
Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation

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The public is investing substantial financial and other resources in conservation easements and the conservation and historic values they protect. Yet little has been written about who should be entitled to what when land encumbered by a conservation easement is condemned in whole or in part. This Article explores these issues. It first demonstrates that conservation easements should constitute a compensable form of property for purposes of the Takings Clause of the Fifth Amendment. Then, using well-settled eminent domain valuation principles, it describes how just compensation should be calculated and apportioned between the holder of a conservation easement and the owner of the encumbered land upon the taking of all or any portion of the encumbered land. The Article explains that paying the economic value attributable to a conservation easement upon its condemnation to the owner of the encumbered land would confer an undue windfall benefit on the owner at the public's expense. The Article also explains that allowing condemning authorities to take easement-encumbered land without paying for the easement would have the perverse and counterproductive effect of making land protected for its conservation or historic values cheaper to condemn than similar unprotected land.

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INTRODUCTION

Conservation easements restrict the development and use of the land they encumber for the purpose of preserving the land’s natural, open, scenic, historic, or ecological features.¹ Landowners convey such easements to government entities or charitable conservation organizations (known as land trusts), and these entities and organizations hold and enforce the easements for the benefit of the public. Many conservation easements are donated in whole or in part as charitable gifts, others are sold for cash, and still others are

¹ See ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 14-15 (2d ed. 2005). Conservation easements also often grant their holders certain affirmative rights with respect to the encumbered land, such as a right to reasonable access to land to monitor and enforce the terms of the easement. *Id.* at 366-68. However, the primary function of a conservation easement is to restrict the development and use of the encumbered land to accomplish the conservation purposes specified in the easement. *Id.* at 14-15.

conveyed in exchange for variances or other development approvals. In addition, most conservation easements are granted “in perpetuity,” meaning they are intended to protect the particular land they encumber for the conservation purposes specified in the deed of conveyance “forever” — or for as long as such protection continues to be possible or practicable.²

Government entities and land trusts typically hold conservation easements “in gross,” meaning they do not hold the easements in connection with, or appurtenant to, parcels that are benefited by the easements.³ Traditional servitude doctrines raised potential difficulties for both the creation and long-term validity of land use restrictions held in gross.⁴ Accordingly, to facilitate the use of conservation easements as a land protection tool, all fifty states and the District of Columbia have enacted some form of legislation that removes the potential common law impediments to the creation and long-term validity of conservation easements (the “easement-enabling statutes”).⁵

² See generally Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673 (2007) (explaining bias in favor of perpetual conservation easements and how perpetuity should be interpreted in conservation easement context).

³ It is common for the owner of one parcel of land (the benefited parcel) to have the right to enforce “negative” restrictions that limit the development or other uses of an adjoining or nearby parcel of land (the burdened parcel). In such a case, the owner of the benefited parcel is said to hold the benefit of the negative restrictions in connection with, or appurtenant to, the benefited parcel. See GERALD KORNGOLD, *PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES* § 801, at 292 (2d ed. 2004). In some cases, negative restrictions on the development and use of land are not held appurtenant to a benefited parcel. In such cases the benefit of the restrictions is said to be held “in gross.” *Id.* § 801, at 292-93.

⁴ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. a (2000) (noting rule prohibiting equitable enforcement of restrictive-covenant benefits held in gross and doubt regarding whether negative easements for previously unrecognized purposes were valid or transferrable); see also KORNGOLD, *supra* note 3, § 9.15(a), at 378-80 (discussing various policy concerns associated with enforcing restrictions on land held in gross in private context).

⁵ ALA. CODE §§ 35-18-1 to -6; (West, Westlaw through 2007 Sess.) ALASKA STAT. ANN. §§ 34.17.010-.060 (West, Westlaw through Feb. 29, 2008 legislation); ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (West, Westlaw through 2007 1st Sess.); ARK. CODE ANN. §§ 15-20-401 to -410 (West, Westlaw through 2007 Sess.); CAL. CIV. CODE §§ 815-816 (West, Westlaw through 2007-08 3d Extra Sess. Urgency Sess.); COLO. REV. STAT. ANN. §§ 38-30.5-101 to -111 (West, Westlaw through law effective Mar. 6, 2008); CONN. GEN. STAT. ANN. §§ 47-42a to -42c (West, Westlaw through 2008 Jan. Special Sess.); DEL. CODE ANN. tit. 7, §§ 6901-6905 (West, Westlaw through 2007 Sess.); D.C. CODE §§ 42-201 to -204 (West, Westlaw through Mar. 18, 2008); FLA. STAT. ANN. § 704.06 (West, Westlaw through Mar. 14, 2008); GA. CODE ANN. §§ 44-10-1 to -5 (West, Westlaw through 2007 Sess.); HAW. REV. STAT. ANN. §§ 198-1 to -6

The easement-enabling statutes authorize the creation and enforcement of conservation easements provided, in general, that the easements are conveyed (1) to a government entity or charitable conservation organization, and (2) for one or more of the conservation purposes specified in the statute.⁶ Before the enactment of easement-

(West, Westlaw through 2007 3d Special Sess.); IDAHO CODE ANN. §§ 55-2101 to -2109, 67-4613 (West, Westlaw through Feb. 27, 2008); 765 ILL. COMP. STAT. ANN. 120/0.01-/6 (West, Westlaw through P.A. 95-711 of 2007 Sess.); IND. CODE ANN. §§ 32-23-5-1 to -23-8-4 (West, Westlaw through Mar. 19, 2008); IOWA CODE ANN. §§ 457A.1-.8 (West, Westlaw through Mar. 13, 2008); KAN. STAT. ANN. §§ 58-3810 to -3817 (West, Westlaw through 2007 Sess.); KY. REV. STAT. ANN. §§ 382.800-.860 (West, Westlaw through 2007 Sess.); LA. REV. STAT. ANN. §§ 9:1271-:1276 (West, Westlaw through 2007 Sess.); ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-C, 1551-1555 (West, Westlaw through ch. 479 of 2008 Sess.); MD. CODE ANN., REAL PROP. § 2-118 (West, Westlaw through Jan. 1, 2008); MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (West, Westlaw through ch. 62 of 2008 2d Sess.); MICH. COMP. LAWS ANN. §§ 324.2140-.2144 (West, Westlaw through P.A.2008, No. 35-38, 40-42 of 2008 Sess.); MINN. STAT. ANN. §§ 84C.01-.05 (West, Westlaw through chs. 151-153, 155-159 of 2008 Sess.); MISS. CODE ANN. §§ 89-19-1 to -15 (West, Westlaw through 2007 Sess. and 1st Extra Sess.); MO. ANN. STAT. §§ 67.870-.910 (West, Westlaw through 2007 Sess. 1st Extraordinary Sess.); MONT. CODE ANN. §§ 76-6-201 to -211 (West, Westlaw through 2007); NEB. REV. STAT. §§ 76-2111 to -2118 (West, Westlaw through 2007 1st Sess.); NEV. REV. STAT. ANN. §§ 111.390-.440 (West, Westlaw through 2007 Sess. and 23d Special Sess.); N.H. REV. STAT. ANN. §§ 477:45-:47 (West, Westlaw through ch. 3 of 2008 Sess.); N.J. STAT. ANN. §§ 13:8B-1-:8B-9 (West, Westlaw through 2007 legislation); N.M. STAT. ANN. §§ 47-12-1 to -6 (West, Westlaw through Mar. 4, 2008 of 2008 2d Sess.); N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to -311 (West, Westlaw through ch. 1-35, 52 of 2008 legislation); N.C. GEN. STAT. ANN. §§ 121-34 to -42 (West, Westlaw through S.L. 2007-552 of 2007 Sess. and Extra Sess.); N.D. CENT. CODE § 55-10-08 (West, Westlaw through 2007 Sess.); OHIO REV. CODE ANN. §§ 5301.67-.70 (West, Westlaw through File 56 of 2007-08 Sess.); OKLA. STAT. tit. 60, §§ 49.1-.8 (West, Westlaw through ch. 4 of 2008 2d Sess. 2008 Sess.); OR. REV. STAT. ANN. §§ 271.715-.795 (West, Westlaw through 2007 Sess.); 32 PA. CONS. STAT. ANN. §§ 5051-5059 (West, Westlaw through Act 2007-77); R.I. GEN. LAWS §§ 34-39-1 to -5 (West, Westlaw through 2007 legislation); S.C. CODE ANN. §§ 27-8-10 to -120 (West, Westlaw through 2007 Sess.); S.D. CODIFIED LAWS ANN. §§ 1-19B-16, -56 to -60 (West, Westlaw through 2007 Sess.); TENN. CODE ANN. §§ 66-9-101 to -103, -301 to -309 (West, Westlaw through 2007 1st Sess.); TEX. NAT. RES. CODE ANN. §§ 183.001-.005 (West, Westlaw through 2007 Sess.); UTAH CODE ANN. §§ 9-8-501 to -506, 57-18-1 to -7 (West, Westlaw through 2007 1st Special Sess.); VT. STAT. ANN. tit. 10, §§ 821-823 (West, Westlaw through No. 83 of 2007-08 Sess.); VA. CODE ANN. §§ 10.1-1009 to -1016 (West, Westlaw through 2007 Sess.); WASH. REV. CODE ANN. § 64.04.130 (West, Westlaw through ch. 5 of 2008 Sess.); W. VA. CODE §§ 20-12-1 to -8 (West, Westlaw through H.B. 4147 of 2008 Sess.); WIS. STAT. ANN. § 700.40 (West, Westlaw through 2007 Act 54 published Feb. 22, 2008); WYO. STAT. ANN. §§ 34-1-201 to -207 (West, Westlaw through March 7, 2008 legislation of 2008 Budget Sess.).

⁶ See, e.g., ALA. CODE § 35-18-1(2) (West, Westlaw through 2007 Sess.) (defining eligible holder of conservation easement to be governmental body or charitable organization); *id.* at § 35-18-1(1) (setting forth conservation purposes for which

enabling statutes, government entities and land trusts could avoid the potential common law impediments to the enforcement of in gross land use restrictions by acquiring, along with every conservation easement, fee title to a small “anchor” parcel to which the easement could be appurtenant.⁷

Although the easement-enabling statutes ensure that conservation easements held in gross will be valid and enforceable, the validity and enforceability of such easements may not depend on the statutes. For example, in 1991, the Supreme Judicial Court of Massachusetts declined to apply common law real property rules to invalidate a restriction in a conservation easement that did not conform precisely to the definition of a conservation easement in the enabling statute.⁸ The court explained: “Where the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force.”⁹ Similarly, in 2005, the Supreme Court of Virginia held that an easement in gross conveyed for conservation and historic preservation purposes to a nonprofit organization fifteen years before the enactment of Virginia’s easement-enabling statute was nonetheless valid and enforceable.¹⁰ The court noted, *inter alia*, Virginia’s strong public policy in favor of land conservation and the preservation of historic sites and buildings.¹¹

Over the past several decades the government at all levels and the nonprofit sector have increasingly relied on conservation easements to accomplish land protection goals.¹² Not surprisingly, the number of

conservation easement can be created).

⁷ The acquisition of such anchor parcels was apparently commonplace in Wyoming until it enacted easement-enabling legislation in 2005. See C. Timothy Lindstrom, *Changes in the Law Regarding Conservation Easements: An Update*, 5 WYO. L. REV. 557, 557-58 (2005); see also BYERS & MARCHETTI PONTE, *supra* note 1, at 389 (noting that in states without easement-enabling legislation, it is “a common practice to have the grantor convey a small parcel in fee to the holder along with the easement, in order to circumvent common law limitations on the enforceability of negative easements ‘in gross’ The easement may then be described as ‘appurtenant’ to the parcel conveyed in fee.”).

⁸ See *Bennett v. Comm’r of Food & Agric.*, 576 N.E.2d 1365, 1366 (Mass. 1991).

⁹ *Id.* at 1367.

¹⁰ See *United States v. Blackman*, 613 S.E.2d 442 (Va. 2005); see also RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 1.6 reporter’s note (“Although many conservation servitudes are created pursuant to statute, common-law conservation servitudes are also recognized . . .”).

¹¹ *Blackman*, 613 S.E.2d at 448.

¹² See BYERS & MARCHETTI PONTE, *supra* note 1, at 7-9 (discussing growth in use of

acres encumbered by conservation easements has risen dramatically.¹³ The strong public policy in favor of the use of conservation easements as a land protection tool is evidenced by the enactment of the easement-enabling statutes,¹⁴ the generous federal (and, in some cases, state) tax benefits offered to easement donors,¹⁵ and the pouring of public funds into easement purchase programs.¹⁶ The public investment in conservation easements is also substantial.¹⁷ This investment most obviously takes the form of the revenues foregone as a result of the tax incentive programs and the public funds appropriated for easement purchase programs. However, the public also invests in conservation easements indirectly: (1) by funding the operations of government entities that hold and enforce easements; (2) through the grant of tax-exempt status to the more than 1600 land

conservation easements).

