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Abstract

Conservation easements, a widely used tool to preserve land for conservation purposes, suffer from a fundamental flaw in lacking a means of adapting the permanent interests they create to changed conditions. This flaw is becoming more apparent as the early generation of these interests age and climate change threatens to bring more rapid demands for adaptation of existing conservation goals in light of changed conditions. Drawing on lessons from successes in international financial centers and U.S. states that are successful in jurisdictional competition, this article argues that the law should embrace measures that enable such competition in providing for shared governance of land between conservation interests and private landowners.

Over the last fifty years, an important tool to help meet the demand for land conservation has been the development of conservation easements. By these easements, a subset of decision-making rights over how parcels of land are used are separated from other decision-making rights and transferred to a nonprofit or government agency.[1] "A conservation easement creates a relationship of shared control over the future of land."[2] In part (perhaps in large part) because donating a conservation easement on land to a land trust or government agency can yield large tax benefits that used not to be available, their use has grown dramatically.[3] From a land-preservation perspective, dividing ownership of the ability to make decisions about a parcel of land gives a veto over certain changes in land use to entities dedicated to preventing many changes. I argue that the shared decision-making power over land that arises from conservation easements is the key to understanding the problems created by conservation easements as a means of preserving land.

In general, American property law has looked to the parties sharing or transferring ownership of property to work out their own rules and procedures to govern disputes, relying heavily on exit where the parties cannot agree. Thus, joint tenancies with rights of survivorship,

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[1] Gerald Korngold, Semida Munteanu, & Lauren Smith, *An Empirical Study of Modification and Termination of Conservation Easements: What the Data Suggest about Appropriate Legal Rules*, 24 N.Y.U. ENVTL. L. J. 1, 5 (2016) ("Conservation easements have revolutionized land preservation in the United States over the past thirty-five years."); Elizabeth Byers & Karen Marchetti Ponte, THE CONSERVATION EASEMENT HANDBOOK (2nd ed.) 238 (2005) ("Easements have gone from being a relatively obscure legal instrument to being an important element of the public agency toolbox.").

[2] Byers & Marchetti Ponte, *supra* note 1, at 284.

[3] People who teach property law, like me, love these as superb examples of our favorite metaphor for property rights: the bundle of sticks. A conservation easement separates particular sticks from the bundle, transferring them to a non-profit or government agency.

tenancies by the entirety, and tenancies in common all are readily severable (with various restrictions to protect the one co-owner from being taken advantage of by another in underhanded ways).[4] In common law easements and servitudes, the law allows a variety of adaptations, including transactions that can distinguish interests through unification of the parcels affected, acquisition and loss of rights by prescription, and, most often as a last resort, judicial proceedings to determine the boundaries of an interest.[5] Where exit is impossible – as in the case of involuntarily created easements for utility infrastructure[6] -- these forced relationships generally disadvantage the weaker party over time and build in conflict to the relationship between decisionmakers.

Conservation easements – creatures of statute, not the common law – suffer from the failure of those statutes to consider how to adapt them to the inevitable changes that will occur in a relationship often intended to last forever. As Gerald Korngold notes, "The touchstone of conservation easements has not been flexibility but rather strict adherence to the status quo."[7] This failure is at least in part due to the malign influence of the Internal Revenue Service, whose concerns and expertise have nothing to do with the smooth functioning of joint ownership of land or conservation,[8] and the creation of those interests by fiat rather than as the law's effort to accommodate how people behave today and possibly in the futuere. As both Friedrich Hayek and Bruno Leoni warned, statutes tend to suffer from the conceit of planners generally who think they have anticipated the unknown future sufficiently to protect against problems.[9] In the case of conservation easements, it is clear that they did not.

My argument in this Article has three parts. First, the conservation easement as a legal interest is significantly flawed as a tool to address long-term issues in accomplishing environmental goals because it is poorly suited to long-term joint governance of land use. Second, this problem is exacerbated by the lack of a market-correction process for the inevitable mistakes landowners and easement holders make in creating easements, particularly as they cannot predict future changes in conditions that may affect the desirability of particular provisions of conservation easements and/or the environmental importance of specific parcels of

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[4] Marshall E. Tracht, *Co-ownership and Condominium*, 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 62, 72 (2000) ("The law's ultimate solution to the bilateral monopoly problem inherent in cotenancy is partition of the property…. Any joint tenant, tenant in common or co-owner in indivision has an absolute right to seek a judicial order partitioning the property, an order which can take one of two basic forms: partition in kind or partition by sale.").

[5] *See* Gerald Korngold, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES (2nd ed.) 243 et seq. (2004).

[6] *See* Andrew P. Morriss, Roy Brandys, & Michael M. Barron, *Involuntary Co-Tenants: Eminent Domain and Energy and Communications Infrastructure Growth,* LSU J. ENERGY L. & RES. 29, 70-78 (2014).

[7] Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1575 (2007).

[8] *See, e.g.*, Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform,* 2013 UTAH L. REV. 755, 761 (2013) ("the conservation purposes outlined in the [Internal Revenue] Code are not only open-ended … but generally outside of the IRS's expertise to assess.").

[9] Friedrich A. Hayek, LAW, LEGISLATION AND LIBERTY 1: 13 (1973) ("It will be one of our chief contentions that most of the rules of conduct which govern our actions, and most of the institutions which arise out of this regularity, are adaptations to the impossibility of anyone taking conscious account of all the particular facts which enter into the order of society."); Bruno Leoni, FREEDOM AND THE LAW 7 (3rd ed. 1991) ("a remedy by way of legislation may be too quick to be efficacious, too unpredictably far-reaching to be wholly beneficial, and too directly connected with the contingent views and interests of a handful of people (the legislators), whoever they may be, to be, in fact, a remedy for all concerned.").

land.[10] Third, fixing this problem requires finding ways for landowners and land conservation easements to credibly commit to a conservation purpose that includes a more flexible decision process for coping with errors and changes than conservation easements provide.

To address these problems, I turn to what may seem an unlikely sources of ideas: the development of legal regimes in international financial centers (IFCs) aimed at solving long-term governance problems for extended families that share ownership of assets. This is illustrated by the success of some U.S. states in jurisdictional competition where federal preemption has created a "lead state regulatory" system that enables entities chartered in one state to operate in others. The former includes both offshore trust law and the somewhat-confusingly named "private foundation," an entity imported from Liechtenstein by a number of jurisdictions (the first were Liberia and St. Kitts and Nevis, but are now possible to create in New Hampshire and Wyoming).[11] The latter includes "risk retention groups" (RRGs), which by federal law cannot be excluded from providing services by any state if they are chartered by any state. These entities demonstrate a vibrant law market created through federal preemption of state laws.

These legal regimes provide a solution to the fundamental problem that lies at the heart of conservation easements' weakness: how to make a credible commitment to a long-term goal when the future includes contingencies that those making commitments today cannot foresee. They do so by a combination of statutes and common law that enable the creation of long-term relationships (trusts) and entities (private foundations), a credible jurisdictional commitment to the judicial and legislative efforts needed to maintain the necessary legal infrastructure, *and* a professional community whose success depends on maintaining those commitments. All three components are necessary to solve the problem of shared governance in the long run. Unfortunately, some of those elements are missing in conservation easements. For land conservation efforts to succeed in the long run, this weakness should be addressed.

1. The Problems Conservation Easements Are Intended to Solve

Where particular land has characteristics that make its condition important to some interest group capable of mobilizing the political process to protect that land, governments may take steps to own the land outright (e.g., Yellowstone National Park) or regulate its use to protect particular values (e.g., zoning, historic preservation, restrictions under the Endangered Species Act).[12] Today, these measures are seen as inadequate to meet the demand for restricting land use

[10] There are interesting issues about the ability to understand the overall impact of conservation easements raised by the variable transparency of data on their impact. *See* Adena R. Rissman, Amy W. Morris, Alexey Kalinin, Patrice A. Kohl, Dominic P. Parker, & Owen Sales, *Private Organizations, Public Data: Land trust choices about mapping conservation easements*, 89 LAND USE POLICY 104221 (2019); Korngold, *Intergenerational*, *supra* note 7, at 1576.

[11] *See* Andrew P. Morriss, *Importing Private Foundations Into the Common Law*, IFC REVIEW (Sept. 29, 2021) available at https://www.ifcreview.com/articles/2021/september/importing-private-foundations-into-the-common-law/; Andrew P. Morriss, *Private Foundations in the Common Law Caribbean: Variations on a Theme*, IFC REVIEW (Sept. 8, 2021), available at https://www.ifcreview.com/articles/2021/september/private-foundations-in-the-common-law-caribbean-variations-on-a-theme/.

[12] On the role of the railroads in spurring the creation of Yellowstone National Park, *see* Marcia Argust, *Railroad Magnates, Philanthropists Helped Launch Our National Parks*, Pew Trusts (Aug. 10, 2017) available at https://www.pewtrusts.org/en/research-and-analysis/articles/2017/08/10/railroad-magnates-philanthropists-helped-launch-our-national-parks; Aubrey L. Haines, THE YELLOWSTONE STORY: A HISTORY OF OUR FIRST NATIONAL PARK (rev. ed.) 1: 155, 164-173 (1996) (describing role of Northern Pacific in securing legislation creating Yellowstone).

in pursuit of conservation and aesthetic goals.[13] Budget constraints and political priorities limit direct land acquisition. When public resources are expended in such efforts, they may be diverted to serve parochial interests, such as the creation of the Steamtown National Historic Site, surely a pointless expenditures of federal money, but effectively championed by a legendary Pennsylvania pork barrel politician, Rep. Bud Shuster.[14]

When governments acquire land outright, they may provide inadequate funding for effective management to accomplish the goal of preserving the land's ecological function or other special value.[15] Further, there is widespread disagreement over just which lands ought to be preserved in their current condition or restored to some other condition. Not only do people disagree over how much land ought to be preserved for any particular purpose, but individuals' interests in preserving the current use of any specific parcel land is not necessarily shared with neighbors, let alone newcomers who might prefer a change.

Conservation easements solve a major problem for donor-landowners as they apply to subsequent landowners as well. A landowner who donated a conservation easement to a land trust in 2000 will have restricted the use of that land in 2100, long after the property no longer belongs to the donor. This ability to permanently affect the character of a parcel's land use is necessary to satisfy the IRS that the donation of the easement deserves favorable tax treatment.[16]

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[13] *See, e.g.*, S.H.M. Butchart, et al., *Shortfalls and solutions for meeting national and global conservation area targets*, CONSERVATION LETTERS 8: 329 (2015). There can be crowding out effects of government programs on private conservation efforts. *See* Dominic P. Parker & Walter N. Thurman, *Crowding Out Open Space: The Effects of Federal Land Programs on Private Land Trust Conservation,* 87 LAND ECON. 202 (2011) (finding small but negative effects).

