

# *Fordham Environmental Law Review*

---

*Volume 18, Number 2*

2006

*Article 2*

---

## Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert

Anna Vinson\*

\*

Copyright ©2006 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

# RE-ALLOCATING THE CONSERVATION LANDSCAPE: CONSERVATION EASEMENTS AND REGULATION WORKING IN CONCERT

*Anna Vinson\**

## I. INTRODUCTION

The popularity of conservation easements has skyrocketed over the last several decades. When landowners and non-profits decide to preserve land, they frequently choose conservation easements because easements offer the promise of perpetual, or at least long term, conservation and can be tailored to reach a specific conservation objective. Moreover, landowners who donate conservation easements can receive tax benefits in return. Although there are many benefits to conservation easements, the development of this conservation method has unfortunately not been accompanied with sufficient enforcement mechanisms, standardization, or a uniform tracking system. In addition, as conservation easements emerge as a dominant conservation mechanism, they may undermine the more traditional regulatory system. Because of the perceived shortcomings of conservation easements and the impact of easements on the existing regulatory system, many scholars now question the efficacy of conservation easements and debate whether or not they should predominantly be replaced with a return to conservation regulation.

The solution is not so cut and dry. Just as there are many ways in which regulation is more effective than conservation easements, there are many instances in which conservation easements are preferable. To effectuate the greatest conservation, each conservation method should be used where it will result in a greater public benefit than would the other. These applications should be more clearly defined, in order to prevent one conservation mechanism from undermining the other. Conservation easements and regulation each have distinct advantages and both should be used in concert for the greatest conservation results.

Section II of this Article introduces the debate over the growing use of conservation easements in lieu of regulation. Section II(A) briefly explains the benefits of conservation easements and some

problems with regulation, and how both factors contributed to the rise in the use of easements in the last several decades. This Article then describes concerns with conservation easements, including shortcomings of the easements themselves as listed in Section II(B), and the possibility that easements undermine regulation and jeopardize the benefits thereof as explained in Section II(C). Section III, comprising the bulk of this Article, seeks to identify those situations best served by regulation and those best served through conservation easements. This Article concludes that application of each method should be limited to those situations in which it works best. Separating the application of conservation easements from that of regulation would clarify, coordinate, and bolster the use of both, and improve the conservation landscape as a whole.

## II. THE DEBATE OVER THE GROWING RELIANCE ON CONSERVATION EASEMENTS

This section provides an overview of the ongoing debate between proponents of conservation easements and those of regulation regarding which mechanism is most effective in achieving the goal of conservation. Part A summarizes the growing trend away from regulation and in favor of private conservation transactions, such as conservation easements. Part B briefly explains common criticisms of conservation easements that give rise to the debate over their use. It also provides a cursory evaluation of those criticisms, and suggests remedies for improving conservation easements.<sup>1</sup> Part C describes the concern that conservation easements undermine regulation, and accordingly, undermine established means of conservation. It then suggests that conservation easements and regulation each have unique strengths and weaknesses, and should be used separately but contemporaneously for the maximum conservation benefit.

---

\* Anna Vinson (J.D. Georgetown University, 2006; A.B. Duke University, 2003) is real estate attorney in Atlanta, Georgia. She would like to thank Professor Peter Byrne at the Georgetown University Law Center for his guidance with this article and for his contagious interest in the dynamics between land use and the environment.

1. These topics are discussed more thoroughly in other sources, *see* JEFF PIDOT, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* (2005), and are mentioned here only to illustrate the concerns over the use of conservation easements.



*A. Increasing Use of Conservation Easements*

Conservation efforts in the United States were originally made possible through regulation enabled by statutes such as the Clean Water Act, the Endangered Species Act, and the Coastal Zone Management Act.<sup>2</sup> But over the years, the regulated populace has become disenchanted with regulation, finding it overly invasive or burdensome and poorly administered.<sup>3</sup> Since the Reagan administration, political momentum in favor of deregulation and an increasingly conservative judiciary have shifted the burden of conservation to private actions including the purchase or donation of conservation easements.<sup>4</sup>

The use of easements as a land conservation method has skyrocketed over the last several decades. The number of land trusts, or non-profit organizations that work to conserve land by acquiring land or conservation easements, has grown from 53 in 1950 to over 1,600 today.<sup>5</sup> In just the last few years, the number of conservation easements in this country has grown from 7,392 in 1998 to 17,847 in 2003.<sup>6</sup> The corresponding acreage protected by those easements nearly quadrupled in that time.<sup>7</sup> This increased use of conservation easements mirrors the overall trend towards private conservation actions evidenced by local and regional land trusts that protect 800,000 additional acres every year.<sup>8</sup>

Conservation easements split the proverbial bundle of property rights and allow the grantee to hold certain rights and prevent the grantor, who owns the underlying possessory interest, from engaging in certain actions.<sup>9</sup> Although the aforementioned restlessness with

2. See John D. Echeverria, *Regulating Versus Paying to Achieve Conservation Purposes*, SJ053 A.L.I.-A.B.A. 1141, 1144 (2004) [hereinafter *Regulating Versus Paying*].

3. Leigh Raymond & Sally K. Fairfax, *The 'Shift to Privatization' in Land Conservation: A Cautionary Essay*, 42 NAT. RESOURCES J. 599, 601 (2002).

4. See *Regulating Versus Paying*, *supra* note 2, at 1145.

5. LAND TRUST ALLIANCE, NATIONAL LAND TRUST CENSUS REPORT (2005), available at [http://www.lta.org/census/2005\\_report.pdf](http://www.lta.org/census/2005_report.pdf) (last visited Apr. 10, 2007).

6. *Id.*

7. *Id.* (reporting that the acreage protected by conservation easements totaled 1,385,000 acres in 1998 and grew to 5,067,929 acres by 2003).

8. *Id.*

9. Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 440 (2002).

regulatory conservation paved the way for conservation easements, easements were made possible through the Uniform Conservation Easement Act (“UCEA”)<sup>10</sup> and subsequent state statutes that supersede the common law restriction against interests in gross and “‘dead hand’ restraints on alienability.”<sup>11</sup> The perpetual nature of conservation easements is one of the factors that makes them so attractive to landowners who want to leave a legacy of conservation.

Although both the longevity of the conservation easement and the growing disfavor for regulation facilitated the emergence of conservation easements as a common land conservation tool, other factors have also been at play.<sup>12</sup> Landowners receive compensation, predominantly provided through tax credits,<sup>13</sup> for donating a conservation easement and thereby refraining from conducting certain activities on their land that they would not otherwise receive through regulation. The justification behind providing public funds for this type of private transaction is that the easement provides a specific public benefit, so stated in the easement itself.<sup>14</sup> These are commonly: “open space, wildlife habitat, historic preservation, agricultural land use.”<sup>15</sup> The financial compensation provided in exchange for an easement is often a motivating factor behind its donation.<sup>16</sup>

There are even further reasons for the popularity of conservation easements. Large, national land trusts and associations of land trusts, such as the Nature Conservancy and the Land Trust Alliance, respectively, have helped popularize conservation easements and sparked the emergence of similar state and local trusts.<sup>17</sup> The growing problem with sprawl and haphazard development has increased many citizens’ interest in protecting undeveloped lands.<sup>18</sup> By allow-

10. UNIF. CONSERVATION EASEMENT ACT §§ 1-6 (1981).

11. *Regulating Versus Paying*, *supra* note 2, at 1161.

12. *Id.* at 1145.

13. John D. Echeverria, *Skeptic’s Perspective on Voluntary Conservation Easements*, ECOSYSTEM MARKETPLACE, Aug. 31, 2005, [http://ecosystemmarketplace.com/pages/article.news.php?component\\_id=3825&component\\_version\\_id=5439&language\\_id=12](http://ecosystemmarketplace.com/pages/article.news.php?component_id=3825&component_version_id=5439&language_id=12) [hereinafter *Skeptic’s Perspective*].