¹³ As of 2005, local, state, and regional land trusts operating in the United States held conservation easements encumbering over 6.2 million acres of land, up from just over 2.5 million acres in 2000. See LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT (2005), available at http://www.lta.org/census/2005_report.pdf. The Nature Conservancy, a land trust operating on the national level, reported that it held easements encumbering an additional 2.7 million acres in 2005. *Betting on the Ranch*, NATURE CONSERVANCY, Summer 2006, at 14, 14. Collectively, that amounts to over 8.9 million acres, or an area more than four times the size of Yellowstone National Park. These figures do not include the untold number of additional acres encumbered by conservation easements held by federal, state, and local government entities, which also have been busy acquiring conservation easements. See BYERS & MARCHETTI PONTE, *supra* note 1, at 8-9 (noting that hundreds of public agencies across country hold conservation easements).

¹⁴ For example, California's easement-enabling statute provides that "[t]he Legislature further finds and declares it to be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations." See CAL. CIV. CODE § 815 (West, Westlaw through 2008 Sess.).

¹⁵ See, e.g., Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations — A Responsible Approach*, 31 *ECOLOGY L.Q.* 1 (2004) (discussing federal and state tax incentives). For more current information on the tax incentives, see Land Trust Alliance, News and Updates on the Conservation Tax Incentive, http://www.lta.org/publicpolicy/tax_incentives_updates.htm (last visited Apr. 13, 2008), and Land Trust Alliance, State Tax Credits for Conservation, http://www.lta.org/publicpolicy/state_tax_credits.htm (last visited Apr. 13, 2008).

¹⁶ See, e.g., LAND TRUST ALLIANCE, *supra* note 13, at 7 ("In 2006, \$6.7 billion in state and local conservation funding passed in 133 measures. . . . In 2005, \$1.6 billion in public funding was approved overwhelmingly in 111 ballot measures across the country. . . .").

¹⁷ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 1.6 cmt. b (noting substantial public investment in conservation easements).

trusts acquiring easements;¹⁸ (3) by allowing tax-deductible donations of cash and other property to be made to government entities and land trusts holding easements; and (4) through state attorney general and court oversight of the administration and enforcement of easements on behalf of the public.¹⁹

Given the strong public policy in favor of the use of conservation easements as a land protection tool and the considerable public investment in such easements, it is surprising that so little has been written about either the extent to which conservation easements are subject to the power of eminent domain or who is entitled to what when land encumbered by a conservation easement is condemned. The extent to which conservation easements are subject to the power of eminent domain is the subject of a separate future article, although it is useful at this juncture to note that conservation easements are generally accorded little protection from condemnation.²⁰ This Article explores the issue of who should be entitled to what when land encumbered by a conservation easement is condemned for a public use that is inconsistent with the continued enforcement of the easement.²¹

The Takings Clause of the Fifth Amendment to the Federal Constitution provides, in part, that private property shall not be taken for public use without just compensation,²² and the Fourteenth Amendment makes the Fifth Amendment applicable to the states and their political subdivisions.²³ Accordingly, when land encumbered by a conservation easement is taken in whole or in part through the exercise of eminent domain, two principal questions are presented

- (1) Does the conservation easement constitute a compensable form of “property” for eminent domain purposes; and

¹⁸ See LAND TRUST ALLIANCE, *supra* note 13, at 3 (reporting that 1667 land trusts were operating in United States as of 2005).

¹⁹ See McLaughlin, *supra* note 2, at 677-700 (describing state attorney general and court oversight of administration and enforcement of conservation easements).

²⁰ See discussion *infra* Part I.C.4.a.

²¹ For purposes of this Article, I assume that the public use to which land encumbered by a conservation easement will be put upon condemnation will require extinguishment of the easement in whole or in part. I acknowledge that, in rare circumstances, land encumbered by a conservation easement may be condemned for a public use that is consistent with the continued enforcement of the easement, such as for use as a nature preserve.

²² U.S. CONST. amend. V.

²³ JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.01[2] (3d ed. 2007).

- (2) If the answer to the first question is yes, how should the conservation easement be valued for purposes of providing just compensation to the holder?²⁴

Denying conservation easements status as compensable property for eminent domain purposes or assigning a zero or inappropriately low value to such easements for purposes of compensating their government or nonprofit holders would have significant adverse consequences for conservation easements as a land protection tool. Conservation easements restrict the development and use of land that has been identified as worthy of preservation — that is, in each instance a government entity or land trust has identified the land as having significant and often unique and irreplaceable conservation or historic values. If condemning authorities could acquire easement-encumbered land for its value as restricted, such land would be an attractive target for condemnation because it would be less expensive (and, in many cases, much less expensive) to condemn than similar unencumbered land.²⁵ The perversity of that situation should be obvious. Undeveloped land is already a target for condemnation because of the political difficulties associated with locating public works projects, particularly unpopular projects such as sewage treatment plants or high-voltage electric transmission towers, in populated areas. If easement-encumbered undeveloped land were cheaper to condemn than undeveloped land that has not been similarly identified as worthy of preservation, protecting land with a

²⁴ If a government entity (as opposed to a charitable organization) holds the conservation easement, a third question must be answered — does the easement constitute “private” property for purposes of the Takings Clause? This Article does not attempt to comprehensively answer that question and, instead, simply offers the following general observations. When the federal government or an entity to which the federal power of eminent domain has been delegated condemns property owned by a state or a political subdivision of a state, the property is considered private property for which just compensation must be paid. *See id.* §§ 2.18[4], 5.06[8][a][ii]. Alternatively, states are permitted to condemn property owned by a municipality or other subordinate public body without paying just compensation if the subordinate public body owns such property in its “governmental” rather than “proprietary” capacity. *See id.* For the purposes of this Article, I assume that a conservation easement held by a government entity is held in a proprietary capacity and, thus, the entity would be entitled to compensation upon condemnation of the easement.

²⁵ A conservation easement can reduce the fair market value of the land it encumbers by hundreds of thousands or even millions of dollars. *See, e.g.,* McLaughlin, *supra* note 15, at 25 (noting that in 17 reported cases courts determined that conservation easements reduced value of land they encumbered by as much as \$4.97 million and as little as \$20,800, with average diminution in value of approximately 43%).

conservation easement would be tantamount to painting a bull's-eye on it for purposes of eminent domain. This would, of course, directly contravene the strong public policy in favor of protecting the conservation and historic values of land with conservation easements.

Moreover, if government and nonprofit holders of conservation easements are not appropriately compensated upon the taking of easement-encumbered lands, the considerable public investment in conservation easements and the conservation and historic values they protect would be lost. This could cause prospective easement grantors, policymakers, and the general public to lose confidence in conservation easements as a land protection tool. Landowners granting conservation easements clearly do not intend to thereby make their land a cheap and therefore attractive target for condemnation. The same can be said for the policymakers pouring public funds into easement purchase and tax incentive programs, and the individual and institutional donors of cash, property, and services to government entities and land trusts acquiring conservation easements. Indeed, the intent of all such parties is just the opposite — to ensure the long term protection of the conservation and historic values of the encumbered lands.

Just as importantly, paying any of the economic value attributable to a conservation easement upon its condemnation to the owner of the encumbered land would confer an undue windfall benefit on such owner at the public's expense. If the owner of the encumbered land earlier donated the easement, such owner should have no claim to any more than the fair market value of the land subject to the easement, having voluntarily made a gift of the easement to the government or nonprofit holder and, in many cases, having been rewarded for this generosity with significant tax savings.²⁶ If the owner of the encumbered land earlier sold the easement, such owner should again have no claim to any more than the fair market value of the land subject to the easement, having voluntarily conveyed the easement to the government or nonprofit holder in exchange for cash. Indeed, if the value attributable to the easement were allocated to such owner, the public would be paying the owner a second time for the same easement. Finally, any owner of easement-encumbered land other than the easement grantor will have purchased or otherwise acquired such land with at least constructive notice of the easement and, in the case of a purchaser, will have paid a reduced price because of the easement's restrictions. In short, upon condemnation, the owner of land encumbered by a conservation easement should be compensated

²⁶ See *supra* note 15 and accompanying text.

only for the fair market value of his interest in that land — the land *encumbered* by the easement.²⁷

Although there is no case law directly on point, this Article explains that denying conservation easements status as compensable property for eminent domain purposes or assigning a zero or inappropriately low value to such easements for purposes of compensating their government or nonprofit holders would be contrary to the Fifth Amendment's requirement that private property shall not be taken for public use without just compensation. Part I of this Article explains that conservation easements constitute a compensable form of property under any reasonable interpretation of the Takings Clause of the Fifth Amendment. Part II describes how just compensation should be calculated and apportioned between the holder of a conservation easement and the owner of the encumbered land upon the taking of the encumbered land in whole or in part. Part III then discusses the easement-enabling statutes, most of which fail to address whether or what compensation is payable to the holder of a conservation easement upon condemnation of the encumbered land.

I. CONSERVATION EASEMENTS AS COMPENSABLE PROPERTY

There may be some confusion with regard to whether conservation easements fit within the definition of compensable property for eminent domain purposes. Although traditional easements unquestionably constitute compensable property whether they are held appurtenant to a benefited parcel or in gross,²⁸ it is not clear if conservation easements are technically easements. Some commentators have argued that conservation easements, which are generally negative restrictions on the development and use of land, are

²⁷ See *infra* Part II.B. (providing numerical examples of proper calculation and apportionment of compensation award upon condemnation of easement-encumbered land). *But see infra* Part III.A (discussing several easement-enabling statutes that inappropriately provide for payment of value attributable to conservation easement to owner of encumbered land upon condemnation); *infra* notes 226-28 and accompanying text (explaining that some conservation easements inappropriately limit holder's share of condemnation award).

²⁸ In *United States v. Va. Elec. & Power Co.*, 365 U.S. 624 (1960), the Supreme Court determined that the holder of a perpetual in gross flowage easement was entitled to just compensation upon the taking of the easement. The Court explained that it is indisputable that an easement is property that cannot be appropriated for public use without just compensation. *Id.* at 627-28; *see also* William B. Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 IOWA L. REV. 293, 301 (1970) (“[E]xtinction of, or permanent interference with, an easement, appurtenant or in gross, amounts to a compensable taking.”).

more properly characterized as real or restrictive covenants.²⁹ That characterization might prove troublesome in the minority of jurisdictions that have denied compensation to holders of restrictive covenants and other negative restrictions upon the taking of the burdened land.³⁰

As the following subparts explain, however, conservation easements fit neatly within the U.S. Supreme Court's modern definition of property for eminent domain purposes.³¹ The minority rule cases denying compensation to holders of restrictive covenants are inconsistent with this modern view and should be viewed as inappropriate holdovers from an earlier time. Moreover, the questionable policy justifications offered in support of the minority rule are even less persuasive in the conservation easement context. Accordingly, Part I concludes that conservation easements should constitute a compensable form of property for eminent domain purposes.

A. *The Meaning of "Property"*

The Fifth Amendment's guarantee of just compensation for the taking of property was heavily influenced by the Framers' concern about the prospect of uncompensated governmental seizure of tangible items, such as horses, fodder, and other provisions for the army.³² Accordingly, in the eighteenth and nineteenth centuries, courts tended to interpret the concept of property for eminent domain purposes as relating to tangible items, rather than the rights, privileges, and duties that constitute our understanding of the concept of property today.³³

Beginning in the 1870s, courts began to interpret the concept of property for eminent domain purposes more expansively, holding that intangible things, such as a right to use land by flooding it and certain

²⁹ See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 1.6 cmt. a (noting that conservation easements, referred to in *Restatement* as "conservation servitudes," could be either restrictive covenants or negative easements); KORNGOLD, *supra* note 3, § 2.05(b), at 19 ("According to traditional theory and doctrine, a conservation . . . 'easement' is not really an easement at all. Rather, since it is a negative restriction, not an affirmative right, it is more like a real covenant.").

³⁰ See *infra* note 49 (listing minority decisions).

³¹ See *infra* Part I.A. (discussing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 381-84 (1945)).

³² Gideon Kanner, *Restrictive Covenants in Condemnation: Bringing Equity into Just Compensation*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 237, 239 (Virginia S. Cameron ed., 1976).

