tail is evidence of the recognition of the social benefits of restricted temporal fragmentation. *Id.*; *see also* CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY § 6 (3d ed. 1988) (discussing modern law of fee tail and describing why opposition to fee tail arose in United States); SINGER, *supra* note 25, at 148 (discussing significance of abrogation of fee tail).

[231] *See* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 59 (1955) (discussing policy against perpetuities); Heller, *supra* note 126, at 1179 (discussing Rule as early example of limitation on temporal fragmentation); Lazarus, *supra* note 16, at 693 (discussing Rule as one of several doctrines dominating substantive legal rules defining nature of private rights in land).

Unlike the fee tail, the modification or termination of a conservation easement involves relatively few burdensome transaction costs.[232] For instance, the recording system assures easements are recorded, lest they be destroyed by transfer of the property to a bona fide purchaser.[233] Likewise, local notice requirements would ensure that the community would receive notice of attempts to modify or terminate conservation easements.[234] Governmental bodies and charitable entities, often conservation easement holders,[235] have a potentially indefinite existence. Therefore, control over the conservation easement vests with an entity that presently exists, unlike many interests historically the subject of the fee tail.[236] Moreover, these holders exist in the public realm and are therefore subject to public scrutiny, influence, and monitoring, which ensures that holders and the public continue to benefit from the conservation easement.[237]

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[232] *But see infra* notes 245-60 and accompanying text (discussing transaction costs associated with reunifying fragmented property interests). Identifying the interested parties does not mean that they will be able to reach agreement on termination or modification of the easement. Also, expanding standing to defend perpetual conservation easements to include private parties makes it more difficult, and perhaps more costly, to undo perpetual conservation easements.

[233] *See* Walliser, *supra* note 17, at 106 (explaining benefits of recording system in regard to transaction costs); *see also* Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, *in* THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 214 (Nicholas Mercuro & Warren J. Samuels eds., 1999) (discussing virtues of recording system).

[234] *Cf.* 1 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 2:3 (2001) (Supp. 2004) (discussing due process guarantees of notice and fair hearing when landowners' use and development rights are being adjudicated or determined by governmental authorities).

[235] *See* UCEA § 1(2)(i)-(ii), 12 U.L.A. 170 (1996) (including both governmental bodies and charitable entities within definition of holder); Walliser, *supra* note 17, at 83-84 (noting that most conservation easements are held by governmental agencies and land trusts).

[236] *See* Walliser, *supra* note 17, at 100-01 (discussing dead hand as undesirable land control).

[237] *Id.* at 83-84, 100-01, 104-05. Walliser writes:

> [G]overnmental agencies and land trusts represent the overwhelming majority of conservation servitude holders, and . . . these two share many of the same essential characteristics . . .: "Being immortal and locally fixed, such [entities] do not die or move away as natural persons do, and so their interests present no unusual complications to the task of documenting the marketability of the burdened property."

Id. at 84 (quoting Ross D. Netherton, *Environmental Conservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 558 (1979)).

In addition, "[t]he Rule has never been applied to restrictive covenants and perpetual easements on the grounds that the social utility of such interests with respect to the use of land usually outweighs the social policy against inalienability of property."[238] The Rule reflects a desire to restrict temporal fragmentation of property interests and applies only to a limited number of defeasible fees.[239] For instance, reversions, the possibility of reverter, and the right of entry—all of which are future interests in the grantor—are exempt from the Rule.[240] The Rule's limited application reflects societal awareness of situations in which arbitrary restrictions on the duration of estates should not be imposed. In some instances, perpetual restraints on the use and development of property serve a societal good that outweighs the possible deleterious effects of dead hand control. This Article's proposal for private-party standing attempts to increase community oversight and empower community monitoring. It merely provides formal recognition of an important public interest.

Safeguarding the individual liberties of property owners and their freedom of alienation requires a very restricted application of the doctrine of changed conditions to perpetual conservation easements.[241] General public policy favoring alienability and the

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[238] Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533, 545 n.63 (1988); *see also* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 305 (5th ed. 2002) (providing background on Rule Against Perpetuities); LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS §§ 120-126 (2d ed. 1966) (providing history of Rule Against Perpetuities). *But see* Korngold, *supra* note 10, at 440 (contending that permitting perpetual easements for conservation purposes fulfills certain social values such as conserving environment but also frustrates others). For example, Korngold explains, "the policy against dead hand ties on land, a policy that allows living land owners to shift land use according to current market choices, is hampered." *Id.*; *see* Walliser, *supra* note 17, at 100 (discussing impact of perpetual easements on dead-hand control).