14. See LAND TRUST ALLIANCE, *THE CONSERVATION EASEMENT HANDBOOK* 10 (Elizabeth Byers & Karin Marchetti Ponte eds., 2005).

15. *Skeptic’s Perspective*, *supra* note 13.

16. *Regulating Versus Paying*, *supra* note 2, at 1148.

17. *Id.* at 1145; see Land Trust Alliance *supra* note 5, at 4-6 (noting that there are over 1600 land trusts nationwide).

18. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 746-47 (2002) [hereinafter *Perpetual Restrictions*].



ing landowners to preserve undeveloped lands and protect the open landscape, conservation easements appeal to a citizen's sense of moral obligation to future generations.<sup>19</sup> Sprawl also heightens landowners' interests in protecting their property and triggers their "not in my backyard" mentality, resulting in more voluntary conservation actions.<sup>20</sup> Finally, much of the reason for the development of conservation easements is the perception that regulations have failed to provide adequate conservation.<sup>21</sup>

Despite the many strengths of conservation easements, proponents of regulation, including John Echeverria of the Georgetown Environmental Law & Policy Institute, argue that regulation can achieve conservation aims where easements cannot and that the many flaws associated with conservation easements may make exclusive reliance on these private transactions unwise.<sup>22</sup> Moreover, Echeverria claims that the rising popularity of conservation easements undermines the effectiveness of regulation, and therefore undermines conservation generally.<sup>23</sup> These and similar concerns have sparked the debate over the future of conservation easements.

#### B. *Problems with Conservation Easements and Possible Remedies*

Critics and supporters of conservation easements alike raise concerns over conservation easements in practice. In several articles, John Echeverria describes what he believes to be significant flaws with conservation easements, including the impossibility of accurately valuing conservation easements, problems with enforcement, and the unlikelihood that easements will achieve permanent conservation.<sup>24</sup> Julia D. Mahoney, Associate Professor at the University of

---

19. *Id.*

20. E-mail from John D. Echeverria, Executive Director, Georgetown Environmental Law and Policy Institute, to author (May 14, 2006) (on file with author).

21. Nancy A. McLaughlin, A Constructive Reformist's Perspective on Voluntary Conservation Easements, *Ecosystem Marketplace*, Aug. 31, 2005, [http://ecosystemmarketplace.com/pages/article.news.php?component\\_id=3825&component\\_version\\_id=5439&language\\_id=12](http://ecosystemmarketplace.com/pages/article.news.php?component_id=3825&component_version_id=5439&language_id=12) [hereinafter *Constructive Reformist*].

22. See *Regulating Versus Paying*, *supra* note 2, at 1145; *Skeptic's Perspective*, *supra* note 13.

23. "As a practical matter, it appears to be an impossibility that these two approaches can be pursued simultaneously in different parts of the country for very long." *Regulating Versus Paying*, *supra* note 2, at 1172.

24. *Skeptic's Perspective*, *supra* note 13; *Regulating Versus Paying*, *supra* note 2, at 1157-62.

Virginia School of Law, takes issue with the claim that conservation easements are perpetually inherently flawed because the present generation should not encumber future generations with restrictions on land use.<sup>25</sup> Nancy McLaughlin, Professor of Law at University of Utah S.J. Quinney College of Law, frequently writes on the benefits of conservation easements.<sup>26</sup> Yet even McLaughlin voices some concern over abuses of the easement system and enforcement problems.<sup>27</sup> Jeff Pidot, another proponent of conservation easements and Visiting Fellow at the Lincoln Institute of Land Policy, recently published a report analyzing the flaws in the conservation easement system and providing thoughtful remedies, several of which are discussed below.<sup>28</sup> Whether these scholars' concerns relate to the inherent nature of conservation easements, or more specifically address problems with the execution of easements, they can be alleviated through a more balanced look at the effect of conservation easements and targeted remedies, respectively. The particular strengths and benefits of conservation easements make these problems worth correcting, and which Section III will explain further.

One of the foremost concerns with respect to conservation easements is that they are wholly voluntary actions. Only those landowners who choose to donate conservation easements can engage in this type of conservation, and land is accordingly protected based on availability rather than importance.<sup>29</sup> The resulting conservation landscape is fragmented and may not include parcels of particular importance. Conservation easements are therefore less likely to generate significant reciprocal benefits than are more coordinated and comprehensive conservation methods.<sup>30</sup>

Another common complaint voiced with respect to conservation easements regards their perpetual nature. Critics wonder not only whether conservation easements *will* endure, but whether they

---

25. See generally *Perpetual Restrictions*, *supra* note 18, at 739; Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573 (2004) [hereinafter *The Illusion of Perpetuity*].

26. See *Constructive Reformist*, *supra* note 21; Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 424 (2005) [hereinafter *Perpetual Nature*].

27. *Constructive Reformist*, *supra* note 21.

28. PIDOT, *supra* note 1.

29. Echeverria, *supra* note 20; Gwenann Seznec, Note, *Effective Policies for Land Preservation: Zoning and Conservation Easements in Anne Arundel County, Maryland*, 23 VA. ENVTL. L.J. 479, 487 (2005).

30. Echeverria, *supra* note 20.



*should* endure. Echeverria and Mahoney both consider whether the present generation should impose its environmental policy on future generations.<sup>31</sup> They believe that future generations may have an improved understanding of environmental priorities,<sup>32</sup> and that the location of critical lands will likely shift.<sup>33</sup> They also claim that the option to develop is preferable to a permanent restriction on development because development is reversible.<sup>34</sup> These claims are more thoroughly refuted below,<sup>35</sup> but in summary they are untenable ultimately because conservation easements can be modified if their stated public benefit is no longer practical and, moreover, they are far more reversible than are developments.

While some critics distrust conservation easements on principle, other observers raise criticisms over their execution.<sup>36</sup> According to Pidot's report, one substantial flaw with existing conservation easements is that as a group they lack consistency; because forms and terms are not standardized across the field.<sup>37</sup> Too much flexibility in the process has created a system in which too many elements are negotiable. There is no common understanding of acceptable activities under a conservation easement and grantors can negotiate away essential elements of the easement but receive the standard compensation.<sup>38</sup> While this helps parties enter into flexible contracts, it frustrates enforcement and enables landowners to donate meaningless easements.<sup>39</sup>

---

31. *Regulating Versus Paying*, *supra* note 2, at 1159-62; *The Illusion of Perpetuity*, *supra* note 25, at 584-87.

32. *Regulating Versus Paying*, *supra* note 2, at 1161; *The Illusion of Perpetuity* *supra* note 25, at 584-87.

33. *Regulating Versus Paying*, *supra* note 2, at 1161-62; *The Illusion of Perpetuity*, *supra* note 25, at 584-87.

34. *See Regulating Versus Paying*, *supra* note 2, at 1162. *See generally Perpetual Restriction*, *supra* note 18; *The Illusion of Perpetuity*, *supra* note 25.

35. *See infra* text accompanying notes 98-128.

36. While this Article highlights and responds to only several of those concerns, there are many more concerns over conservation easements that are not discussed here. For example, environmental justice problems arise with respect to conservation easements because easements emerge predominantly in rural areas, and poorer communities in urban areas are denied the public benefits of conservation. Raymond & Fairfax, *supra* note 3, at 637. For a more thorough discussion of the concerns over conservation easements, see Raymond & Fairfax, *supra* note 3; *Skeptic's Perspective*, *supra* note 13.

