
JAMES L. OLMSTED*

Representing Nonconcurrent Generations: The Problem of Now

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* Jim Olmsted is a graduate of the University of California at Davis School of Law. He is licensed to practice law in California, Nevada, Oregon, and Washington. He is the founder and owner of Conservation and Preservation Counsel, a Eugene, Oregon, based law firm that specializes in representing land trusts and landowners in land conservation acquisitions across the country.

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This Article is a rebuttal to a position of property law staked out by Professor Julia D. Mahoney. Professor Mahoney's theories regarding property law, enunciated in multiple publications and presentations, are well researched, well thought out, and highly nuanced.¹ This Article is concerned with but one portion of her previous work: the position that conservation easements should not be allowed to remain in effect in perpetuity. Instead, she proposes they should be time-limited or perhaps not created in the first instance. Like Professor Mahoney's other work, the reasoning behind this position is well fleshed out. However, Professor Mahoney's position regarding perpetuity in conservation easements may result in undermining current land conservation practices and thereby diminishing the natural endowments to which future generations are the rightful beneficiaries.

In terms of format, this Article first provides a brief discussion of the historical and philosophical antecedents of real property law in the United States. The Article next provides an historical and legal analysis explaining how conservation easements fit within the current real property regime in the United States.

¹ See, e.g., Julia D. Mahoney, Point, *Land Preservation and Institutional Design*, 23 J. ENVTL. L. & LITIG. 433 (2008), [hereinafter Mahoney, Point]; Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573 (2004); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002) [hereinafter Mahoney, *Perpetual Restrictions*]. But see Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 620 (2004) (following Julia Mahoney's article in the same volume with a temperate rebuttal but nevertheless concluding that "[r]eform is warranted, but that reform should reflect the important role that 'perpetuity' has long played and should play in all forms of intergenerational conservancies"). For an invaluable series of arguments rebutting the position of Professor Mahoney as well as a survey of writings addressing the perpetuity issue in conservation easements, see Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 289 (2007) ("The perpetual nature of conservation easements is a principal reason for their popularity. The idea of permanency appeals to people.").

Having thus laid this contextual groundwork, the Article expounds upon the merits of perpetual conservation easements. The final parts of the Article are in rebuttal to challenges to this Article in Professor Mahoney's article, *Land Preservation and Institutional Design*.²

I A BRIEF HISTORY OF PROPERTY LAW

Conservation easements,³ as compared to environmental and land use laws, represent a widespread and increasingly popular means of protecting and preserving undeveloped, natural, and scenic land. Unlike environmental and land use laws, land trusts use conservation easements to accomplish land preservation by operating in the private sector where they use market forces to acquire conservation easements on private land. Once acquired, a conservation easement typically prohibits all development and improvement of the eased land in perpetuity. Land trusts utilize market forces in roughly two ways: they either buy conservation easements, typically based upon a real property appraisal, or they accept the easements as charitable gifts for which donating landowners may take a federal, and sometimes also a state, income tax deduction.⁴

Conservation easements today are in many ways governed by state real property laws. Accordingly, a brief historical and philosophical background of the real property law regime we now live under in the United States, albeit greatly condensed and simplified, should prove helpful in tracing the origins of conservation easement law. The following is this author's attempt at simplifying almost one thousand years of property law within a few paragraphs. In attempting this endeavor, the author refers his reader to the remarkable and erudite book

² Mahoney, Point, *supra* note 1.

³ As will be explained in much more detail to follow, conservation easements are an interest in land. In the typical conservation scenario, a landowner will sell or donate a conservation easement on his or her property. The landowner will retain ownership of the property; however, certain uses on the property may be prohibited or required pursuant to the easement. By far the most common use of a conservation easement is to prohibit development on the eased land.

⁴ Land trusts also preserve land by purchasing fee title to conservation-quality land.

from which this summary is constructed, namely, *The Land We Share* by author Eric T. Freyfogle.⁵

A. Early Views of Land as Property

The nature of land ownership has been in flux for as long as there have been humans attempting to coexist within a fixed area of land. The earliest form of land ownership of which most people are aware is feudalism. When, in 1066, William the Conqueror crossed the English Channel to conquer England, he brought with him the seeds of feudalism, which soon took hold.⁶ To peasants working the land in the thirteenth century, the concept of private property as we now know it would have been completely alien. While peasants may have held the right to work certain portions of a lord's land, the peasant landholder lacked the legal ability to sell the land.⁷

As feudalism gave way to new and evolving forms of land ownership, the meaning, nature, and source of private land ownership became not only a practical matter of great importance but also the subject of philosophical inquiry. In the seventeenth century, King Charles II of England aggressively attempted to control all land as a matter of the royal right of kings.⁸ English philosopher John Locke countered such claims by using a “state-of-nature” argument to demonstrate that “private property arose independently of any law or government action.”⁹ According to Locke, private property was a right of individuals, with government as its prime protector—but not its

⁵ ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD (2003); see also SEAN COYLE & KAREN MORROW, THE PHILOSOPHICAL FOUNDATIONS OF ENVIRONMENTAL LAW: PROPERTY, RIGHTS AND NATURE (2004); KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY WITH ORIGINAL AUTHORITIES (Clarendon Press 5th ed. 1897) (1875). For law review articles weaving together the historical and philosophical antecedents of modern property law, see Andrew P. Morris & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95 (2000); Leigh Raymond & Sally K. Fairfax, *The “Shift to Privatization” in Land Conservation: A Cautionary Essay*, 42 NAT. RESOURCES J. 599 (2002).

⁶ FREYFOGLE, *supra* note 5, at 46–47.

⁷ *Id.* at 47.

⁸ *Id.* at 4.

⁹ *Id.*

creator.¹⁰ While Locke's views had many adherents, both European and among the American colonies, they also raised many challenges. Benjamin Franklin, for example, declared that property was a creature not of God or government but of society.¹¹ Thomas Jefferson's response was a melding of Locke's "natural rights" argument and Franklin's attribution of private property to social convention.¹² It is Jefferson's ideas about private property that seem most current today. It is likely that most of us would agree that private property is an individual right (or bundle of individual rights as taught in law school) that is moderated in various ways by social convention as expressed in real property, land use, and zoning laws.

B. Sic Utere Tuo Ut Alienum Non Laedas

While many so-called "wise-use" adherents and other various and sundry contemporary "property rights" advocates would have us believe that private property rights have held exalted status from colonial days to the present, quite the opposite is true. For example, Jefferson took a dim view of "speculators and land barons who tied up vast tracts of land while other citizens went landless." According to Jefferson, it was government's duty to "break up large landholdings . . . [to] take every chance to make land freely available."¹³ Thus, to the degree that land trusts make otherwise private property available to the public (which can be done in many ways), it might be accurate to describe land trusts acquiring conservation easements that allow public access on private land as taking a Jeffersonian approach to land ownership. Nevertheless, a property regime in America that would freely allow the creation of conservation easements was far in the future.

In America's early days, "under the Constitution, private property was constrained less by moral concerns and natural rights reasoning" than by collectively held legal powers as

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 4–5 ("Jefferson spoke often of property as a vital individual right, even as he revised Locke's phrase 'life, liberty, and property' to his now-familiar 'life, liberty, and the pursuit of happiness.'").

¹³ *Id.*

manifested in legislatures and courts.¹⁴ As noted by Eric T. Freyfogle, “jurists of all persuasions” held that landowners were fundamentally constrained by “the doctrine *sic utere tuo ut alienum non laedas*, or ‘use your own so as not to injure others.’”¹⁵ These ideas existed with continuing force even as late as 1879, when Henry George, author of *Progress and Poverty*, argued that when a growing community causes the value of vacant land to increase, it should be the public, not the landowner that profits “from a bounty that nature alone provided.”¹⁶

C. The Effect of Industrialism on American Land Use

Beginning roughly around the turn of the nineteenth century, the rise of American industrialism was creating a new landscape of property law and ownership. As increasing numbers of people, and more importantly increasing numbers of industrialists, jostled for exclusive rights to various natural resources—for example, the power from river flows—a new form of ownership began to take shape. Through a series of court cases, traditional forms of land ownership to which *sic utere tuo ut alienum non laedas* applied gave way to a new and more absolute form of ownership. Under this new order, “[s]o long as a landowner avoided negligence and malice,” they could do as they wished with their property, regardless of the disruption or harm to their neighbors.¹⁷ By the late nineteenth century, the paradigm of private land ownership familiar today had begun to emerge.¹⁸ This paradigm can be simplified into two distinct trends. The first was the increasing willingness of courts to side with landowners in protecting landowners’ rights, including the rights to pollute or otherwise cause harm to other properties. The second was the emerging role of legislatures in regulating land uses.¹⁹ The changes in land use laws during the Industrial Revolution rapidly turned America into a country with fragmented public and private land, with much of the

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 5–6.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 72.

¹⁸ See *id.* at 80.