[239] *See* Heller, *supra* note 126, at 1179-80 ("Recognizing that purely private decisions about the use of property can impose long-term social costs, the [Rule] conclusively presumes a point after which the social cost of fragmentation exceeds private gains."); *supra* note 221 and accompanying text.

[240] *See* Heller, *supra* note 126, at 1181 (discussing these exemptions as evidence of deficiencies in Rule); *see also* DUKEMINIER & KRIER, *supra* note 238, at 305 (discussing various applications of Rule to future interests). Alternatively, future interests are spoken of as always being valid, as opposed to exempt from the Rule, because they are vested for purposes of the Rule. CORNELIUS J. MOYHNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 122 (2d ed. 1988). Additionally, certain gifts to charitable trusts are exempt from the Rule. *See* SIMES, *supra* note 238, § 136 (discussing application of Rule to charitable trusts).

[241] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. f (2000) (discussing policy

free use of land does not refer merely to the ability of successors to take property in the most unrestricted state possible.[242] The free alienability concept also anticipates the freedom of property owners with respect to their property and how they transfer it.[243] Conservation easements are legislatively manifested policies favoring conservation and preservation. When policies developed in the common law, such as the policy against indirect restraints on alienation, conflict with legislatively declared policies, such as those pertaining to conservation easements, the legislative policies should prevail and outweigh policies expressed in the common law.[244]

2. Fragmentation and the Anticommons. Excessive fragmentation can lead to what has been termed the problem of the anticommons, the wasting of real property through underuse.[245] Underuse occurs when property ownership and entitlement becomes so fragmented that there are too many excluders, or persons with the ability to block the productive use of property and valuable

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reasons for preserving perpetual conservation easements); Heller, *supra* note 126, at 1199 (stating that "scholars today typically claim that unbounded alienability helps to ensure efficient resource use"). In the context of perpetual conservation easements, this proposition is not as straightforward as it might appear because of the significance of the temporal impact. Promoting, facilitating, and protecting free alienability of perpetual conservation easements may encourage efficient use for grantors, although some contend that it does not. After the conveyance of the perpetual easement, however, and particularly if private-party standing is granted, the interest conveyed no longer bears the quality of "unbounded alienability," in part because of the fragmentation, antiproperty, and anticommons effects discussed in this Article.

[242] Epstein, *supra* note 61, at 1359-60; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.01 cmt. f (2000) (discussing heirs' concerns regarding alienability of land with conservation easement).

[243] Epstein, *supra* note 61, at 1359-60. Misconceiving freedom of alienation as referring solely to the real property itself and its susceptibility to subsequent transfers "has allowed the courts to take an aggressive stance in striking down consensual restraints on alienation as being against public policy, or worse, inconsistent with the 'inherent nature' of the fee." *Id.* at 1360 (citation omitted); *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.5 (2000) (discussing servitudes as form of indirect restraint on alienation).

[244] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. f (2000).

[245] *See* Heller, *supra* note 126, at 1165-67 n.8, 1221-22 (discussing problems of fragmentation and anticommons). In describing the problem of waste attending the commons and anticommons situations, Heller states that "[i]n well-functioning property regimes, legislatures and courts prevent such waste by drawing boundaries that constrain owners' choices about fragmentation. Outside the boundaries are commons and anticommons property; inside are forms of private property." *Id.* at 1166. Heller's "boundary principle" describes doctrines that keep resources in productive use by establishing a separation between the various property categories. *Id.*; *see also* Bell & Parchomovsky, *supra* note 3, at 6 (explaining how anticommons plagues private property regimes).

resources.[246] Reunification of property interests entails transaction costs that often exceed the cost of originally fragmenting the property.[247] As a result, optimal and economically efficient reunification of fragmented interests may not occur.[248]

Private market systems may still offer a solution to the reunification hurdle created by transaction costs. Acknowledging private property interests in conservation easements encourages private firms and organizations to engage in environmental conservation and to become stewards of conservation property.[249] For instance, "the recognition of conservation easements already empowers conservation groups to purchase development rights from a given parcel of land and protect the present ecological values."[250] Respecting decisions of private property owners to place permanent restrictions in favor of conservation on their lands may lead to fragmentation of property interests, but it may also produce efficient outcomes.[251] It is not in property owners' interests "to fragment their

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[246] Heller, *supra* note 126, at 1197-98; *see also* Bell & Parchomovsky, *supra* note 3, at 6 (explaining that result of anticommons is underuse of resources).

[247] Parisi, *supra* note 66, at 628; *see* Epstein, *supra* note 61, at 1366-68 (discussing unified servitudes and holdout effect).