37. PIDOT, *supra* note 1, at 8-9.

38. *Id.*

39. *Id.*



Moreover, Pidot and others cite as a concern the lack of a national or local system for recording and tracking easements.<sup>40</sup> Without a national, state, or local database employing geographical information systems ("GIS") technology or a similar mapping mechanism, it is difficult to raise public awareness regarding the presence of conservation easements. The lack of a mapping mechanism further prevents land use planners from recognizing areas in need of conservation and may impede coordination of conservation efforts. Accordingly, the absence of a coordinated system further frustrates enforcement and monitoring efforts, and the haphazard development of conservation easements creates a fragmented and disjointed landscape.<sup>41</sup> Such a landscape could ultimately be counter-productive if it exacerbates sprawl by forcing development outwards, or if it interferes with smart growth.<sup>42</sup> Pidot suggests that establishing a national conservation easement coordinating system that standardizes forms and terms, coordinates easement placement, and provides a comprehensive database for recording and tracking easements could remedy these aforementioned problems.<sup>43</sup>

Another concern among critics is that overvalued appraisals and financial incentives for easement donation create a system of misplaced motivations and useless easements.<sup>44</sup> Echeverria explains that the absence of a fair appraisal process means that landowners can bargain for overly generous compensation.<sup>45</sup> Even worse, the taxpaying public does not have its interests represented at the negotiating table.<sup>46</sup> Landowners may seek to encumber their property for financial reasons, and end up with an easement in which the financial benefit does not accurately reflect the burden required by the easement. Where financial rewards provide incentives for property owners to donate an easement, the donor may not be conscious of providing actual conservation value and the resulting easement may lack public benefit.<sup>47</sup> To reconcile these concerns, Pidot suggests

---

40. *Id.* at 12.

41. Raymond & Fairfax, *supra* note 3, at 623.

42. *Skeptic's Perspective*, *supra* note 13.

43. Pidot *supra* note 1, at 9-12.

44. *See id.* at 27-29; *Regulating Versus Paying*, *supra* note 2, at 1150.

45. *Regulating Versus Paying*, *supra* note 2, at 1150.

46. *Id.*

47. *Id.* at 1157. Moreover, there is some concern that the government, in allowing public trusts to select lands and craft easements in exchange for tax credits, has abandoned its responsibility to oversee the use of public funds. Raymond & Fairfax, *supra* note 3, at 638. Consider, however, that conservation easements are

that a uniform appraisal system with strict parameters could ensure that grantors receive just compensation and that the easement conveys an actual public benefit.<sup>48</sup>

Similarly, some critics claim that grantors may receive “double compensation” for the easement when the easement confers financial rewards and results in an increase in land value.<sup>49</sup> However, the increase in property value or environmental benefits is not bestowed exclusively on the property owner. Neighboring properties would also benefit from the property value increase resulting from the open space, and environmental benefits would likewise not be bound by property lines. Accordingly, conservation easements are, for neighbors, an improvement on the reciprocity of advantage concept,<sup>50</sup> because a land owner benefits from his neighbor’s restrictions from a harmful activity without being bound by those same restrictions himself. Echeverria counters by emphasizing that regulation is generally preferable because everyone is bound and everyone benefits.<sup>51</sup> Regardless, a uniform appraisal system would safeguard against the distribution of tax credits that do not accurately reflect the restriction conveyed.

Finally, a frequent and significant concern regarding conservation easements is the lack of effective enforcement of the terms of the agreement.<sup>52</sup> Without effective stewardship, conservation easements are ultimately meaningless and certainly not worth the tax credit or other financial incentive provided. Pidot explains, “[e]ven the best written easements are only as good as the holder’s resolve and capacity over the long term to monitor, enforce, and defend them.”<sup>53</sup> This is problematic, as easement monitoring can be very expensive, and funding for stewardship is often not included in the price of the

---

governed by the OCEA and state and local statutes. Moreover, the grantees are either non-profit land trusts or government agencies, both of which are accountable to the public. See *Constructive Reformist*, *supra* note 21.

48. Raymond & Fairfax, *supra* note 3, at 636.

49. *Id.* at 637.

50. The reciprocity of advantage concept is that every land owner benefits even though he is restricted because he is assured his neighbors are bound by the same restrictions. *Regulating Versus Paying*, *supra* note 2, at 1165.

51. Echeverria, *supra* note 20.

52. See *Constructive Reformist*, *supra* note 21; PIDOT, *supra* note 1; *Regulating Versus*, *supra* note 2, at 1165.

53. PIDOT, *supra* note 1, at 18.



easement or provided for by the land trust.<sup>54</sup> Pidot suggests that enforcement efforts could be improved by simply requiring that easement holders have certain funds set aside to monitor and enforce every easement that they own.<sup>55</sup> If easements are to remain a substantial part of the conservation landscape, the solutions Pidot and others have proposed for solving the problems associated with conservation easements should be adopted.

### C. *Conflict Between Conservation Easements and Regulation*

A significant concern with respect to the growing use of conservation easements is that they may undermine conservation regulation. Echeverria worries that if landowners grow accustomed to receiving financial benefits for making conservation-minded decisions, they will become more resistant to regulation.<sup>56</sup> Moreover, he suspects that landowners may even have a legal claim to demand compensation for encumbering their property.<sup>57</sup> Echeverria explains, “[a]ny program involving acquisition of fee or partial interests in property for conservation purposes can be viewed as the ‘practical equivalent’ of achieving the same goal through regulation. According to one possible reading of Justice Scalia’s words, whenever the government demonstrates its capacity and willingness to purchase property for conservation purposes, it bolsters the constitutional argument that the government must do so in all cases.”<sup>58</sup> In light of the problems with conservation easements listed in Part B, the concern becomes that conservation efforts overall are weakened as a less effective system undermines and replaces a more traditional method of conservation.

Even if improvements are made to the existing conservation easement system, the problem of a compromised conservation landscape might persist and worsen. For example, Echeverria argues that, should conservation easements become more coordinated and dominate the conservation landscape, conservation easements would more

---

54. See PIDOT, *supra* note 1, at 18-19 (summarizing findings of the 2005 Senate Finance Committee report and citing U.S. Senate Finance Committee 2005a, 9).

55. See PIDOT, *supra* note 1, at 20-21 (providing thoughtful solutions to the significant problem of inadequate enforcement).

56. *Regulating Versus Paying*, *supra* note 2, at 1171.

57. *Id.* at 1172.

58. *Id.*

efficiently undermine and impede heretofore effective regulations.<sup>59</sup> Should the use of conservation easements surpass and undermine regulation, conservation efforts would be weakened generally because conservation easements and regulation have different strengths and advantages, and one cannot replace the other.

The root of the problem with conservation easements undermining regulation is the overlap between the subjects being regulated and those purchased for conservation benefits. By recognizing the unique advantages of each method, one could identify the situations in which each would be most effective. Each method should be employed in the situation in which it is preferable to the other, which would at once prevent the systems from undermining one another and also maximize conservation.

The remainder of this Article suggests a delineation between the application of conservation easements and regulation. Hopefully, by separating the methods, conservation easements would no longer step on the toes of regulation and each system could be utilized to its maximum benefit, improving the conservation landscape overall.

### III. WORKING IN CONCERT: CONTEMPORANEOUS USE OF CONSERVATION EASEMENTS AND REGULATION

Consider the proposition, which this Article will more thoroughly establish below, that regulation is a more effective conservation tool than are conservation easements in those situations in which the goal is to impose comprehensive restrictions across a large geographical area. If conservation easements continue to undermine regulation, we risk losing the widespread, uniform conservation that regulation enabled. Consider also that conservation easements are a more effective conservation tool with respect to perpetual conservation. Should we halt the use of conservation easements in order to save regulatory conservation, we would lose the ability to protect land in an ever-changing political climate. Eliminating one method of conservation in favor of the other would risk an overall reduction in the amount and quality of land conserved.