³³ *Id.* at 239-40.

contract rights, constituted compensable property.³⁴ The first articulation in the eminent domain context of the modern concept of property as consisting of a bundle of rights appeared in an 1874 New Hampshire case.³⁵ In that case, the court ruled that “[p]roperty in land must be considered . . . as an aggregation of qualified privileges,” and “[p]roperty is taken when any one of those proprietary rights is taken”³⁶

In 1943, in *United States v. 53 1/4 Acres of Land*, the Second Circuit Court of Appeals held that an inchoate statutory right of a mortgagor to assume a lease upon default of the tenant constituted compensable property for eminent domain purposes.³⁷ The Second Circuit explained:

We see no reason to grope about in the mysterious world of “estates” and “interests not estates.” . . . [W]e think that the right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an “estate” or “interest” in the land.³⁸

Two years later, the U.S. Supreme Court articulated the modern view of property for eminent domain purposes in the much-cited case, *United States v. General Motors Corp.*³⁹ In determining the just compensation due to a lessee upon the government’s condemnation of the lessee’s right to occupancy, the court stated:

It is conceivable that [the term “property” in the Fifth Amendment] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter *The*

³⁴ *Id.* at 240-41.

³⁵ *Thompson v. Androscoggin River Improvement Co.*, 54 N.H. 545 (1874); Kanner, *supra* note 32, at 240-41.

³⁶ *Thompson*, 54 N.H. at 551-52.

³⁷ 139 F.2d 244 (2d Cir. 1943).

³⁸ *Id.* at 247.

³⁹ 323 U.S. 373 (1945).

*constitutional provision is addressed to every sort of interest the citizen may possess.*⁴⁰

As a result of this expansive modern view, a variety of intangible rights or interests in real property have been treated as compensable property for eminent domain purposes, including appurtenant and in gross easements, restrictive covenants, leasehold interests, interests of mortgagees, life estates, remainders, and reversions.⁴¹

As the foregoing discussion indicates, the meaning of the term “property” for eminent domain purposes is not frozen in time. Rather, the meaning of the term evolves to reflect our changing understanding of the concept of property and changing societal needs.⁴² Accordingly, over time we can expect that the term will be interpreted to encompass a wide variety of interests that the courts deem important enough to grant legal protection.⁴³

B. *Negative Restrictions on the Development and Use of Land*

1. The Majority and Minority Rules

Courts at the federal level and in a majority of states that have addressed the issue have held that negative restrictions on the development and use of one parcel (the burdened parcel) that are held appurtenant to a different parcel (the benefited parcel) constitute compensable property for eminent domain purposes.⁴⁴ Accordingly,

⁴⁰ *Id.* at 377-78 (emphasis added).

⁴¹ See SACKMAN, *supra* note 23, §§ 5.02, 5.03, 5.07[2][b], [4][a], 12D.01; *id.* at § 5.01[5][d][iii] (“Real property is subject to the power of eminent domain, as are all rights or interests therein. All of these interests must be paid for when the property is acquired through eminent domain.”); see also Stoebuck, *supra* note 28, at 296 (“An important part of the . . . history of eminent domain law is the increasing recognition of ‘property’ as a nonphysical concept.”); discussion *infra* Part I.B.1 (explaining that negative restrictions on development and use of land are treated as compensable property in majority of jurisdictions that have addressed issue).

⁴² See SACKMAN, *supra* note 23, § 5.08[1]-[2]; Kanner, *supra* note 32, at 238-41.

⁴³ See SACKMAN, *supra* note 23, § 5.08[2] (“Property may refer to almost anything in a society that deserves special protection or legal recognition by ownership.”).

⁴⁴ See *Adaman Mut. Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960); *United States v. Certain Lands in Augusta*, 220 F. Supp. 696 (D. Me. 1963); *S. Cal. Edison Co. v. Bourgerie*, 507 P.2d 964 (Cal. 1972); *Town of Stamford v. Vuono*, 143 A. 245 (Conn. 1928); *Pulos v. James*, 302 N.E.2d 768 (Ind. 1973); *Wash. Suburban Sanitary Comm’n v. Frankel*, 470 A.2d 813 (Md. Ct. Spec. App. 1984), *vacated on other grounds*, 487 A.2d 651 (Md. 1985); *Ladd v. City of Boston*, 24 N.E. 858 (Mass. 1890); *Allen v. City of Detroit*, 133 N.W. 317 (Mich. 1911); *Burger v. City of St. Paul*,

when the burdened parcel is condemned for a use that is inconsistent with the restrictions, and the restrictions are thereby extinguished, the owner of the benefited parcel is entitled to compensation for the value of the restrictions.⁴⁵

Many of the majority rule cases involve the taking for a public use of one or more lots in a residential development where all of the lots are burdened by reciprocal residential-use restrictions. Thus, for example, in the leading case of *Allen v. City of Detroit*, the Supreme Court of Michigan held that the city could not construct a fire engine house on two lots it had purchased in a development restricted to residential use without paying just compensation to the owners of the other lots in the development, which were benefited by the residential-use restrictions.⁴⁶ The court explained that “[b]uilding restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and are a property right of value, which cannot be taken for the public use without due process of law and compensation therefor”⁴⁷

The value of such appurtenant restrictions is generally determined by applying the “before and after method” to the *benefited* parcel. Thus, the compensation payable to the owner of a benefited parcel for the loss of the benefit of the restrictions is equal to the difference between (1) the fair market value of the benefited parcel immediately before the taking, with the restrictions on the burdened parcel intact, and (2) the fair market value of the benefited parcel immediately after the taking,

64 N.W.2d 73 (Minn. 1954); *Peters v. Buckner*, 232 S.W. 1024 (Mo. 1921); *Horst v. Hous. Auth.*, 166 N.W.2d 119 (Neb. 1969); *Meredith v. Washoe County Sch. Dist.*, 435 P.2d 750 (Nev. 1968); *Duke v. Tracy*, 252 A.2d 749 (N.J. Super. Ct. Ch. Div. 1969); *Leigh v. Vill. of Los Lunas*, 2005-NMCA-025, 137 N.M. 119, 108 P.3d 525 (Ct. App. 2004); *Flynn v. N.Y., Westchester & Boston Ry. Co.*, 112 N.E. 913 (N.Y. 1916); *City of Raleigh v. Edwards*, 71 S.E.2d 396 (N.C. 1952); *Sch. Dist. No. 3 v. Country Club of Charleston*, 127 S.E.2d 625 (S.C. 1962); *City of Shelbyville v. Kilpatrick*, 322 S.W.2d 203 (Tenn. 1959); *City of Houston v. McCarthy*, 464 S.W.2d 381 (Tex. Civ. App. 1971); *Meagher v. Appalachian Elec. Power Co.*, 77 S.E.2d 461 (Va. 1953). Mississippi adopted the majority rule in a case involving restrictions where the benefited parcel was not identified. *See Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1296 (Miss. 1994); *see also* discussion *infra* Part I.B.3.b. Kentucky and Pennsylvania have adopted the majority rule by implication. *See Ashland-Boyd County City-County Health Dept. v. Riggs*, 252 S.W.2d 922, 925 (Ky. 1952); *Crayder v. Seidman*, 87 Pa. D. & C. 118, 125 (Ct. Com. Pl. 1953).

⁴⁵ *See* cases cited *supra* note 44; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 7.8 (“Condemnation of an estate burdened by a servitude modifies or terminates the servitude to the extent that the taking permits a use inconsistent with continuance of the servitude.”).

⁴⁶ *Allen*, 133 N.W. at 321.

⁴⁷ *Id.* at 320.

with the restrictions on the burdened parcel extinguished — or the amount by which the taking reduces the fair market value of the benefited parcel.⁴⁸ Accordingly, when one or more lots in a development subject to reciprocal residential-use restrictions are taken for a public use inconsistent with the restrictions (such as for use as the site of a fire engine house, storm drainage pond, public school, post office, or elevated water storage tank), the owners of the other lots in the development are entitled to compensation equal to the amount by which the taking reduces the fair market value of their lots.

Although courts in a minority of jurisdictions have denied compensation for the taking of such appurtenant negative restrictions,⁴⁹ support for the minority rule is waning. As discussed in Part I.B.2, the legal and policy justifications offered in support of the minority decisions have been sharply criticized by both courts and commentators.⁵⁰ Two states, California and Texas, have abandoned the minority rule in favor of the majority rule.⁵¹ The trend in more recent cases has been to adopt the majority rule.⁵² The majority rule was

⁴⁸ See, e.g., *Vuono*, 143 A. at 249 (“When an easement appurtenant to land is taken, the measure of damages is the depreciation in the value of the dominant tenement.”); *Leigh*, 108 P.3d at 530 (“[M]ajority jurisdictions use the before and after rule in measuring the value of a restrictive covenant . . .”).

⁴⁹ See *Moses v. Hazen*, 69 F.2d 842, 844 (D.C. Cir. 1934); *United States v. Certain Lands in Jamestown*, 112 F. 622, 626 (Cir. Ct. R.I. 1899), *aff'd*, *Wharton v. United States*, 153 F. 876 (1st Cir. 1907); *Burma Hills Dev. Co. v. Marr*, 229 So. 2d 776 (Ala. 1969); *Ark. State Highway Comm. v. McNeill*, 381 S.W.2d 425 (Ark. 1964); *Smith v. Clifton Sanitation Dist.*, 300 P.2d 548 (Colo. 1956); *Bd. of Pub. Instruction v. Bay Harbor Islands*, 81 So. 2d 637, 642 (Fla. 1955); *Anderson v. Lynch*, 3 S.E.2d 85 (Ga. 1939); *Hosp. Serv. Dist. No. 2 v. Dean*, 345 So. 2d 234, 237 (La. Ct. App. 1977); *Doan v. Cleveland Short Line Ry. Co.*, 112 N.E. 505 (Ohio 1915); *Burke v. Okla. City*, 350 P.2d 264 (Okla. 1960); *State ex rel. Wells v. City of Dunbar*, 95 S.E.2d 457 (W. Va. 1956).

⁵⁰ For law review commentators, see Paul B. Edelberg & Charles C. Goetsch, *Hartford National Bank and Trust Company v. Redevelopment Agency of the City of Bristol*, 164 *Conn.* 337, 321 A.2d 469 (1973); *Establishing the Compensability and Value of Restrictive Covenants and Easements in Gross*, 7 *CONN. L. REV.* 403 (1975); Kanner, *supra* note 32; Stoebuck, *supra* note 28.

⁵¹ See *S. Cal. Edison Co. v. Bourgerie*, 507 P.2d 964, 968 (Cal. 1973) (overruling earlier decision and adopting majority rule); *City of Houston v. McCarthy*, 464 S.W.2d 381, 387 (Tex. Civ. App. 1971) (holding that damages, as opposed to injunctive relief, could be recovered upon taking of restrictive covenants, thereby distinguishing earlier case that purported to adopt minority rule); see also *City of Heath v. Duncan*, 152 S.W.3d 147, 152 (Tex. App. 2004) (holding that reciprocal residential-use restrictions are compensable property for eminent domain purposes).

⁵² See *Dible v. City of Lafayette*, 713 N.E.2d 269, 273 (Ind. 1999); *Wash. Suburban Sanitary Comm'n v. Frankel*, 470 A.2d 813, 817 (Md. Ct. Spec. App. 1984), *vacated on other grounds*, 487 A.2d 651 (Md. 1985) (noting “rather formidable array of authority” in support of majority rule); *Morley v. Jackson Redevelopment Auth.*, 632

adopted by the *Restatement (First) of Property*, published by the American Law Institute in 1944, and the *Restatement (Third) of Property: Servitudes*, published by the Institute in 2000.⁵³ And, as discussed in Part I.B.3, two cases strongly support the application of the majority rule to negative development and use restrictions held in gross.

2. Debunking the Minority Rule

a. “Contract Right” Versus “Property”

Courts adopting the minority rule denying compensation for the taking of negative restrictions on development and use maintain that such restrictions are mere contract rights rather than property for which compensation is due in eminent domain proceedings.⁵⁴ This justification for the minority rule can be traced to eighteenth- and nineteenth-century cases, which were decided before the modern view of property as consisting of both tangible and intangible rights had taken hold in the eminent domain context.⁵⁵ Accordingly, the more recent cases holding that negative restrictions on development and use do not constitute property for eminent domain purposes can be viewed as “perpetuating a result based on outmoded reasoning.”⁵⁶

So. 2d 1284, 1297 (Miss. 1994); *Leigh*, 108 P.3d at 530.

⁵³ See RESTATEMENT (FIRST) OF PROP. § 566 (1944); see also *id.* § 566 caveat (declining to take position on question of compensation to be paid upon taking of such interests because authorities were in uncertain and developing state); RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 7.8 reporter’s note; see also *id.* (noting that amount of compensation to be paid upon taking of restrictive covenant was not addressed because Chapter 7 “deals only with termination of the servitude”).