[248] Parisi, *supra* note 66, at 628. *But see* Epstein, *supra* note 61, at 1366 (discussing intangible value of holdout option as defense against collective action by majority).

[249] *See* Adler, *supra* note 151, at 684 (arguing that policymakers should expand property-based institutions in order to empower private sector in conservation efforts); *see also* COLE, *supra* note 38, at 59-66 (explaining how conservation easements help to preserve wild lands).

[250] Adler, *supra* note 151, at 685. *But see* ERIC T. FREYFOGLE, JUSTICE AND THE EARTH: IMAGES FOR OUR PLANETARY SURVIVAL 28-29 (1993) (explaining that pure economic calculations insufficiently address perils of overuse and inability of privatization to wholly address problem in all situations). The evidence indicates that environmental problems do not necessarily disappear simply because assets are in private hands. *Id.* at 28. The author states that evidence consistently supports a finding that individual owners destroy environmentally important, historically significant property that they privately own. *Id.* at 29. He concludes that an "ethic of care" is required if privatization is to work. *Id.* at 30.

[251] *See* Epstein, *supra* note 15, at 924-25 (stating that present generation has interest in negotiating transfer terms of conservation easements in manner that is efficient and that reflects true future value of land restriction); Epstein, *supra* note 61, at 1365-66 (arguing in favor of "a complete denial of public intervention based on changed conditions"). According to Professor Epstein, judicial intervention to address uncertainties arising subsequent to the parties' negotiations would result in an increase in uncertainty attending any transaction. Epstein, *supra* note 61, at 1365-66. In contrast, a rigid legal rule disfavoring application of the doctrine of changed conditions would essentially allocate property interests at the inception of the agreement in favor of maintenance of the negotiated agreement and would increase certainty. *Id.* at 1366. Professor Epstein explains as follows:

> The point is not that certainty is always bad or always good when time horizons are long. The point is that, given the pervasive ignorance over

rights inefficiently since they will bear the costs of that fragmentation."[252]

The assertion that original parties cannot accurately anticipate changed conditions and that, as a result, they cannot establish a purchase price reflective of the risks is merely an acknowledgment of the uncertainty associated with all negotiations.[253] Additionally, such arguments also assume that had the parties possessed perfect knowledge about the scope of changed conditions, they would have either conveyed a conservation easement of limited duration or expressly consented to the modification or termination of the easement pursuant to the changed conditions doctrine.[254] The Statute of Frauds requires a writing to convey real property precisely because it is exceedingly difficult to gather evidence of the assumptions and intentions of original parties, especially years after

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> the trade-off between the virtues of flexibility and certainty, and between the vices of indefiniteness and rigidity, there is simply no persuasive reason to embrace one extreme to the exclusion of the other.

Id. Also discussing private-party negotiations, Parisi writes:

> From an economic perspective, it can be generally assumed that rational owners would fully anticipate the expected costs and benefits of fragmentation prior to fragmenting their property. Most specifically, rational owners would realize that, if the fragmentation of their property proves to be suboptimal and reunification becomes necessary at a later time, the cost of reunification could be prohibitive, given the hold-up strategies of the fragmented owners. Rational owners would anticipate such extraordinary cost of reunification and recapture the expected rent transfer by charging higher prices for the sale of the fragmented parcels.

Parisi, *supra* note 66, at 627; *see also* Walliser, *supra* note 17, at 56 (stating that conservation easement challenges occur when certainty is needed most, that is, when holder seeks to enforce restriction); *cf.* Adler, *supra* note 151, at 653, 657 (describing "free market environmentalism," as environmental protection principle rooted in market institutions, more particularly, in property rights). Adler concludes that environmental problems are " 'essentially property rights problems' which are solved by the extension, definition, and defense of property rights." *Id.* at 668.

[252] Hansmann & Kraakman, *supra* note 155, at 418. The authors explain: "Consequently, the most serious anticommons problems seem to arise when a division of rights whose expected value was initially positive is rendered inefficient by time or changed circumstance." *Id.* at 418-19.

[253] Epstein, *supra* note 15, at 923-25; *see* COLE, *supra* note 38, at 65-66 ("There is no imposition because the conservation easement . . . [is] created voluntarily, by contract. Assuming no spillover effects, the deal must be efficient . . . otherwise the parties would not have consummated the deal."); *Conservation Success Story*, *supra* note 23 (discussing conservation easements as tool for those who are land rich and cash poor).