[14] Bob Janiskee, *Attendance Shortfalls at Steamtown National Historic Site Prompt Calls for Privatization*, NAT. PARKS TRAVELLER (Sept. 14, 2008) available at https://www.nationalparkstraveler.org/2008/09/attendance-shortfalls-and-related-problems-steamtown-national-historic-site-prompt-calls-pri?page=2 ("Too many people are avoiding Steamtown. Too many who go there are leaving disappointed."); Jeff Flake, *Jurassic Pork* 25-26 (June 2015) available at https://freebeacon.com/wp-content/uploads/2015/06/Jurassic-Pork-print-copy.pdf (quoting National Park Service official on the "very backdoor way of creating an area" used for Steamtown and noting $66 million spent on site). As Korngold, et al., note, tax laws and regulations "contemplate deviation [from perpetuity] only in strictly circumscribed situations." Korngold, et al., *supra* note 1, at 43. Worse, tax law appears to allow only for termination, not modification, of easements. Id. at 44.

[15] See, e.g., Brian Yablonski, *Yellowstone's Innovative Flood Response Offers a Lesson for All National Parks*, THE HILL (June 28, 2022) available at https://www.perc.org/2022/06/28/yellowstones-innovative-flood-response-offers-a-lesson-for-all-national-parks/.

[16] *See, e.g.*, Julie Ann Gustanski & Roderick H. Squires, *Introduction* in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires, eds.) 1 (2000) (concluding that the Tax Reform Act of 1976 "has played an instrumental role in providing guidance to states, enabling legislation, and launching easements into widespread use by explicitly recognizing them as tax-deductible donations."); *See* Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment after Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217, 289 (2012) ("the enormous up-front investment in tax-deductible conservation easements will be for naught if the purportedly perpetual protections prove to be ephemeral because government and nonprofit holders are able to release, sell, swap, or otherwise extinguish the easements in disregard of the restriction on transfer, extinguishment, proceeds, and other perpetuity-related requirements."). Note that there the creation of the federal deduction for conservation easements occurred in 1976 "virtually without debate and without any notice whatsoever." Stephen J. Small, *An obscure tax code provision takes private land protection into the twenty-first century,* in PROTECTING THE LAND, *supra,* at 56. Even the 1980 amendment, which created section 170(h), the core tax code provision, involved only "a few interest groups." Id. One consequence of this lack of attention was a staggering underestimate of the size of the tax benefits that would result: the committee reports on the 1980 bill estimated an annual tax loss to the federal

This feature of conservation easements appeals to many landowners who have donated easements. For example, one donor explained why he donated a conservation easement on his farm by saying "because 52 years ago I found it to be a beautiful piece of property and *wanted it to remain so forever*."[17] Unfortunately, donor interest in permanent preservation of today's land uses for their property is not the best guide to resource protections and expenditures.

Some lands matter more than others in environmental terms. Wetlands are critical parts of ecosystems; mammals, reptiles, insects, and plants require habitat; and so forth. In addition, amenities provided by current land use can be disrupted by development: scenic views can be affected, land use patterns can change, historic buildings might be replaced or modified beyond recognition, and so forth. At the same time, considerable land is not critical habitat or is *currently* not significant to any particular eco-concerns. Indeed, it seems likely that most land presents no more than passing interest to most people as it represents a land use pattern or structure of a particular social, historical, or other value to only a few people. Because of donors' intense interest in their land, the conservation easement was attractive to conservation interests because, like other interests labeled "easements," it is potentially infinite. (Conservation easements can be explicitly less than infinitely lived, but if they are, they do not qualify for the federal tax deduction and many land trusts will not accept them.[18])

The development of conservation easements required creation of a new legal regime as they are not "easements" that the common law would have recognized.[19] Although some observers (particularly Gerald Korngold) warned early on that use of term "easement" was problematic since it brought with it conceptual baggage associated with the common law's understanding of easements,[20] the term nonetheless became the dominant legal label for these

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government of just $5 million. A single easement donated in 1998 was valued at over $10 million. Id. One objection to the discussion in this paper is likely to be that current potential conservation easement donors highly value their ability to permanently restrict the future use of their land. One response might be that allowing such restrictions is not the sort of thing the law ought to facilitate since those restrictions' costs are likely an increasing function of the time from the donation.

[17] Byers & Marchetti Ponte, *supra* note 1, at 7 (emphasis added).

[18] Byers & Marchetti Ponte, *supra* note 1, at 190 (noting Vermont Land Trust will not accept non-perpetual easements).

[19] Jean Hocker, *Foreword*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires, eds.) xvii (2000) ("Conservation easements are not like easements lawyers were used to."); Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process,* 2007 UTAH L. REV. 1039, 1048 (2007) ("Common law rules in most jurisdictions either barred privately held conservation easements or placed their legality into serious doubt.").

[20] *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements,* 63 TEX. L. REV. 433, 435 (1984) ("choosing the 'easement' label for a conservation interest and following the classical rules could lead an uncritical decisionmaker to a quick and rigid result without the necessary policy analysis."). *See also* Korngold, *Contentious*, *supra* note 19, at 1052 (noting that conservation easements "typically involve only negative restrictions on the burdened owner's use of her property, they should more accurately be called 'conservation 'covenants.' Or, following the taxonomy of the Restatement of Property (Servitudes), which unifies easements and covenants for many purposes under the rules, 'servitude,' these interests could be called conservation 'servitudes'."); CONSERVATION EASEMENTS: TAX AND REAL ESTATE PLANNING FOR LANDOWNERS AND ADVISORS (David J. Dietrich & Christian Dietrich, eds.) xix (2011) ("The term 'conservation easement' is the accepted name for a legal tool that fits in the real property law of easements like a square peg in a round hole."). Worrying about the language used to describe the interests is not merely an academic matter. As this guidebook notes, the UCEA drafters noted in a comment that they did not address the application of charitable trust

interests by being enshrined in the state statutes authorizing these interests. Courts' (and parties') occasional conflation of conservation easements (creatures of statutes) and common law easements has caused interpretative problems from time to time and some uncertainty still lingers over exactly what rules govern important aspects of conservation easements as a result.[21]

Like any new concept introduced into the law, the conservation easement evolved over time. Land trusts learned from experience how to craft easement language and now focus more on long-term stewardship issues than they initially did;[22] the IRS has launched multiple efforts to constrain uses of conservation and historic preservation easements it views as being driven primarily by their tax advantages rather than the conservation purposes it recognizes;[23] and conflict of interest problems have surfaced in some land trusts' dealings with amendments to conservation easements connected to land-trust insiders.[24] Perhaps most challenging, there is increasing concern over how management of conservation easements can adapt to the inevitable changes in land use patterns, landowner and societal preferences, and environmental conditions, including but not limited to those caused by climate change.[25] This problem is exacerbated by the decentralized nature of decisions to place conservation easements on land. Decisions about where to place easements and exactly what restrictions the easement will put on the land are made by individual landowners working with nonprofits or government agencies, usually

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law to conservation easements – a still unresolved issue and one which has been called "perhaps the most controversial issue in the area of easement modification and termination," Korngold, et al., *supra* note 1, at 48-49 – because "states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes." Id. at xxv (quoting National Conference of Commissioners on Uniform State Laws, *Amendments to the Uniform Conservation Easement Act* (Feb. 3, 2007), para 6.) available at https://docplayer.net/8857629-Amendments-to-uniform-conservation-easement-act.html.

[21] *See* J. Brady Hagan, Note, *Facing the Growing Tension between Conservation Easements and the Common Law,* 108 KY. L. J. 335, 349 (2019) ("How environmental law and policy will interact with and be balanced against preexisting common law is where its fundamental tension with conservation easements lies.").

[22] Byers & Marchetti Ponte, *supra* note 1, at 1-2 ("The collective work of easement holders has grown in complexity and this book highlights the sophistication that has evolved with experience – showing how, with careful drafting, easements can meet multiple goals for land protection and management. … [This experience led the new edition to focus] more on the easement tool and less on broader organizational issues, such as, for example, marketing an easement plan.").

[23] Internal Revenue Service, *IRS wraps up 2022 "Dirty Dozen" scams list; agency urges taxpayers to watch out for tax avoidance strategies* (25 July 2022), https://www.irs.gov/newsroom/irs-wraps-up-2022-dirty-dozen-scams-list-agency-urges-taxpayers-to-watch-out-for-tax-avoidance-strategies (listing "abusive syndicated conservation easements" as one of the 12 strategies for tax avoidance it was targeting).

[24] Jason A. Richardson, *Increased Scrutiny on Conservation Easement Donations: How a crackdown on tax fraud by the IRS could impact environmental protection*, 1 ENVT'L & ENERGY L & POL'Y J. 273 (2005); David B. Ottaway & Joe Stephens, *Nonprofit sells scenic acreage to allies at a loss*, WASH. POST (May 4, 2003); Joe Stephens & David B; Ottaway, *How a bid to save a species came to grief*, WASH. POST (May 5, 2003).

[25] *See, e.g.*, CONSERVATION EASEMENTS: TAX AND REAL ESTATE PLANNING, *supra* note 20, at xxviii ("drafting an easement that foresees all possible future situations is an unattainable goal, and questions will inevitably remain."); Korngold, et al., *supra* note 1, at 22-23 (describing impacts of climate change likely to require changes to conservation efforts); Kingsbury Browne, *Foreword* in THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC EASEMENT PRESERVATION PROGRAMS (Janet Diehl & Thomas S. Barrett, eds.) xii (1988) ("Notwithstanding geologists who predict the disappearance of Cape Cod by wave erosion within 2,000 years, local counsel on the Cape prepare easements that dutifully recite the impossible. Notwithstanding history abundant with examples of dramatic land use changes from overgrazing, rising and falling seas, industrial development, population shifts, and pollution, each of the easement documents in the handbook proclaim that the easement shall be 'in perpetuity' – as indeed it must if the easement is a gift that is to qualify as a deductible charitable contribution.").

bargaining in the shadow of the IRS's interpretation of the tax code. These decisions are extremely difficult to alter and are made so on purpose. The budget constraints that the donor landowners and the easement holders face today differ from the budget constraints landowners and easement holders face in future circumstances. The normal discovery process of market transactions is significantly attenuated because the grant of an easement is largely a once-and-for-all decision rather than a continuing series of marginal (and sometimes more than marginal) adjustments.