At the same time, the haphazard use of both conservation easements and regulation in the same situations and for the same purposes will ultimately cheapen both methods. The growing popular-

---

59. *Skeptic's Perspective*, *supra* note 13.



ity of conservation easements may result in their application where regulation would have been more effective. The expectation that one should receive compensation for encumbering one's property may undermine regulation. The two methods of conservation cannot continue to coexist in an uncoordinated manner.

The solution, therefore, is to develop a coordinated conservation system that employs both conservation easements and regulation. It is wiser to acknowledge the strengths of each tool and remedy their weaknesses than to abandon one or the other altogether.<sup>60</sup> Specifically, that system should clearly delineate the situations in which each individual tool is most effective and to restrict the application of that tool to those situations. This would result not only in the most effective application of each conservation tool, but would ensure that neither conservation easements nor regulation is undermined or eliminated.

This section of the Article examines the strengths and shortcomings of both conservation easements and regulation, and concludes that each performs better than the other in certain situations. Part A describes the benefits of regulation and the circumstances in which regulation is the preferable conservation mechanism. Conversely, Part B enumerates those situations in which conservation easements would more effectively achieve conservation purposes. The examples provided in these sections support the claim that because each can outperform the other in certain circumstances, both methods should be used separately but contemporaneously for the optimum benefit.

*A. Situations in Which Regulation is the Most Appropriate Mechanism for Conservation*

Supporters of regulation note that it has several qualities that make it preferable to private transactions for conservation. First, the federal, state, or local governments that pass regulation are politically accountable.<sup>61</sup> With regulation, the public has an opportunity to evaluate a conservation action and the public funds expended,<sup>62</sup> whereas conservation easements take place largely outside of the public domain. Critics of conservation easements who claim that there should be greater transparency because public funds motivate

---

60. See *Constructive Reformist*, *supra* note 21.

61. See *Regulating Versus Paying*, *supra* note 2, at 1168-69.

62. *Id.* at 1159.

the transactions,<sup>63</sup> often prefer regulation for this reason.<sup>64</sup> However, while regulations may be less expensive to implement, they are not inexpensive to monitor or enforce. Although both regulation and conservation easements require costly monitoring and enforcement, public review and political accountability are available with respect to regulation. Moreover, judicial scrutiny further ensures that regulation serves the public benefit.<sup>65</sup> Accordingly, regulation may be more appropriate in those situations where *significant* public funds would otherwise be necessary to facilitate a conservation easement.<sup>66</sup> Still, legislators should be careful not to take advantage of the low cost of regulations and “shift the costs of their decisions to landowners and developers.”<sup>67</sup> More research into what amount of funding is significant should be done before this delineation is useful.

Second, proponents of regulation note that its involuntary nature carries several benefits.<sup>68</sup> One benefit is that regulation can provide an across-the-board restriction to land use rather than the fragmented landscape created by uncoordinated, voluntary land owner actions. With regulation, restrictions can be put into effect throughout a region quickly and cheaply to respond to an environmental problem or provide coordinated protection of a landscape or system, such as a watershed.<sup>69</sup> Where an environmental concern carries a sense of immediacy or is common to a region as a whole, regulation may be the best method of conservation.

Similarly, another benefit of the involuntary nature of regulation is that it prevents the free-rider problem.<sup>70</sup> Neighboring landowners benefit from the restrictions on each other's property, and no property owner is restricted without also receiving the environmental benefits of his neighbor's restrictions. With conservation easements, property owners may have a financial incentive not to restrict their land use as long as they can receive similar benefits from their neighbor's encumbrances.<sup>71</sup> Regulation may therefore be preferable

---

63. See Raymond & Fairfax, *supra* note 3, at 636-38.

64. See *Regulating Versus Paying*, *supra* note 2, at 1168-69.

65. *Id.*

66. *Id.* at 1155.

67. *Id.*

68. Echeverria, *supra* note 20.

69. *Regulating Versus Paying*, *supra* note 2, at 1154, 1158.

70. *Id.* at 1153.

71. *Id.* at 1156.



in those situations where all property owners should be similarly restricted and protected from an environmental harm.

A final benefit of the involuntary nature of regulation is that it raises public awareness of, and responds to public support for, conservation issues. By prohibiting landowners from dumping chemicals in watersheds or removing riparian plants from stream banks, a local government can raise awareness in the community of the importance of protecting water sources.<sup>72</sup> Where a community is concerned, either for environmental or safety purposes, about construction near a high water mark, legislatures can respond to that concern by restricting development within the coastal zone. Regulation may therefore be a valuable government tool in a community that either desires conservation action or, conversely, where there is no existing conservation interest or voluntary effort to protect an area or land feature.

These benefits associated with regulation suggest that regulation should be employed where government desires to impose comprehensive restrictions across a region or impact all landowners similarly. Regulation should be used where political accountability is important, as in the expenditure of large amounts of public funds. In all of these instances, regulation should be used instead of private, individual transactions such as conservation easements.

*B. Situations in Which Conservation Easements are the Most  
Appropriate Mechanism for Conservation*

There are also many situations in which conservation easements are preferable to regulation. Although this Article provided a cursory overview of the latter, it addresses those circumstances best served by conservation easements in greater detail. That attention is warranted because so much of the very recent relevant literature focuses on criticisms of conservation easements rather than the mechanism's unique advantages.<sup>73</sup> Of course, until very recently, the environmental community was overwhelmingly in favor of conservation easements. Criticism of their widespread application is a more recent phenomenon. Through the following examples, this

---

72. See *id.* at 1154 (suggesting that regulation draws landowners' attention to conservation by requiring them to avoid certain behaviors).

73. See *Perpetual Nature*, *supra* note 25; *Perpetual Restrictions*, *supra* note 18; *The Illusion of Perpetuity*, *supra* note 25. See generally Raymond & Fairfax, *supra* note 3.

Article hopes to respond to the current literature and illustrate how essential conservation easements are to the conservation landscape.

### 1. Conservation in a Hostile Political Climate

A primary example of where conservation easements are preferable to regulation is the situation where there is insufficient political support to establish the regulation in the first place, either because regulation or conservation is unpopular. In such a political environment, a conservation-minded land owner can voluntarily sell or donate an easement to his or her property.

Conservation regulation is not always possible without strong political support for resource preservation. Regulations are inherently contentious, and likely to be more hotly debated than are private transactions. Budgetary constraints, political trends, and concerns over infringement upon personal liberties can all interfere and as a result, politicians often fail to enact necessary conservation regulation where there is a weak environmental lobby.<sup>74</sup> Politicians are likely to be more responsive to immediate pressures than to the value of conservation in the long term.<sup>75</sup> In this scenario, private transactions may be the only means to establish long-term conservation.

All of these factors may impede conservation regulation, or they may simply slow it down. Accordingly, if a quick response to a conservation threat is essential, regulation may not be the best method. Of course, regulations can be put into effect relatively quickly to respond to a widespread problem,<sup>76</sup> as long as there is political support both to fix the problem and in favor of regulation. Land trusts may be able to acquire easements more quickly, however, because they are not as "clunky and rule-bound."<sup>77</sup>

Conservation easements may also be preferable where citizens are skeptical of their government. Such citizens may still support conservation efforts, and consequently may prefer private conservation transactions. Because the property can be owned by any entity, public or private, and the easement can likewise be held, many of the barriers that make property owners skeptical of the government vanish.<sup>78</sup> Landowners can donate easements to land trusts, which often

---

74. See, e.g., Cheever, *supra* note 9, at 438.

75. *Constructive Reformist*, *supra* note 21.