[254] Epstein, *supra* note 61, at 1364-65.

negotiations and conveyances have been completed.[255] Implied terms should not be added to conservation easements under the guise of fulfilling what would have been the intent of the parties had they fully appreciated future events.

Similarly, the holdout problem (the ability of owners of widely fragmented property interests to block reunification and development by refusing to consent to termination or modification of the conservation easement) is not unique to conservation easements. One might even assert that the holdout problem is not really a problem at all; rather, the right to withhold one's consent is at the essence of the definition of ownership in the fee simple absolute context.[256] The holdout right, however, is not absolute. For instance, virtually all individual property rights are vulnerable to forced modification by government under its power of eminent domain.[257] The ability to disrupt the holdout right is more disturbing in the conservation easement context, however, because unlike the government's exercise of its eminent domain power, the interference is often by an insider, an original party to the conservation agreement or the original party's privy.[258] Parties to conservation agreements should be discouraged from undermining their own agreement merely because a change in economic conditions has made their bargain less attractive.[259]

So long as the original parties to the conservation agreement were aware of the various difficulties that might accompany the conveyance of the conservation easement, including the possibility of holdouts, the best legal rule is one which enforces private

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[255] *See* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS 381-82 (West 1952) (discussing rationale of Statute of Frauds).

[256] Epstein, *supra* note 15, at 920; Epstein, *supra* note 61, at 1367.

[257] *See* Epstein, *supra* note 15, at 920 (explaining limitations on holdout right); *see also supra* notes 50-54 and accompanying text.

[258] *See* Epstein, *supra* note 15, at 920 (comparing holdout right in easement context with eminent domain).

[259] *See id.* at 921 (discussing ex ante and ex post effects of holding out). Epstein writes:

> Ex post it is clearly in some people's interest to have the right to hold out. This right may be awkward to exercise when it is apparent that consent is withheld only to extract a profit from others but it may nonetheless still have real positive value. In many cases the covenant continues to be of some value to a covenantee.

Id.

agreements. Concern over the limited ability of the present generation to anticipate the effects of fragmentation and the anticommons on future generations is not a sufficient reason to deny private-party standing. The future consequences of property transfers can be difficult to take into account.[260] Perhaps this uncertainty justifies monitoring the evolution of new forms of property rights and carefully accounting for their costs and benefits. Concern over future consequences, however, is not a sufficient reason to divest conservation easement grantors of decisionmaking authority and to strip private parties of the societal benefits of those decisions.

B. PERPETUAL CONSERVATION EASEMENTS ARE UNRESPONSIVE TO DEVELOPING COMMUNITY NEEDS

Perpetual conservation easements are sometimes characterized as overly aggressive regulations that stymie effective development, undermine responsible future planning, and fail to respond to altering community needs.[261] The community's needs can be thought of as the future needs of individuals and the entire community for housing, transportation, and new jobs.[262] Some argue that the original parties cannot negotiate in full knowledge because they cannot anticipate the nature and extent of changed conditions.[263] As a result, perpetual easements impede responsible and appropriate development.[264]

Conservation easements are necessarily restrictive; they can be tailored, however, to reserve particular development rights and uses

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[260] *See* Merrill & Smith, *supra* note 221, at 30 (discussing unknown impact of conservation easements on future generations).

[261] *See* COLE, *supra* note 38, at 85-109 (discussing challenges to presumption that private property regimes always enhance economic efficiency); *cf.* Frazier, *supra* note 14, at 58 (stating that some believe "environmental laws of the past three decades give too much weight to guiding principles that protect community interests at the expense of individual resource owners").

[262] *See, e.g.*, Adam E. Draper, Comment, *Conservation Easements: Now More Than Ever – Overcoming Obstacles to Protect Private Lands*, 34 ENVTL. L. 247, 253-54 (2004) (describing impact of conservation easements on needs of communities and individuals).

[263] *See supra* notes 253-54 and accompanying text.

[264] *See supra* note 261 and accompanying text.

to the grantor.[265] Contracting parties often negotiate to secure terms most beneficial to themselves even at the expense of nonparties to the negotiations.[266] Countering this tendency, perpetual conservation easements serve present community and individual needs. Private-party standing allows consideration of community interests and preferences when parties seek to undo or weaken perpetual conservation easements. By denying private-party standing, decisionmakers may forego the benefit of the community's judgment about the reasonableness of modifying a perpetual conservation easement. Unchallenged by community involvement, advocates would articulate the reasonableness standards of those desirous of developing protected resources, leaving already disadvantaged courts with even greater obstacles to confront.[267]