Both the subject matter of conservation easements and the relationship of the easement holder to the burdened land are quite different from common law easements. Those easements often shift a right from one parcel of land to another, often neighboring, property (e.g. an easement for access across one parcel to another),[26] usually concern limited ranges of rights (e.g., easements for utility access to residences or characteristics schemes in neighborhoods),[27] are subject to modification through the courts when circumstances or public views of what are acceptable changes (e.g. race-based barriers in residential developments),[28] and can be extinguished through merger of the burdened and benefited estates.[29] More generally, as Stephen Eagle noted, "the common law was resistant to the imposition of burdens upon land that were not directly related to the coordination of their uses with the uses of neighboring lands."[30] Conservation easements generally remove development rights or restrict future uses and allocate those rights to entities which are not adjacent landowners. Conservation easements are more durable interests than common law easements because they are difficult to change.[31]

2. Lack of adaptability

Because conservation easements are individually drafted for each burdened parcel, they are regularly described as "flexible."[32] This description is, at best, partially accurate. The exact nature of the restrictions placed on the burdened parcel are almost infinitely variable: the landowner may be allowed to add buildings, change uses within a restricted range, be required to follow an amendable conservation plan, etc. Indeed, in this sense they are more flexible than common law easements, which are restricted to a narrow range of uses. One virtue of this flexibility is that it allows landowners and easement holders to specialize and so take advantage

[26] *See* John V. Orth, *The Burden of an Easement*, 40 REAL PROP. PROB. & TR. J. 639 (2006).
[27] *See* St. Charles Cty. v. Laclede Gas Co., 356 S.W.3d 137, 139 (Mo. banc 2011) (an easement is "a right to use the land for particular purposes.").
[28] *See* Barrows v. Jackson, 346 U.S. 249, (1953) (protecting landowner from suit for damages over racially restrictive covenant because "[t]he law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use.").
[29] *See, e.g.*, Zanelli v. McGrath, 106 Cal. App. 4th 615 (Cal. App. 2008) (applying doctrine of merger).
[30] Stephen J. Eagle, *Conservation Easements and Private Land Stewardship*, Competitive Enterprise Institute 2 (1998) available at https://cei.org/sites/default/files/Steven%20Eagle%20-%20Conservation%20Easements%20&%20Private%20Land%20Stewardship.pdf.
[31] *See* Korngold, *Intergenerational*, *supra* note 7, at 1574 ("The touchstone of conservation easements has not been flexibility but rather strict adherence to the status quo. These perpetual property interests are designed to forever preserve the current natural or ecological state of the burdened property.").
[32] Byers & Marchetti Ponte, *supra* note 1, at 10 ("Easements are a popular conservation tool because of their flexibility and their applicability to a wide variety of situations.").

of their comparative advantages in production using the land (particularly agricultural land) and making conservation decisions.[33]

Once established, conservation easement restrictions are relatively *inflexible* in two ways. First, conservation easements generally are negative restrictions (perhaps reflecting the influence of thinking of them as "easements"), barring particular activities but not providing for positive obligations for good resource management.[34] Moreover, both "the statutory framework of the Uniform Act and the Internal Revenue Code incentive for perpetuity" mean that "flexibility cannot be easily accommodated in current conservation easement law. Future generations will have to suffer the ironclad choices that were made for them."[35] Second, many holders will not agree to changes except neutral ones (many amendments in practice concern boundary adjustments to conform to legal descriptions of properties, for example, or to shift the location of a potential building site within the property) or to make the restrictions more stringent (such as by expanding the coverage of the easement or removing permitted uses).[36] Even where the law might permit some flexibility, the looming shadow of the IRS (and the costs interaction will entail) will deter much flexibility and the best practice among land trusts is to draft conservation easements to impede efforts to change their terms after the fact.[37] Adapting to the inevitability of changed circumstances as well as what economist Israel Kirzner calls "the deep fog of ignorance that surrounds each and every decision made in the market"[38] is thus not among conservation easements' stronger points.[39] The inflexibility that conservation easements introduce into the

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[33] *See* Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RES. J. 483 (2004).

[34] Byers & Marchetti Ponte, *supra* note 1, at 141 ("Conservation easements are generally negative covenants, prohibiting destructive activities on protected properties. Easements are less suited to ensuring positive resource management of a property."); Todd D. Mays, *A holistic examination of the law of conservation easements* in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires, eds.) 35 (2000) (suggesting conservation easement statutes would be "improved immeasurably" if they authorized including affirmative obligations).

[35] Korngold, *Intergenerational*, *supra* note 7, at 1577-78.

[36] Byers & Marchetti Ponte, *supra* note 1, at 184 ("'Change it for the better or don't change it at all,' would be the best philosophy on which to base an amendment policy, with only those amendments that strengthen the protective terms of the easement permitted."); id. at 186 (noting that a 1999 survey found that "Land trusts agreed to amendments primarily to clarify vague terms, correct errors, or relocate building envelopes. This suggests that many amendments could be avoided with careful planning and drafting.") CONSERVATION EASEMENT HANDBOOK, *supra* note 25, at 121-22 (noting land trust policy to accept amendments only that strengthen or are neutral). Korngold, et al., found that at least some easement holders were willing to exchange or decrease conservation rights. Korngold, et al., *supra* note 1, at 39.

[37] The IRS views conservation easements as requiring detailed factual investigation during audits. For example, its audit manual warns that "Examiners will need to look beyond information provided on the tax return and analyze the substance of the transaction rather than the mere form. Examiners must employ investigative skills to identify any omissions or discrepancies of material facts." Internal Revenue Service, CONSERVATION AUDIT TECHNIQUES GUIDE 63 (Jan. 24, 2018). Taking a practical approach, the manual also warns that "casual attire and boots may be necessary" on inspections of the property. Id. at 65.

[38] Israel M. Kirzner, *Discovery, Capitalism, and Distributive Justice* in DISCOVERY, CAPITALISM, AND DISTRIBUTIVE JUSTICE: THE COLLECTED WORKS OF ISRAEL KIRZNER (Peter J. Boettke & Frederic Sautet, eds.) 14 (2016).

[39] As Kirzner noted, in emphasizing the importance of markets' ability to adapt,

> life is full of surprises. We live in an uncertain world—that is, a world in which we can be sure that we will be surprised. We act continually in full knowledge of the circumstance that we are quite ignorant concerning the limits of our ignorance. We act knowingly that this inescapable uncertainty surrounding our

accomplishment of conservation goals, as well as the larger economy, is costly because it blocks entrepreneurial discovery,[40] which includes discovery of environmental issues that may not exist or be understood today. This is recognized in the conservation community, as an article in a land trust publication conceded, "It seems irresponsible to promote perpetual restrictions without commensurate attention to means of adjusting them to inevitable future changes."[41]

What is most remarkable about conservation easements is that there is almost no other area of real property law where the discretion of future owners can be so effectively limited in *perpetuity*. Indeed, the history of Anglo-American real property law can be characterized as the progressive *elimination* of restrictions on future owners' control of property.[42] For example, at one time in Britain it was routine for real property to be entailed such that it had to descend through the line of male heirs of the current owner (an interest termed a "fee tail"). This estate developed as a means of avoiding common law rules of inheritance,[43] a parallel with the conservation easement's development as a means of avoiding common law restrictions on easements (and facilitation of avoidance of estate taxes). Today, the fee tail exists primarily as an annoyance to first year property students (as an occasional subject of a multiple-choice question on an exam). All but four U.S. states have either abolished (or never recognized the fee tail); even the four holdouts (Massachusetts, Maine, Delaware, and Rhode Island) apply it either to create a life estate and remainder in the owner's children (Rhode Island) or only in the case of intestacy (the others).[44] England began whittling away at the fee tail in the 15th century with legal

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> planned activity drastically erodes our control over the processes we initiate. We can no longer feel confident that our command over inputs ensures our command over output.

Israel M. Kirzner, *Discovery, Capitalism, and Distributive Justice*, *supra* note 38, at 39. More generally, Korngold notes that American land law too often ignores what he terms "lessons of flexibility and humility in the face of inevitable change and the unknown." Korngold, *Intergenerational*, *supra* note 7, at 1527.

[40] Israel M. Kirzner, *Discovery, Capitalism, and Distributive Justice*, *supra* note 38, at 89 ("Conversely, we notice, entrepreneurial discoveries are to be expected only in areas of activity into which entry is not blocked (by institutional barriers, or, possibly, by monopolized exclusion from resource availability). Blocked entry not only precludes entrepreneurial innovation on the part of newly competing potential entrants, it also removes the force of such competitive pressure upon incumbents, inevitably congealing their entrepreneurial juices.").

[41] Karen Marchetti-Kaiser, *Recent Easement Amendment Survey Findings*, THE BACK FORTY ANTHOLOGY 3.69 (1995). More generally, Korngold argues that arrangements involving land generally require more attention because of their long-lived impacts compared to other voluntary arrangements. Korngold, *Intergenerational*, *supra* note 7, at 1528. Note that McLaughlin and Machlis see perpetuity as solving a "market failure", which she identifies as the failure to "leave a socially desirable amount of such land undeveloped." McLaughlin & Machlis, *supra* note 47, at 1571. A key advantage of the Kirznerian approach is to avoid the market failure paradigm, in which outcomes which someone – or in the case of McLaughlin and Machlis, the United States Department of Agriculture, on which they rely for support that there is a market failure in land use decisions – simply identifies outcomes they dislike as being the result of a market failure. Rather than a market failure, identifying disequlibria conditions such as USDA asserts exist present a market *opportunity*, a need not being met. *See* McLaughlin & Machlis, *supra* note _, at 1570-71.

[42] *See* Korngold, *Intergenerational*, *supra* note 7, at 1551 ("Making land marketable and developable has been the key imperative in the evolution of land law, from its initial incarnation in England after the Norman Conquest in the eleventh century through the time of the reception of much of the English common law into the early American legal system and continuing to the current day."); Edward R. Cohen, *Towards the Higher Estate*, in Edward R. Cohen, MATERIALS FOR A BASIC COURSE IN PROPERTY (1978). *See also* Hagan, *supra* note 21, at 344-45.

[43] *See* Joseph Biancalana, THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL ENGLAND (2001).

[44] Wikipedia – as of August 4, 2022 – lists U.S. conservation easements as "a form of entail still in use." Wikipedia, *Fee Tail*, available at https://en.wikipedia.org/wiki/Fee_tail#Abolition

procedures that removed the entailment and has continued to transform fee tails into more marketable interests since.[45]

Where people seek to perpetuate control beyond their lives, the most effective means in Anglo-American jurisdictions is often by the establishment of a trust. Settlors can select the initial trustee, provide letters of wishes as well as instructions (to some extent) in the trust instrument. Even then, the trustee has considerable discretion in acting to deal with changed circumstances, including the ability to seek guidance from a court.[46] Alternatively, people bestow assets on an entity (such as a non-profit foundation or corporation) which lacks a natural lifespan and whose goals are restricted to a purpose; the entity's governing board can adapt to changed circumstances. With all these methods there are ways to adapt to changed circumstances, both through actions by a trustee or board or by seeking court approval of more fundamental changes. These means are lacking in statutory conservation easements.[47]

Further, conservation easements arise out of a process by which individual landowners, able to find a willing public or private entity qualified to be the easement holder, drive the process. This decentralized process worries observers considering the issue from the points of view of environmentalists (who worry that a lack of planning will lead land trusts to end up with a series of easements that fail to advance a coherent conservation purpose)[48] and the IRS (which worries that taxpayers are getting away with paying significantly less tax by giving up rights not worth very much).[49] As there is no capacity to harmonize easements in an area, this decentralization of term negotiations can exacerbate the need for future adaptability.

For land trusts, the durability and restricted ability of conservation easements are a mixed blessing.[50] On the one hand, the land trust effectively "ties itself to the mast" with respect to how

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[45] *See* Biancalana, *supra* note 43 (describing 15th century developments).

[46] Indeed, where a grantor seeks too much control over how a trustee will behave, the grantor risks having the trust declared a sham.

[47] Prof. Nancy McLaughlin and Benjamin Machlis have argued that "conservation easements are public or charitable assets" and that the public "is the beneficial owner of such easements." Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public and Investment in Conservation: A Reply to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561, 1564-65 (2008). Prof. McLaughlin's argument for applying charitable trust doctrine is quite different from the trust analogy I am making, and, I would argue, is antithetical to it. The argument in this article does not directly engage with her argument but I note here that her solution is a more regulatory approach than the existing practice and would make worse the problems identified in this article.