¹⁹ See *id.* at 81–82.

increasingly large tracts of land gobbled up by railroad and timber companies. These changes also allowed the pollution of air, water, atmosphere, and, all too often, the property of one's neighbor.²⁰

II THE RIGHT TO PRESERVE LAND

A. Why Land Is Important

Out of a fear of pretentiousness, other than quoting a few turns of phrase, this Article will dispense with an explanation of why land is important. This task is done so much better by Henry David Thoreau, John Muir, Aldo Leopold, Wendell Berry, Wallace Stegner, and other giants in the genre of nature writing.²¹

Instead, I leave for myself the task of merely pointing out how our love of the land is manifested in our daily language. All of us have a *birthplace*. As we grow up, most of us do so in a *neighborhood* in our *hometown*. Even many of our hometowns themselves are named after natural features, such as the towns of Mount Hood in Oregon and Mount Shasta in California. Our hometowns likely exist in a region, the *Great Pacific Northwest* or *Cascadia* for example. All of these places of importance exist in our *homeland*, the protection of which most of us would fight for. Most of us also have a sense of our own time and place and how we fit within them. Land is so much a part of us that we

²⁰ For an outstanding anthology on the philosophy and history of modern American property rights, see PRIVATE PROPERTY IN THE 21ST CENTURY: THE FUTURE OF AN AMERICAN IDEAL (Harvey M. Jacobs ed., 2004).

²¹ For a sophisticated and nuanced examination of nature writing in America, see WALTER BRUEGEMANN, THE LAND: PLACE AS GIFT, PROMISE, AND CHALLENGE IN BIBLICAL FAITH (Walter Brueggemann & John R. Donahue eds., 2d ed. 2002); DON SCHEESE, NATURE WRITING (Ronald Gottesman ed., 1996). For the most recent scholarly anthology of environmental writing, see the remarkable work edited by environmental guru and writer Bill McKibben, AMERICAN EARTH: ENVIRONMENTAL WRITING SINCE THOREAU (Bill McKibben ed., 2008). For insights on nature writing, see WHAT'S NATURE WORTH? NARRATIVE EXPRESSIONS OF ENVIRONMENTAL VALUES (Terre Satterfield & Scott Slovic eds., 2004). For a systematic list of arguments in favor of wilderness, see Michael P. Nelson, *An Amalgamation of Wilderness Preservation Arguments, in Environmental Ethics 413* (Andrew Light & Holmes Rolston III eds., 2003) (noting many categories of pro-wilderness arguments that support the use of perpetual conservation easements to protect the unique and irreplaceable natural areas they describe).

speak of ourselves in terms of whether we are northerners or southerners, flatlanders or mountain dwellers. For most of us, we live either on the West Coast or the East Coast or in the heartland that lies between them. Having heard any one of these appellations applied to someone we have just met instantly begins to adjust our feelings toward that person. Land is where our hearts live. It is unique and never fungible. It defines our lifestyles, resulting in many of us attempting to wrest away its control by government and to develop the land ever more to our liking. Land is more than where we live; it is part of who we are.

B. Easements at Common Law

One topic not yet fully addressed in this brief history of property law is the main topic of this Article, namely, the perpetual conservation easement. The reason for the deferred discussion of this legal land preservation tool is to provide a chronological context as conservation easements did not exist in early English common law; only recently in the history of American real property law have conservation easements received broad acceptance. Going back to English common law, conservation easements were disfavored for a number of reasons. A key factor in the disfavor of conservation easements was that they were *easements in gross*. As such, they could theoretically be held by a particular person or entity. Thus, while the burdens may have run with the land, the benefits held in gross did not. That an easement could be held by a person or entity was at odds with traditional *appurtenant easements*, which were commonly accepted. Under the law of appurtenant easements, the burden on one parcel ran with the land to create a benefit to another parcel that also ran with the land rather than to any particular individual or entity as with easements in gross.²² Another factor in the disfavor of conservation easements at common law was that they operated like negative servitudes in that they prohibited many activities on a burdened parcel, including, most notably, a prohibition of development or

²² Holly Piehler Rockwell, Annotation, *Easement, Servitude, or Covenant as Affected by Sale for Taxes*, 7 A.L.R.5th 187, § 10(b) (1992). For example, the owner of Parcel A may grant the owner of Parcel B an easement to cross Parcel A; the easement over Parcel A is thus *appurtenant* to Parcel B. In other words, each new owner of the burdened land must abide by the appurtenant easement until it is neutralized in one way or another.

improvement of the land. The legal bias against negative servitudes created another barrier to modern conservation easements as we know them today.

Two other problems with conservation easements at common law were that they possibly violated both the rule against perpetuities and were unlawful restraints on alienation. It is somewhat difficult to see how these negative features operated. Perhaps it was because conservation easements almost always have a successor in interest if the original land trust ceases to exist. As the rule against perpetuities requires the vesting of an interest in property within a life-in-being plus twenty-one years, perhaps it was having a successor easement holder for which there was no way of knowing if and when the easement might vest in the successor holder that triggered the rule. It is easier to see how a conservation easement might be considered a restraint on alienation. Since there would be few buyers for land on which all development rights were neutralized in perpetuity, this was perhaps sufficient to constitute a restraint on alienation.

How then did this disfavored and rarely used legal instrument for the protection of land become what is believed by many today to be the single most important natural resource protection available?

C. Uniform Conservation Easement Act

The year 1981 was a banner year for conservation easements. It was in July and August of 1981 that the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all states the UCEA.²³ As explained in the Commissioners' Prefatory Note:

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the

²³ UNIF. CONSERVATION EASEMENT ACT, Prefatory Note, 12 U.L.A. 165-69 (1981).

restrictions or affirmative duties are binding upon the successors and assigns of the original parties.²⁴

In visionary fashion, the commissioners further explained:²⁵

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. If it is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.²⁶

By removing the impediments of the common law, the Commissioners made possible the privatization of zoning and land use laws by land trusts protecting land through perpetual conservation easements and outright purchase.²⁷ The fact that the UCEA has since been enacted in almost every state in the United States is certainly a ringing endorsement.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Roger E. Meiners & Dominic P. Parker, *Legal and Economic Issues in Private Land Conservation*, 44 NAT. RESOURCES J. 353, 357 (2004) ("Land trusts have emerged as the dominant institution for preserving and enhancing environmental amenities on private land."); see also Konrad Liegel & Gene Duvernoy, *Land Trusts: Shaping the Landscape of Our Nation*, 17 NAT. RESOURCES & ENV'T 95 (2002).

The untapped potential of land trusts to strategically shape the national landscape, and the increasing ability of land trusts to rise to this challenge, means that legal practitioners working on open space and growth management issues must better understand the role of land trusts in addressing and resolving growth management issues.

Id.; see also Raymond & Fairfax, *supra* note 5; Ray Ring, *Congress Looks to Reform a System with No Steering Wheel*, HIGH COUNTRY NEWS, May 30, 2005, at 8, 11 ("[Conservation] [e]asements, which often protect a hodgepodge geography, are also taking the place of more orderly, large-scale land-use planning, says John Echeverria, director of the Georgetown Environmental Law and Policy Institute in Washington, D.C.").

One other form of privatization of the land use planning process is the use of transfer fees to generate capital for land protection and preservation efforts. Such transfer fees are imposed by a real estate developer and represent a small percentage of the per unit retail value of the property. While individual transfer fees may be relatively insignificant to the land purchaser, when added together they can represent substantial amounts of money, which developers donate to land trusts and other charitable organizations to be used in major fee title and conservation easement acquisitions. The similarity of privately imposed transfer fees to property or sales taxes is obvious.²⁸

The next impetus to the use of conservation easements came in the 1970s, when the federal government recognized the value of perpetual protection of land and enacted tax incentives to increase the rate of land being protected. These tax laws came in the form of § 170(h) of the Internal Revenue Code and in various Treasury regulations.²⁹ In a nutshell, these laws provided federal tax deductions for a donor of a perpetual conservation easement to a land trust or other organization meeting statutory requirements. Later changes to the tax code provided reductions in inheritance tax for land on which perpetual conservation easements had been placed. The net result of these tax incentives was a dramatic increase in the use of the conservation easement as a tool for land and ecosystem protection to a degree Professor Mahoney describes as “seismic.”³⁰

²⁸ For the California State Legislature’s ambivalent response to the budding practice of including transfer fee covenants in California subdivisions, see CAL. CIV. CODE §§ 1098, 1098.5, 1102.6(e) (West 2007 & Supp. 2009). Among other requirements, the primary result of this legislation is to establish notice requirements sufficient to apprise all potential purchasers of real property subject to transfer fees of the existence and effect of the transfer fees.

²⁹ I.R.C. § 170(h) (2006); Treas. Reg. § 1.501(c)-1(d) (as amended in 1990); *see also* C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS (2008); Stephen J. Small, *Proper—and Improper—Deductions for Conservation Easement Donations, Including Developer Donations*, 105 TAX NOTES 217 (2004).

³⁰ Mahoney, *Point, supra* note 1, at 438.