76. *Regulating Versus Paying*, *supra* note 2, at 1154.

77. Raymond & Fairfax, *supra* note 3, at 625.

78. See Cheever, *supra* note 9, at 446-47.



purchase easements and later transfer them to the government in what are called “flip transactions.”<sup>79</sup> One of the benefits of flip transactions is that landowners may feel uncomfortable negotiating the easement with the government, or the government may be too hemmed in with rules and bureaucracy to be able to meet the needs of landowners in negotiation.<sup>80</sup>

Conservation easements may also be preferable where citizens favor deregulation generally. The state of Virginia, in which conservation is popular but regulation is not, is illustrative. The Virginia legislature has authorized tax credits for property owners who encumber their land with conservation easements.<sup>81</sup> This allows Virginia to maintain its conservation objectives in an anti-regulatory climate. In fact, Virginia’s current governor, Tim Kaine, recently proposed the use of conservation easements to combat development.<sup>82</sup> Through conservation easements and outright land purchases, Kaine hopes to protect 400,000 acres by 2010.<sup>83</sup>

In a community that resists regulation, conservation easements may be the best way to provide reliable conservation. In that situation, conservation regulation may have the opposite effect, and create anti-environmental sentiment.<sup>84</sup> Landowners may take actions to avoid regulation and, in effect, further frustrate the motivation behind that regulation.<sup>85</sup> To demonstrate this result, Echeverria explains that landowners with property that is attractive to a rare species may take actions to reduce that attractiveness before the species is listed under the Endangered Species Act.<sup>86</sup> He argues that the non-compliance can easily extend to illegal conduct, and that “citizens’ response to Endangered Species Act requirements is sometimes to ‘shoot, shovel, and shut up.’”<sup>87</sup> Landowners naturally react quite differently to enforcement actions taken by the government to uphold a law, as opposed to those taken by a grantee acting to en-

---

79. Raymond & Fairfax, *supra* note 3, at 625.

80. *Id.*

81. Virginia Land Conservation Incentives Act of 1999, VA. STAT ANN. tit. 58.1, §§ 510-513 (2006).

82. Editorial, *Kaine’s Blueprint for a Green Virginia*, THE ROANOKE TIMES, Apr. 24, 2006, at B6.

83. *Id.*

84. *Regulating Versus Paying*, *supra* note 2, at 1155.

85. *Id.*

86. *Id.*

87. *Id.*

force an easement into which the owner voluntarily entered.<sup>88</sup> Whereas citizens are very aware of unfair or uneven applications of legal restrictions, the tailored nature of conservation easements ensures that property owners expect different treatment.<sup>89</sup>

The above examples illustrate that conservation easements are preferable to regulation in political climates that are hostile to regulation or do not overwhelmingly support conservation. In those situations in which legislatures do not have the political support to enact conservation regulation, conservation-minded landowners may still voluntarily donate conservation easements and effectuate the same result. In those situations where the hostility is instead directed at regulation or a heavy-handed government, private conservation transactions may have greater appeal. In both cases, conservation easements are an important alternative to regulation.<sup>90</sup>

## 2. Conservation in Perpetuity

The perpetual nature of conservation easements is a principal reason for their popularity. The idea of permanency appeals to people. Landowners feel an intense connection to their land, and often find it comforting that their land will continue to exist in its present state long after they are gone. One family in Texas recently donated a conservation easement on a ranch that has been in their family for six generations.<sup>91</sup> The easement, donated to the Nature Conservancy, prohibits development on 10,843 acres of ranch property.<sup>92</sup> One family member stated that she believes her family chose to donate a conservation easement because it provided “a real sense of security in their mind that their family heritage will continue to be preserved for future generations. You can’t put a price on that type of security.”<sup>93</sup> In addition, the tax advantages conferred in exchange for the easement will help the donors keep the property in their fam-

---

88. Cheever, *supra* note 9, at 445.

89. *Id.* at 446.

90. Note that Echeverria raises an interesting point in response, wondering whether this sort of delineation will encourage landowners to oppose conservation and regulation in order to receive compensation for restrictions on land use. Echeverria, *supra* note 20.

91. Pat Hathcock, *Conserving Nature and Ownership*, VICTORIA ADVOCATE, Apr. 17, 2006.

92. *Id.*

93. *Id.*



ily for generations to come.<sup>94</sup> In the absence of regulation, landowners can certainly conserve and protect their property through their own initiative. But if they want to be assured that the property will continue to remain undeveloped in the future, landowners will select conservation easements. The permanency afforded by conservation easements often induces property owners to donate easements in addition to, or in the absence of, regulation.

Landowners may also choose to protect their land through conservation easements because they don't trust regulation to provide permanent protection. The permanence of regulation is unpredictable. Legislatures may discard regulation because of waning political support or a loss of funding. Regulations can be replaced by new regulations that are more *in vogue*,<sup>95</sup> or they can expire through sunset provisions. Landowners that are satisfied with existing conservation regulations may nonetheless chose to encumber their land with conservation easements that will extend in perpetuity.

Although it may be one of the primary benefits of conservation easements, perpetuity is also frequently noted as one of conservation easements' greatest flaws.<sup>96</sup> Concerns over the perpetual nature of conservation easements are twofold: namely, that conservation easements will thwart future attempts at conservation and that they carry negative social impacts by frustrating future landowners. Either way, critics worry that the inability of future generations to modify or dissolve easements will worsen the problem.

Echeverria and Mahoney claim that conservation easements restricting development on a property may prevent future generations from realizing their conservation aims.<sup>97</sup> Future generations will have the benefit of further advances in technology, environmental modeling, and an improved understanding of resource management. In light of these advantages, it may not be wise to limit their actions.<sup>98</sup>

Moreover, Echeverria and Mahoney argue that these generations may not only have different conservation priorities, but because the natural world is so dynamic, today's critical lands may not be as

---

94. *Id.*

95. Cheever, *supra* note 9, at 437.

96. See *Regulating Versus Paying*, *supra* note 2; *The Illusion of Perpetuity*, *supra* note 25.

97. *Regulating Versus Paying*, *supra* note 2, at 1161; *The Illusion of Perpetuity*, *supra* note 25, at 584-87.

98. *The Illusion of Perpetuity*, *supra* note 25, at 584-87.

critical tomorrow.<sup>99</sup> They anticipate that conservation easements may force restrictions to be placed and retained on areas where they may not be necessary in the long term.<sup>100</sup> As Echeverria explains, “[i]f melting of the polar icecaps accelerates, for example, now ecologically valuable coastal wetlands may become relatively less environmentally valuable areas of open ocean in a few decades.”<sup>101</sup> McLaughlin adds that resources might be tied up with the monitoring and enforcement of easements on lands that are less crucial than yet unprotected lands.<sup>102</sup> According to these critics’ thoughtful analyses, today’s conservation easements may ultimately protect lands that are only moderately valuable in the long term and result in the waste of financial resources and conservation efforts.<sup>103</sup>

McLaughlin also points out, however, that these concerns regarding conservation easements can be alleviated through application of the doctrine of *cy pres*, or “changed conditions,” which allows for termination of an easement when the stated purpose is no longer practicable.<sup>104</sup> With the application of this doctrine, conservation easements would not frustrate future generations when they become useless or no longer serve their stated purpose. Moreover, with respect to the concerns over the limitations imposed by conservation easements, development will do more to limit the choices of future generations than will open space.

Mahoney worries further, future generations may feel as though their hands are tied by the limitations we presently impose through conservation easements.<sup>105</sup> She believes that they may want to preserve different lands than we preserve today as their cultural or aesthetic values shift,<sup>106</sup> because what seems attractive and important to

99. *Regulating Versus Paying*, *supra* note 2, at 1161-62; *The Illusion of Perpetuity*, *supra* note 25, at 584-87.