[48] *See, e.g.*, George Wuerthner, *The Problem of Conservation Easements*, THE WILDLIFE NEWS (Apr. 15, 2020) available at https://www.thewildlifenews.com/2020/04/15/the-problem-of-conservation-easements/ ("land conservation becomes opportunistic instead of strategic."); Heidi J. Albers & Amy W. Ando, *Could State-Level Variation in the Number of Land Trusts Make Economic Sense?*, 79 Land Econ. 311, 312 (2003) ("lack of coordination among [land trusts] has become a serious problem.").

[49] Internal Revenue Service, *Conservation Easements: Background – Abusive Transactions Involving Charitable Contributions of Easements* (n.d.) available at https://www.irs.gov/charities-non-profits/conservation-easements ("We have seen taxpayers, often encouraged by promoters and armed with questionable appraisals, take inappropriately large deductions for easements. In some cases, taxpayers claim deductions when they are not entitled to any deduction at all (for example, when taxpayers fail to comply with the law and regulations governing deductions for contributions of conservation easements). Also, taxpayers have sometimes used or developed these properties in a manner inconsistent with section 501(c)(3)."). *See also* Parker & Thurman, *supra* note 13 (finding significant effect of tax deduction in inducing donations).

[50] *See* Korngold, et al., *supra* note 1, at 5 ("The greatest strength of conservation easements—perpetual protection of land—also presents, at times, their most significant challenge.").

a future board might deal with the easement.[51] A land trust that released an easement in whole or in part to the burdened landowner in the future could put its tax-exempt status at risk (under current law),[52] providing a powerful incentive for the land trust to stick to the original conservation purpose outlined in the easement. But gaining that commitment to the purpose costs the land trust the flexibility to engage in transactions that might be more effective at achieving its conservation aims in the future. A parcel that appeared worth saving in perpetuity in 2000 might no longer appear important, or even desirable, in 2100 due to changes in population density in the area or climate change. As a guide to drafting conservation easements conceded, "No matter how much we might want to ensure that a piece of land is preserved forever, we simply cannot do it."[53] Moreover, holding easements is not costless for land trusts.[54] Indeed, a common theme in the literature on conservation easements is that land trusts need to prepare for the long haul in accepting easements, seeking cash donations from easement donors and others to fund monitoring and enforcement. As a result, many are choosey about the easements they accept.[55] Some of the land conservation literature even accepts the needs for more flexible approaches, such as by providing for regularly updated management plans for covered land.[56]

If we set aside the narrow interests of landowner-donors in perpetuating their particular vision of the future use of land they own, an interest that is among the least important from a conservation or other public policy point of view (and whose long-term importance largely rests on its role in inducing donations of conservation easements, because once landowner-donors are deceased, they are not in a position to object to or agree to any modifications), then the primary

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[51] *See* Korngold, *Contentious*, *supra* note 19, at 1041 (using Odysseus metaphor). *See, e.g.*, Byers & Marchetti Ponte, *supra* note 1, at 183 ("Although altered circumstances and conditions may someday justify an amendment to the document, an organization or landowner should never agree to a conservation easement with the idea that its terms will be changed later."). Consider how the same organization would treat the donation of 100 shares of IBM stock. It would hold the stock when doing so made sense for its portfolio and dispose of it should its needs or assessments of the stock's change. It seems odd that the organization would treat an instrumental asset such as the stock more thoughtfully than an asset more closely related to its core purpose.

[52] *See* Land Trust Alliance, *Staying Within the Bounds of the Income Tax Code and Public Perception: Private Inurement and Private Benefit*, (Spring 1999) available at http://www.conservationlaw.org/publications/09-PrivateBenefitandInurement.pdf ("if you amend a conservation easement to provide more development rights in detriment to the conservation values of the property, you are arguably acting for the sole benefit of the landowner — a 'disinterested individual' — without regard for the public interest, and to the detriment of the conservation purpose of your organization.").

[53] CONSERVATION EASEMENTS: TAX AND REAL ESTATE PLANNING, *supra* note 20, at 171. Note that enforcing easement terms may persist even where they no longer serve the conservation purpose because the transaction cost of changing the terms is too high relative to the value that a change would unlock.

[54] Janet Diehl, *Managing a Responsible Easement Program* in THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC EASEMENT PRESERVATION PROGRAMS (Janet Diehl & Thomas S. Barrett, eds.) 101 (1988) ("Routine monitoring costs money. Defending easements against legal challenges costs even more. In accepting an easement, your organization or agency assumes a perpetual financial liability.").

[55] *See, e.g.*, CONSERVATION EASEMENT HANDBOOK, *supra* note 25, at 103-04 (quoting land trust director on need for cash donations to accompany easement donations).

[56] CONSERVATION EASEMENTS: TAX AND REAL ESTATE PLANNING, *supra* note 20, at 171 (""Easements should consider adopting built-in 'updates' that allow for future changes to be made in areas where change is sure to occur. In an effort to ensure that management of forests on the easement property is according to state-of-the-art management techniques, for example, the easement document could provide that the management plan is to be revised every five years according to the latest practices, or state outright that it is the management plan's purpose to allow for adaptive management.").

goal is to apply resources to conservation purposes.[57] At the time of the donation, those resources consist of the land to which the conservation easement applies. Locking in a particular vision of the future is not the best way to do this.

3. Why adaptability is needed

If we were to design a decision-making process to advance land conservation interests from scratch, presumably we would prefer a process that has as its overriding purpose the advancement of the conservation interest, a decision maker credibly committed to that purpose, and a way to keep the decision maker honest. Simply giving the property in its entirety to a land trust would do that (assuming the land trust's internal governance keeps it honest going forward). Landowner-donors do not want to do that, however, because they also want to advance the purpose of being able to make use of the land themselves (as a place to live, for recreation, for farming, etc.) and for themselves and their heirs to also benefit from the value of the land (less, of course, the value of the conservation easement). Thus, another important interest of landowner-donors is to preserve some (usually the large majority) of the decision-making power over the land for themselves and their heirs or successors. Land trusts also often do not want the burden of fee simple ownership[58] and there is justified concern that as non-profits began to own more and more land in an area, local governments and economic interests would become alarmed at the loss of tax revenues and restriction of future development opportunities and take steps to curb conservation efforts.[59]

If the property is not to be turned over to a land trust in fee simple, then the next best thing is to commit future decisions about the property's use to a joint decision-making process in which someone (the land trust) committed to the conservation purpose has a strong voice in relevant decisions about the land's use, including a veto over at least some decisions. In part, this is what landowner-donors attempt to accomplish by using a conservation easement.[60] With

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[57] The resources that should be applied to conservation purposes, however defined, is not infinite, because there are competing needs. It may be that it is effectively infinite, as the current amount is so low that any conceivable increase is to be welcomed as still providing net benefits. However, the resources applied to conservation easements is quite large and so it seems unlikely that the question of tradeoffs is not relevant. Moreover, the resources applied via conservation easements can only grow, because there is an effective one-way ratchet to their use. *See also* Korngold, *Intergenerational*, *supra* note 7, at 1553 (discussing problems of dead hand control of land).

[58] Dennis G. Collins, *Enforcement problems with successor grantors*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires, eds.) 157 (2000) ("In many cases, the conservancy would prefer to hold an easement on a property rather than owning the property outright. All the concerns of ownership and management remain with the landowner.").

[59] *See, e.g.*, THE CONSERVATION EASEMENT HANDBOOK, *supra* note 25, at 2 ("Easements keep property in private hands and on the tax rolls, and also can carry a lower initial price tag than outright acquisition.").

[60] The conservation easement literature recognizes this, noting that easement holders must begin to think of their relationship with the landowner as a "partnership" from first contact. *See, e.g.*, Byers & Marchetti Ponte, *supra* note 1, at 134-35 ("Easement holders need to think of easement stewardship as a partnership with the landowner that begins at the first meeting to discuss the prospective easement project."). *See also* CONSERVATION EASEMENT HANDBOOK, *supra* note 25, at 101 (quoting former director of stewardship at The Nature Conservancy that "The fact is, easements are the *most* complicated land protection tool. Holding an easement—which is actually like owning land in a partnership—is at least twice as complicated, and it can turn out to be more expensive [as owning in fee]."). Unlike legal partnerships, which can be dissolved at will and which often must dissolved upon events such as the death of a partner, conservation easement "partnerships" are at most able to be terminated with great difficulty. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHIC. L. REV. 947, 958-962 (1984) (discussing advantages of dissolution at will for partnerships).

proper drafting, the right to build additional houses on a parcel can be limited to a number which will not materially affect the conservation purpose but which will allow, for example, landowner-donors to have their children be able to build homes on the property. This works reasonably well in the short- and medium-terms, since by the time a landowner-donor is considering a donation of a conservation easement, the landowner-donor likely has a good idea how many such children there will be and how interested they are likely to be in having a home on the property. However, the landowner-donors have little idea of how many great-grandchildren they will have, so crafting a conservation easement that will effectively deal with the interests of those descendants further out than those presently alive is not nearly as straightforward. At least some of the donor's interests (and the subsequent landowners') thus also lie in the direction of greater adaptability.)[61]

In general, landowner-donors can set out with a reasonable degree of certainty how they would like to see the property treated for the next several decades. Assuming they can find a land trust willing to accept the future uses they foresee (something that limits their degrees of freedom), a conservation easement can be crafted that manages to articulate the conservation purpose and the landowner-donor's use interest. Even so, and "even when we employ great care in drafting easement language and creating professional conservation management plans, circumstances and hearts change."[62]

However, as articles on conservation easements often note, perpetuity is a very, very long time.[63] The landowner-donor will no longer be the property owner and descendants or successors in interest will be in a matter of decades at the most. As the literature frequently notes, subsequent owners are likely to be less committed to the conservation purpose embedded in the easement and more likely to want to engage in behavior inconsistent with the easement's terms than the donors.[64] There are also instances where subsequent owners claim to be ignorant of the

[61] Adaptability is not laxness. The conservation-oriented co-owner would presumably bargain for offsetting changes in return for, say, allowing an additional building.

[62] John B. Wright, *Reflections on Patterns and Prospects of Conservation Easement Use* in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires, eds.) 499 (2000). Wright further observes, "Being human, it is not unthinkable that landowners who grant easements may change their minds about restrictions. Practitioners must enter negotiations with a commitment to discuss and evaluate all possible future uses of the land. In our rush to craft the most stringent restrictions, we must take care not to create time bombs that may well detonate the reputation of the land trust involved." Id.

[63] Byers & Marchetti Ponte, *supra* note 1, at 143 ("Perpetuity is a very, very long time."). *See also* Mayo, *supra* note _, at 40 ("the history of conservation easements is quite short, and the expectation that a conservation easement will serve its purpose *forever* requires some degree of hubris.").