Additionally, conservation easements assist in providing for the needs of growing populations while simultaneously combating the deleterious effects of sprawl—a pattern of growth characterized by dispersed commercial centers, retail areas, and homes and dependent upon the automobile to link citizens to one another and to their communities.[268] Conservation easements are a component

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[265] *See, e.g.*, I.R.C. § 2031(c)(8)(B) (2004) (defining qualified conservation easements); Draper, *supra* note 262, at 254-55 (describing conservation easements as flexible and diverse); DePalma, *supra* note 4 (providing example of developers and conservation easement holders cooperating to achieve environmental objectives and housing needs); Stephens & Ottaway, *supra* note 4 (providing example of conservation easement containing exceptions that allow for significant development). Landowners, however, are discouraged in some instances from retaining development rights to their property, since doing so may have adverse estate and gift tax consequences. *See* I.R.C. § 2031(c)(5)(A), (c)(8)(B) (2004) (stating that to extent donor of conservation easement retains development rights, value of such development rights shall not be excluded from donor's gross estate for purposes of calculating federal estate taxes).

[266] *See* Frazier, *supra* note 14, at 64 (observing that interests of those who are not parties to agreements concerning real property are inappropriately neglected).

[267] *See supra* note 86 and accompanying text.

[268] DANIEL R. MANDELKER & JOHN M. PAYNE, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 3 (5th ed. 2001); *see also* Draper, *supra* note 262, at 252 (describing sprawl as product of poorly planned land-use policies prone to overconsumption of land and incompatibility with surrounding uses and spaces); Carole Paquette, *Building Homes but Saving Prime Land*, N.Y. TIMES, Dec. 12, 2004, § 11, at 12 (discussing use of both conservation-subdivision legislation and donation of land as conservation easement as part of effort to "preserve substantial amounts of land in new developments"). C. Woodrow Irvin describes a compromise between a luxury home developer and land trust, illustrating the coexistence of development and conservation with the following story:

> Steve Korfonta, president of Seville Homes, a luxury-home builder, said zoning regulations would have allowed his company to build as many as

of " 'the smart growth' movement, which emphasizes preservation of farmland and open space by accommodating population growth in compact new developments or . . . in revitalized, redeveloped cities."[269] Conservation easement enforcement promotes conservationists' goals and simultaneously encourages communities to plan and implement growth strategies with an awareness of important environmental concerns.[270]

C. THE WINDFALL ARGUMENT AND ANALOGIES TO THE PUBLIC TRUST DOCTRINE

1. The Windfall Argument. Some argue that private-party standing produces undeserved windfalls. According to this argument, private parties will file frivolous lawsuits either hoping to extract settlements or seeking to benefit from injunctive relief when they have made no investment in the conservation easement or property. The windfall and litigation issues also reflect

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> seven houses, to be sold at more than $1 million each, on a 2.6 acre historic property he purchased in Annandale last year.
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> But after hearing pleas from the trust and the Oak Hill Citizens Association, Korfonta said, he agreed to accept $730,000 and tax incentives from the Fairfax County Board of Supervisors in exchange for preserving and renovating a Georgian mansion that dates to around 1790 before offering it for private sale. The historic house will be open to the public four days a year, under terms of the agreement.
>
> His decision not to build on the site, Korfonta said, "really has to do with the specific property. It's a gorgeous piece of property." Korfonta said he has put about $300,000 into renovating the house and plans to sell it for more than $2 million.
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> "We didn't make anywhere near the money we could have" if the company had forgone the easement process and developed the land with single-family homes, Korfonta said. But in his mind, he said, there was never any question that he was willing to preserve the property if he could.

C. Woodrow Irvin, *Land Trust Touts Success in Preserving Virginia Properties*, WASH. POST, Jan. 23, 2005, at T11.

[269] MANDELKER & PAYNE, *supra* note 268, at 3; *see, e.g.*, Henderson v. Kittitas County, 100 P.3d 842, 846 (Wash. Ct. App. 2004) (describing comprehensive plan, in context of application to rezone, that attempts to address problems of sprawl by using conservation easements along with small lot zoning in hopes of retaining rural character of affected land).

[270] *See supra* notes 261-69 and accompanying text. *But see* Ploetz, *supra* note 57 (describing developer's contention that "increase in assessments has actually increased the chances of development for many parcels by forcing people to choose between going into a conservation easement or developing their property, since the increased assessments have made simply holding the property more expensive").

disagreement over the appropriate size of the class that should be eligible for private-party standing. Others argue that the general public reaps a windfall if enforcement rights are conferred upon it because the public has not directly paid for the conservation easement. Further, any expectations of the general public in the continuation of a conservation easement are unearned and not backed by any investment.