100. *See Regulating Versus Paying*, *supra* note 2, at 1161; *The Illusion of Perpetuity*, *supra* note 25, at 584-87.

101. *Regulating Versus Paying*, *supra* note 2, at 1161.

102. *Perpetual Nature*, *supra* note 25.

103. Echeverria, *supra* note 20.

104. *Perpetual Nature*, *supra* note 25; *Constructive Reformist*, *supra* note 21. “Should the change of conditions demonstrably render the easement pointless, the easement holder and possessory holder may sell their interest and divide the proceeds subject to a prearranged formula set forth in the easement.” Cheever, *supra* note 9, at 448. In response to this proposal, Echeverria raises a valid point by wondering whether courts should be making this sort of land use determination. Echeverria, *supra* note 20.

105. *The Illusion of Perpetuity*, *supra* note 25, at 578-80.

106. *Id.* at 576-77.



us now may not have the same draw in the future.<sup>107</sup> If that is true and if future landowners resent the burden on their property, they may try to amend or terminate the easement or simply evade the restrictions on their property. Future resentment and attempts to avoid easement restrictions could interfere with present landowners' intent that the land be preserved in perpetuity. To prevent future evasive behavior, parties could draft a stated purpose that specifies goals and values, allowing the easement to be modified through the doctrine of *cy pres* if that purpose is no longer practicable. Additional solutions include improved monitoring and enforcement or including tighter language in the easements.

Mahoney and Echeverria also believe that, given all of the flaws with perpetual land use restrictions, present generations should not establish permanent land use restrictions and land should remain available for development which can be reversible.<sup>108</sup> Although there are many fair criticisms of perpetuity, the fact of the matter is that most aspects of development are irreversible. Even if a strip mall or a dam is razed, the remaining landscape is drastically different than it would have been had the land remained undeveloped. Results of development, such as the eradication of a species by a dam and the resulting shift in the local food web, are certainly not irreversible.

Another counter-argument to some critics' claim that development is reversible is that developers generally lack an incentive to transform existing developed land and there is no financial motivation for governments to return developed land to open space. The fiscal and physical costs of removing existing development make it less likely that development will be reversed.<sup>109</sup> Much of the reason for new development is that it is less expensive to fill an open space than to demolish an old development and rebuild it. For example, the recent demolition of Washington's old Convention Center produced more than 10,000 tons of steel and 50,000 cubic yards of concrete,<sup>110</sup> and

---

107. *Id.* at 587-88.

108. *See Regulating Versus Paying*, *supra* note 2, at 1162. *See generally*, *Perpetual Restrictions*, *supra* note 18; *The Illusion of Perpetuity*, *supra* note 25.

109. *The Illusion of Perpetuity*, *supra* note 25, at 590-95.

110. Manny Fernandez, *Old Convention Center to Go Out with a Bang, Bang, Bang . . .*, WASH. POST, Nov. 21, 2004, at C04; Press Release, Wrecking Corporation of America, Wrecking Corporation of America Announces Completion of Old Washington D.C. Convention Center Demolition: WCA recycled tons of steel, crushed thousands of yards of cubic concrete on site (July 25, 2005). "After it was all said and done, we recycled a little over 12,000 gross tons of steel, crushed

cost as much as \$11 million.<sup>111</sup> The author of this Article fails to understand from where the money or motivation to demolish development and *not* rebuild will come.

One of the simplest examples of a situation in which conservation easements are preferable to regulation is where a property owner or land trust wants to establish permanent, or at least long term, conservation. Regulation cannot provide the same assurance of permanency, and claims that development is reversible do not hold water. Accordingly, conservation easements should be used where a land owner or grantee wants to extend regulation indefinitely or otherwise provide permanent conservation.

### 3. Tailor-Made Conservation

Another benefit of conservation easements is that their inherent flexibility makes them a good fit for a variety of situations and for parties with varying interests. While regulation works in broad strokes, conservation easements can be better tailored to protect specific resources.<sup>112</sup> Parties can negotiate the terms of the easement and impose restrictions that meet their “specific financial and real estate needs.”<sup>113</sup> The grantor can sell or donate as many sticks of the property bundle as he or she would like. Such flexibility allows parties to protect parcels that might otherwise not be reached through regulation, and provide either partial or complete conservation.

One of the named property owners of the aforementioned family ranch in Texas<sup>114</sup> said this of the flexibility in negotiating his conservation easement:

I’d like to emphasize that this is a totally negotiated document. What I mean by that is, while we had no desire to give up any control of the ranch, what we have here in the final document really doesn’t give up any control other than a right to extensive subdivision. We have the right to add more housing for the family. We can still ranch, hunt, lease to other hunters. We addressed oil and

---

50,000 to 60,000 cubic yards of concrete and land filled only 350 dumpster loads of C&D (construction and demolition) waste.” *Id.*

111. H.R. REP. NO. 108-734, at 5 (2005) (Conf. Rep.).

112. *Regulating Versus Paying*, *supra* note 2, at 1156.

113. Raymond & Fairfax, *supra* note 3, at 627.

114. See Hathcock, *supra* note 91.



gas exploration and water, which is becoming important. We have the ability to use all the water we want on the ranch, and we have mechanisms to set up where, if we want to sell water off the ranch, we can do that as long as it meets the requirements in the easement. It took many months to work out, and we found out that what we were required to do by the easement as to ranching and hunting is pretty much the same practices as we have always done . . . . The main effect of the easement is to maintain the ranch as its [sic] always been.<sup>115</sup>

Still, the easement ensures that no future property owner will use the ranch improperly, and provides that the Nature Conservancy has the right to monitor and enforce the easement to ensure compliance with the terms of the easement.<sup>116</sup>

With conservation easements, parties can either completely restrict development or only restrict certain types of development in certain parts of the property. Regulation restricts development categorically: development within the coastal zone,<sup>117</sup> dredging and filling of wetlands,<sup>118</sup> or preservation of unpaved rural roads.<sup>119</sup> Instead of being bound by these categorical restrictions, property owners can prevent development of any sort on the property through the use of conservation easements. Complete preservation may be desirable to preserve open space, protect species at risk, or provide a buffer zone for an important water source. For example, the Hudson River Estuary Grants program helps to protect New York City's water source by providing grants to non-profit groups for the acquisition of open space adjacent to the Hudson River.<sup>120</sup> Absolute prevention of development on a parcel can provide more effective and comprehensive conservation than can piecemeal restrictions, and may produce superior environmental protection.<sup>121</sup>

---

115. *Id.*

116. *See id.*

117. Coastal Zone Management Act, 16 U.S.C. § 1451- 64 (1972).

118. 33 U.S.C. § 1344 (1977).

119. Department of Planning, Loudoun County, Virginia, *available at* [http://inetdocs.loudoun.gov/planning/docs/compplan/\\_revisedcompplan\\_3/revisedgeneralp\\_/index.htm](http://inetdocs.loudoun.gov/planning/docs/compplan/_revisedcompplan_3/revisedgeneralp_/index.htm) (last visited Jan. 28, 2007).

120. 2006 Hudson River Estuary Action Agenda Grants Program at 2 (N.Y. State Dep't of Env'tl. Conserv.), *available at* <http://www.dec.state.ny.us/website/hudson/hregrantsapp.pdf> (last visited Apr. 21, 2006).

121. *See The Illusion of Perpetuity*, *supra* note 25, at 582.

Conservation easements are the best way to protect a large property in its entirety, and many reasons exist for doing so. Preserving a large parcel creates a large open space, rather than a patchwork assemblage of preserved properties. It also keeps ecosystems, such as forests or marsh lands, intact and preserves the services provided by such ecosystems.<sup>122</sup> Finally, large property owners can be assured that, through their easement donation, their land will never be subdivided or fall victim to sprawling development.