⁵⁴ See, e.g., *Moses*, 69 F.2d at 844 (holding that residential-use covenants were “not truly property rights, but contractual rights, which the government in the exercise of its sovereign power may take without payment of compensation”).

⁵⁵ See *Kanner*, *supra* note 32, at 244 (noting that courts got off on wrong foot with regard to minority rule because “the concept of property for purposes of eminent domain underwent a process of development in this country and did not mature into substantial parallelity with the general law of property until well into the twentieth century”); *Stoebuck*, *supra* note 28, at 306 (noting that proprietary nature of restrictive covenants was not so generally accepted when progenitor of minority view, *United States v. Certain Lands*, was decided); discussion *supra* Part I.A.

⁵⁶ *Stoebuck*, *supra* note 28, at 306. Moreover, even if one were to concede the “contract right” label for negative restrictions on development and use, “that proves nothing, for it has long been recognized that contract rights, specifically those pertaining to land, are property for eminent domain purposes.” *Id.* at 305; see also *Kanner*, *supra* note 32, at 246-47.

Courts in a majority of jurisdictions have rejected the minority's narrow and outdated view of property in favor of the modern view articulated by the U.S. Supreme Court in *General Motors*.⁵⁷ Thus, for example, in holding that reciprocal residential-use restrictions constitute compensable property for eminent domain purposes in *United States v. Certain Land in Augusta, Maine*, the U.S. district court explained that, while it has long been settled that the Fifth Amendment is limited to the protection of property, "it is equally clear that the term 'property' is to be broadly interpreted."⁵⁸

In *Southern California Edison Co. v. Bourgerie*, the Supreme Court of California determined that negative building restrictions held appurtenant to a benefited parcel constitute compensable property for eminent domain purposes.⁵⁹ In rejecting the much-criticized "property" versus "contract" labeling process, the court explained:

Under the minority view, compensation is denied to persons whose property may have been damaged as a result of the violation of a valid deed restriction, thereby placing a disproportionate share of the cost of public improvements upon a few individuals. Neither the constitutional guarantee of just compensation nor public policy permit such a burdensome result.⁶⁰

As further support for its decision, the court cited the U.S. Supreme Court's decision in *Fuller*, in which the Court declared: "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law."⁶¹

The Supreme Court of Tennessee expressed a similar sentiment in *Shelbyville v. Kilpatrick*.⁶² In holding that reciprocal residential-use restrictions constitute compensable property for eminent domain purposes regardless of their characterization under property law, the court explained:

⁵⁷ See *supra* notes 39-40 and accompanying text (discussing *General Motors*).

⁵⁸ *United States v. Certain Land in Augusta, Me.* 220 F. Supp. 696, 699 (D. Me. 1963) (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

⁵⁹ *S. Cal. Edison Co. v. Bourgerie*, 507 P.2d 964 (Cal. 1973). *Bourgerie* involved a public utility seeking to condemn a parcel of land for the purpose of building an electric transmission station. *Id.* at 965. The parcel was, however, subject to an appurtenant restriction specifically prohibiting its use for that purpose. *Id.*

⁶⁰ *Id.* at 968.

⁶¹ *Id.* (citing *United States v. Fuller*, 409 U.S. 488, 490 (1973)).

⁶² *City of Shelbyville v. Kilpatrick*, 322 S.W.2d 203 (Tenn. 1959).

Certainly it is not within the spirit of our eminent domain law that such [an] interest . . . may be taken away from its owner without compensation, if that owner is damaged. . . . The only right, broadly speaking, that any owner of any real estate has in land is the right to use it. So, it would seem to follow that the ownership of the right to restrict the use of a given parcel of land . . . is . . . a property right in that lot, for which, when deprived thereof, [the owner] should be compensated.⁶³

The essence of the majority position is that negative restrictions on the development and use of land are valid, enforceable, and therefore valuable interests in the burdened land, just like traditional easements (which unquestionably constitute compensable property for eminent domain purposes). Accordingly, to establish a substantive distinction by merely labeling one a contract right and the other a property interest is “inequitable and rationally indefensible.”⁶⁴ It also matters not whether the negative restrictions are labeled under state law as restrictive covenants, equitable servitudes, or some form of equitable or negative easement.⁶⁵ In a majority of jurisdictions all such restrictions are treated as property for eminent domain purposes, and

⁶³ *Id.* at 205.

⁶⁴ See *Bourgerie*, 507 P.2d at 966-67; see also, e.g., *United States v. Certain Land in Augusta, Me.* 220 F. Supp. 696, 701-02 (D. Me. 1963) (noting that “better reasoned authorities” adopting majority rule “clearly turn on the premise that [in] the enforcement in equity of covenants and agreements running with the land is the recognition of their existence as equitable property interests of a nature similar to legal easements”). One commentator explained:

[R]estrictive covenants are treated by the courts as property rights in litigation between private parties, and hence the Government’s appearance on the scene in the capacity of a condemnor should have no effect on the proprietary interest of the owners The theory of the Fifth Amendment is that when the Government takes private property, it has no greater right in avoiding payment of damages than do private parties

Kanner, *supra* note 32, at 247-48.

⁶⁵ See, e.g., *Horst v. Hous. Auth.*, 166 N.W.2d 119, 121 (Neb. 1969) (“Whether the interests involved here [i.e., residential-use restrictions] be treated as negative easements, equitable easements, equitable servitudes, or contractual covenants running with the land, they constitute property in the constitutional sense and must be compensated for if their extinguishment results in damage to the owners.”); see also Kanner, *supra* note 32, at 247 (“The theoretical basis of the majority view is that it is not important how restrictive covenants are characterized, because, however characterized, they constitute a property interest in the land in issue in the sense that they confer upon their owners the right to control such land.”).

the owners of land benefited by such restrictions are entitled to compensation upon the taking of the burdened land.⁶⁶

b. Policy Justifications

Courts adopting the minority rule also offer a number of policy justifications in support of their position. Although these policy justifications appear to be the real basis for the minority rule decisions,⁶⁷ they too have been sharply criticized by majority rule courts and commentators.

(1) Restricting the Exercise of Eminent Domain

Courts adopting the minority rule have argued that it is against public policy to allow individuals, by private agreement, to restrict the government's exercise of the power of eminent domain.⁶⁸ But as one commentator has noted: "The notion that restrictive covenants somehow impair the exercise of the power of eminent domain is simply untenable."⁶⁹ Negative restrictions on development and use do not preclude the taking of the burdened land. Rather, the government is free to take the burdened land and is merely required to pay appropriate compensation to the various owners of interests in that land.⁷⁰

(2) Intolerable Financial and Procedural Burdens

Another argument offered in support of the minority rule relates to the condemnation of one or more lots in a development where all of the lots are subject to reciprocal residential-use restrictions. Minority courts have argued that, given the large number of lot owners who would have to be joined in the condemnation proceeding, and the fact

⁶⁶ See *supra* note 44 for a list of the majority rule cases.

⁶⁷ See, e.g., *Bourgerie*, 507 P.2d at 967 ("We need not contemplate in depth the somewhat esoteric dialogue on the appropriate characterization of a building restriction. . . . An objective analysis reveals the real basis for the decisions which deny compensation for the violation of building restrictions by a condemnor relates to pragmatic considerations of public policy rather than abstract doctrines of property law . . .").

⁶⁸ See, e.g., *United States v. Certain Lands in Jamestown*, 112 F. 622, 629-30 (Cir. Ct. R.I. 1899), *aff'd*, *Wharton v. United States*, 153 F. 876 (1st Cir. 1907).

⁶⁹ Kanner, *supra* note 32, at 245-46.

⁷⁰ See Kanner, *supra* note 32, at 246 ("In such cases, the owner does not try to stop the Government from devoting the land in question to legitimate governmental uses; indeed, he could not do so even if he tried What the owner does contend in such cases is that his interest (in the form of restrictions) is being 'taken' and hence he is entitled to just compensation.").

that each such lot owner would have to be compensated based on the extent to which the taking reduces the value of his or her lot, treating the negative restrictions as compensable property would place intolerable financial and procedural burdens on condemning authorities.⁷¹

The total award for the taking of both a burdened parcel and the appurtenant restrictions benefiting the other parcels in a residential subdivision could possibly exceed the fair market value of the burdened parcel if it were not subject to such restrictions. In other words, the restrictions might enhance the value of the benefited parcels more than they diminish the value of the burdened parcel, and the condemning authority might be required to pay more than fair market value for the property it acquires — the burdened parcel free of restrictions on its use.⁷² Majority rule courts and commentators have pointed out, however, that the taking of lots in a residential subdivision for some public uses may not negatively impact the value of neighboring lots.⁷³ In addition, even if the public use would negatively impact the value of neighboring lots, it is likely to negatively impact only those lots in close proximity to the lots taken.⁷⁴ Moreover, as a practical matter, only the owners of lots negatively impacted would need to be joined in the proceeding.⁷⁵

It also has been observed that “the constitutional guarantee of compensation does not extend only to cases where the taking is cheap

⁷¹ See, e.g., *Bd. of Pub. Instruction v. Town of Bay Harbor Islands*, 81 So. 2d 637, 643-44 (Fla. 1955) (“In the event of the construction of a public building in a large subdivision containing many separate ownerships, a determination of the varying degrees of damage, if any, which might be claimed by the individual lot owners would present obstacles of an unwarranted nature in the exercise of the sovereign power.”); *City of Houston v. Wynne*, 279 S.W. 916, 920 (Tex. Civ. App. 1926) (speculating that in some circumstances there could be as many as 10,000 claimants). Texas has since adopted the majority rule. See *supra* note 51 and accompanying text.

⁷² See, e.g., *Bourgerie*, 507 P.2d at 967 (conceding possibility that cost of condemning property might be increased somewhat by awarding compensation for violation of building restrictions).

⁷³ See, e.g., *id.* at 968 (“As a practical matter some takings would result in negligible damage to the owners of the restriction (e.g., public works such as parks or access roads) . . .”).

⁷⁴ See, e.g., *id.* (“[I]f the character of the improvement were such that damage to some landowners would result (e.g., schools or fire stations), it is likely that only those immediately adjoining or in close proximity to the improvement would suffer substantial injury, even in highly restricted areas.”).

⁷⁵ See, e.g., *id.* (“As to the procedural difficulties . . . a condemner need only selectively join in the action landowners whose property is most likely to be damaged by the violation of the building restriction . . .”).

or easy.”⁷⁶ As the Supreme Court of Nevada explained in *Meredith v. Washoe County School District*:

We do not agree that because a number of persons may be affected by the proceedings it is best to hold the appellants have no right that the law should protect against the sovereign and deny them the right to offer proof of damage. Procedural considerations should not determine the substantive question of whether there is a compensable property interest.⁷⁷

(3) Bad Faith and Fraud

Finally, some minority courts have suggested that if negative restrictions are treated as compensable property, “landowners might ‘pluck valuable causes of action from the thin air’ by entering into agreements imposing restrictions whenever condemnation proceedings are on the horizon.”⁷⁸ In the case of appurtenant restrictions, which are valued by reference to the *benefited* parcels, the creation of such restrictions at the eleventh hour could increase the amount of compensation the condemning authority is required to pay and, as a result, potentially discourage the proposed condemnation.⁷⁹ Majority rule courts and commentators have noted, however, that the fact that some litigants might abuse a rule that treats negative restrictions as compensable property is no reason to withhold the benefit of the rule from those who are entitled to it.⁸⁰ Moreover, when abuses do occur, they can be dealt with on a case-by-case basis by denying claimants compensation.⁸¹ Thus, the possibility of bad faith

⁷⁶ See Stoebuck, *supra* note 28, at 307.

⁷⁷ *Meredith v. Washoe County Sch. Dist.*, 435 P.2d 750, 753 (Nev. 1968).

⁷⁸ See, e.g., *Bourgerie*, 507 P.2d at 967 (citing Ark. State Highway Comm’n v. McNeill, 381 S.W.2d 425, 427 (Ark. 1964)).

⁷⁹ See *supra* note 72 and accompanying text.

⁸⁰ See Kanner, *supra* note 32, at 247; see also *Bourgerie*, 507 P.2d at 968 (“[T]he speculative possibility that some unduly acquisitive landowners might in bad faith enter into restrictive covenants solely for the purpose of collecting compensation would not justify the denial of compensation to all property owners, including those acting in good faith.”).