The potential harm from underenforcement of perpetual conservation easements is a public harm and is not restricted to the original parties their successors, or to neighboring property owners. As stated previously, the benefits of conservation are public and affect a broad community.[271] Excessive litigiousness and the accompanying social costs are important concerns, but the need for public representation in suits seeking to undermine perpetual conservation easements outweighs these concerns. The state of Tennessee serves as an example of a state which has struck the proper balance.[272]

Additionally, public investment assumes a variety of forms, and the reasonableness of the public's expectations stems from the purposes underlying the creation of perpetual easements.

> [W]ith virtually every conservation easement, there is a significant public subsidy. The public *should* care about how its money is being spent, whether it is being spent for something of long-term public benefit, and whether it is being spent efficiently; that is, the public should be interested in whether it is getting a fair public bang for its buck.[273]

The public's interest and investment in perpetual conservation easements entitle the public to rely on the enforcement of these easements, absent compelling circumstances. This interest and

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[271] *See supra* notes 3, 164-65 and accompanying text.

[272] *See* Tenn. Envtl. Council v. Bright Par 3 Assocs., L.P., No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at *1 (Tenn. Ct. App. Mar. 8, 2004) (holding that residents of Tennessee have standing to sue to enforce conservation easements).

[273] Pidot, *supra* note 5, at 2; *see also id.* at 2-3 (discussing public stake in conservation easements).

investment also entitle the public to private-party standing to enable the public to raise its concerns in court.

2. The Public Trust Doctrine. Important analogies exist between private-party standing and the public trust doctrine.[274] Both the public trust doctrine and private-party standing concern property involving a public interest; both protect and express a recognition of a right in the public to the enjoyment and limited use of property. Simultaneously, both private-party standing and the public trust doctrine acknowledge that the public does not own the property in the way ownership is understood in a private transaction, where no overarching public interest concerns exist. Also, in both contexts, the property may be privately owned, and if so, the property is nevertheless subject to the conservation easement or public trust.

Illinois Central Railroad Co. v. Illinois[275] is perhaps the best expression of the modern public trust doctrine. The Supreme Court described the state's interest in navigable waters as one involving a public trust and of concern to all of the state's citizens.[276] Accordingly, the state was not free to alienate such lands or abdicate its trust responsibilities over them in a way that was inconsistent with trust purposes.[277] The Court stated:

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[274] *See* Frazier, *supra* note 61, at 354-57 (discussing proposals to expand scope and use of public trust doctrine). Frazier essentially redefines the public trust doctrine purposes to create a public right to "have access to healthy, functioning natural ecosystems." *Id.* at 356. Frazier also discusses deficiencies of the public trust doctrine as a tool for achieving biological diversity protection:

> (1) as judge-made law, the particulars of the public trust doctrine vary widely from state to state; (2) the public trust doctrine is developed in a piecemeal fashion, as a result of the vagaries of litigation, without the unifying structure of a statute or a constitutional provision; (3) the public trust doctrine, in its present form, is not well suited for the protection of plants; and (4) courts currently use the public trust doctrine to protect public use of a resource, not to protect the resource itself.

Id. at 356-57 (citing Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 325 (1991)). *See generally* Joseph L. Sax, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (discussing nature of contemporary public trust doctrine). Professor Sax states in his article, "[o]f all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems." *Id.* at 474 (citation omitted).

[275] 146 U.S. 387 (1892).

[276] *Id.* at 455.

[277] *Id.* at 452-53.

> The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining . . . .
>
> . . . .
>
> This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested.[278]

The Court identified at least three distinct interests in trust resources: the *jus privatum*—the private property right,[279] the *jus publicum*—the public trust,[280] and the *jus regium*—the power of regulation, currently recognized as the police power.[281] According to the Court, property transferred by the state under its *jus privatum* power remained subject to the preexisting and paramount *jus publicum* because the public right in trust resources could not be destroyed by transfer of a private property right.[282] Similarly, private property dedicated to conservationist purposes through attachment of a conservation easement is a significant public resource, one appropriate for heightened protection through recognition of private-party standing. Private-party standing is an

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[278] *Id.* at 453-56.

[279] *Id.* at 458; *see, e.g.*, Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1087 (Idaho 1983) (considering whether public trust doctrine precluded grant to private club). The Idaho Department of Lands attempted to lease the use of private docking facilities on the bay of a navigable lake to a private club. *Kootenai Envtl. Alliance*, 671 P.2d at 1087. The court held that the lease did not violate the public trust doctrine because the lease was found to be compatible with the requirement "that public trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon." *Id.* at 1091. The court also noted that, when dealing with public trust resources, the public trust doctrine establishes the outermost boundaries of permissible government grants. *Id.* at 1095.