For these reasons, owners of plantation properties in South Carolina often encumber their land with conservation easements. In 2003, The Nature Conservancy received several conservation easements to plantation properties, allowing the non-profit land trust to protect 2,200 acres of land in South Carolina through only seven conservation easements.<sup>123</sup> Property owners donated easements each covering hundreds of acres of land, and one property owner's family had owned their parcel for over 150 years.<sup>124</sup> These landowners feel an intense personal relationship with their property, and the fact that it will be preserved in perpetuity comforts them.<sup>125</sup> In addition to the personal satisfaction they derive from such donations, the landowners are able to produce substantial results through their sizable donations:

White and his wife, Sara, donated a 231-acre conservation easement on their Dovefield Plantation Swamp property just east of Walterboro. The property's watershed includes Doctor's, Ireland and Ivanhoe creeks, which form the headwaters of the Ashepoo River, one of the three rivers comprising the ACE Basin. The bottomland hardwood swamp provides habitat for game species, including white-tailed deer, wild turkeys, and wood ducks, as well as resident and migratory songbirds.

. . . .

---

122. See The Nature Conservancy, *The Nature Conservancy Protects 2,200 Acres with Seven Conservation Easements* (2004), available at <http://www.nature.org/wherewework/northamerica/states/southcarolina/press/press1339.html>.

123. *Id.*

124. *See id.*

125. *Id.*



In Dorchester County, Carl Pierce donated a 293-acre conservation easement on Gable Farm. Historically managed with ecologically compatible timber harvests and prescribed burns, the longleaf pine forest on the property supports three colonies of the federally endangered red-cockaded woodpecker and is enlisted in the U.S. Fish and Wildlife Service's Safe Harbor Program.

....

Two conservation easements totaling 225 acres on Doe Hall Plantation near McClellanville not only protect high quality maritime forest but also water quality in the adjacent Cape Romain National Wildlife Refuge.<sup>126</sup>

Just as conservation easements are an effective tool for eliciting conservation opportunities on large properties that could not be targeted through regulation, they can also protect unusual properties that might not otherwise be conserved. Conservation easements are the perfect mechanism for protecting distinct properties that require conservation but could not be similarly conserved or targeted through regulation. Such properties may include those that contain important habitat for at-risk species—in fact, in 2000, 42% of land trusts focused primarily on preserving land containing critical habitat.<sup>127</sup>

The Nature Conservancy's response to the discovery of the ivory-billed woodpecker stands as a perfect example of the utilization of conservation easements for the protection of unique properties. The ivory-billed woodpecker, thought extinct in the United States, was spotted again in the swamps of Arkansas in early 2004.<sup>128</sup> Not long after, The Nature Conservancy and the Cornell Lab of Ornithology formed a partnership, called the Big Woods Conservation Partnership, to research and protect the bird.<sup>129</sup> Through that partnership, The Nature Conservancy has already acquired roughly 18,500 acres of land where the bird was spotted for research and preservation

---

126. *Id.* (Quotation taken from photo-highlight).

127. *See* Cheever, *supra* note 9, at 441.

128. *See* The Nature Conservancy, Ivory Billed Woodpecker Fact Sheet (2005), available at <http://www.nature.org/pressroom/press/press1885.html>.

129. Press Release, Big Woods Conservation Partnership, The 2005-06 Ivory-Bill Search (Apr. 28, 2005), available at <http://www.ivorybill.org/release.html>.

purposes, through purchase and conservation easements.<sup>130</sup> This real life example shows that protection of a unique landscape, such as a critical habitat for an at-risk species, is more effectively done through conservation easements which can be tailored to fit the desired property and need.<sup>131</sup>

Conservation easements can be structured in a variety of ways with a variety of subjects. Grantors can establish minor encumbrances or prohibit development entirely, and can do so on properties that would not otherwise be subject to regulation. The flexibility of conservation easements makes them ideal for landowners with specific goals, or for large or unusual properties that could not be targeted through regulation.

#### 4. Threats of Regulatory Takings

Conservation easements are preferable to regulation because they can produce public benefits that, if provided under regulation, would be considered regulatory takings under the Fifth Amendment takings doctrine.<sup>132</sup> First, although landowners could transfer all development rights to a grantee through a conservation easement, the same comprehensive conservation effort might not be feasible through regulation. Such regulatory efforts may be considered regulatory takings, however the current volatility of takings law makes it difficult to determine when this will be the case.<sup>133</sup>

More often than not, courts do not support a regulatory takings claim. Generally, the Supreme Court holds that, in order to find a regulatory taking, a piece of property must completely lose its economic value.<sup>134</sup> Accordingly, restriction of all development rights

---

130. See *id.*; Buddy Gough, *Big Time in the . . . Big Woods, Big Trees, big woodpeckers, big deal – all found in Delta bottomland*, ARKANSAS DEMOCRAT-GAZETTE (Little Rock), Mar. 30, 2006.

131. Echeverria responds that if the ivory-billed woodpecker turns out to in fact be extinct, the vast amount of private conservation in this region would be wasted. He adds that this example would illustrate the importance and value of short term conservation. Echeverria, *supra* note 20. This author would respond that the stated public benefit of these easements is likely for the protection of the ivory-billed woodpecker, and the extinction of that species would warrant use of the doctrine of *cy pres*.

132. See discussion *infra* Section III.4.

133. *Regulating Versus Paying*, *supra* note 2 at 1151 (describing the difficulty in “[predicting] whether a regulatory program will generate successful takings claims”).

134. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).



may constitute a “denial of all economically beneficial or productive use of land,”<sup>135</sup> and therefore qualify as an unconstitutional taking. However, a property owner who wishes to permanently prohibit all development may donate an easement that is tantamount to a 100% loss in economic value for the property. In Annapolis, Maryland, for example, the Annapolis Roads Property Owners Association (ARPOA) is interested in maintaining open space and providing a natural buffer for the community.<sup>136</sup> To that end, ARPOA has purchased two pieces of property, totaling 37 acres, and is in the process of restricting development on both through permanent conservation easements.<sup>137</sup>

Nor could the government restrict all development rights on a property through the use of eminent domain. The government rarely uses eminent domain for conservation purposes, most likely because of the relative weakness of the environmental lobby.<sup>138</sup> The use of eminent domain is also very unpopular—in many cases, an exercise of eminent domain results in political suicide.<sup>139</sup> Accordingly, restriction of all development rights is possible only through the use of conservation easements and could not be effectuated through regulation.

Second, conservation easements are preferable because regulations that require indefinite public access to a property may be construed

---

135. *Id.*; see also *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) (requiring that there be a significant economic impact on the property as a whole in order to find a regulatory taking). Consider, however, that the fact that the landowner should reasonably expect some regulatory impact on his property supports a rejection of a regulatory takings claim. *Regulating Versus Paying*, *supra* note 2, at 1152.

136. Annapolis Roads Property Owners Association, *Annapolis Roads Community Purchases Green Willow Property: Second Property Purchase Strengthens Ongoing Community Preservation Campaign*, P.R. NEWSWIRE U.S., Apr. 11, 2006, available at <http://www.glacierconcept.com/annapolis-roads-community.htm>.

137. See *id.* (describing ARPOA's recent acquisition of a 4.7 acre tract, 3.5 acres of which the association will protect via conservation easement); Press Release, Maryland Dep't of Natural Resources, Governor Ehrlich Announces BPW Approval of Conservation Easements on the Annapolis Neck Peninsula in Anne Arundel County: Maryland Environmental Trust loan facilitates protection of 37 acres (July 7, 2005), available at <http://www.dnr.state.md.us/dnrnews/pressrelease2005/070705a.html> (announcing the cooperative efforts between the Maryland Environmental Trust and ARPOA for the purchase and protection of property in the Annapolis Roads community).