D. The Need for Conservation Easements

It is beyond debate that our environmental laws have been weakened at every level.³¹ While it is outside the scope of this Article to describe all the ways this has been done, the following brief summary may be helpful. The first level of attack was weakening environmental statutes by amendment. The second level of attack was to push agencies to weaken their regulations and their enforcement of whatever regulatory authority remains. The third level of attack meshed with the second, namely, to underfund agencies, to fire their best people, and to restock them with incompetents or regime loyalists. All of this has occurred in the current executive regime, and it has spread from there to permeate all branches and all levels of government.³²

It is important to understand that there is no hyperbole here regarding the impotence of today's environmental laws in the United States. Things really are as bad as they seem and likely worse. The import of this is that it raises the stakes for land trusts and conservation easements. This conclusion simply cannot be stated strongly enough or in enough different ways. This country and this planet are experiencing a number of interrelated crises including climate change (and all the disastrous results to follow), loss of species and of biodiversity, influxes of invasive species in almost every major ecosystem, and the potential for another ozone hole to appear in our atmosphere. Piece by piece, those who care about this planet

³¹ See Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 VA. ENVTL. L.J. 243 *passim* (2007).

³² Robert F. Kennedy, Jr., Chief Prosecuting Attorney, Hudson Riverkeeper, We Must Take America Back, Keynote Address at the University of Oregon School of Law Public Interest Environmental Law Conference (March 1, 2007), in 22 J. ENVTL. L. & LITIG. 201, 202–03 (2007). The George W. Bush administration has

put polluters in charge of virtually all of the agencies that are supposed to be protecting America from pollution. They appointed a timber-industry lobbyist to oversee the U.S. Forest Service—Mark Rey, who is probably the most rapacious in American history. As head of public lands was mining industry lobbyist Steven Griles, who believes that public lands are unconstitutional. As head of the air division of the EPA was utility lobbyist Jeffrey Holmstead, who has represented nothing but the worst utility air polluters in the country. The head of Superfund was a woman whose last job was teaching corporate polluters how to evade Superfund. The second in command at the EPA was a Monsanto lobbyist.

Id.

must find all the pieces, pick them up, and with conservation easements cobble them all together again. In other words, we need to return to the land ethic of *sic utere tuo ut alienum non laedas*. The most effective means for doing so is the use of conservation easements, and for these conservation easements to work, they must be perpetual.³³

III THE RIGHTS OF NONCONCURRENT GENERATIONS

A. A *One-Sided Conversation*

The problem of now, as used in the title of this Article, relates to our limited ability to communicate with past and future generations. This is not to say that communication is impossible so much as to say that it is one-sided. Certainly, past generations speak to us in an incredible variety of ways. When considered together, these communications form our heritage and our culture. To name all of the ways in which the past speaks to us would be to write the history of all civilizations that preceded our own and include, among other sources for discourse, history, literature, art, architecture, engineering, and too many other historical idioms to mention. To parse out a single overriding message is impossible, but to say that past generations of most cultures would have us preserve the world they lived and loved in is certainly plausible and even provable from the testaments to the glory of nature of the great nature writers of all ages.

We likewise have a similar problem with the future. Again, our conversation is one-sided. However, we are the speakers and future generations are the listeners. Just as the past speaks to us with many voices and through many idioms, so too do we now speak to the future. Sadly, as the ecological abuses of our American, corporate-driven, automotive, and convenience culture begin to catch up with us and with other countries seeking to emulate us, our most unified and powerful

³³ For wide-ranging and persuasive works on the value of perpetual conservation easements in protecting land, see DOUGLAS E. BOOTH, LAND TRUSTS AND BIODIVERSITY (2007); RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA (2003); ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK (2d ed. 2005); PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

communication will not be in any benign cultural idiom. Instead, our primary message to the future will be in the form of uncontrollable climate change and its dire consequences to biodiversity and even the most basic human needs, such as fresh water, clean air, and edible food. In short, the message we are sending to future generations by our actions is that we don't care enough about them to not steal their natural resources, drive their most charismatic and iconic species to extinction, and generally wreck their planet for our own selfish pleasures.

B. Legacies of Concrete, Steel, and Glass

For anyone interested in the debate in this Article, the required background reading should begin with Professor Mahoney's seminal, scholarly, and sustained polemic against perpetual conservation easements found in her article *Perpetual Restrictions on Land and the Problem of the Future*.³⁴ As

³⁴ Compare Mahoney, *Perpetual Restrictions*, *supra* note 1 (providing an outstanding and scholarly history of the development of land preservation tools, particularly conservation easements, in the United States), and 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, 1042 (2007) ("The current legal regime and incentive system of conservation easements, however, simultaneously create a serious risk of binding future generations with outmoded and rigid restrictions on land. Perhaps the greatest risk of conservation easements comes from what many view as their most important attribute—their perpetual nature."), and Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523 (2006) (generally following the scholarship of Professor Julia D. Mahoney), with Carol Necole Brown, *A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 GA. L. REV. 85 (2005) (containing scholarly discussions of the historical and philosophical underpinnings of private property and conservation easements and arguing for giving private parties legal property entitlements to enforce conservation easements), and Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. REV. 883 (2005) (concluding that conservation easements can be drafted as flexible documents that protect land in perpetuity), and Thompson, *supra* note 1, at 607–08 (generally rebutting Professor Mahoney's views on perpetuity, but also noting that Professor Mahoney recognizes "the notion of 'perpetual' land conservation is a bit of a canard"), and Vinson, *supra* note 1 (debunking arguments against perpetual conservation easements and arguing in favor of perpetual conservation easements). It is worth noting that the perpetuity debate has not been limited to academia. For example, the widely distributed publication *Range* magazine devoted nearly its entire Winter 2004 issue to the subject of perpetuity in conservation easements. See Tim Findley, *Forever and Ever, Amen: Land Trusts and the Frightening Thought of Perpetuity*, RANGE, Winter 2004, at 42. For extended and broadly reaching analyses of the strengths

described below, the one-sided nature of our communications to future generations is one of the central themes in Professor Mahoney's work; although, she would resolve the problem in a fashion diametrically opposed to that of this author.

In Professor Mahoney's opinion, current landowners, in conjunction with land trusts and other organizations, mistakenly believe that they have the ability to identify lands worthy of "eternal protection" as well as the moral right or moral obligation to create the legal means, primarily through conservation easements, to protect such lands.³⁵ Accordingly, land trusts "work hard to foment the expectation that, absent highly unusual circumstances, conservation easements will remain in effect in perpetuity."³⁶ At the heart of Professor Mahoney's objection to the blanket use of perpetual conservation easements (as opposed to having varying degrees of duration) is a deep uncertainty and lack of confidence regarding this generation's use of perpetual conservation easements to engage in *de facto* land use planning for the future. In this author's opinion, as we are one of just a few generations which have managed to so pollute our atmosphere with greenhouse gases that we threaten every aspect of the concept of "nature," not to mention our own well-being, such uncertainty and skepticism is absolutely merited. We are in the process of making horrendous decisions in terms of the future of biodiversity and human well-being. While skepticism about the ability of our collective behavior to save our planet and ourselves is fair, it is a non sequitur to extend this skepticism, as Professor Mahoney does, to the conservation professionals who are engaged in preserving conservation-worthy land through conservation easements. As Professor Mahoney has written:

One possible response to conservation easements is to dismiss their imposition as manifestations of hubris and myopia, and assume that future generations will simply ignore today's restrictions. From that perspective, the belief that some lands should be earmarked for perpetual preservation, and that in setting them aside we are building up a land bank

and weaknesses of conservation easements, see SALLY K. FAIRFAX & DARLA GUENZLER, *CONSERVATION TRUSTS* (2001); JEFF PIDOT, *REINVENTING CONSERVATION EASEMENTS* (2005).

³⁵ Mahoney, *Point, supra* note 1, at 434.

³⁶ *Id.* at 436.

for our descendants, is nothing more than a harmless delusion. Future generations will make their own decisions, essentially unconstrained by the goals enunciated by land trusts and property owners [of today], just as today's preservationists feel unconstrained by earlier versions of how to save nature.

There are two problems with this response. The first is that conservation servitudes are engineered to be hard to undo. . . . The second reason not to shrug off conservation easements as a modern folly, one destined to fade away within a decade or two or likely to be undone when conditions change, is that their creation is being subsidized through³⁷ tax deductions and direct payments by governmental entities.