[280] *Ill. Cent. R.R.*, 146 U.S. at 458.

[281] *Id.* at 456.

[282] *Id.* at 458.

important bulwark against undue infringements on conservation resources that are the subject of protection via perpetual conservation easements.

Subsequent to *Illinois Central Railroad*, the Supreme Court expanded the public trust doctrine from tidelands under navigable waters to include "ownership of all lands under waters subject to the ebb and flow of the tide."[283] Convinced that "the ebb-and-flow rule [had] the benefit of 'uniformity and certainty, and . . . eas[e] of application,' "[284] the Court rejected the dissenting Justices' concerns that the Court's holding was a "radical expansion of the historical limits of the public trust"[285] that disrupted settled property title expectations.[286] As previously discussed, legislative provision for perpetual conservation easements represented an expansion of the common law of easements, covenants, and servitudes.[287] In this context, state legislative expansion of the limitations of conservation easements so as to validate perpetual grants is reasonable and fulfills the reasonable expectations of private parties. A presumption of private-party standing under the common law would afford the uniformity and predictability valued by the Court regarding issues affecting the public's interest in public resources.[288]

"In sum, when a conservation easement is created, there is a legitimate [public interest and concern] that the easement will be honored and that the easement holder . . . will be able to monitor, enforce and defend the easement *forever* . . . ."[289] Private-party standing is a viable way of protecting the public's legitimate interest in a valuable public resource.

D. THE *NUMERUS CLAUSUS* PRINCIPLE—TIME HONORED STANDARDIZATION OF PROPERTY RIGHTS

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[283] Phillip Petroleum Co. v. Mississippi, 484 U.S. 469, 484, 476 (1988).

[284] *Id.* at 481 (quoting Cobb v. Davenport, 32 N.J.L. 369, 379 (1867)).

[285] *Id.* at 493 (O'Connor, J., dissenting).

[286] *Id.* at 493-94; *see also* David L. Callies & Benjamin A. Kudo, The Idea of Property: Custom and Public Trust, Address Before the Midyear Meeting of the Am. Ass'n of Law Schools (June 17, 2004) (on file with author) (listing state cases discussing recent expansions and refusals to expand public trust doctrine).

[287] *See supra* note 2 and accompanying text.

[288] *See supra* notes 5, 279 and accompanying text.

[289] Pidot, *supra* note 5, at 3.

Numerus clausus, meaning "closed number," is a civil law doctrine restricting the categories of legally recognized property rights.[290] The phrase stands for the principle that certain standardized forms should govern property law and that property rights should conform to these standards.[291] Although there is no corresponding common law name, American common law has recognized and strictly enforced the *numerus clausus* principle in various legal contexts and has, at times, explained the principle by reference to the anticommons.[292]

Property rights establish useful organizing principles for society. They are especially significant as instruments used to establish expectations that guide social interactions.[293] Societal expectations are expressed in attitudes, fixed customs, and laws. Property rights create entitlements to benefit or disadvantage the holder of those rights and others; they are closely linked with harmful and beneficial externalities. Therefore, according to the *numerus clausus* argument, newly created property rights should be avoided in favor of existing property entitlements, the contours of which are supposedly well settled in the common law.[294]

One popular explanation for *numerus clausus* states that the principle is a means of addressing the negative effects on future generations of the problems of the anticommons and of over-fragmentation of property.[295] Thus, *numerus clausus* is properly understood as a limitation on the *types* of enforceable property rights, not the *number* of rights.[296] Strong judicial adherence to

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[290] Hansmann & Kraakman, *supra* note 155, at 379-81, 417-20 (providing brief history of *numerus clausus* underlying rationales, discussing costs of lack of standardization of property forms, and stating that there is no formal common law equivalent).

[291] Merrill & Smith, *supra* note 221, at 4.

[292] *See id.* at 12-14 (discussing formalistic structure of estates in land); *id.* at 15 ("The *numerus clausus* principle is also quite strong in the concurrent-interest area."); *id.* at 16-17 (discussing nonpossessory interests of easement, real covenants, and equitable servitudes and stating that although *numerus clausus* is applied in relatively weakened form compared with other areas of property law, there is still evidence of its significant impact on some recognized forms of nonpossessory property interests).

[293] Demsetz, *supra* note 109, at 347.

[294] In fact, common law property notions are constantly in a state of change and flux. *See supra* notes 221-60 and accompanying text (discussing, for example, present and future estates and perpetuities).