[64] *See, e.g.*, Byers & Marchetti Ponte, *supra* note 1, at 75 (quoting Stephen J. Small that "Conservation-minded easement holders work with conservation-minded landowners to produce an easement document that sounds beautiful. But the holder and landowner should take the defensive perspective and read a draft of the document as if they were the lawyer representing the next landowner who may not be as conservation-minded."); id. at 136 ("Research shows that most easement violations occur after the property leaved the original grantor's hands."); CONSERVATION EASEMENT HANDBOOK, *supra* note 25, at 91-92 (quoting U.S. Fish and Wildlife Service official that "Times change, owners change, economic pressures change, value systems change, and the long-term relationship with [the grantee] imposed by the easement will cease to be attractive to at least some property owners. The temptation to violate will increase. The easement holder must be prepared to withstand the pressures and be blessed with a carefully drawn easement that can stand up to a court test."); Russell L. Brenneman, *Introduction to Model Easements*, in CONSERVATION EASEMENT HANDBOOK, *supra* note 25, at 44 ("The passage of time increases the

easement's terms, that reflects an error in one or more of the recording of the easement (which is required to claim the tax deduction), the title search by the buyer's agent during the purchase, or communication between the buyer's agent and the buyer.[65] These are not merely hypothetical concerns. Korngold, et al. examined IRS tax filings by large land trusts between 2008 and 2013 and found that "modifications are actually currently taking place. Changes are part of the reality of conservation easements."[66] After surveying the changes, they conclude that "The fact that conservation easements are in fact being modified runs counter to the paradigm of perpetuity."[67] That changes are already taking place despite the obstacles current law places in their path and the relative youth of most conservation easements suggests that future demand for changes will be significant.[68]

More importantly, the land use pattern will likely change in the neighborhood of the burdened land.[69] As an example, consider Chicago's growth. Figure 1 shows the change in land use in the Chicago region between 1900-1992. Preservation of the agricultural use of a parcel in DuPage or Will Counties (the counties adjacent to Cook County on the west) would have left an isolated island of farmland in a sea of urban land uses. There might be aesthetic or other benefits from having such islands, but it seems unlikely that such islands would provide either the conservation values that would have been when they were created or significant environmental benefits.

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likelihood that people who were not involved in the original easement transaction will be dealing with each other about Greenacre.").

[65] Well drafted conservation easements are likely to require that an owner selling the burdened estate notify the easement holder of any sales. Shea B. Airey, *Conservation Easements in Private Practice*, 44 REAL PROP. TR. & EST. L. J. 745, 778 (2010) **(**Landowners can retain limited development rights but required to notify easement holder prior to exercising if might interfere with conservation purpose). Of course, the owner may fail to do so. *See, e.g.*, Windham Land Trust v. Jeffords, 967 A.2d 690 (Me. 2009) (landowner engaged in inappropriate activities).

[66] Korngold, et al., *supra* note 1, at 7.

[67] Korngold, et al., *supra* note 1, at 35.

[68] Korngold, et al., conclude that "We would expect that the pressure for more substantial amendments will increase over time as ecological and human needs evolve." Korngold, et al., *supra* note 1, at 8.

[69] Clemens Muller-Landau, *Legislating Against Perpetuity: The Limits of the Legislative Branch's Powers to Modify or Terminate Conservation Easements*, 29 J. LAND RES. & ENV'L L. 281, 281 (2009) ("Over the next twenty years, it is likely that the institutional focus of the land trusts and government entities holding conservation easements will shift from the acquisition of new easements to the stewardship of existing easements. As conservation easements age, and the environmental, political, and social landscape evolves, the pressure to modify or even terminate easements will inevitably grow.").

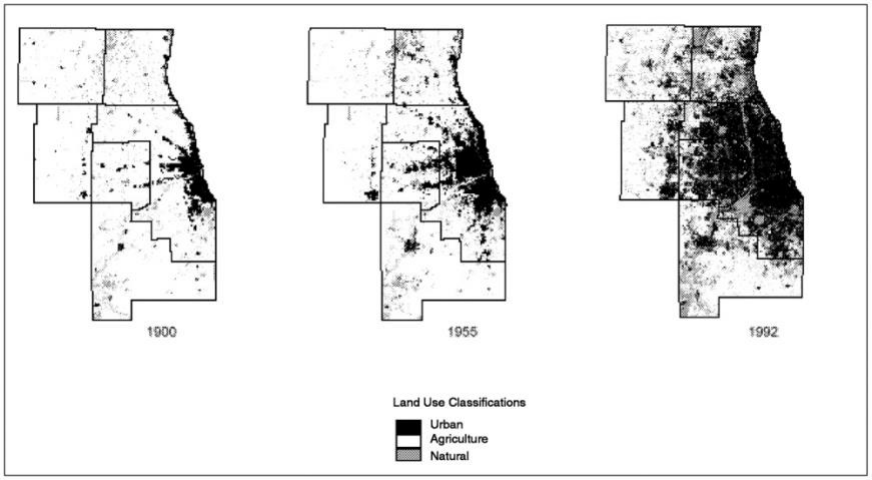

Figure 1 - Chicago Land Use 1900-1992 (National Academy of Sciences, GROWING POPULATIONS, CHANGING LANDSCAPES 278 (2001).

The probability of a conflict between the owner of the land burdened by a conservation easement and the owner of the easement is thus likely to rise over time even without considering how changed circumstances due to climate change, economic shifts, or new scientific discoveries might affect the easement's conservation purpose.[70]

Further, because conservation easements are effectively drafted and administered as one-way ratchets toward greater restrictions (the IRS encourages this approach by making disapproving noises about the tax exemption for the donation and the tax status of land trusts if easements' terms can be or are varied),[71] there is no equivalent to the market discovery process by which the joint owners of the burdened land discover how their joint property might be used. In particular, tax-related restrictions limit the ability to engage in substitutions of covered property, a means of adding flexibility that can be highly desirable.[72]

4. Introducing adaptability

A market discovery process might lead to the recognition that people will pay large sums to develop a particular parcel of land, a result that the rigidity of conservation easements is intended to thwart. Other times, however, the discovery process might be that a lovely farm in Will County, Illinois, that contributes to wildlife corridors, provides a decent living to a farming family, and scenic views for passersby is now surrounded by dense development and so provides

[70] *See* CONSERVATION EASEMENTS: TAX AND REAL ESTATE PLANNING, *supra* note 20, at 172 ("A conservation easement granted for the purpose of preserving the habitat of an endangered species, for example, can no longer accomplish its purpose if the species becomes extinct. An easement covering a particular parcel may cite as its purpose the preservation of a waterway, which may reroute entirely off the easement property. An easement granted for the purpose of preserving working forestland or agricultural land may fail if market or environmental conditions frustrate these uses.").
[71] Micah G. Fogarty, *Navigating IRS Challenges to Conservation Easements*, 90(7) FL. BAR J. 52 (2016) (summarizing cases showing IRS objections to substitutions of land subject to easements).
[72] Morgan Davis, Comment, *Belk v Commissioner: Land Substitutions in Conservation Easements*, 48 LOY. L.A. L. REV. 1193, 1202-03 (2015) (discussing cases that "render easements with substitution provisions ineligible for the federal income tax deduction in all cases. But substitution provisions are desirable because they create flexibility in conservation easement restrictions.").

views only for the owners of the suburban homes on its borders, is no longer viable as a farm, and provides no meaningful wildlife habitat except for the deer whose primary ecosystem contribution is as carcasses on the nearby interstate. The challenge is to find an institutional solution that prevents change in the former, allows it in the latter, and finds an appropriate means of locating the margin between them.

The market discovery process is not the solving of maximization problems, although much of economics has replaced studying the making of choices with solving maximization problems.[73] Instead, market discovery focuses on "the process generated by the forces of the market."[74] Markets

> offer the incentives for members of such groups [people who organize themselves into mutual aid groups] *to discover* the fact that cooperation would be mutually gainful. Where the structure of property rights is such as to make it economically feasible for private internalization of external effects to occur, the market will generate the incentives sufficient *to alert* market participants to the benefits so to be gained.[75]

This is done by entrepreneurs, for "[t]he entrepreneur is the agent that spurs society to take advantage of existing scattered and dispersed knowledge."[76] By restricting the opportunities for change in an effort to avoid the error of too much change to a parcel's use, conservation easements fail to avoid the alternative error of too little change.

In general, a key source of entrepreneurial activity is "*discovery*, in which unfocused, unspecified, purposefulness—a generalized intentness upon noticing the useful opportunities that may be present within one's field of vision—in fact yields discovered opportunities (which may then be subsequently exploited in maximizing choice fashion)."[77] This discovery requires the ability to engage in transactions. Because conservation easements lock out the possibility of

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[73] Israel M. Kirzner, *Entrepreneurship, Choice, and Freedom*, in THE COLLECTED WORKS OF ISRAEL M. KIRZNER: REFLECTION ON ETHICS, FREEDOM, WELFARE ECONOMICS, POLICY, AND THE LEGACY OF AUSTRIAN ECONOMICS (Peter J. Boettke & Frédéric Sautet, eds.) 4 (2018). *See also* Israel M. Kirzner, *Roundaboutness, Opportunity, and Austrian Economics*, in THE COLLECTED WORKS OF ISRAEL M. KIRZNER: AUSTRIAN SUBJECTIVISM AND THE EMERGENCE OF ENTREPRENEURSHIP THEORY 114 (Peter J. Boettke & Frédéric Sautet, eds.) (2015) (**"**Where contemporary neo-classical or mainstream economists have seen the market, almost exclusively, as a social engine yielding instantaneously achieved states of equilibrium (in the context of alternative given conditions of supply and demand), modern Austrians see the market as a systematic but *open-ended* process of competitive-entrepreneurial decisions executed on qualities and quantities of output, methods of production, and bids and offers on the prices of inputs and outputs.").

[74] Israel M. Kirzner, *Divergent Approaches in Libertarian Economic Thought*, in ETHICS, *supra* note 73, at 24.

[75] Israel M. Kirzner, *The Limits of The Market*, in ETHICS, *supra* note 73, at 389-90.

[76] Israel M. Kirzner, *The Role of the Entrepreneur in the Economic System*, in THE COLLECTED WORKS OF ISRAEL M. KIRZNER: THE ESSENCE OF ENTREPRENEURSHIP AND THE NATURE AND SIGNIFICANCE OF MARKET PROCESS (Peter J. Boettke and Frédéric Sautet, eds.) 121 (2018).

[77] Israel M. Kirzner, *Entrepreneurship*, in ESSENCE, *supra* note 76, at 8. The entrepreneur must be alert to the opportunity, but "[t]he alert discovery of such opportunities is not itself a deliberately planned act—but neither is it purely a matter of chance. Discovery must, to a degree, be credited to the human being without whose alertness the good fortune would simply not have been noticed." Israel M. Kirzner, *Discovery, Capitalism, and Distributive Justice* in DISCOVERY, CAPITALISM, AND DISTRIBUTIVE JUSTICE: THE COLLECTED WORKS OF ISRAEL KIRZNER (Peter J. Boettke & Frederic Sautet, eds.) 32 (2016).

much change, they short circuit the discovery and evolution process.[78] What conservation easements do well is increase the weight on preserving the conservation values associated with the easement and raising the cost of changing the use of the property. But they do so in a manner that rigidifies the status of the property, rendering it impossible (or at least extremely costly) for the discovery process to unfold.