While it is possible to buy into Professor Mahoney's skeptical judgment of present day collective, lifestyle-based decision making—remember we are the generation burning up our planet—Professor Mahoney fails to offer any land conservation method that would substitute for conservation easements. Stated another way, while Professor Mahoney attacks conservation easements on the basis that they are sufficiently well-engineered and supported by law to exist as far into the future as we can imagine, she offers no solution with any force even minimally comparable to that which she attributes to conservation easements. Instead, Professor Mahoney would have us substitute the highly refined process of protecting land using conservation easements with mere wishful thinking. As stated in *Perpetual Restrictions on Land*:

In sum, there is reason to suspect that instead of helping us to avoid "meriting the curses of our successors," the extensive use of conservation servitudes as an anti-development tactic may create ecological, legal, and institutional problems for later generations [to deal with]. Members of the present generation may be forced to conclude that their conception of "nature" cannot be saved, because the natural world they know and love will not outlast them indefinitely. *Instead, the best strategy may well be to make sensible land use decisions, with the hope and expectation that future decisionmakers will do the same.*³⁸

Professor Mahoney is absolutely correct that the conservationists who place land in conservation easements (including philanthropic grantors, biologists, land planners, land trust staff, and attorneys) are making decisions about what is

³⁷ Mahoney, *Perpetual Restrictions*, *supra* note 1, at 769–70 (citation omitted).

³⁸ *Id.* at 787 (emphasis added) (citation omitted).

best for the future. It is also a compliment to our society, our system of laws, and the work of land trust document drafters that Professor Mahoney believes conservation easements will be durable enough to survive well into the future and to cause great expense and effort to undo. Ironically, such a testimonial would likely help *increase* funding for conservation easements rather than frighten funders away.

Where Professor Mahoney errs is in the belief that perpetual conservation easements deny future generations the right and ability to make their own decisions about how property is to be used. Unfortunately, the present generation is greedy beyond compare, especially when it comes to the exploitation of natural resources. If we did not have the UCEA, the legal tool of conservation easements, and the land trusts to wield them, current generations would rush to develop all available land to the fullest extent possible. Under such a regime, our most valuable lands in terms of being aesthetically pleasing, spiritually healing, and scientifically interesting would rapidly be developed. In other words, rather than limiting the land use choices of future generations, conservation easements provide them with an additional and fundamentally important option that would not have been available had the land been allowed to be developed: the option of keeping land in its natural state.

The problem with allowing unfettered development is that when the natural features of land are destroyed by development, it is impossible to replicate them. Nature, in all of its forms, from the ecosystem level on down to the complex interactions of the species that inhabit them, is simply far beyond our means to fully understand, let alone re-create. Stated another way, we should not fool ourselves that we have the knowledge and the power to re-create nature.³⁹

³⁹ See, e.g., Robert Elliot, *Faking Nature*, in ENVIRONMENTAL ETHICS, *supra* note 21, at 381 (concluding that not only is it impossible to “fake” nature, doing so would sever the historical ties to the origins of the property, which as humans we value as highly as the appearance of things, not least of which is nature); Eric Katz, *The Big Lie: Human Restoration of Nature*, in ENVIRONMENTAL ETHICS, *supra* note 21, at 390–91, 396 (“A ‘restored’ nature is an artifact created to meet human satisfactions and interests. Thus, on the most fundamental level, it is an unrecognized manifestation of the insidious dream of the human domination of nature. . . . Nature restoration is a compromise; it should not be a basic policy goal.”); Vinson, *supra* note 1, at 292 (“Although there are many fair criticisms of perpetuity, the fact of the matter is that most aspects of development are

While Professor Mahoney is benevolently concerned about imposition of greater legal costs on future generations to undo conservation easements, this economic argument ignores the reality that reducing the economic burdens of undoing the conservation easements of today is a rather trivial and fungible legacy to the future when compared to the legacy of saving natural areas and the flora and fauna that inhabit them. Opening up conserved land today would undoubtedly create a land rush. However, in the larger scheme of things, the profits thus harvested would be only the tiniest blip on our gross national product. On the other hand, the loss of the natural areas and open spaces protected by conservation easements represents a loss of our most precious legacy to the future: a miraculous and functioning natural world.

In Professor Mahoney's view, the greater gift to the future is not the absence of development, but instead, the concrete, steel, and glass of modern development. Indeed, it is possible to tear down almost any human-made improvement. It is perversely interesting to speculate whether it costs more to tear down a well-built strip mall or shopping center than to legally undo a conservation easement. But the important debate here is not solely development versus nondevelopment. Rather, the debate centers on what legacy we want to leave to future generations. For Professor Mahoney, that legacy is to not "create ecological, legal, and institutional problems for later generations."⁴⁰ While such a legacy may be possible to achieve, it is meager and trivial compared to the legacy of a relatively naturally functioning planet.

The greater gifts to the future are not creations of concrete, steel, and glass (no matter how great the architecture may be or how many new Starbucks are opened), but natural areas, which

irreversible. Even if a strip mall or a dam is razed, the remaining landscape is drastically different than it would have been had the land remained undeveloped."). *But see* David Lowenthal, *Making a Pet of Nature*, in *TEXTURES OF PLACE: EXPLORING HUMANIST GEOGRAPHIES* 84, 88–89 (Paul C. Adams et al. eds., 2001) (noting that Frederick Law Olmsted, landscape architect and designer of New York's Central Park, planted trees to look like natural scenery and quoting Anne Whiston Spirn's "wry" observation that Olmsted was so successful in that endeavor "that those who accepted 'the scenery as 'natural,' objected to cutting trees [Olmsted] had planned to cull").

⁴⁰ Mahoney, *Perpetual Restrictions*, *supra* note 1, at 787.

future generations may cherish as we do in our generation.⁴¹ In other words, in our one-way communication with the future, the idiom should be one of preservation of as much of our natural world as possible. If future generations no longer want land preserved by conservation easements, they will certainly find the legal and political means to remove them. This would be a tragedy, but it would mean that future generations have the chance to make the decisions themselves. We will also have left future generations the same thorny questions we now face regarding what to preserve for future generations and how to accomplish it. Should future generations choose not to preserve lands currently under conservation easements and should they find a means to undo our conservation easements, it will then be their decision, and not ours, to decide where to place their inevitable monumental constructions of concrete, steel, and glass.

C. Legacies of Open Spaces, Wilderness, and Biodiversity

As explained earlier, there is little need to describe the beauty of nature and the intense feeling of belonging to, or being a part of, a particular place. This may be left to the prophets and poets of nature from Henry David Thoreau, John Muir, Aldo Leopold, Wendell Berry, and Wallace Stegner to all the other masters of painting landscapes with words and of explaining our deepest feelings about land.⁴² Regarding the complexity, beauty, and human need for biodiversity, the reader is encouraged to read the works of E.O. Wilson.⁴³

To argue in favor of perpetual conservation easements is to hammer home the directionality of change. While there are

⁴¹ To the best of this author's knowledge and experience, in our modern times, there has never been a protest, a fast, a proclamation, or a manifesto in favor of developing a piece of vacant land. On the other hand, there have been many protests, fasts, proclamations, and manifestos opposing the transformation of natural lands into the familiar modern structures of today (e.g., sewer plants, power plants, highways, high-rises, condominiums, and, most reviled of all, strip malls).

⁴² Of course, this is not to mention those whose visual images convey the beauty of our natural world. This includes artists like Thomas Cole and Frederic Edwin Church and photographers like Ansel Adams. See BARBARA NOVAK, NATURE AND CULTURE: AMERICAN LANDSCAPE AND PAINTING 1825–1875 (3d ed. 2007).

⁴³ See, e.g., EDWARD O. WILSON, BIOPHILIA: THE HUMAN BOND WITH OTHER SPECIES (1984); EDWARD O. WILSON, THE CREATION: AN APPEAL TO SAVE LIFE ON EARTH (2006); EDWARD O. WILSON, THE DIVERSITY OF LIFE (1993).

some things that change back and forth, from one state to another, such as water, land is not in that category. Natural land, once altered, can never regain its natural state. Nor is it possible for humanity to accomplish this. Once the topography has been bulldozed into unnatural forms, the waterways altered or dammed, the vegetation removed, the last of a rare species vacated, the land is forever changed. No one loses their virginity twice. It's the same for land. What's done is done.

It is largely due to this irreversibility that Professor Mahoney's argument is unpersuasive. That once disturbed nature can be put back in place and its complex interconnections restarted, much like a defibrillating heart is restarted with a jolt of electricity, is a fallacy. Nature, once undone, cannot be put together again.⁴⁴

IV ASSUMING THERE IS A PROBLEM

Assuming that some, or all, perpetual easements are “bad” because they are ill-conceived and legally difficult to undo, how bad is the problem and what can be done to mitigate it? The following subparts explore these issues and conclude that perpetual conservation easements are not as bad as Professor Mahoney asserts.