[295] Merrill & Smith, *supra* note 221, at 6.

[296] *Id.*

numerus clausus requires courts to "respect the status quo with respect to the menu of available property rights," thereby leaving the legislature as the most rational source of legal reform.[297]

When significant demand for new forms of property interests and entitlements arise, legislatures respond by enacting legislation addressing the emerging need. For example, condominiums and timeshares are legal forms of ownership made possible by legislative enactment.[298] "The abolition of the fee tail, dower and curtesy, the tenancy by the entirety, and the tenancy in partnership have [sic] been accomplished in this country by legislation, not by courts."[299] Also, many states have enacted statutes to modify the Rule Against Perpetuities.[300]

Conservation easements are created by state legislatures, consistent with the *numerus clausus* emphasis on the legislature as the proper source of legal reform.[301] Moreover, these easements are not an entirely new form of property; they are closely analogous to the "implied reciprocal servitude" or "implied reciprocal negative easement," a theory most frequently discussed in the context of subdivision controls.[302] Implied reciprocal negative easements are a component of the general-plan doctrine and are used to effectuate the intentions of parties to enforce a set of land-use controls for real

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[297] *Id.* at 59.

[298] *Id.* at 67; *see also* ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 525-26, 555-57 (2d ed. 2002) (discussing condominiums and timeshares as statutorily created entities).

[299] Merrill & Smith, *supra* note 221, at 60.

[300] *Id.*; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.3 (2000) (explaining limits on duration of servitude); Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1907 (1986) (noting "a number of state statutes impose a fixed-year limit" on future interests).

[301] *See supra* notes 8-9 and accompanying text.

[302] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.14(2)(b) (2000) ("A conveyance by a developer that imposes a servitude on the land conveyed to implement a general plan creates an implied reciprocal servitude burdening all the developer's remaining land included in the general plan, if injustice can be avoided only by implying the reciprocal servitude."). The Restatement implies that servitude burdens contravene the Statute of Frauds, hence the requirement that burdens only be implied if necessary to avoid injustice. *Id.* § 2.14 cmt. d, cmt. i. Perpetual conservation easements, as addressed in this Article, are identified in writing and therefore meet the Statute of Frauds requirement. Thus, the requirement of establishing an injustice to be avoided for the burden to be implied under the implied reciprocal servitude rule is unnecessary for perpetual conservation easements.

property development.[303] These implied easements remain presently useful when developers do not "include an express statement in the declaration, or deeds, that the other lot owners are intended beneficiaries. Where there is a general plan, it is implied that all the other lot owners are intended beneficiaries, unless the facts or circumstances indicate a contrary intent."[304] Purchasers rely on their status as intended beneficiaries when they purchase land that appears or purports to be conveyed according to an intended plan of development, whether commercial, residential, or mixed use, and the implied reciprocal negative easement protects purchasers' reliance interests.

Similarly, perpetual conservation easements allow interested parties, those who are the intended and natural beneficiaries of the easement, to enforce the burden of the servitude on the owner of the burdened estate. Like implied reciprocal negative easements, private-party standing is an effective mechanism to protect the public's reliance interest in perpetual conservation easements.

Finally, the standardization in property rules that is the focus of *numerus clausus* has both benefits and costs. The benefits include the minimization of property forms.[305] This allows individuals to focus their sphere of inquiries on whether their specific interest fits within the limited menu of property forms, thereby reducing errors, reducing third-party information costs, increasing certainty for present and future generations, and increasing productivity.[306] The costs, however, are equally evident: frustration of reasonable expectations and intentions of contracting parties and contract beneficiaries, disincentives to pursue socially legitimate and beneficial goals in an efficient manner, and excessive infringement on the rights of property owners to make decisions, even decisions that some might view as suboptimal.[307]

VII. CONCLUSION

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[303] *Id.* § 2.14 cmt. b.
[304] *Id.*
[305] Merrill & Smith, *supra* note 221, at 33-34, 53-54.
[306] *Id.*
[307] *Id.* at 35.

There is a time to develop and a time to conserve natural resources, a season for all things. Once a property owner decides the time to conserve is now, the owner may choose to express his or her sense of timeliness by conveying a perpetual conservation easement. "The system of private governance on balance works pretty well, if only because the only available alternative is highly discretionary public control . . . ."[308] Recognition of private-party standing, combined with existing public law regulation of environmentally designated properties and species, provides the best opportunity for achieving the optimal level of efficient conservation.

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[308] Epstein, *supra* note 15, at 926.