One alternative to both outright fee acquisition of a property by the land trust or conservation easements would be for the land to be owned in fee by an entity with a governing body made up of both the landowner-donors' (or their successors in interest's) representatives and the land trust, with a requirement that the body act unanimously. This could be a trust with co-trustees, a private foundation with both groups represented on the board, or some other entity (such as an LLC). The landowner-donor and the land trust would agree to an initial document setting out the conservation purpose, the permitted uses, etc. just as they would in drafting a conservation easement. Under many jurisdictions' trust laws, the combination of the trust instrument itself and a letter of wishes from the grantor(s) can provide considerable guidance to the trustees without unduly restricting their ability to apply the trust instrument's instructions (taking into account the letter of wishes) to new circumstances. Similarly, the private foundation serves only its purpose, owing no fiduciary obligations to any beneficiaries.[79] This may be more attractive to landowners for there is often more scope for the founder of a private foundation to be involved in the foundation's operations than there is for a grantor to be involved in a trust's operation, because many private foundation statutes allow the founder "to retain a degree of influence and control that is seldom available to a trust settlor.[80] If the documents are properly drafted, it is easy to imagine how an entity like a private foundation or a relationship like a trust could be designed to give voice to both the land trust and the landowner-donor (and any successors in interest). Perhaps the biggest hurdle to such a structure is that it would be novel and odd and so both land trusts and landowners might be reluctant to be a pioneer in its use.[81]

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[78] As Kirzner notes, the process depends on the human imagination.

> To speak of entrepreneurial vision is to draw attention, by the use of metaphor, to the formidable and benign coordinative powers of the human imagination. Austrian economists have, in principled fashion, refused to see the world as wholly knowable, as suited to interpretation by models of equilibrium from which uncertainty has been exhausted. It would be most unfortunate if, in pursuing this refusal, economists were to fall into a no-less-serious kind of error. This error and the systematic market forces set in motion by freedom for entrepreneurial discovery and innovation, harness the human imagination to achieve no less a result than the liberation of mankind from the chaos of complete mutual ignorance.

Israel M. Kirzner, *Uncertainty, Discovery, and Human Action: A Study of the Entrepreneurial Profile in The Misesian System* in THE COLLECTED WORKS OF ISRAEL M KIRZNER: LUDWIG VON MISES: THE MAN AND HIS ECONOMICS (Peter J. Boettke and Frederic Sautet, eds.) 180 (2019).

[79] Paolo Panico, PRIVATE FOUNDATIONS: LAW AND PRACTICE 91 (2014) ("However, although they are often functionally similar to trusts, private foundations are not based on a relationship between a trustee owning fiduciary duties to a beneficiary, who in turn has the correspondent rights, in relation to some property. The beneficiaries of a private foundation have no proprietary interests in the foundation assets; their legal position may be described at best as a claim in debt or in specific performance.").

[80] Panico, *supra* note 79, at 19.

[81] And, of course, the IRS would need to be dealt with, an agency that is not particularly welcoming to innovative structures that reduce taxes. But, just as the LLC went from an oddball business entity that was not predicted to be particularly important (*see, e.g.*, William J. Carney, *Close Corporations and the Wyoming Business Corporations Act:*

The point is not to suggest that land trusts and landowners give up on conservation easements and switch to using New Hampshire, Wyoming, Liberian, Liechtenstein, or St. Kitts private foundations to hold land. The point of this hypothetical example is that it shows a governance structure for the combination of landowner-donor (and successor) interests and land trust interests which would provide greater flexibility for the conservation purpose to be adapted to changing conditions. Three examples of changed conditions illustrate why this flexibility would be desirable.

> *Example 1*: A South Dakota rancher places a conservation easement on his 20,000-acre ranch, restricting the future construction of buildings and limiting the property's use to ranching. Fifty years later, vat-grown beef's popularity has soared and the market for beef from cattle is virtually non-existent.[82] The land is not suitable for any other agricultural use but could be turned into smaller vacation properties for people who enjoy prairie vistas, a use barred by the easement. Under the existing easement terms, however, they cannot engage in the trade even if the vacation properties could be burdened with additional terms (e.g., no pesticide use, restoration of native grasses, interior fence removal, restocking with buffalo) that would enhance the original conservation purposes and the value of the property for vacation uses.
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> *Example 2:* A Montana rancher places a conservation easement on her 50,000-acre cattle ranch that restricts use to agriculture and forbids other commercial activities.[83] Fifty years later, the development of electric storage techniques makes it possible to profitably produce wind energy from the property.[84] The land trust that holds the easement and the successor to the original easement owner agree that they both would like to develop the wind resource and to a formula for sharing the proceeds. The current landowner is excited at the prospect of being able to modernize the ranch equipment and buildings, including replacing the current flood irrigation system for the hayfields with one that uses less water. The land trust would like to use the funds it would receive to acquire environmentally sensitive habitat for beavers along streams in the valley and restore

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Time for a Change, 12 LAND & WATER L. REV. 537, 581 (1977) (LLC "does not represent a viable alternative [to close corporations] for most enterprises, absent some costly drafting to provide solutions for those matters uncovered by its provisions")) to the dominant business entity for new businesses and to be adopted in multiple jurisdictions around the world, sometimes the IRS does accept an innovation. When the IRS agreed that Wyoming LLCs were eligible for pass-through taxation status, the floodgates were opened and the LLC took off. *See* Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure,* in Steven A. Bank and Kirk J. Stark (eds.), *Business Tax Stories* (2005).

[82] This is less implausible than it may seem at first glance. *See* Matt Ridley, *One Day We Will See that Meat is Murder*, THE TIMES (LONDON) (April 24, 2017) ("I think the general drift of culture is heading very slowly towards disapproval of killing animals for meat, however humanely it is done" and suggesting that artificial meat may "get there first."). *See also* Ricky Ben-David, *Israeli developer of 3D-printed plant based meat pulls in $135 million,* The Times of Israel (24 January 2022) available at https://www.timesofisrael.com/israeli-developer-of-3d-printed-plant-based-meat-pulls-in-135-million/ .

[83] Byers & Marchetti Ponte, *supra* note 1, at 199-200 ("Grazing land is the most commonly protected agricultural | land in the western states").

[84] Both the development of fracking generally and the development of coal bed methane production in Wyoming are examples of how technological change can alter resource development possibilities. *See* FRACKING; Dustin Bleizeffer, *Coalbed Methane: Boom, Bust and Hard Lessons*, WyoHistory.org (March 29, 2015), available at https://www.wyohistory.org/encyclopedia/coalbed-methane-boom-bust-and-hard-lessons

native species to the streams. Under the existing easement terms, however, they cannot engage in the trade.

Example 3: A Colorado dairy farmer places a conservation easement on her 800-acre farm that restricts the use of the property to agriculture and specifically bars any building on 100 acres of wetlands on the farm. Fifty years later, climate change has reduced snowpack and increased plants' demand for water. As a result, dairying is no longer economically viable in this area of Colorado and the wetlands have long dried up. The property is near the Colorado Springs to Fort Collins corridor and has fantastic views. The land trust holding the easement would welcome the sale of the property for housing, because its share of the proceeds would enable it to protect the state's remaining wetlands and invest resources in conservation elsewhere in the area. The landowner (the great grandson of the original owner-donor) wants to get out of farming and use his share of the funds to start a business elsewhere. Under the existing easement terms, they cannot make the trade.

It is possible to imagine that a court might approve these changes under either a *cy pres* theory or changed circumstances theory,[85] although the application of these theories to conservation easements remains controversial.[86] (What the IRS might think of all this is even harder to predict, although my best guess is that the IRS would frown upon any such flexibility.)[87] At least today, any theory allowing a change would be at a minimum controversial and, even with the posited agreement between the current landowner and the land trust to the changes, would likely be costly to arrange.

Our hypothetical private foundation would make a solution more likely. In each of the examples, in which I have assumed that the easement owner and the landowner are in agreement about the appropriate course of action, a private foundation board or co-trustees would be able to make the necessary changes. Even absent agreement on the appropriate course of action, there would be room for bargaining because the landowner would presumably be willing to cede an additional share of the gains so long as she received at least the value of the burdened land. If the parties still disagreed, then the change would not take place. If the gains from the change become sufficiently large, particularly if the change is driven by changed conditions as in Examples 1 and 3, the chances of an agreement seem high.

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[85] *See, e.g.*, Jessica E. Jay, *Perpetual is not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements,* 36 HARV. ENVTL. L. REV. 1, 21 (2012) ("When paired with the changed-conditions doctrine, the cy pres doctrine allows for the selection of other purposes during easement amendment, excluding development of the land burdened by the easement. In the case that no other purpose is available to continue the easement, the changed-conditions doctrine applies to terminate the easement, with payment of damages and restitution for the easement's loss."**);** Duncan M. Greene, Note, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation,* 28 SEATTLE UNIV. L. REV. 883, 905 (2005) ("unanticipated changes can sometimes be accommodated by a voluntary or judicially imposed modification or termination of the conservation easement.").

[86] This can be seen in Prof. McLaughlin's extensive analysis of IRS and judicial analyses of the application of *cy pres* to conservation easements. McLaughlin, *Extinguishing and Amending, supra* note 16, at 246-252.

[87] McLaughlin, *Extinguishing and Amending, supra* note 16, at 280-81 ("Congress did not intend, through section 170(h), to subsidize the acquisition of conservation easements that would be fungible or liquid assets in the hands of their government or nonprofit holders.")

5. Learning from IFCs

Credible commitments are needed whenever two or more people or firms are planning interactions that stretch across time. Accomplishing the goal of conservation easements depends on this, as described above. When a conservation easement is first transferred from a landowner to land trust or public agency, the relationship that produced the donation is generally sufficient for both parties to the continuing relationship to avoid major conflicts. Both the landowner and the easement holder participated in designing the easement and so both interests are accommodated. Any conflict with the landowner's other goals for her property were likely resolved by the landowner in deciding to make the transfer of the easement. Survey evidence found relatively few major conflicts with the donor and but more with subsequent landowners.[88] However, as the burdened property passes to owners yet more distant from the donor and conditions change, the likelihood of conflict increases.

Indeed, the often-unstated premise of the conservation easement is that the conservation values it enshrines need protecting *from subsequent landowners.* Indeed, enabling current owners to bind their successors is the reason that using adopting the form of an easement was a useful innovation: it enabled binding subsequent landowners to the original vision by taking away from them the sticks in the bundle that the landowner-donor does not want them to have the option to exercise. There is, of course, a significant difference in how that vision will be expressed by a recalcitrant future landowner, particularly if surrounding land uses change in ways that would make varying or ending the easement more valuable. Conservation easements have a significant weakness in accomplishing the goals of the donor and the easement holder, as they constrain the landowner only on a few of the many margins of decision making, even with a well-drafted easement. Because there are multiple margins on which landowners will have relatively unconstrained decision-making authority that are likely to affect those values, conservation easements primarily offer easement holders a hammer that is potentially expensive to use.

The jurisdictions that have successful international financial centers (IFCs) have developed the means for their customers to make credible commitments over long periods of time.[89] Such commitments are necessary when a family wishes to create a structure to govern multiple generations of wealth management, firms plan a joint venture, or investors commit to fund a business. The essence of such long-term relationships – whether among business partners or family members – is that they will involve future actions whose contours cannot be specified today. This problem is similar to the problems faced by donors and easement holders in seeking to enshrine conservation values in future land management decisions.