⁸¹ See *Smith v. Clifton*, 300 P.2d 548, 550 (Colo. 1956) (denying compensation when restrictions prohibiting use of burdened land as site for sanitary disposal system were agreed to in attempt to discourage taking). Although Michigan is firmly in the majority rule camp, the Supreme Court of Michigan denied compensation for the taking of reciprocal residential-use restrictions admittedly agreed to in an attempt to increase the amount to be received upon the taking of the burdened land. See *Taylor v. Van Wagoner*, 278 N.W. 49, 51 (Mich. 1938).

or fraud “is no reason to throw the baby out with the bathwater and deny compensation for all restrictive covenants.”⁸²

In summary, the minority rule cases denying compensation for the taking of appurtenant negative development and use restrictions are holdovers from an earlier time. They are inconsistent with the U.S. Supreme Court’s modern view of property for purposes of the Takings Clause, and with the Court’s position that the requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.⁸³ Moreover, the policy justifications that the minority courts rely upon are unpersuasive and, even if one were to accord them some credence, considerations of policy should not trump constitutional rights.⁸⁴

3. Application of the Majority Rule to In Gross Restrictions

The issue of whether in gross (as opposed to appurtenant) negative restrictions on development and use constitute compensable property for eminent domain purposes has not been directly addressed by the courts. However, two cases provide strong support for the conclusion that such in gross restrictions do constitute compensable property. These two cases, *Hartford National Bank & Trust Co. v. Redevelopment Agency*⁸⁵ and *Morley v. Jackson Redevelopment Authority*,⁸⁶ are discussed in detail below.

a. *Hartford*

In 1968, the redevelopment agency of the City of Bristol (“Agency”) condemned certain restrictive covenants held in gross by the trustee of a charitable trust and offered to pay the trustee one dollar as compensation.⁸⁷ The trustee requested a reappraisal of the value of the covenants, and the matter was referred to a state referee.⁸⁸ After

⁸² See Stoebuck, *supra* note 28, at 310.

⁸³ See *supra* notes 40, 61 and accompanying text.

⁸⁴ See Stoebuck, *supra* note 28, at 307 (“[S]urely no policy can be discovered by an American court which overcomes a guarantee contained in a constitutional bill of rights. If there is a policy question at all, it must be answered in favor of the constitutional right.”).

⁸⁵ *Hartford Nat’l Bank & Trust Co. v. Redevelopment Agency*, 321 A.2d 469 (Conn. 1973).

⁸⁶ *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284 (Miss. 1994).

⁸⁷ *Hartford*, 321 A.2d at 471.

⁸⁸ *Id.*

reviewing evidence offered by both parties, the referee determined that the proper way to value the in gross covenants was to apply the before and after method to the burdened parcels.⁸⁹ The referee found the trustee was entitled to \$37,180 as compensation, which represented the difference between (1) the fair market value of the burdened parcels immediately after the taking, with the covenants having been extinguished, and (2) the fair market value of the burdened parcels immediately before the taking, with the covenants intact.⁹⁰ In other words, the referee determined that the trustee was entitled to compensation equal to the amount by which the taking and consequent extinguishment of the covenants increased the fair market value of the burdened parcels.

The Agency appealed the referee's determination, arguing that the referee's method of valuation was inappropriate.⁹¹ The Agency asserted that, because the trustee was not the owner of land adjoining the burdened parcels, the trustee suffered no actual loss as a result of the condemnation.⁹² The Agency did not argue that the in gross covenants were not compensable property for eminent domain purposes because it apparently had earlier conceded this point.⁹³

Although the Supreme Court of Connecticut did not have to address the issue, it went to some trouble to satisfy itself that the in gross restrictive covenants were a species of property. The court determined that the covenants created an easement in gross for the benefit of the trustee and cited to a case in which an easement in gross was treated as compensable property for eminent domain purposes.⁹⁴ The court also cited the *Restatement (First) Property*, which provides that easements in gross intended to endure indefinitely constitute real property.⁹⁵ Having satisfied itself that the in gross covenants were a species of property, the court then turned to the issue of valuation.

The court first noted that, when the Agency extinguished the restrictive covenants through condemnation, "it obviously increased the value of the land [it] acquired" by releasing that land from the

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 472 (citing *Whitmier & Ferris Co. v. State*, 209 N.Y.S.2d 247 (N.Y. App. Div. 1961) (holding that plaintiff advertising corporation was entitled to compensation when its exclusive in gross right to place advertising signs on wall or fence was taken by eminent domain)).

⁹⁵ *Id.* (citing RESTATEMENT (FIRST) PROP. § 454 cmt. B (1944)).

restrictions on its use.⁹⁶ The court then noted that, while there were no certain guidelines regarding the valuation of easements in gross, the *Restatement (First) of Property* provided that the effect of the extinguishment of an easement on the value of the burdened land “probably has a closer relation to the value of the easement when it is in gross than when it is appurtenant.”⁹⁷ The court ultimately held that the referee’s approach to the valuation of the in gross restrictions was correct “whether [the restrictions] be viewed as creating an easement in gross or simply as enforceable promises respecting the use of land.”⁹⁸ In so doing, the court implicitly rejected the Agency’s argument that the trustee suffered no actual loss as a result of the condemnation because it held the covenants in gross.

Hartford stands for the proposition that in gross restrictions on the development and use of land have value, and that such value can be measured by the extent to which extinguishment of the restrictions increases the value of the burdened land. Moreover, although the issue of whether the in gross restrictions constituted compensable property for eminent domain purposes was not before the court, the court satisfied itself that such restrictions were a species of property. Accordingly, the court implicitly recognized in gross restrictions as a compensable form of property for eminent domain purposes.

b. Morley

In 1981, Dean Morley and Margaret Laurence purchased the historic King Edward Hotel (“King Edward”) located in Jackson, Mississippi from Standard Life Insurance Company (“Standard”).⁹⁹ Standard sold the property subject to the following restrictive covenant, which was binding upon Morley and Laurence and their successors in interest:

The property shall be used as offices, a hotel, apartments, commercial rental property or a combination of these. No part of the property shall be converted for use as a home for the elderly, a nursing home or as low rent, government subsidized housing.¹⁰⁰

⁹⁶ *Id.* at 473.

⁹⁷ *Id.*

⁹⁸ *Id.*; see also Edelberg & Goetsch, *supra* note 50, at 415-16 (citing Referee’s Memorandum of Decision in *Hartford* and noting: “The court . . . accepted the referee’s finding that the ‘before and after’ method of valuation of the covenant was ‘the only rational way to evaluate the restrictions themselves.’”).

⁹⁹ *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1286-87 (Miss. 1994).

¹⁰⁰ *Id.* at 1295.

Although Standard owned other property in the vicinity of the King Edward, it failed to identify any property as the benefited (or dominant) parcel in the instrument containing the covenant.¹⁰¹

In 1989, the Jackson Redevelopment Authority (“JRA”) filed suit to acquire the King Edward by eminent domain.¹⁰² Standard was joined as a party because it claimed it had a compensable interest in the property in the form of a restrictive covenant.¹⁰³ The trial court found that JRA had the legal authority to take the King Edward by eminent domain, and the jury awarded Morley and Laurence \$500,000 as compensation.¹⁰⁴ The trial court also found that Standard did not have a compensable interest in the property.¹⁰⁵ Both parties appealed to the Supreme Court of Mississippi.¹⁰⁶

On appeal, JRA argued that restrictive covenants should not be treated as compensable property for eminent domain purposes (in other words, that the minority rule should apply).¹⁰⁷ JRA also argued that, even if restrictive covenants are treated as compensable property, the covenant at issue should not be so treated because Standard failed to identify a benefited parcel in the instrument creating the covenant.¹⁰⁸ Standard argued that its restrictive covenant constituted compensable property, that such property had value, and that such value could be determined by reference to the effect the taking of the King Edward would have on property it owned in the vicinity.¹⁰⁹

In holding that restrictive covenants constitute compensable property for eminent domain purposes, the Supreme Court of Mississippi acknowledged that there is some disagreement on this issue among the states, but determined that the opinions in the

¹⁰¹ *Id.*

¹⁰² *Id.* at 1286.

¹⁰³ *Id.*

¹⁰⁴ *Id.* Although the King Edward was listed on the National Register of Historic Places, it had not been occupied since 1967. At the time of the *Morley* decision in 1994, it had become a blight on the Jackson skyline, “home only to a group of pigeons that enter through the numerous broken windows and mark the hotel with great mounds of disease-carrying excrement.” *Id.* at 1287.

¹⁰⁵ *Id.* at 1286.

¹⁰⁶ The issues that Morley and Laurence appealed are not relevant to this Article and, thus, are not discussed. See generally *Morley v. Jackson Redevelopment Auth.*, 874 So. 2d 973 (Miss. 2004).

¹⁰⁷ *Morley*, 632 So. 2d at 1295.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Morley and Laurence objected to any holding that would diminish the amount of compensation payable to them. *Id.* at 1295-96.

majority rule jurisdictions are “better reasoned.”¹¹⁰ The court noted the modern view of property articulated by the U.S. Supreme Court in *General Motors*.¹¹¹ The court also cited with approval *Adaman Mutual Water Co. v. United States*, in which the Ninth Circuit Court of Appeals compared restrictive covenants to traditional easements, and concluded that “both interests are directly connected to the land and we are unable to find a distinction between them [that] will justify dissimilar treatment at the hands of the condemning authority.”¹¹²

The court further explained that Standard clearly had kept a valuable “stick” in the “bundle of rights” that made up the complete estate when it sold the King Edward to Morley and Laurence — the stick being the right to use the King Edward for purposes prohibited by the covenant.¹¹³ The court pointed out that if Morley and Laurence or their successors in interest had wished to use the King Edward for a prohibited purpose they would have had to purchase that right from Standard.¹¹⁴ For this reason, the court found “unpersuasive” JRA’s argument that only where the dominant estate is mentioned in the instrument containing a covenant is the owner of such estate entitled to compensation.¹¹⁵ Indeed, the fact that Standard owned property in the vicinity of the King Edward did not appear to be relevant to the court’s holding that Standard owned a valuable stick in the bundle of rights that made up the King Edward estate.

The court then determined that the value of the restrictive covenant held by Standard should be determined using the “unit valuation method,” explaining:

Where there are different interests or estates in the property acquired by condemnation, the proper course is to ascertain the entire compensation to be awarded as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights.¹¹⁶

The court rejected Standard’s argument that the covenant should be valued by computing the difference between the market value of the

¹¹⁰ *Id.* at 1296.

¹¹¹ *Id.*

¹¹² *Id.* at 1296-97 (citing *Adaman Mut. Water Co. v. United States*, 278 F.2d 842, 849 (9th Cir. 1960)).

¹¹³ *Id.* at 1297.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* (citing *Lee v. Indian Creek Drainage Dist.*, 246 Miss. 254, 148 So.2d 663, 666 (1963))

property Standard owned in the vicinity of the King Edward before and after the taking (i.e., by employing the method generally used to value appurtenant restrictions).¹¹⁷ The court explained that such an approach would be:

[F]undamentally incompatible with the reality that the covenant gives Standard Life an interest in the King Edward property. The unit rule requires that in this case, a value be assessed on the fee simple interest in the King Edward, then that amount be apportioned among [Morley and Laurence] and Standard . . . according to their respective interests.¹¹⁸

The court presumably did not authorize the use of the valuation method applied in the case of appurtenant restrictions because Standard had not identified a benefited or dominant parcel in the instrument creating the covenant. In other words, the court treated the covenant as if Standard held it in gross.¹¹⁹

In *Morley*, the Supreme Court of Mississippi did not address whether Standard's restrictive covenant was properly classified as appurtenant or in gross, and such classification did not appear to be important to its holding. Instead, the court embraced the U.S. Supreme Court's modern view of property. The court also recognized that a right to control the use of land can have considerable value independent of its connection to an identified benefited or dominant parcel. *Morley* thus supports the conclusion that *any* valid and enforceable restriction on development and use, whether held appurtenant to a benefited parcel or in gross, constitutes compensable property for eminent domain purposes.

C. Conservation Easements

Under any reasonable interpretation of the Takings Clause of the Fifth Amendment, conservation easements should be treated as a compensable form of property. The U.S. Supreme Court's modern definition of the term "property" for purposes of the Takings Clause, the majority rule that negative restrictions on development and use

¹¹⁷ *Id.*; see also *supra* note 48 and accompanying text (discussing valuation of appurtenant restrictions).

¹¹⁸ *Morley*, 632 So. 2d at 1297.

¹¹⁹ The court did not opine on the method by which the total compensation award, determined under the unit valuation method, should be apportioned between the owners of the King Edward and Standard. *But see* discussion *infra* Part II.A.1.b (noting that standard method used to value in gross nonpossessory interests in land for eminent domain purposes is before and after method as applied to burdened land).

constitute property, existing case law involving conservation easements, and leading sources of legal analysis all support this conclusion. Moreover, any attempt to invoke the minority rule to deny compensation to holders of conservation easements should fail because the minority rule is outdated and inconsistent with the modern view of property, and the questionable justifications offered in support of the rule are even less persuasive in the conservation easement context.