138. See *Regulation Versus Paying*, *supra* note 2, at 1150.

139. See *The Illusion of Perpetuity*, *supra* note 25, at 596.

to be a regulatory taking. In addition to the regulation that denies a property owner all economically viable use of his or her land, the other form of regulatory taking is that in which the regulation imposes a permanent physical occupation on the property.<sup>140</sup> A permanent or indefinite physical presence on a property is always construed as a taking and thereby requires compensation.<sup>141</sup> Although occasional entries onto the property would not qualify as a permanent physical presence,<sup>142</sup> indefinite public access to the property may.<sup>143</sup> Therefore, conservation easements may be the only way to conserve land *and* grant the public access to that land.

Public right of access is important because it increases the public benefit of the easement. For example, a property owner in Florida recently donated a 15-mile conservation easement to the United States Forest Service to connect portions of the existing Florida Trail, a National Scenic Trail.<sup>144</sup> A primary purpose of that easement is to share the property with the public—hiking trails are an essential element.<sup>145</sup> Allowing public access to property can improve monitoring and enforcement of the area protected by easement. In New England, there is a historic property with 160 acres of woodlands covered by a conservation easement that allows public access to the property.<sup>146</sup> Each year, thousands of visitors enjoy hiking the trails on the property and help to monitor the easement.<sup>147</sup> Public access further allows the community to participate in maintenance of that property.<sup>148</sup> “With support from the [grantor], the town’s conservation commission and a devoted group of volunteers

---

140. See *Lucas*, 505 U.S. at 1015.

141. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); see also *Lucas*, 505 U.S. at 1015.

142. See *Regulation Versus Paying*, *supra* note 2, at 1153.

143. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831-32 (1987) (holding that permanent public access constitutes permanent physical occupation, and requiring California to pay for an easement for such access); see also *Loretto*, 458 U.S. at 433 (restating that “a land-owner’s right to exclude [is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property’”).

144. Heather Civil, *Property owner shares conservation land with the public: M.C. Davis sells easement for stretch of Florida Trail*, NORTHWEST FLORIDA DAILY NEWS, Apr. 19, 2006.

145. *Id.*

146. PIDOT, *supra* note 1, at 21 (describing how the public and volunteers regularly enjoy, monitor, and maintain the property).

147. *Id.*

148. *Id.*



maintain the trails on the property. The easement is monitored annually by the [grantee] and daily by the many visitors who hike its trails.”<sup>149</sup> Because conservation easements can include provisions to allow public access to the resource, which will increase public enjoyment of the resource and help maintain the integrity of the property, the public benefits of a conservation easement may be greater than that which can be achieved through regulation.

Conservation easements are preferable to regulation because they allow a property owner to restrict all development or allow public access to the property. If the government attempted either through regulation, the courts would likely find such regulation to constitute a taking under the current Fifth Amendment takings doctrine.

### 5. Affirmative Conservation

Because the grantee and grantor of a conservation easement can negotiate the terms of the easement, the grantee of the easement has authority and freedom of action over the land that would not otherwise be available through regulation.<sup>150</sup> That freedom enables the grantee to do much more than simply prevent certain activities on the land—the grantee can also require that certain affirmative actions be taken to preserve and maintain the property for specific ecosystem services and public benefit.

Although legislators can restrict certain actions through regulation, legislators cannot require landowners to maintain and improve the environmental conditions on their property because of common law constraints and suggested constitutional limitations.<sup>151</sup> Property owners may agree through conservation easements, however, to take affirmative measures to conserve and protect their land. Echeverria notes that conservation easements are superior to regulation in requiring landowners to take affirmative conservation actions, including “planting buffer strips along streams, restoring wetlands, or maintaining a certain age class of timber to accommodate the habitat needs of an endangered species.”<sup>152</sup> Similarly, the aforementioned family that donated an easement to their ranch in Texas<sup>153</sup> noted that the Nature Conservancy, the grantee of the easement, requires that

---

149. *Id.*

150. Cheever, *supra* note 9, at 444-45.

151. *Regulation Versus Paying*, *supra* note 2, at 1162.

152. *Id.*

153. *See* Hathcock, *supra* note 91.

the family take certain actions, including wildlife management, to maintain the integrity of the ranch.<sup>154</sup> Representatives from the Nature Conservancy are also teaching the family about the rare flora and fauna on the property, and are helping to return the property to its prior state by recommending plans for brush control and prescribed burns.<sup>155</sup> Accordingly, where a property owner or land trust wants to ensure that affirmative actions are taken to preserve land in perpetuity, conservation easements are preferable to regulation.

#### IV. CONCLUSION

Although the conservation landscape appears to reflect a shift towards privatization (and there is a lively debate regarding this shift),<sup>156</sup> in actuality both private and public means are used to effectuate conservation purposes. Moreover, the lines between public and private mechanisms for conservation are disintegrating.<sup>157</sup> Conservation easements may build upon existing regulation,<sup>158</sup> and local zoning plans may incorporate conservation easements.<sup>159</sup> However, in the absence of a coordinated conservation scheme, the two mechanisms may unfortunately undermine each other and stand in the way of much needed conservation.

As this Article has shown, both conservation easements and regulation each have unique advantages. Land use planners should not only acknowledge the strengths of each method, but also remedy the weaknesses of each method rather than choosing to abandon one or the other altogether.<sup>160</sup> Once the advantages of both methods are identified, both conservation easements and regulation should be employed contemporaneously where they are each most effective. Such coordinated use would produce the optimum conservation results by putting each method to its greatest use and preventing one from undermining the other.

---

154. *Id.*

155. *Id.*

156. Compare *Constructive Reformist*, *supra* note 21, with *Skeptic's Perspective*, *supra* note 13.

157. Raymond & Fairfax, *supra* note 3, at 603.

158. See *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1215 (N.Y. 2004) (involving an exaction that demanded the use of a conservation easement that reinforced local environmental regulation).

159. Raymond & Fairfax, *supra* note 3, at 627-28.

160. See *Constructive Reformist*, *supra* note 21.



This Article set out to identify several situations in which regulation and conservation easements were each preferable to the other. In sum, regulation is preferable to conservation easements in the following situations: where the expenditure of a large amount of public funding is involved,<sup>161</sup> where a sweeping, regional response to a conservation concern is required,<sup>162</sup> to avoid free riders,<sup>163</sup> to raise awareness of conservation issues,<sup>164</sup> and to respond to a community's interest in conservation.<sup>165</sup> To the contrary, conservation easements are preferable to regulation in the following situations: where there is weak political support for conservation,<sup>166</sup> where landowners distrust the government or favor deregulation,<sup>167</sup> for conservation in perpetuity,<sup>168</sup> for flexibility of contract,<sup>169</sup> to conserve large properties as a whole,<sup>170</sup> for unique or unusual properties,<sup>171</sup> to bar all development,<sup>172</sup> to provide public access,<sup>173</sup> and for affirmative conservation.<sup>174</sup>

Though this Article by no means provides a solution for coordinating conservation easements and regulation, it hopefully moves the discussion towards such coordination and away from a debate that pits one method against the other. The most effective land conservation system will be one in which both conservation and regulation easements are coordinated and complimentary.

---

161. See discussion *supra* Part III(A).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. See discussion *supra* Part III(B)(1).

167. *Id.*

168. See discussion *supra* Part III(B)(2).

169. See discussion *supra* Part III(B)(3).

170. *Id.*

171. *Id.*

172. *Id.*

173. See discussion *supra* Part III(B)(4).

174. See discussion *supra* Part III(B)(5).