IFCs specialize in areas of law that serve their clients, using statutes, regulations, and case law to address comprehensively the legal issues in trust law, business entities law, and related areas.[90] They effectively "export" the rule of law in the global "law market," luring those

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[88] Dianne A. Stroman & Urs P. Kreuter, *Perptual conservation easements and landowners: Evaluating easement knowledge, satisfaction and partner organization relationships,* 146 J. ENVIRONMENTAL MANAG. 284, 289 (2014).
[89] Andrew P. Morriss & Charlotte Ku, *Ensuring Credible Commitments,* IFC REVIEW (May 5, 2022) available at https://www.ifcreview.com/articles/2022/may/ensuring-credible-commitments/.
[90] Andrew P. Morriss & Charlotte Ku, *IFCs: Pioneers in Transmission of Legal Innovation,* IFC REVIEW (Jan. 14, 2021) available at https://www.ifcreview.com/articles/2021/january/ifcs-pioneers-in-transmission-of-legal-innovation/.

seeking to make such commitments to use their legal systems. The IFC benefits as users pay fees to the government, hire local professionals to design and implement structures, and, often, spend time in the jurisdiction for meetings and leisure.[91]

To succeed in this market, IFCs must offer "better" law than their competitors. In general, this means providing predictable and widely accepted law.[92] Further, a family putting its assets into a trust or investors organizing a business want to know their goals are compatible with the legal rules of the jurisdiction where they are operating.[93] Most successful IFCs are built on a foundation of English companies and trust law (and, more generally, English common law).[94] They add value to this common base by providing law that is better organized, clearer, and easier for lawyers to understand.[95] Jersey, for example, created a statutory trust law in 1984 and has regularly amended it since, enshrining key principles of English case law (with some modifications that Jersey experts think provide a competitive advantage) in a clear, well-drafted statute.[96] The quality of drafting of IFC statutes is high, much higher than in larger jurisdictions because IFCs regularly engage highly qualified counsel (often British) to draft or advise on statutes and use a collaborative process that engages the community.[97] In many respects, the collaborative process is similar to that followed by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which drafted the UCEA, although it is much faster than the NCCUSL's process.[98] These laws are regularly updated through the similarly collaborative process (far more frequently than uniform laws are updated.[99]

One example of how IFCs make their law more competitive is particularly relevant to the problems conservation easement holders and landowners sometimes encounter. From 1974 until 2013, English trust law contained a rule known as "the rule in *Hastings Bass*."[100] This rule permitted a judge to undo a trustee decision (including doing so many years after the decision) if the trustee had failed to consider something he ought to have considered or considered something he ought not to have considered and, importantly, no third parties would be disadvantaged by the relief.[101] For example, in *Green v. Cobham*, a trustee made a staggeringly expensive mistake with

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[91] Andrew P. Morriss & Charlotte Ku, *The Evolution of Offshore: From Tax Havens to IFCs,* IFC REVIEW 7 (2020)
[92] Morriss & Ku, *Pioneers*, *supra* note 90.
[93] Morriss & Ku, *Pioneers*, *supra* note 90.
[94] The major exceptions (Liberia, Liechtenstein, and Panama) either rely on a well-developed and stable body of law (Liechtenstein, which first passed its comprehensive business entities law in the 1920s) or adapted Delaware corporate law (Liberia and Panama). *See* Morriss & Ku, *Pioneers*, *supra* note 90.
[95] Morriss & Ku, *Pioneers*, *supra* note 90.
[96] Morriss & Ku, *Pioneers*, *supra* note 90.
[97] Morriss & Ku, *Pioneers*, *supra* note 90; Charlotte Ku & Andrew P. Morriss, *International Financial Centers as a Model: Facilitating Growth & Development by Connecting to International Legal Frameworks,* 14 LAW & DEV. 429 (2021).
[98] *See* K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 774-775(2013).
[99] Andrew P. Morriss, *International Financial Centers & the Law Market* (in progress manuscript on file with author).
[100] Hastings-Bass (Deceased), Re [1975] Ch. 25 (CA (Civ. Div.)); [1974] STC 211 (the case cited as the source of the rule); Pitt v. Holt; sub. nom. Futter v. Futter [2011] EWCA Civ 197; [2011] S.T.C. 809. The history of the rule is summarized in Morriss, *Law Market*, *supra* note 99.
[101] The classic statement of the English version of the rule was set out by Lloyd JJ in *Sieff v Fox:* "When trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court

respect to the what even the court conceded were quite complex rules governing whether or not an attorney who had retired from the practice of law serving as a trustee counted toward a trust becoming tax resident in the United Kingdom, resulting in £37 million in capital gains becoming taxable there.[102] The trustees successfully sought relief under *Hastings Bass* on the entirely plausible grounds that they would never have knowingly made such an expensive error and the transaction that subjected the trusts to the capital gains tax (a distribution) was voided.

In 2010, the UK revenue authority ("HMRC") intervened in two *Hastings-Bass* cases, seeking to persuade the courts to effectively overrule the earlier decision.[103] (Somewhat mysteriously, HMRC had previously declined virtually all of the opportunities it was given to appear in tax-related *Hastings-Bass* cases.)[104] It successfully did so, persuading both the Court of Appeal (2011) and the UK Supreme Court (2013) to eviscerate the rule.[105] Correctly anticipating the demise of the rule in England, the Jersey Trusts Law Working Group (a group of lawyers and other trust professionals together with representatives of the Jersey government) began work on a statute that would enshrine a refined version of the rule in Jersey law before the UK Supreme Court decision. In a remarkably short time, the statute was drafted (with the assistance of a "leading English barrister"), passed by the Jersey legislature, and received the Royal Assent.[106] Several other IFCs with British connections have since passed similar legislation, including Bermuda[107] and the Cayman Islands.[108]

Preserving the *Hastings-Bass* avenue of relief is valuable to trust beneficiaries. By their nature, trusts seek to solve the problem of addressing future unknown issues by delegating discretionary power to a trusted third party to make those decisions, as guided by the trust documents, letters of wishes, and other materials drafted to explain the settlor's intent.[109] Trust law imposes fiduciary obligations on trustees, which primarily address the potential for the

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will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account." [2005] EWHC 1312 (Ch).

[102] [2002] STC 820. For the curious, the answer is that such a trustee counts toward tax-residency in evaluating whether a majority of the trustees of the trusts involved are tax resident in the UK, although an attorney in active practice who serves as a trustee in his or her capacity as an attorney does not. In *Green* a trustee retired and a clever HMRC official apparently spotted the change.

[103] For complicated reasons not relevant here, completely overruling an earlier judgment is quite unusual in Britain. Although having been regularly invited to offer its views on the rule in earlier cases, HMRC had rarely done so.

[104] The tax authority was responsible for the *Hastings-Bass* rule in the first instance, having argued in *Re Hastings-Bass (deceased)* that the court possessed the power in question and urging it to use it to change a trust in a way that would raise the estate's tax bill! The court declined to exercise the power but agreed with the revenue authorities that it had the power.

[105] Pitt v. Holt [2011] EWCA Civ 197; Futter v Commissioners [2013] UKSC 26. *See generally* Robert Pearce, *Revisiting Trustees' Decisions: Is* Pitt v Holt *the Final Word on the Rule in* Hastings-Bass?, 26 DENNING L.J. 170 (2014).

[106] States of Jersey, Hansard 7.1 (16 July 2013) available at https://statesassembly.gov.je/Pages/Hansard.aspx?docid=CCAEA6AF-D9CD-4FB9-A8E5-6150C2C47C6C&qtf=Hastings-bass (barrister); Morriss, *Law Market, supra* note _.

[107] Trustee Amendment Act 2014.

[108] Cayman Islands Trust Law sec. 64A (2020).

[109] *The Letter of Wishes: The Tale Your Trust Document Does Not Tell,* MurthaCullina (Jan. 2015) available at https://www.murthalaw.com/files/letter_of_wishes_te_1_2015.pdf.

trustee to make off with the trust property or engage in various forms of malfeasance.[110] However, even in the case of gross violations of these duties, beneficiaries face relatively high hurdles in seeking relief. *Hastings-Bass* addresses a different problem from bad behavior by a trustee: where a trustee's decisions fail to consider something the trustee should have or consider something the trustee should not have, the beneficiary has a remedy. For example, where trustee reliance on erroneous professional advice leads to bad decisions, *Hastings-Bass* allows the beneficiary to ask a court to allow it to avoid the harmful results of those decisions.[111] As an additional benefit, the statutory versions of the rule incentivize trustees to document the reasons they made decisions, to establish a basis for its application should the basis prove incorrect.[112]

Jersey's enshrining of the *Hastings-Bass* principle in its statutory trust law is an example of how IFCs compete in the law market.[113] Jersey determined that having a *Hastings-Bass* rule would increase its competitiveness in that market and was able, in a relatively short time, to commit to maintaining the rule as England was abandoning it. Someone considering establishing a trust in England or Jersey might therefore prefer the latter because of the backstop it offers to trustee decisions, or, at least, that is the hope in Jersey.[114] I argue elsewhere that Jersey is better equipped to apply a *Hastings-Bass*-type rule because its dependence on trust business will make its trust professionals, legal profession, and judiciary more capable in applying the rule than their equivalents in England.[115] This is not because English judges' knowledge of trust law is inferior to Jersey's judiciary's (indeed, the judges who authored the judgments in the appellate litigation in *Pitt* and *Futter* were acknowledged trust and tax law experts prior to their elevation to the bench) but because Jersey's judiciary is part of a legal community that understands the importance to the jurisdiction of its reputation for careful application of trust rules while the English judiciary is not.[116]

The Rule in *Hastings-Bass* an example of how legal rules can address the problems created by the imperfect knowledge of those creating long-lived or perpetual interests. It is also an example of the type of rule that conservation easements need: an equitable doctrine that allows, subject to judicial oversight and with the caveat that third parties' expectations be protected, the correction of exactly the type of problems long-lived property interests are likely to encounter. When climate or other factors change circumstances, so the original conservation purpose is no longer served by a conservation easement, or changes to the conservation easement's terms would bring it closer to the purpose, and the parties did not consider such changes, a "environmental Rule in *Hastings-Bass*" would enable adaptation to the new circumstances.

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[110] *See* Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 Quinnipiac Prob. L. J. 261 (2015-16).

[111] *See, e.g., Sieff, supra.* Since the bad advice was given to the trustee, the beneficiary would have no remedy against the provider of the advice (e.g., a lawyer). Since the trustee sought advice, it would be unlikely that the beneficiary would have a fiduciary claim against the trustee. Critics of the rule referred to this as providing "Doctor Equity … a magical morning-after pill" to give "to trustees suffering from post-transaction remorse." Lord Neuberger of Abbotsbury, *Aspects of the Law of Mistake: Re Hastings-Bass,* 15(4) Trusts & Trustees 189, 192 (2009).

[112] *Hastings Bass principle considered in depth,* 11 TRUSTS & TRUSTEES 36, 37 (Oct. 2005).

[113] Morriss, *Law Market, supra* note 99.

[114] Morriss, *Law Market, supra* note 99.

[115] Morriss, *Law Market, supra* note 99.

[116] Morriss, *Law Market, supra* note 99.