1. Conservation Easements Fit Within the Modern Definition of “Property”

Conservation easements fit neatly within the modern definition of “property” for eminent domain purposes, which, as articulated by the U.S. Supreme Court in *General Motors*, includes “every sort of interest the citizen may possess.”¹²⁰ Conservation easements are valid, enforceable, and therefore valuable interests in the land they encumber. In this respect they are no different from traditional easements, which unquestionably constitute property for eminent domain purposes, or restrictive covenants, which a majority of state courts and the federal courts treat as compensable property. In fact, the easement-enabling statutes were enacted for the very purpose of sweeping away any common law impediments that might otherwise undermine the validity or enforceability of conservation easements.¹²¹ Moreover, a growing body of case law illustrates that courts do not hesitate to enforce conservation easements.¹²²

¹²⁰ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); see *supra* text accompanying note 40.

¹²¹ See, e.g., R.I. GEN. LAWS § 34-39-1 (West, Westlaw through 2007 legislation) (“The purpose of this chapter is to grant a special legal status to conservation restrictions and preservation restrictions so that landowners wishing to protect and preserve real property may do so without uncertainty as to the legal effect and enforceability of those restrictions.”); NAT’L CONF. OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM CONSERVATION EASEMENT ACT 2 (1981 (amended 2007)), http://www.law.upenn.edu/bll/ulc/ucea/2007_final.htm (“The Act has the . . . purpose of sweeping away certain common law impediments which might otherwise undermine the easements’ validity, particularly those held in gross.”).

¹²² See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 8.5 reporter’s note (noting in 2000 that courts have not hesitated to enforce conservation easements); see also, e.g., *United States v. Ponte*, 246 F. Supp. 2d 74, 81-82 (D. Me. 2003) (ordering owner of easement-encumbered land to remove platform constructed in violation of easement and restore area to its condition before construction); *Weston Forest & Trail Ass’n, Inc. v. Fishman*, 849 N.E.2d 916, 918 (Mass. App. Ct. 2006) (affirming lower court’s order that owner of easement-encumbered land remove barn constructed in violation of easement).

The in gross status of conservation easements should also not prevent them from being treated as compensable property for eminent domain purposes. As the courts in both *Hartford* and *Morley* recognized, the right to control the use of land can be a valid, enforceable, and therefore valuable right independent of its connection to a benefited or dominant parcel. Indeed, this fact has long been recognized with regard to more traditional easements, which are treated as compensable property whether held appurtenant or in gross.¹²³ Moreover, conservation easements held in gross are identical to conservation easements held appurtenant to small anchor parcels in purpose and effect.¹²⁴ Accordingly, there would be no principled justification for treating nominally appurtenant conservation easements as compensable property, while denying the same treatment to conservation easements held in gross.

To paraphrase the Second Circuit in *53 ¼ Acres of Land*, there is no need to “grope about” in the mysterious world of “estates” and “interests not estates” in determining whether a conservation easement constitutes compensable property for eminent domain purposes.¹²⁵ All that matters is that condemnation of a conservation easement deprives its holder of a valid, enforceable, and therefore valuable right. Any attempt to establish a substantive distinction between conservation easements and other nonpossessory partial interests in real property by labeling one a mere contract right and the others property interests would be inequitable and rationally indefensible.¹²⁶ It would also be contrary to the admonition of the U.S. Supreme Court that the constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.¹²⁷

2. Existing Case Law

Although there is no precedent directly addressing whether the condemnation of an existing conservation easement constitutes the taking of compensable property, several cases strongly support that conclusion. In *Hardesty v. State Roads Commission*, the highest court in Maryland held that a state agency’s creation (or imposition) of a

¹²³ See *supra* note 28 and accompanying text.

¹²⁴ See *supra* note 7 and accompanying text (discussing these appurtenant easements).

¹²⁵ See *supra* note 38 and accompanying text.

¹²⁶ See *supra* note 64 and accompanying text.

¹²⁷ See *supra* note 61 and accompanying text.

perpetual scenic easement through condemnation involved the taking of property for which the owner of the burdened land was entitled to compensation.¹²⁸ It follows that if a landowner voluntarily conveys such property to a land trust or government entity, the land trust or government entity should be similarly entitled to compensation if such property is later taken by eminent domain. This conclusion is supported by *Washington Suburban Sanitary Commission v. Frankel*, in which Maryland's intermediate appellate court adopted the majority rule and held that the owner of negative restrictions on the development and use of land was entitled to compensation for the taking of such restrictions upon condemnation of the burdened land.¹²⁹ The court cited to *Hardesty* in support of its holding, noting that in Maryland a "species of negative easement or servitude known as a scenic easement has been held to be property and compensable when taken by condemnation."¹³⁰

In *United States v. Welte*, the district court had little trouble concluding that a perpetual conservation easement granted to the United States constituted property of the United States for purposes of the provision in the U.S. Code that prohibits persons from knowingly injuring or destroying "any real or personal property of the United States."¹³¹ In support of its holding the court cited to numerous cases in which more traditional easements were held to constitute property for eminent domain purposes.¹³² The court noted that "[w]hile an easement does not grant possession in fee of the servient estate . . . [it] is 'an interest in land in the possession of another' . . . and is, therefore, property."¹³³

And in *Johnston v. Sonoma County Agricultural Preservation & Open Space District*, a California court of appeal held that the holder of a conservation easement did not act inappropriately in agreeing to a settlement in lieu of condemnation.¹³⁴ In blessing the settlement

¹²⁸ 343 A.2d 884, 877 (Md. 1975).

¹²⁹ See *Wash. Suburban Sanitary Comm'n v. Frankel*, 470 A.2d 813 (Md. Ct. Spec. App. 1984), *vacated on other grounds*, 487 A.2d 651 (Md. 1985).

¹³⁰ *Id.* at 820.

¹³¹ *United States v. Welte*, 635 F. Supp. 388, 389 (D.N.D. 1982). The easement at issue in *Welte* was granted to the United States to maintain the encumbered land as a waterfowl production area. *Id.*

¹³² *Id.* at 390 (citing *United States v. Va. Elect. & Power Co.*, 365 U.S. 624, 627, (1961), *United States v. Welch*, 217 U.S. 333, 339 (1910), *Duke Power Co. v. Toms*, 118 F.2d 443, 447 (4th Cir. 1941), *Lynn v. United States*, 110 F.2d 586, 589 (5th Cir. 1940), *Tenney Tel. Co. v. United States*, 82 F.2d 788 (7th Cir. 1936) (per curiam)).

¹³³ *Id.* (citing RESTATEMENT (FIRST) OF PROP. § 450 (1944)).

¹³⁴ See *Johnston v. Sonoma County Agric. Pres. & Open Space Dist.*, 123 Cal. Rptr.

agreement, the court in dicta assumed without discussion that the holder of the easement would have been entitled to some money judgment as compensation for the condemnation.¹³⁵ Collectively, these cases strongly suggest that conservation easements should be treated as a compensable form of property for eminent domain purposes.

3. Additional Support

Additional support for treating conservation easements as a compensable form of property can be found in two leading sources of legal analysis. The *Restatement (Third) of Property: Servitudes* provides that *all* servitude benefits, one category of which is conservation servitudes, should be treated as property rights entitled to the protection of the Takings Clause.¹³⁶ *Powell on Real Property* similarly provides that “[t]he better view . . . is that the condemnation of [a conservation easement] is the taking of an interest in property that requires compensation to the holder.”¹³⁷

4. Minority Rule Justifications Are Unpersuasive

As discussed at length in Part I.B.2., the minority rule denying compensation to the holder of negative restrictions on development and use upon the taking of the burdened land is a holdover from an earlier time and inconsistent with the modern view of property. It is possible, however, that condemning authorities will invoke the rule in minority jurisdictions in an attempt to deny holders of conservation easements compensation upon condemnation. Accordingly, it is important to explain why the questionable policy justifications offered in support of the minority rule are even less persuasive in the conservation easement context.

2d 226 (Ct. App. 2002). The court ruled that the Open Space District, which held a “forever wild” conservation easement encumbering a 1400-acre National Audubon Society preserve, was permitted to approve the grant of an underground utility easement to the city without voter or legislative approval because the transfer was in lieu of certain condemnation. *Id.* at 237-39. The court also determined that the settlement that the District negotiated with the city was valid under eminent domain law. *Id.* at 239.

¹³⁵ See *id.* at 238 (“[T]he District obtained settlement terms far out of proportion to any money judgment in an eminent domain proceeding . . .”).

¹³⁶ RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 7.8 reporter’s note.

¹³⁷ RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.07[2] (Michael Allan Wolf ed., 2007).

a. *Conservation Easements Do Not Restrict the Exercise of Eminent Domain*

Minority rule courts have argued that it is against public policy to allow individuals, by private agreement, to restrict the exercise of the government's power of eminent domain. However, as in the case of private agreements creating restrictive covenants, conservation easements generally do not restrict the government's ability to exercise eminent domain with respect to the burdened land. Easement-enabling statutes in half of the states expressly provide that conservation easements are subject to the power of eminent domain.¹³⁸ In addition, even in states where the statute does not so provide, the power is generally exercisable.¹³⁹ Accordingly, governments are generally free to condemn easement-encumbered land, although, as described in Part II, they should be required to pay appropriate compensation to both the holder of the easement and the owner of the encumbered land.

In certain limited circumstances a condemning authority's ability to exercise eminent domain with respect to easement-encumbered land may be constrained. For example, in some cases the "prior public use doctrine" may prevent condemnation of conservation easements held by government entities.¹⁴⁰ In Florida, the easement-enabling statute

¹³⁸ See, e.g., ARIZ. REV. STAT. ANN. § 33-272.A (2006) (noting that Arizona easement-enabling statute "neither limits nor enlarges the power or purposes of eminent domain"); VA. CODE ANN. § 10.1-1010(F) (2006) (noting that Virginia easement-enabling statute "does not . . . in any way limit the power of eminent domain as possessed by any public body").

¹³⁹ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 7.8 cmt. a ("Servitude benefits like other interests in property may be condemned under the power of eminent domain."); POWELL, *supra* note 137, § 34A.07[2] (" . . . if a conservation easement restricts the development of real property that is needed for a school, hospital, or publicly aided housing, eminent domain may be exercised."); Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592, 598 (2001) ("Privately held conservation easements . . . offer surprisingly little protection from condemnation."); Phillip E. Hassman, Annotation, *Eminent Domain: Right to Condemn Property Owned or Used by Private Educational, Charitable, or Religious Organization*, 80 A.L.R.3d 833, §2[a] (1996) ("The fact that property is owned or used by a private educational, charitable, or religious organization has not ordinarily, in itself, served to protect the property from being taken under an eminent domain power.").

¹⁴⁰ See, e.g., Fla. E. Coast Ry. Co. v. Miami, 321 So. 2d 545, 547 (Fla. 1975) ("Generally, property held by an authority that has the power of condemnation cannot be taken by another authority with the same power of condemnation absent specific legislation. This is known as the prior public use doctrine."). See generally SACKMAN, *supra* note 23, § 2.17[3] (describing prior public use doctrine).

provides that in any legal proceeding to condemn land for the construction and operation of a linear facility, the court must consider the public benefit provided by both the conservation easement and the linear facility in determining which lands may be taken.¹⁴¹ In addition, a number of states have enacted statutes that provide for the purchase of conservation easements to protect agricultural land (“agricultural protection statutes”), and some of these statutes require condemning authorities to meet certain conditions before condemning the easement-encumbered land.¹⁴²

In the foregoing circumstances, however, competing public policies (rather than the conservation easement per se) are the cause of the constraint on condemnation. The prior public use doctrine prevents condemning authorities from endlessly condemning and recondemning properties from one another.¹⁴³ In the case of the Florida easement-enabling statute and the agricultural protection statutes, the constraints on condemnation help to ensure that the public policy in favor of protecting land for its conservation, historic,

¹⁴¹ See FLA. STAT. § 704.06(11) (2006); see also *infra* note 265 (defining linear facility). Florida is the only state to provide this type of limited protection for conservation easements in its enabling statute. See *infra* Part III (discussing easement-enabling statutes).