A. Why Perpetual Conservation Easements Redux

If we were to conclude that perpetual conservation easements are a net negative as a land use tool, what should we do? One solution would be to not draft every conservation easement to be perpetual. For example, once the mass extinctions and migrations of plants and animals are fully triggered by climate changes from global warming, it may be better to establish a series of nonperpetual conservation easements. These nonperpetual conservation easements could act as stepping

⁴⁴ See Greene, *supra* note 34, at 902 (“[C]onservation easements may actually preserve more options than they eliminate because, unlike legal restrictions on land use, the development of land is often impossible to reverse.”); Vinson, *supra* note 1, at 293 (“Regulation cannot provide the same assurance of permanency [as perpetual conservation easements], and claims that development is reversible do not hold water.”).

stones, or collectively as “arks,” that once populated and then depopulated could be retired as conservation easements.⁴⁵

But, let’s again look at the merits of perpetual conservation easements.⁴⁶ As explained above, once land has been developed, it can never be put back to its natural state. Moreover, since any one piece of land will exist as part of a larger landscape, developing a piece of land may result in permanently and irrevocably diminishing the naturalness of that larger landscape. This problem is addressable by the doctrine of *sic utere tuo ut alienum non laedas*, and it is a fundamental reason for perpetual conservation easements. If a conservation easement is part of a larger conservation effort (for example, on a landscape scale), allowing nonperpetual easements to “wink out” can undermine the overall conservation effort.

Another reason for perpetual conservation easements is that they dampen out the inevitable changes that will occur within and around the conservation easement perimeter. For example, imagine that a severe global-warming-caused drought has caused the loss of certain plant or animal species or perhaps entire ecosystems both within and outside the perimeter of a conservation easement. Now, assume that the drought ends and that the lands surrounding the eased land have been divested of their natural species and ecosystems. Next, assume two scenarios. In the first scenario, assume the conservation easement was nonperpetual and that the land trust terminated the easement, ceased protecting its species, and let it revert to the same state as the surrounding area. None of the eased land or the surrounding land has returned to its former state. Now, assume another scenario. In this scenario, the conservation easement was drafted to be perpetual under such circumstances, and the land trust had no choice but to protect the native species against the drought. Now assume that the plants and wildlife

⁴⁵ See James L. Olmsted, *Capturing the Value of Appreciated Development Rights on Conservation Easement Termination*, 30 ENVIRONS ENVTL. L. & POL’Y J. 39, 43–45 (2006) (suggesting the use of perpetual “park” easements and nonperpetual “ark” easements depending upon the relative ecological stability of a given piece of land).

⁴⁶ It is assumed for purposes of this Article that the reader is familiar with I.R.C. § 170(h) and related regulations that require a conservation easement to be perpetual in order for the donor to claim a tax deduction on a donated conservation easement. *See supra* text accompanying notes 29–30.

from the perpetual conservation easement have repopulated the surrounding areas.

What happened in the first scenario was the land trust's response to a low signal-to-noise ratio needlessly terminating a nonperpetual conservation easement that was only temporarily affected by the operation of external factors. What happened in the second scenario was the perpetual conservation easement dampened the effects of the drought by preserving the flora and fauna of the eased land, which allowed it to survive and repopulate nearby areas with native species. The lesson to be drawn here is that a perpetual conservation easement avoided the unnecessary termination of a nonperpetual conservation easement based on misunderstood changes to the conservation values of the easement in question.

In similar fashion, perpetual conservation easements dampen out economic changes associated with land values. Virtually every good conservation easement contains a clause stating the easement cannot be terminated simply because the development of the land around the eased area would increase the value of the eased area substantially—but for the conservation easement. If conservation easements were not perpetual, they would be terminated at the first cycle of increase in land values. Perhaps the surrounding land values will remain high or rise even higher. They may also decrease. Most likely there will be cycles of land values rising and lowering. Only perpetual conservation easements can dampen out these cycles and any resulting perturbations that might have otherwise impinged upon them.

Perpetual conservation easements also address the current generation's lack of information about the future. If a conservation easement is to be less than perpetual, how long should it last? One year? Five years? A decade? A century? We simply cannot tell how long the protection will be needed. The only length of time that avoids substantial amounts of guesswork is the perpetual conservation easement. To use an example, imagine that a passenger on a boat has fallen overboard and cannot swim to safety. The only way to rescue the drowning passenger is by throwing him a life-preserver. Now suppose there is a life-preserver that is easily strong enough to tolerate the force of pulling the victim to the safety of the boat. Unfortunately, when the life-preserver is thrown out to the victim, it is discovered that the rope attached to the life-

preserver is too short. The victim cannot be rescued by the short rope and consequently drowns. The same could be said for nonperpetual conservation easements. After an area is preserved, shouldn't the protection be extended long enough to protect against all possible harms, regardless of when they arrive and when they leave?

There are many more arguments that can be made for perpetual easements. It is probably also worth noting that every institution that has addressed this issue, whether governmental or nongovernmental, has arrived at the same decision: a conservation easement must be perpetual to be effective. Two of these institutions stand out: the National Conference of Commissioners on Uniform State Laws, who drafted the UCEA,⁴⁷ and Congress, who drafted § 170(h) of the Internal Revenue Code.⁴⁸

One of the most passionate published defenses of perpetual easements is the following excerpt of an article by Ann Taylor Schwing, a highly respected and well-known member of the land trust community. Among her credentials, Ann Taylor Schwing is of counsel with the California law firm of McDonough Holland & Allen, P.C., a land trust accreditation commissioner for the Land Trust Alliance, and a past president of the Land Trust of Napa County.⁴⁹ The following excerpt of an article by Ann Taylor Schwing appeared in a special report published by the Land Trust Alliance. Because Ann Taylor Schwing is herself a donor of a substantial and ecologically important conservation easement, her words below carry a special weight:

Why worry about perpetuity when we will never see or know it in our lives on Earth? Simple knowledge of perpetuity distinguishes us as human. Our common mission to protect land in perpetuity defines and moulds our land trust movement. Whether land is donated to or purchased by a land trust, perpetuity truly matters for many reasons, from the practical to the spiritual.

Land donors care deeply about their land. They care enough to give their land away to achieve its protection in

⁴⁷ UNIF. CONSERVATION EASEMENT ACT 12 U.L.A. 165 (1981).

⁴⁸ I.R.C. § 170(h) (2006).

⁴⁹ Ann Taylor Schwing, *Believe in Perpetuity*, EXCHANGE, Fall 2007, at 30, 32, available at http://landtrusts.org/publications/exchange/special_issue/believe_perpetuity.pdf.

perpetuity. If they thought the protection would last only 20,⁵⁰ or 100 years, many would not donate.

It is further proof of the widespread preference for perpetual conservation easements that Ann Taylor Schwing's testament to perpetuity was published by the Land Trust Alliance, the umbrella organization of this nation's approximately 1600 land trusts, and distributed to its member organizations and to their thousands of members.

B. The Mitigating Effect of Reopeners

Professor Mahoney has argued that perpetual conservation easements are engineered to be difficult to undo. This does not mean, however, that it is impossible. It has been argued that conservation easements should be treated as charitable trusts, which, should they become impossible or impractical to carry out, can be judicially terminated. In such circumstances, following legal precedent developed for charitable trusts, the doctrine of cy pres likely would be applied. Under the cy pres doctrine, a court would attempt to balance the social benefit of terminating the conservation easement against the intent of the grantor. Professor Nancy A. McLaughlin is the most well-known proponent of the charitable trust theory of conservation easements and the author of several seminal articles on the topic.⁵¹

⁵⁰ *Id.* at 30; see also Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. LAW. 441, 457 (2000) (noting that the first generation of landowners to encumber their property with a perpetual conservation easement is "motivated by the perpetual protection of their property" and further noting that "it is the subsequent generations of landowners that inherit or purchase the encumbered property that are proving to resent the restrictions on the use of their land"); Vinson, *supra* note 1, at 276 ("The perpetual nature of conservation easements is one of the factors that makes them so attractive to landowners who want to leave a legacy of conservation.").

⁵¹ See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005). Professor McLaughlin has more recently published a second article addressing the amendment and termination of conservation easements. Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006). As a testament to the influence of Professor McLaughlin's scholarship, in 2007 the National Conference of Commissioners on Uniform State Laws amended its comments to the Uniform Conservation Easement Act to recognize Professor McLaughlin's work in the two articles cited above and to direct its readers to Professor McLaughlin's work for a discussion of how charitable trust principles

One way that drafters of perpetual conservation easements avoid their premature termination is by reciting as many adverse circumstances as possible and drafting language that the grantor and grantee agree that such circumstances do not make the easement impossible or impractical to carry out. Such roadblocks to termination could preclude termination based upon increases in the value of the eased property as adjacent property is developed, financial hardship of the grantor, various events beyond the parties' control, and, most importantly, changes caused by climate change. Because the popularity of conservation easements is so relatively recent, we do not have an extensive body of case law to draw upon to determine how difficult it will be to undo a conservation easement. On the other hand, we do know that a number of very smart people are doing their very best, especially in terms of easement drafting, to avoid the early and inappropriate termination of their perpetual conservation easements.

At this stage in the law of conservation easement termination, it is too soon to offer generalizations about what terminating a conservation easement would require. There are simply too few court cases addressing this issue, a fact which can itself be taken as evidence that conservation easements are working well and not sparking litigation.