For IFC judges, lawyers, and other professionals, the 'shadow of the future' is a powerful influence on their behavior, much more so than in larger jurisdictions. This idea, described by Robert Axelrod in his classic *The Evolution of Cooperation*, captures the idea that where future gains from cooperation are more likely, sustaining cooperation is also more likely.[117] Because their economies are dependent on continuing to attract business, IFCs feel the shadow of the future intensely.[118] It incentivizes IFCs to make a credible commitment to preserve their overall legal framework for trusts, companies and other entities, and transactions.[119] Those considering locating a transaction or entity in an IFC care quite a bit that the jurisdiction does not change the legal principles it announced. When they have confidence the IFC will not defect from the legal bargain, they can to craft solutions to anticipated problems.

When we consider problems that the parties to a transaction did not anticipate, IFCs provide the parties with commitment to a general legal framework. For example, the settlor of a trust in an IFC can reasonably that any unanticipated problem will be addressed using a framework well-tested, clear principles of trust law. Should the matter reach an IFC court, it will be handled by an experienced judge familiar with complex trust matters and able to resolve areas of disagreement by applying to those principles. The jurisdiction's commitment to its trust law framework and to having a judiciary with the required legal skills and commitment to upholding the integrity of its trust law provides the confidence on which the IFC's trust business relies. The small size of most IFCs is an important part of how they can make these commitments. Not only do they regularly update their statutes more frequently than larger jurisdictions do but they do so through a collaborative process with the relevant professional communities.[120]

IFCs have solved the commitment problem through a process for handling changed circumstances and unknown future conditions that involves both institutions and rules. Their incentives are aligned to maintain the proper balance by the competition among jurisdictions to secure the business that developing the right mix of institutions and rules attracts. The question then is how to replicate those conditions for conservation purposes.

6. Possible Solutions

There are (at least) three ways in which the weaknesses of conservation easements might be addressed. First, and least likely, landowner-donors and easement holders might switch to using something like fee ownership by an entity on whose governing body they both have veto rights. Assuming the IRS could be persuaded to allow transfers of land to such entities to qualify for tax deductions at least in the same range as conservation easements receive, such entities would allow more flexibility in deciding how to best apply the resources to the conservation purposes at hand. They would be far from perfect – it is easy to imagine deadlocks on the governing body developing, although clever drafting and the experience of transactional lawyers with devising tie breakers for close corporations and other entities might mean that true deadlocks emerge less often than feared. As noted above, however, I suspect that such a radical

[117] Robert Axelrod, THE EVOLUTION OF COOPERATION 126-132 (1984).
[118] Morriss & Ku, *Credible Commitments*, *supra* note 89.
[119] Morriss & Ku, *Credible Commitments*, *supra* note 89. *See also* Tony Freyer & Andrew P. Morriss, *Creating Cayman as an Offshore Financial Center: Structure & Strategy since 1960*, 45 ARIZ. ST. L. J. 1297 (2013).
[120] Morriss & Ku, *Credible Commitments*, *supra* note 89.

change – even if embraced by forward-looking land trusts – would simply be too strange to win much acceptance among the donor community. Lawyers who create trusts for business interests in IFCs have told me that persuading the settlors to agree to turn property over to a trustee is a major challenge; this would be a major obstacle here as well. Foundations might help solve this as one of the attractions of the private foundation is the greater opportunities it allows for founders to participate in ongoing governance after turning over the assets and its adoption by common law jurisdictions is in part motivated by the hope that it will attract clients from civil law jurisdictions who find the idea of a trust to strange to accept.[121]

Second, the federal government could create a law market for conservation easement holders by enacting a statute like the Liability Risk Retention Act (LRRA).[122] That statute provides that a "risk retention group" (RRG) (an insurer providing only liability insurance for its members) licensed by any U.S. state may do business in any other U.S. state.[123] In effect, the LRRA creates a "lead state regulator" model. Uniquely, it does so without creating a federal presence in insurance regulation. As a result, vigorous competition has produced several able competitors in the business of regulating these entities, including Vermont and the District of Columbia.[124] Competitive forces prevent these jurisdictions from engaging in a race-to-the-bottom, both because the insureds are uninterested in organizing fraudulent coverage for themselves and because the jurisdictions worry about their reputations. Competitive forces also push these jurisdictions to regulate RRGs *better*. RRG regulations thus do not include the sort of price and policy-language filing requirements states require of direct-to-consumer insurers and allow the RRGs much greater flexibility in designing coverage, investment decisions, etc. than they do conventional insurers.[125] With almost forty years' experience and hundreds of RRGs with thousands of members in operation, the LRRA is a success.[126] Of course, some of the states where, say, Vermont-licensed RRGs then operate dislike this because they are preempted from regulating those RRGs' activities (California, for example, appears to intensely dislike RRGs.)[127] The lesson provided by the LRRA is that the lead state regulator model can work. A law market in which conservation easement interpretation shifts to courts in a jurisdiction with a vested interest in making the conservation easement business work well would be an improvement over scattering it among fifty states.

Consider how it may work in practice. A Vermont land trust can already hold conservation easements in any state. And landowner-donors are free to give an easement on property in virtually any state to a land trust or other entity elsewhere.[128] Unlike insurance, there is no need to preempt states from imposing barriers to entry. However, if a state where the land is not located is to be the governing authority, then we need clearer guidance for the state's judiciary on how to provide the right balance of flexibility in implementation together with

[121] Morriss, *Importing Private Foundations*, *supra* note 11.
[122] 145 U.S.C. 65.
[123] *See* Andrew P. Morriss, *Non-territorial Special Jurisdictions in the U.S. Insurance Market*, 3(1) J. SPEC. JURIS. 59, 77-85 (2022) available at http://ojs.instituteforcompgov.org/index.php/jsj/article/view/44. It also authorizes "purchasing groups" by preempting state fictitious name legislation, with similar effect. Id. at 72-77.
[124] Morriss, *Non-territorial*, *supra* note 123, at 82.
[125] Morriss, *Non-territorial*, *supra* note 123, at 91.
[126] Morriss, *Non-territorial*, *supra* note 123, at 92.
[127] Morriss, *Non-territorial*, *supra* note 123, at 79.
[128] North Dakota's limits on the duration of conservation (and all) easements have to be taken into account here.

rigidity in sticking to the conservation purpose behind the original conservation easement creation.

If there is to be flexible regulation of easement holders' agreement to changes at a much greater level than we have today, we need the regulatory expertise that comes from the combination of competition for business and the specialization in serving particular industry segments. It is easy to imagine, for example, Vermont developing a reputation for being a good place to locate the legal entity to hold forest land conservation easements, Montana for range land, Florida for wetlands, and so forth. As states developed market niches, they would also develop expertise in their attorneys general offices (or elsewhere) in overseeing conservation easement transactions. Adding a backstop of federal preemption of local efforts to force conservation easements to be held in the same state where the land is located would prevent local efforts to interfere.

There are several ways to push states to provide the necessary guidance. One would be for Congress to create a safe harbor for tax deductibility for easements created under a state's law that provides the right balance. Alternatively, the IRS could adopt a regulation stepping back from its current rigid insistence on "forever or nothing" and fleshing out standards for amendments and termination that better reflect the need for sensible rules in those areas in the future.[129] Another would be for a body like NCUSL to once again take up the issue and offer a new version of the UCEA, taking into account the additional experience that has accrued since the earlier uniform law was proposed. In many respects (except for speed), NCUSL resembles the collaborative process IFC legal communities use to keep their laws up-to-date.

7. Conclusion

Commitment to conservation purposes was introduced via conservation easements in the wrong way. Dividing ownership *forever* between conservation organizations and landowners within a rigid framework will ultimately serve neither well. If nothing changes, increasing pressure will build up to force change on the conservation easement in an environment where the pressure relief will come on an ad hoc basis through the courts. That is a vastly inferior system of solving the problem to a more deliberative one and risks having what we might term "Barnes Foundation catastrophe." That occurred when a foundation (of the U.S. charitable sort, not the private foundation type) created by Dr. Albert Barnes in 1922 through a trust indenture to hold his extensive and valuable art collection ended up not only eliminating every single one of Barnes' restrictions on how it was to operate but doing exactly the opposite of what he would have wanted to happen to his collection.[130] If conservation easements are going to be made

[129] It would, of course, be better if Congress did this, since it doesn't seem likely that the IRS actually has the authority to develop a comprehensive regulatory scheme on its own. One way to accomplish this would be to amend section 170(h) to provide language authorizing such changes. (As Nancy McLaughlin has persuasively argued, Congress does not appear to have intended to allow such changes based on state laws. McLaughlin, *Extinguishing and Amending*, *supra* note 16, at 247-48. That, however, rarely seems to be a barrier to the IRS doing that in other areas.

[130] The sad story is recounted in Andy & Danielle Mayoras, *The Barnes Art Collection Controversy, Part I*, The Probate Lawyer Blog (Aug. 3, 2010) available at https://www.probatelawyerblog.com/2010/08/the-barnes-art-collection-controversy.html and Andy & Danielle Mayoras, *The Barnes Art Collection Controversy, Part II*, The Probate Lawyer Blog (Aug. 9, 2010) available at https://www.probatelawyerblog.com/2010/08/the-barnes-art-

adaptable enough to work in a changing society and climate, they need more flexibility.[131] Without an institutional mechanism to enable commitment to a conservation purpose in the long run, however, they risk being unable to adapt.

Changing conservation easements is difficult because their current characteristics are embedded in state statutes and IRS regulations and administrative practice. This makes change hard because, as Hayek and Leoni both warned, using statutes drafted by human beings lacking omniscience is riskier than relying on the common law's evolutionary process.[132] Securing the ability to conserve private land – and gaining the ability to fund doing so through tax deductions – undoubtedly seemed worth the risks, to the extent that such risks were recognized. (I have found no evidence that they were.)

As Korngold, et al., conclude, "Because easement alteration is a reality, one would hope that there could be a serious, policy-based dialogue about substantive and procedural rules for amendments that could lead to direction from decision makers."[133] Assembling a coalition in support of making conservation easements more adaptable, or authorizing one or more of the alternative approaches set out in this article, will be difficult. Increasing recognition among conservation groups of the problems a lack of adaptability causes, and the pressures of climate change, may be sufficient to get conversations about increasing adaptability past the academic stage. Looking to IFCs like Guernsey, which is developing expertise in other areas around environmental issues, and states that have succeeded in other areas of regulatory competition such as Vermont, are a good place to start.

collection-part-ii.html. It is also recounted in the documentary *The Art of the Steal* available at https://watchdocumentaries.com/the-art-of-the-steal/ . As Roger Ebert concluded in his review of the documentary,

> It is perfectly clear exactly what Barnes specified in his will. It was drawn up by the best legal minds. It is clear that what happened to his collection was against his wishes. It is clear that the city fathers acted in obviation of those wishes, and were upheld in a court of appeals. What is finally clear: It doesn't matter a damn what your will says if you have $25 billion, and politicians and the establishment want it.

Roger Ebert, *Philadelphia lawyers are good, but the politicians are better*, RogerEbert.com (March 10, 2010) available at https://www.rogerebert.com/reviews/the-art-of-the-steal-2010

[131] Korngold, *Intergenerational*, *supra* note 7, at 1531 ("Perhaps the greatest gift we can give as citizens and parents to the next generations is the power and flexibility to adapt the world we have created for them, and to make course corrections to meet ever-changing needs.").

[132] Hayek, *supra* note 9, at 85-86; Leoni, *supra* note 9, at 178-79.

[133] Korngold, et al., *supra* note 1, at 35.