¹⁴² These agricultural protection statutes are independent of the easement-enabling statutes listed in *supra* note 5. The Kentucky statute provides that the state “shall not locate landfills, sewage treatment plants, or other public service facilities that are not compatible with or complimentary to agricultural production on restricted lands.” KY. REV. STAT. ANN. § 262.910(2)(d) (West, Westlaw through 2007 legislation). The Rhode Island statute provides that “[a]ny state or local agency must demonstrate extreme need and the lack of any viable alternative before exercising a right of eminent domain over any farmland to which the development rights have been purchased by the commission on behalf of the state. . . .” R.I. GEN. LAWS § 42-82-6 (West, Westlaw through 2007 legislation). The Texas statute provides that agricultural lands protected through the purchase program may not be condemned unless it is determined at a public hearing that “there is no feasible and prudent alternative to the use or taking of the land.” TEX. NAT. RES. CODE ANN. § 183.057(a)(1) (West, Westlaw through 2007 Sess.). Finally, the New Jersey statute prohibits public bodies from condemning protected agricultural lands “unless the Governor declares that the action is necessary for the public health, safety and welfare and that there is no immediately apparent feasible alternative.” N.J. STAT. ANN. § 4:1C-25 (West, Westlaw through 2007 legislation).

¹⁴³ See, e.g., *United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land*, 753 F. Supp. 50, 54 (D.P.R. 1990) (“Without the prior [public] use doctrine, there could be a free for all of battling entities all equipped with eminent domain power, passing title back and forth.”); SACKMAN, *supra* note 23, § 2.17 (“The underlying rationale is to prevent condemnation back and forth between competing condemners.”).

or agricultural value is not subverted through the condemnation process.¹⁴⁴

b. Compensating Holders of Conservation Easements Would Not Involve Intolerable Financial and Procedural Burdens

The presumed financial and procedural burdens associated with condemning a lot in a development subject to reciprocal residential-use restrictions would not be present in the case of the condemnation of land subject to a conservation easement. The primary parties to be joined in an action to condemn easement-encumbered land would be the owner of such land and the government or nonprofit holder of the easement.¹⁴⁵ Moreover, if a conservation easement is valued in the same manner as the in gross restrictions in *Hartford*, the total compensation to be paid would not exceed the fair market value of the land acquired by the condemning authority — the land free of the easement's restrictions.¹⁴⁶ In other words, the existence of the easement would not increase the compensation award payable by the condemning authority. It would merely cause that award to be apportioned between the owner of the encumbered land and the holder of the easement based on the value of their respective interests.¹⁴⁷

c. Compensating Holders of Conservation Easements Would Not Encourage Bad Faith and Fraud

Treating conservation easements as compensable property for eminent domain purposes is also not likely to encourage landowners to convey such easements in bad faith when condemnation proceedings are on the horizon. Unlike the owners of appurtenant parcels who may create restrictions at the eleventh hour in an effort to obtain compensation,¹⁴⁸ landowners conveying conservation easements generally do not stand to personally gain in the event of

¹⁴⁴ See *supra* notes 141-42 and accompanying text (discussing these statutes).

¹⁴⁵ The state attorney general, in his capacity as supervisor of charitable or public assets, might intervene to ensure that the interests of the public are appropriately represented.

¹⁴⁶ See *supra* Part I.B.3.a, discussing *Harford*, in which the holder of in gross restrictions was entitled to compensation equal to the extent by which condemnation and consequent extinguishment of the restrictions increased the value of the burdened land.

¹⁴⁷ See *infra* Part II.B (discussing proper calculation and apportionment of compensation award upon condemnation of easement-encumbered land).

¹⁴⁸ See discussion *supra* Part I.B.2.b.(3).

condemnation. Once a conservation easement is conveyed to a government entity or land trust, it is an asset held by that entity for the benefit of the public. If the encumbered land is later condemned, the portion of the award attributable to the value of the easement should be payable to the government entity or land trust to be used to accomplish similar conservation or preservation purposes in some other manner or location.¹⁴⁹

In addition, although owners of appurtenant parcels may create restrictions at the eleventh hour in an attempt to increase the total amount of compensation payable and thereby discourage the condemnation,¹⁵⁰ landowners conveying conservation easements generally cannot hope to do the same. As noted above, the conveyance of a conservation easement generally would not increase the compensation payable upon the condemnation of the encumbered land. Rather, the conveyance of an easement would simply require that the compensation award be apportioned between the owner of the encumbered land and the holder of the easement based on the value of their respective interests.¹⁵¹

Although the conveyance of a conservation easement at the eleventh hour might discourage or prevent condemnation due to the constraints discussed above, those constraints generally would not be the result of bad faith or fraud, but rather of competing public policies.¹⁵² Moreover, to the extent a landowner conveys (and a government entity or nonprofit accepts) a conservation easement in bad faith when condemnation proceedings are on the horizon, such an abuse could be dealt with on a case-by-case basis.¹⁵³

d. Policy Justifications Support Treating Conservation Easements as Property

Considerations of public policy actually weigh heavily in favor of treating conservation easements as compensable property for eminent domain purposes. As noted in the Introduction, if conservation easements are not treated as compensable property and condemning authorities are permitted to acquire easement-encumbered land for only its restricted value, easement-encumbered land would become an attractive target for condemnation because it would be less expensive

¹⁴⁹ See generally discussion *infra* Part II.

¹⁵⁰ See discussion *supra* Part I.B.2.b.(3).

¹⁵¹ See *supra* notes 146-47 and accompanying text.

¹⁵² See *supra* Part I.C.4.a.

¹⁵³ See *supra* note 81 and accompanying text.

to condemn than similar unencumbered land. Moreover, the considerable public investment in conservation easements and the conservation and historic values they are intended to protect would be lost. In short, the strong public policy in favor of the use of conservation easements as a land protection tool would be subverted through the condemnation process.

Given the foregoing, it should not be difficult to persuade courts in minority jurisdictions to treat conservation easements as compensable property for eminent domain purposes. The minority rule cases are holdovers from an earlier time and inconsistent with the modern view of property. Moreover, once informed of the significant negative policy ramifications of denying compensation to the government and nonprofit holders of conservation easements, courts in minority jurisdictions are likely to be disinclined to do so. Those courts could simply overrule their earlier decisions and adopt the majority rule, as the Supreme Court of California did in *Bourgerie*.¹⁵⁴ Alternatively, they could distinguish conservation easements from other types of negative development and use restrictions (such as reciprocal residential-use restrictions) on the policy grounds noted in Part I.

D. Conclusion

As the foregoing discussion indicates, conservation easements should be treated as compensable property for eminent domain purposes in all jurisdictions, whether they are characterized under state property law as restrictive covenants, equitable servitudes, equitable or negative easements, or some statutorily modified amalgam of those interests, and whether they are held in gross or appurtenant to an anchor parcel. Given the considerable public interest and investment in conservation easements, as well as the significant adverse policy ramifications of denying compensation to the holders of conservation easements upon condemnation, it is difficult to imagine a partial interest in land that is more worthy of legal protection in the eminent domain context.

II. JUST COMPENSATION FOR THE TAKING OF A CONSERVATION EASEMENT

Having determined that a conservation easement should constitute compensable property for eminent domain purposes, it is necessary to next consider how a conservation easement should be valued for

¹⁵⁴ See *supra* note 51 and accompanying text.

purposes of providing just compensation to its governmental or nonprofit holder. A number of principles that are employed in the eminent domain context address the various questions that will arise upon the condemnation of easement-encumbered land. These principles address (1) the meaning of “just compensation” in the eminent domain context, (2) the valuation of property when it is held by a condemnee subject to a restriction limiting its use to a particular public or charitable purpose, (3) the determination of just compensation when the property taken is subject to divided ownership, and (4) the determination of just compensation when there is only a partial taking of property. These principles provide the framework within which just compensation can be calculated and apportioned between the owner of easement-encumbered land and the holder of the easement upon the taking of the encumbered land in whole or in part.

The first two principles are discussed below in Part II.A. The last two principles are discussed below in Part II.B in the context of two examples — the first involving the condemnation of easement-encumbered land in its entirety (a “total taking”), and the second involving the condemnation of only a portion of easement-encumbered land (a “partial taking”). Part II.C then discusses a valuation methodology known as the substitute facilities doctrine, and the problems associated with attempting to apply that doctrine in the conservation easement context.

A. *General Eminent Domain Principles*

1. The Meaning of Just Compensation

a. *Fair Market Value Is Not the Exclusive Method of Valuation*

The normal standard applied in determining just compensation for the taking of property is the property’s fair market value.¹⁵⁵ Fair market value is defined generally as “what a willing buyer would pay in cash to a willing seller,”¹⁵⁶ and more specifically as:

¹⁵⁵ See, e.g., SACKMAN, *supra* note 23, § 13.01[9] (“The concept of [fair] market value strikes a fair balance between the public’s need and the claimant’s loss upon condemnation of property for a public purpose. Thus, to the extent that fair market value can be determined, this is normally the proper measure of compensation.”).

¹⁵⁶ See *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961).

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.¹⁵⁷

As long as there is an ascertainable market for the property, the fair market value standard is adhered to.¹⁵⁸ However, fair market value “is not an absolute standard nor an exclusive method of valuation.”¹⁵⁹ Where property does not have a market value, other valuation methods are used.¹⁶⁰ As explained by the U.S. Supreme Court in *United States v. Commodities Trading Corp.*:

This Court has never attempted to prescribe a rigid rule for determining what is “just compensation” under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is “just” both to an owner whose property is taken and to the public that must pay the bill?¹⁶¹

The Court further explained that “[t]he word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity’. . . .”¹⁶² Indeed, as with the cases involving what constitutes compensable property for eminent domain purposes, considerations of fairness and equity permeate the decisions regarding what constitutes just compensation.¹⁶³

¹⁵⁷ See J. D. EATON, REAL ESTATE VALUATION IN LITIGATION 18 (2d ed. 1995).

¹⁵⁸ See SACKMAN, *supra* note 23, § 12.01; *id.* § 13.01[7] (“‘Fair market value’ is a term of art in appraisal practice. . . . [I]nherent in this term is the assumption that there is a fair market.”).

¹⁵⁹ See *Va. Elec. & Power Co.*, 365 U.S. at 633 (approving use of before and after method to value existing in gross flowage easement upon its taking, and noting that there was “no evidence of a market in flowage easements of the type here involved”).

¹⁶⁰ See *United States v. Miller*, 317 U.S. 369, 374 (1943) (“Where, for any reason, property has no market, resort must be had to other data to ascertain its value . . .”).

¹⁶¹ *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123-24 (1950).

¹⁶² *Id.* at 124.

¹⁶³ See, e.g., *United States v. Fuller*, 409 U.S. 488, 490 (1973) (“The constitutional requirement of just compensation derives as much content from the basic equitable

b. Nonpossessory Interests in Land — The Before and After Method

Nonpossessory interests in land, such as traditional easements and restrictive covenants, typically are not bought and sold in competitive and open markets.¹⁶⁴ Accordingly, fair market value (the willing buyer, willing seller standard) is generally not the appropriate standard by which to determine just compensation for the taking of such interests. Not surprisingly, courts generally use a different method to value such interests for eminent domain purposes — the before and after method. Thus, for example, when condemnation involves the imposition of an easement on the condemnee's land, the compensation payable to the condemnee is generally equal to the difference between the value of the land before and after the imposition of the easement — or the extent by which the easement reduced the value of the condemnee's land.¹⁶⁵ When an existing easement held appurtenant to a benefited parcel is condemned (usually as a result of the condemnation of the burdened parcel), the compensation payable to the owner of the easement is generally equal to the difference between the value of the *benefited* parcel before and after the taking — or the extent by which extinguishment of the easement reduced the value of the benefited parcel.¹⁶⁶ That same valuation rule is applied upon the condemnation of existing negative restrictions on the development and use of land (generally referred to as restrictive covenants) held appurtenant to a benefited parcel. In the majority of jurisdictions where such restrictions are treated as compensable property, the compensation payable to the owner of such restrictions is equal to the difference between the value of the benefited parcel before and after the taking.¹⁶⁷

principles of fairness as it does from technical concepts of property law.” (citation omitted)); *Va. Elec. & Power Co.*, 365 U.S. at 631 (quoting *Commodities Trading Corp.*, 339 U.S. at 124).

¹⁶⁴ See, e.g., THE APPRAISAL OF REAL ESTATE 86 (12th ed. 2001) (“The value of an easement in and of itself is usually difficult to measure, primarily because easements are rarely sold.”).

¹⁶⁵ See SACKMAN, *supra* note 23, §13.15[1] (explaining that before and after method is generally employed to value easements in such circumstances because there usually is no established market for easements).

¹⁶⁶ In *United States v. Welch*, 217 U.S. 333, 339 (1910), the Court held that the owner of a right-of-way easement held appurtenant to a benefited parcel was entitled to compensation for the taking of the easement as a result of the flooding of the burdened land. The Court determined that the compensation payable for the easement was equal to the extent by which the taking reduced the value of the benefited parcel.