However, in the absence of judicial guidance, there is a growing body of legal scholarship that is addressing such questions as when and how a conservation easement should be terminated. The important point to take away from this discussion is that there are already legal theories and doctrines waiting in the wings that could be used to amend or terminate a conservation easement with or without a judicial proceeding. By way of contrast, there are no such systematic theories or doctrines which could be used to undo a major development project. Moreover, even if such theories existed, and even if the application of such theories, doctrines, or laws resulted in the demolition of a human-built structure or landscape, even the smartest future generations will lack the ability to restore the affected land to its original state of natural complexity.

might be applied to conservation easements. UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (amended 2007), 12 U.L.A. 185 (1981).

Thus, perpetual conservation easements will in one way or another provide options for future generations that nonperpetual conservation easements will not, namely, offering them the choice of keeping a property natural or developing it. The reverse, however, does not hold true. Avoiding the use of perpetual conservation easements and allowing development to proceed as usual, which Professor Mahoney argues for so adamantly, is a one-way street. It simply cannot be said enough. Once the natural character of land has been destroyed, there is nothing that can be done to restore the land to its original state.

C. *The Mitigating Effect of Price Differentials*

Professor Mahoney has argued that perpetual conservation easements are engineered to be hard to undo. In fact, she claims, they are so hard to undo that they impose an unfair burden on future owners of eased land. And it is in this sense, according to Professor Mahoney, that we of this generation engage in the fallacy that we can predict that future generations will want durable and perpetual conservation easements protecting natural landscapes. This is not to say that Professor Mahoney does not engage in her own speculations about the future. In the future predicted by Professor Mahoney, people will not want preserved land, especially if it creates an island of undevelopable land in the middle of highly developed land.⁵² Instead, they will crave land to build affordable housing, schools, hospitals, and all of the other necessary urban infrastructure. What her argument misses, however, is that natural areas, scenic

⁵² Actually, there is no reason to assume a priori that this is a bad thing. Consider one of the most famous islands of undevelopable land in the middle of some of the most highly developed land on the planet—Central Park. In designing Central Park, Frederick Law Olmsted no doubt predicted the development surrounding Central Park and designed the park to be a refuge and relief from the vicissitudes of precisely that development. See S.B. Sutton, *INTRODUCTION TO FREDERICK LAW OLMPSTED, CIVILIZING AMERICAN CITIES: WRITINGS ON CITY LANDSCAPES* 1 (S.B. Sutton ed., 1997) (discussing Frederick Law Olmsted's role in the design and implementation of Central Park in New York City); see also LAWRENCE BUELL, *WRITING FOR AN ENDANGERED WORLD: LITERATURE, CULTURE, AND ENVIRONMENT IN THE U.S. AND BEYOND* 85 (2001) (“The first phase of modern green city thinking was ushered in by the urban landscape and public health reform movements of the mid-nineteenth century, Frederick Law Olmsted being the best-known American exemplar.”).

vistas, and open space are the most treasured of all infrastructure, especially in urban areas.

There is another counterargument to Professor Mahoney's position: the price differential between land not under a conservation easement and land that is under a conservation easement. In the latter case, the purchase price of the eased land will almost always be less than that of comparable land free of conservation easements. While such lands will likely not be available for affordable housing, schools, or hospitals, the land likely will be available for conservation buyers, of which there are many. These conservation buyers will find themselves in the enviable position of being able to buy tracts of land, sometimes very large tracts, at bargain basement prices. These tracts would have the bonus of being managed and protected by a land trust or other entity holding the conservation easement. In the absence of studies on the subject, it is unclear whether conservation buyers represent a wealthy elite reaping the benefits of deflated land prices for which they can receive in return their own private Idaho. In any event, as the example just provided demonstrates, conservation easements *do not* necessarily remove all social benefits from land. Eased land may be purchased as a private retreat while other conservation easements may guarantee perpetual public access for recreational uses, such as hiking and mountain biking, as well as many other public uses, including sightseeing, bird watching, and scientific study. Such recreational uses depend upon a natural infrastructure created and maintained by conservation easements no less than the developed environment relies upon human-created infrastructure.

Unfortunately for those who support perpetual easements, the previous paragraphs foreshadow a scenario which is both a rebuttal to the concerns of Professor Mahoney's economic hardship arguments and a potential death knell for many perpetual conservation easements. To paraphrase Professor Mahoney's core argument, perpetual conservation easements are engineered to be difficult to undo. Consequently, future generations seeking to undo perpetual conservation easements will be faced with expensive and time consuming endeavors. Assuming that most of the work of undoing perpetual conservation easements will be done by attorneys, for whom time is money, we can reduce Professor Mahoney's concern to

this: it will be expensive to undo perpetual conservation easements in the future. Unfortunately, the eased land in question may just supply that money.

In the price differential example above, the argument was made that perpetual conservation easements so devalue the land that individuals are able to purchase and then preserve larger and more ecologically rich parcels of land than the real estate market would otherwise allow. Clearly, this argument assumes a conservation purchaser with the best intentions of land preservation. However, it is likely that it will be a different kind of purchaser that is lured to such devalued lands, namely real estate speculators and developers. In this scenario, the financially motivated purchaser will be able to purchase eased land at bargain basement prices. This category of purchaser will then use the money saved by purchasing the eased land to pay the attorneys' fees and other related costs to mount a legal attack against the conservation easement. While this type of market behavior is anathema to the land trust community, it should serve as both solace and rebuttal to Professor Mahoney's misplaced concerns for future generations who will be forced to "struggle" to undo the conservation easements "thoughtlessly" placed on land by previous generations. Sadly, and to the contrary, many eased lands will bear the seeds of their own destruction by virtue of creating price differentials that, when unleashed, will offset the transactional costs of nullification of the conservation easements that formerly protected them in their natural states. Moreover, in view of the vast potential for the economic appreciation of the pent-up development rights in eased land, it can almost be taken as axiomatic that the values thus released will far exceed the transactional costs that reunited them with the underlying land.⁵³

⁵³ For a means to counteract this result and direct the pent-up profit in a terminated perpetual conservation easement to the easement holder, see Olmsted, *supra* note 45, at 51; *see also* Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 516 (2004) ("Because they will always imperfectly divide land interests, easements create temptations for the landowner and land trust to try to capture the value of imperfectly specified rights.") Presumably, landowners will face even greater temptations than land trusts to terminate conservation easements to release the full value of the restricted development rights.

V A FINAL REALITY CHECK

A. What Would Future Generations Want?

1. Housing or Open Spaces?

Of course we cannot predict precisely what future generations will want from their land, which many would argue is merely borrowed by each generation.⁵⁴ According to Professor Mahoney, we can be certain that one future need will be housing and affordable housing in particular.⁵⁵ Thus, to the degree that the present generation locks up buildable land through conservation easements or drives up the price of otherwise available land, it is depriving future generations of land and materials to build housing.⁵⁶ By way of a hypothetical based upon Professor Mahoney's point, what if the global population in the fourteenth through the nineteenth centuries had increased at far greater rates than actually occurred, and, therefore, faced a continual housing shortage? Now imagine that they altruistically believed that not only should they build dwellings for themselves but also believed that it was their duty to clear land to allow future generations to build as many dwellings as possible. This sense of duty eventually spread through all nations and persisted until the present time. Further, imagine that this process degraded most of the natural places on Earth and eradicated almost fifty percent of all species. This is obviously an unfortunate outcome resulting from misguided altruism. Unfortunately, this hypothetical is all too familiar today as this sort of overdevelopment is close in magnitude to what is happening now on our planet—although more as a result of unrestrained greed than as a result of misguided intergenerational altruism. Is there any reason to believe, as does Professor Mahoney, that the present generation would make such a grand mistake by preserving land from development in perpetuity? The answer is both yes and no. Yes, we will make some mistakes and preserve land that is ecologically marginal and better suited for development than for

⁵⁴ Mahoney, Point, *supra* note 1, at 445.

⁵⁵ *Id.* at 440.

⁵⁶ *Id.*

preservation. But, no, we will not make so many mistakes that we overwhelm the good we have done by preserving in perpetuity the truly unique and remarkable natural lands on our planet. Moreover, our mistakes will not really be mistakes at all, just differences in what we, in our best judgment, believed would be the most valued by future generations: inventories of protected land or inventories of developed or developable land. And, most important of all, should preservation of a parcel of land prove to be a “mistake,” it will be possible to undo completely by legal means. However, the converse is not true. Should we allow preservation-worthy lands to be developed and such development is later deemed to have been a mistake, it will be impossible to turn back the ecological clock and re-create the natural attributes of the land and of the unique history that goes with it.

2. Parking Lots or Parks?

It is difficult to make this argument in any fashion other than ad hominem or aesthetically. Nevertheless, there are certain absolutes we can point to in support of perpetual land preservation and as proper legacies for future generations. First, we must look at our parks, from Central Park to Glacier Park, to Yellowstone and Yosemite. There can be no argument that these lands would have been better served by development. They absolutely would not. They are beautiful, unique, and intrinsically valuable.

If, by way of contrast, one wants to see the perfect example of a beautiful natural feature destroyed by overdevelopment, one need only to look as far as Lake Tahoe. Lake Tahoe, which is bordered by Nevada and California, is arguably the greatest land use failure in North America. The development around Lake Tahoe has become nothing less than a circular city around a once divinely beautiful natural feature. Ironically, most of the development at Lake Tahoe has taken place under a much lauded, but ultimately flawed, regulatory system involving two states and a multitude of counties, the Tahoe Regional Planning Agency. Sadly, the highly developed Lake Tahoe of today could have been truly protected by perpetual conservation easements rather than by an ambitious and well-intentioned, but nevertheless failed, land use regime.

3. Zoos or Wild Places?

Less visible, but still of great benefit to humanity, are all the wild places that have been preserved. While not listed on maps and perhaps even off limits to public use, these places give us glimpses of natural beauty while performing such vital natural services as providing clean water, fostering biodiversity, sequestering carbon, and preventing erosion. All of these uses of land represent absolutes. As absolutes, we need not fear our own judgment or ability to predict the future in saving them from development. It is simply the right thing to do. Are there, then, some lands that should not have received perpetual protection? Undoubtedly yes. Land trusts and other preservation entities, including governmental ones, are human and thus capable of error. However, there appear to be few instances of such error or at least few instances of such error on a scale that would make it newsworthy. In the final analysis, we owe future generations the joys of nature we have experienced and, if all the information we have to rely on in selecting which part of nature to preserve are extrapolations from our own time, so be it. We have much science to draw upon as well as much collective experience in relating to the earth and to nature. Whenever possible, we should preserve natural areas, which are irreplaceable, and be courageous in not second-guessing our decisions.⁵⁷

4. Expensive Infrastructure or Natural Services?

One finds in Professor Mahoney's writings an overriding bias in favor of using land for residential, commercial, or industrial purposes. Professor Mahoney is opposed to preserving land for its own sake, for such "warm and fuzzy" purposes as habitat for iconic species that are threatened or endangered, for its scenic qualities, or solely for its value as open space. Regardless of the source of this bias, for purposes of this Article, it reflects an attitude held by many people and so invites a response.

⁵⁷ The newly implemented accreditation program created by the Land Trust Alliance will presumably examine the worthiness of individual conservation easement acquisitions as it systematically audits this country's land trusts. See Land Trust Accreditation Commission, Eligibility Requirements, <http://www.landtrustaccreditation.org/getting-accredited/eligibility-requirements> (last visited Jan. 3, 2009). Their website states that "[t]wo completed projects will provide the Commission with actual data to verify." *Id.*

While volumes could be written in rebuttal, let it suffice for the purposes of this Article to reiterate that protecting land in its natural state can, in and of itself, create marketable services of substantial value. For example, avoiding the deforestation of a functioning ecosystem can result in sustained long-term carbon sequestration as well as preserving air and water quality and providing species habitat. Such carbon sequestration is no less a service because it occurs naturally than it would be if performed by a machine. Natural areas also keep our water clean and our air breathable. The point is that even the most hardened capitalist can follow the money back to natural services. Thus, to the extent, if any, that Professor Mahoney bases her objections to the strenuous deployment of conservation easements on the theory that such easements cancel out or diminish the overall dollar value that would occur if the eased lands in question were put to other residential, commercial, or industrial uses, such objections could likely be put to rest based upon a determination of what could be phrased as our collective “gross natural product.”⁵⁸

B. How Would Climate Change Affect This?

Of course, any current decisions regarding the best use of land for future generations will be made in the apocalyptic context of climate change. As we stumble through our self-created hyper-crisis of global warming and climate change, such decisions will be made in scenarios of ever increasing flux. Such flux will not be limited to weather but will affect literally every aspect of the human experience. It will include alterations in species

⁵⁸ See generally MARK A. BENEDICT & EDWARD T. McMAHON, GREEN INFRASTRUCTURE (2006); GRETCHEN C. DAILY & KATHERINE ELLISON, THE NEW ECONOMY OF NATURE: THE QUEST TO MAKE CONSERVATION PROFITABLE (2002); WILLIAM J. GINN, INVESTING IN NATURE: CASE STUDIES OF LAND CONSERVATION IN COLLABORATION WITH BUSINESS (2005); PAUL HAWKEN, THE ECOLOGY OF COMMERCE (1993); GEOFFREY HEAL, NATURE AND THE MARKETPLACE: CAPTURING THE VALUE OF ECOSYSTEM SERVICES (2000); NATHANIEL O. KEOHANE & SHEILA M. OLSTEAD, MARKETS AND THE ENVIRONMENT (2007); NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (Gretchen C. Daily ed., 1997); JAMES RIDGEWAY, IT’S ALL FOR SALE: THE CONTROL OF GLOBAL RESOURCES (2004); J.B. RUHL ET AL., THE LAW AND POLICY OF ECOSYSTEM SERVICES (2007); NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW (2006); LUCA TACCONI, BIODIVERSITY AND ECOLOGICAL ECONOMICS (2000).

populations and ecosystem functioning, as every plant and animal species either adapts, migrates, or goes extinct. These changes will result in disturbances of the natural services that have aided our survival for centuries by providing us with necessities such as clean water, clean air, seasonal changes that trigger the growth of food plants, and even such largely ignored but immensely important services as pollination of food plants by bees⁵⁹ and other insects. As for humanity, entire civilizations will be destroyed as domino-like chains of cataclysmic events are set off in every direction. Changes in the monsoons and other formerly seasonally moderated weather patterns will result in floods in some areas and desertification in others. The inability to produce food will result in mass hunger and pandemic outbreaks of disease. The remaining human societies will be in turmoil. In many societies, turmoil will express itself in violence as people find themselves fighting for food, water, and arable land. Such aggression will occur at the level of individuals, but it will also occur on a larger scale, as armies will likely be formed and thrust into battle to defend or to procure the necessities of life.⁶⁰ Terrorism and anarchy will reign in many areas. Even without warfare, millions of people will die from various combinations of hunger, thirst, disease, and temperature and weather extremes. These are not remote possibilities. They are well-documented projections by United Nations scientists and leading climate change analysts.⁶¹

⁵⁹ ROWAN JACOBSEN, FRUITLESS FALL: THE COLLAPSE OF THE HONEY BEE AND THE COMING AGRICULTURAL CRISIS (2008); MICHAEL SCHACKER, A SPRING WITHOUT BEES: HOW COLONY COLLAPSE DISORDER HAS ENDANGERED OUR FOOD SUPPLY (2008).

⁶⁰ See Thomas Homer-Dixon et al., *Debating Disaster: The World Is Not Enough*, NAT'L INT., Jan.–Feb. 2008, at 25–36.

⁶¹ See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, U.N., CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS (2007) (contribution of Working Group I to the Fourth Assessment Report); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, U.N., CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY (2007) (contribution of Working Group II to the Fourth Assessment Report); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, U.N., CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE (2007) (contribution of Working Group III to the Fourth Assessment Report). If there is any doubt about the predictions in this paragraph, one need only to choose among the literally thousands of science-based books, scientific reports, scientific articles, and other climate change related documents published in the last three years. In doing so, one will find that there is simply no lack of corroboration of what has been written here. Sadly, though the warnings are coming ever more

How then should the current generation prepare for a world in which topsoil is more valuable than gold? The question answers itself. If we predict hunger, we must harbor seeds and protect species that are necessary for plant pollination and other natural functions. If we predict loss of land mass to flooding from elevated ocean levels caused by the melting of polar ice caps, we should build dikes and save large tracts of land on high ground. Such large tracts of land could possibly provide land for agriculture or for villages. Even though we have already polluted our atmosphere with sufficient greenhouse gases to cause harm for centuries, we can still protect ourselves from some of the worst effects. One means for such prevention is to protect those lands, most notably forest lands, where trees or other natural vegetation sequester carbon. Any other lands that harbor greenhouse gases, such as peat bogs, may likewise benefit from protection.

C. A Multiplicity of Preserves

As noted throughout this Article, Professor Mahoney has strong doubts about the value of perpetual conservation easements. A corollary to this doubt is the concern that even if perpetual conservation easements were in some instances appropriate, humanity might lack the ability to discriminate between perpetuity-quality landscapes and non-perpetuity-quality landscapes. From our vantage point of the time of publication of this Article, such discriminations must occur not only within the complex interlocking of natural and human-built environments but within those same environments with the additional layer of uncertainty created by climate change.

One response to these concerns can be found in the work of Professor Richard Brewer. In his treatise on the land conservation movement in America, Professor Brewer acknowledges the challenges to conservation efforts posed by climate change, but notes optimistically, “Fighting the anti-

frequently and are increasingly dire, the inertia against acting rapidly to mitigate the disastrous consequences we have already set in place seems to prevail. Perhaps one of the most eloquent and yet fact specific discussions of the seriousness of climate change and the great need for immediate action can be found in an article written by Professor Mary Christina Wood. See Mary Christina Wood, *Nature's Trust: A Legal, Political, and Moral Frame for Global Warming*, 34 B.C. ENVTL. AFF. L. REV. 577 (2007).

biodiversity effects of global climatic change is a contribution to worldwide conservation for which local land trusts are uniquely suited.”⁶² Regarding the use of conservation easements to preserve biodiversity in the face of global climate change, Professor Brewer notes that “[c]onservation biologists and organizations have expended a great deal of [time and] effort . . . devising methods to figure out where biodiversity is and designing plans to capture it.”⁶³ One such biodiversity preserving methodology is “gap analysis.”⁶⁴ Using gap analysis, scientists locate preserves where species or species communities are absent or underrepresented (for example, where there are “gaps” in a particular species distribution).⁶⁵ Land trusts or other conservation driven organizations may use this data in selecting and creating new preserves that contain the underrepresented species or species communities that fill the conceptual diversity-gaps identified by gap analysis.⁶⁶

Despite his optimism, Professor Brewer nevertheless concludes that such “schemes, however useful they may be for today, suffer by assuming a static world.”⁶⁷ Accordingly, Professor Brewer further notes that “[m]uch more complicated approaches would be necessary to add global climatic change to methods designed to tell us what land to preserve. The task of protecting the amounts of land that such efforts might yield might well be impossible, as a practical matter.”⁶⁸ In this gloomy conclusion, Professors Brewer and Mahoney may find some common ground. Professor Brewer laments the difficulty of scientifically determining preservation-worthy land and the

⁶² BREWER, *supra* note 33, at 104.

⁶³ *Id.* at 103; see also Daniel L. Aaronson & Michael B. Manuel, *Conservation Easements and Climate Change*, 8 SUSTAINABLE DEV. L. & POL’Y 27, 29 (2008). Aaronson and Manuel conclude that if carbon capture could be made a valid conservation purpose, conservation easements could become “a meaningful component of the overall climate change solution.” *Id.* This is a vast understatement of the role of conservation easements in mitigating global climate change and its consequences.

⁶⁴ BREWER, *supra* note 33, at 103.

⁶⁵ *Id.*; see also Gap Analysis Program, U.S. Geological Survey, <http://gapanalysis.nbii.gov/portal/server.pt> (follow “About Gap” hyperlink) (last visited Jan. 3, 2009).

⁶⁶ BREWER, *supra* note 33, at 103.

⁶⁷ *Id.*

⁶⁸ *Id.* at 103–04.

impossibility of protecting the large amounts of land such designations might yield.⁶⁹ Professor Mahoney, on the other hand, flatly argues that we lack the judgment to choose preservation-worthy land in the first instance.

Professor Mahoney concludes that, without perfect knowledge of future land use needs, we should eschew substituting our knowledge for that of future generations by tying up land with difficult-to-reverse conservation easements. While Professor Mahoney seeks to save land *for* current and ongoing development, Professor Brewer, on the other hand, grapples with the opposite problem of saving existing natural lands *from* development. Both Professors Mahoney and Brewer seem to agree, however, that their opposite goals are hampered by the difficulty of accurately predicting future land use needs. However, their responses to the lack of perfect information could not be more at odds. Professor Mahoney's response to lack of information is to avoid inadvertently creating legal problems for the future by encumbering land with conservation easements. Professor Brewer, on the other hand, argues that the best use of conservation easements to protect biodiversity is for land trusts to acquire a "multiplicity of preserves."⁷⁰

Professor Brewer offers several general justifications for this strategy. First, no single acquisition, even a large one, can capture all the species or the "interspecific interactions" of a target plant or animal.⁷¹ As Professor Brewer explains, "[a] stand or a preserve is a *sample* that catches some of the traits and not others, as a dipperful of water fails to catch everything living in a pond."⁷² Another reason for having a multiplicity of preserves of a particular biotic community is to lower the likelihood of regional extinctions.⁷³ By having a multiplicity of preserves, if a small population of a species goes extinct, that preserve may nevertheless be repopulated by members of that species harbored in a nearby protected preserve.⁷⁴ Following this strategy, "[e]ach trust working in its own area can provide

⁶⁹ *Id.* at 101–04.

⁷⁰ *Id.* at 102.

⁷¹ *Id.* at 101.

⁷² *Id.* (emphasis added).

⁷³ *Id.* at 102.

⁷⁴ *Id.*

preserves in which it tries to capture the whole variety of local habitats available.”⁷⁵ As explained by Professor Brewer, “[w]hen species are eventually lost from [their] region, the land trust will have provided an array of habitats available for immigration by other native species that now find the climate to their liking.”⁷⁶ For such an “array of habitats” to be available for their new tenants, they must be preserved in perpetuity. By preserving a perpetual “meta-refuge” of an array of habitats, land trusts are able to follow the precautionary principle and preserve aspects of nature that we as yet barely understand. The failure to do so is forever to close the doors of survival on those migrating species that come late to the preserve.

D. Social and Environmental Change

The roles of social, economic, and environmental change in perpetual easements have been addressed in several places in this Article. However, for the sake of frontally addressing these key issues in Professor Mahoney’s various works, they are briefly highlighted here.

Professor Mahoney is concerned that the present generation of land trusts is oblivious to the manifold social changes the future will bring us. As a result, these land trusts fail to meet the social and economic needs of future generations because they are based on the needs of the present generation. This is simply not true. There are already numerous articles and books on this subject, which function to provide guidance to today’s land trusts on how to draft conservation easements for the future.⁷⁷ Moreover, in addition to the scholarship on the subject, the Land Trust Alliance is constantly providing guidance on such issues on a national level. As a consequence, today’s land trusts are very aware of and responsive to the problem of varying economic conditions and changing social values.

Regarding environmental change, the answer is much the same. There is simply a tremendous amount of information about global warming and global climate change. There is so much information that the “default” mode for the majority of

⁷⁵ *Id.* at 104.

⁷⁶ *Id.*

⁷⁷ See, e.g., *id.*; Greene, *supra* note 34; Thompson, *supra* note 1.

Americans and for all of the land trusts is one of expecting change. Indeed, not only are land trusts aware of the coming waves of global climate change, they are already drafting conservation easements that address global climate change directly.⁷⁸

Because these issues are addressed elsewhere in this Article, little more needs to be said other than that it is safe to assume that today's highly informed and sophisticated land trusts are aware of coming social, economic, and environmental change and are dedicated to responding to such changes as best as is possible in the present.

VI CONCLUSION

Professor Mahoney has noted in the past "a certain irony" in this author's unwavering support for perpetual conservation easements against my acknowledgments of the interwoven complexities of human conduct, particularly regarding the ownership and use of land. To the contrary, there is nothing ironic about using a perpetual legal tool to solve perpetual human problems. What is far more puzzling is Professor Mahoney's position that it is more difficult, expensive, and time consuming to undo a well-drafted conservation easement than it is to legally peel away years of outdated land use regimes and to demolish the concrete, steel, and glass megastructures allowed to flourish under such regimes. While a well-drafted conservation easement should be difficult to unwind, in our legal system, there is no single law that is absolutely invulnerable to change. Should future generations need (or want) roads, bridges, factories, homes, and skyscrapers more than the relatively natural lands the conservation community has so lovingly saved for them, there is no doubt that they will eventually shatter the legal obstacles created by conservation easements. They will be able to do this legislatively by eliminating the tax benefits of donated conservation easements, enacting legislative prohibitions on perpetual conservation easements, or perhaps by attacking the enabling statutes in which the legal legitimacy of conservation

⁷⁸ See, e.g., Olmsted, *supra* note 45, at 44–46.

easements are grounded. Judicial attacks on conservation easements are equally likely.⁷⁹

Again, it is hardly ironic to selectively protect land in perpetuity in a world in which undeterred individual and corporate conduct are ferociously putting the finishing touches on its destruction. Nothing short of perpetual protections will protect us from what we know will be a perpetual demand for more development resulting in perpetual assaults on our land. In more instances every day, perpetual conservation easements are the only thing standing between natural areas and the juggernaut of global development. As noted earlier, the consequences of land-use decisions are one-way; we can build structures and we can tear them down. What we cannot do is replace the immensely complicated natural systems that pre-existed our human handiwork, no matter how clever we regard ourselves to be. Thus, what is ironic here is the belief that future generations will thank us not for using perpetual conservation easements to protect the last unique and irreplaceable traces of nature's grandeur, but instead for replacing the remaining enclaves of undisturbed nature with our fungible structures of concrete, steel, and glass.⁸⁰

⁷⁹ Vinson, *supra* note 1, at 279 (noting that perpetual conservation easements can be modified if their stated public benefit is no longer practical and further noting that perpetual conservation easements are "far more reversible than are developments"); see also Shari L. Diener, *The Intergenerational Dilemma: Creating a Workable Framework for the Administration of Conservation Easements*, 10 HOLY CROSS J.L. & PUB. POL'Y 79, 85 (2006) ("Though the easements are termed perpetual, society can always elect to change its rules in a time of need, be it through legislation, common law, constitutional amendment, or executive order.").

⁸⁰ For additional references regarding conservation easements, see Korngold, *supra* note 34, at 1084 n.7.