¹⁶⁷ See *supra* note 48 and accompanying text.

When an existing in gross easement, such as a flowage or utility transmission line easement, is condemned, the compensation payable to the owner of the easement is generally equal to the difference between the value of the *burdened* parcel before and after the taking — or the extent by which extinguishment of the easement increases the value of the burdened parcel).¹⁶⁸ Finally, in *Hartford National Bank & Trust Co. v. Redevelopment Agency*, discussed in Part I.B.3.a, the Supreme Court of Connecticut ratified the use of this same valuation method when existing negative development and use restrictions held in gross were condemned.¹⁶⁹ In that case, the owner of the in gross restrictions received as compensation the difference between the value of the burdened land before and after the taking.¹⁷⁰

c. *Conservation Easements*

Conservation easements, which are conveyed to and acquired by government entities and charitable organizations to be held and enforced for the benefit of the public, are not bought and sold in competitive and open markets.¹⁷¹ Accordingly, when land encumbered by a conservation easement is taken for a public use that is

¹⁶⁸ See *Va. Elec. & Power Co.*, 365 U.S. at 630 (“The valuation of an [in gross] easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining its worth.”); *Conn. Light & Power Co. v. State*, No. 370641, 1991 Conn. Super. Ct. LEXIS 445, at *11 (Super. Ct. Mar. 8, 1991) (approving use of before and after method to establish value of utility company’s existing in gross utility transmission line easement when it was condemned); SACKMAN, *supra* note 23, § 13.15[3] (“Normally, condemnation cases involving easements involve a condemnor trying to subject the condemnee’s land to an easement. . . . However, there are cases where the condemnor’s action results in the taking of an existing easement. When the property taken is an existing [in gross] easement, the proper measure of damages is still the before-and-after method, expressed as the difference between the market value of the land free of the easement and the market value of the land burdened with the easement.”).

¹⁶⁹ See *Hartford Nat’l Bank & Trust Co. v. Redevelopment Agency*, 321 A.2d 469, 473-74 (Conn. 1973).

¹⁷⁰ See *id.*

¹⁷¹ See, e.g., POWELL, *supra* note 137, § 34A.06[1] (“As a practical matter, there is no market for conservation easements. They are not ordinarily bought and sold”); James Boyd et. al., *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 234 (2000) (“Because there is no conventional market for easements, the usual procedure for valuing an asset — simple observation of an equilibrium market price resulting from a large volume of transactions — cannot be followed.”); McLaughlin, *supra* note 15, at 70 (“Because there is little excludable private benefit inherent in [a conservation] easement that might make it attractive to any buyer except a representative of the public, easements are not susceptible to direct valuation in real markets.”).

inconsistent with the easement, fair market value (the willing buyer, willing seller standard) is not the appropriate standard by which to determine the just compensation payable to the holder of the easement.¹⁷² Fortunately, there is no need to grope about in search of a method by which to value conservation easements for condemnation purposes. Conservation easements are routinely valued for acquisition purposes — for purposes of establishing their purchase price in easement purchase programs or calculating the federal and state tax incentives provided to easement donors — using the before and after method.¹⁷³ Moreover, as discussed immediately above, the before and after method is the standard method by which similar nonpossessory interests in land are valued for condemnation purposes.¹⁷⁴

Most conservation easements are held in gross. Accordingly, their value at the time of condemnation should be determined by applying the before and after method to the *burdened* parcel. Thus, upon condemnation, the compensation payable to the holder of a conservation easement should equal the difference between (1) the fair market value of the burdened parcel immediately *after* the taking, with the restrictions on development and use in the easement having been extinguished; and (2) the fair market value of the burdened parcel immediately *before* the taking, with the restrictions on development and use in the easement intact. Stated in another way, the compensation should equal the amount by which extinguishment of the easement increases the fair market value of the burdened parcel. This is the method applied to value more traditional easements held in gross upon their condemnation.¹⁷⁵ This is also the method that was

¹⁷² See discussion *supra* Part II.A.1.a (noting that fair market value is appropriate standard only when there is competitive and open market for property). Indeed, compensating the holder of a conservation easement upon condemnation based on the price the holder would receive if it tried to sell the easement in the open market would result in manifest injustice to the holder and, by extension, the public. See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 491-97 (2005) (discussing this issue in context of extinguishment of conservation easements in cy pres proceedings).

¹⁷³ See McLaughlin, *supra* note 15, at 69-71 (explaining that most if not all donated conservation easements are valued for purposes of federal tax incentives using before and after method). The before and after method is also the recognized method of valuing conservation easements upon their creation in the appraisal industry. See THE APPRAISAL OF REAL ESTATE 86-87 (12th ed. 2001).

¹⁷⁴ See *supra* Part II.A.1.b.

¹⁷⁵ See *supra* note 168 and accompanying text.

applied by the court in *Hartford* to value negative restrictions on development and use held in gross upon their condemnation.¹⁷⁶

2. Property Held Subject to a Restriction Limiting Its Use to a Public or Charitable Purpose

a. Majority Rule — Unrestricted Value

Government entities and charitable organizations often hold property subject to a restriction limiting its use to a specific public or charitable purpose. When such property is condemned, a majority of courts hold that the entity or organization is entitled to compensation based on the value of the property as if it were not subject to the restriction (i.e., based on its *unrestricted* value).¹⁷⁷ Thus, for example, in *Fairfax County Park Authority v. Virginia Department of Transportation*, the Virginia Department of Transportation (“VDOT”) condemned a portion of land that was held in trust by the Fairfax

¹⁷⁶ See *supra* Part I.B.3.a. This same valuation method should also generally be used to value conservation easements held appurtenant to a small anchor parcel. See *supra* note 7 and accompanying text (discussing such easements). In most cases, the small anchor parcel will have been acquired by the holder merely to avoid the potential common law impediments to the long-term validity and enforcement of land use restrictions held in gross. In addition, the easement will have been valued for purposes of the tax incentives or in the context of an easement purchase program as if it were held in gross. *Id.*; see also *supra* note 173. In other words, such easements will generally be only nominally appurtenant and should therefore be valued for both acquisition and condemnation purposes as if held in gross. See also BYERS & MARCHETTI PONTE, *supra* note 1, at 389 (“This kind of arrangement [anchor parcels] is becoming rare, and some holders are actually transferring ownership back to the owner of the land under easement (for full value and subject to restrictions, of course).”).

¹⁷⁷ See SACKMAN, *supra* note 23, § 12C.02; Carol A. Crocca, Annotation, *Measure of Damages or Compensation in Eminent Domain as Affected by Premises Being Restricted to Particular Educational, Religious, Charitable, or Noncommercial Use*, 29 A.L.R. 5th 36, §[2a] (2006). The RESTATEMENT (FIRST) OF PROPERTY provides the following as an illustration:

A, owning Blackacre in fee simple absolute, transfers Blackacre “to B Church Corporation so long as the premises are used for church purposes.” While B is continuing to use Blackacre for church purposes, and at a time when there is no desirability in B changing the site of its church, the City C, in which Blackacre is located, initiates eminent domain proceedings to acquire Blackacre as a part of a public park. B’s estate in Blackacre has the same value, in these eminent domain proceedings, as an estate in fee simple absolute in Blackacre.

See RESTATEMENT (FIRST) OF PROPERTY § 53 cmt. b, illus. 1 (1944).

County Park Authority (“Park Authority”) subject to a restriction that it be used as a public park.¹⁷⁸ VDOT argued that just compensation for the taking should be based on the value of the land as a public park or open space, which VDOT estimated to be \$2,125 per acre.¹⁷⁹ The Park Authority argued that just compensation should be based on the value of the land assuming it was not subject to the use restriction, which the Park Authority estimated to be \$125,000 per acre.¹⁸⁰ The Virginia Supreme Court held that the property should be valued assuming it was not subject to the use restriction, reasoning that the same principles should apply when determining the fair market value of property for both eminent domain and real property taxation purposes.¹⁸¹

Courts in other jurisdictions have offered different reasons for holding that a government entity or charitable organization should be entitled to the unrestricted value of property taken in such circumstances. In *Winchester v. Cox*, the Supreme Court of Connecticut held that upon the Highway Commissioner’s condemnation of a portion of land that had been conveyed as a gift to a town for use as a public park, the town was entitled to compensation based on the unrestricted value of the land.¹⁸² The court explained that the question of just compensation contemplated by the Constitution is more an equitable question than a strictly legal or technical one,¹⁸³ and the state was required to “make the town good so far as money could for the loss of the lands taken from the park.”¹⁸⁴ The court concluded that equity could not be done to the town and to those for whose benefit it held the park land unless the town received the land’s unrestricted value.¹⁸⁵

In *Board of County Commissioners v. Thormyer*, the Supreme Court of Ohio held that upon the Highway Director’s condemnation of a portion of land that had been conveyed as a gift to the Board of County Commissioners for use as a children’s home, the board was entitled to compensation based on the unrestricted value of the

¹⁷⁸ 440 S.E.2d 610, 611 (Va. 1994).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (highest and best use of property if unrestricted was for residential purposes).

¹⁸¹ *Id.* at 612-13.

¹⁸² 26 A.2d 592, 597-98 (Conn. 1942).

¹⁸³ *Id.* at 597 (quoting *United States v. Nahant*, 153 Fed. 520 (1st Cir. 1907)).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

land.¹⁸⁶ The court explained that the donor had obviously imposed the use restriction primarily for the purpose of benefiting the occupants of the children's home, and it could not be seriously suggested that if the donor had foreseen the condemnation he would have wanted the state to benefit from the use restriction by being able to take the land for less than it was worth.¹⁸⁷ In other words, the court in *Thormyer* recognized that individuals who make gifts of property to government entities and charitable organizations to be used for specific charitable purposes do not intend to thereby benefit condemning authorities by enabling them to take such property for less than its fair market value.¹⁸⁸

Pursuant to the majority rule, condemnation of land held subject to a restriction that it be used for a specific public or charitable purpose can be viewed as involving a two-step process: (1) removal of the restriction on the use of the land, followed by (2) the condemning authority's taking of the land free of the restriction. In other words, the value inherent in the right to use the land for purposes other than the specified public or charitable purpose should be viewed as having been conveyed to the government or nonprofit holder, although that value lies dormant and inaccessible by the holder until the restriction on the use of the land is removed in the context of the condemnation proceeding.¹⁸⁹

b. Use of Proceeds

Property held by a government entity or charitable organization subject to a restriction limiting its use to a specific public or charitable purpose is generally treated as being held in trust or quasi-trust for the benefit of the public.¹⁹⁰ Condemnation of such property generally

¹⁸⁶ 159 N.E.2d 612, 619 (Ohio 1959).

¹⁸⁷ *Id.* at 618.

¹⁸⁸ The court also noted that its decision would not obligate the condemnor to pay any more than the land was actually worth. *See id.* at 617.

¹⁸⁹ Although many of the majority rule cases involve the condemnation of land that had been conveyed as a charitable gift to a governmental entity, the rule also has been applied to land held subject to a restriction on its use that a government entity acquired by dedication, purchase, or eminent domain. *See, e.g.,* *People v. City of Los Angeles*, 33 Cal. Rptr. 797 (Ct. App. 1963) (involving land acquired by agent of city by eminent domain and transferred to city to be used "forever" as public park); *State v. Cooper*, 131 A.2d 756 (N.J. 1957) (involving land in subdivision dedicated to borough for use as "Public Square"); *Town of Tonawanda v. State*, 269 N.Y.S.2d 181 (Ct. Cl. 1966) (involving land purchased by town from county subject to covenant or condition that it "be used for municipal purposes only").

¹⁹⁰ *See, e.g., State v. Rand*, 366 A.2d 183 (Me. 1976) (city held land conveyed to it

does not cause the trust to fail,¹⁹¹ or trigger a reversion in favor of the grantor or the grantor's heirs.¹⁹² Instead, the entire condemnation award is generally payable to the government entity or charitable organization as a substitute trust res.¹⁹³ The entity or organization is then required under the charitable trust doctrine of cy pres or similar equitable principles to use the award to accomplish the specified public or charitable purpose in some other manner or location.¹⁹⁴

c. *Conservation Easements*

Conservation easements are generally held by government entities and charitable organizations subject to a restriction that they be used for a specific public or charitable purpose — the protection of the particular land they encumber for the conservation purposes specified

for use as public park in charitable trust); *Blumenthal v. White*, 683 A.2d 410 (Conn. 1996) (city held land conveyed to it for use as public park as quasi-trustee); see also *McLaughlin*, *supra* note 2, at 678, n.16; *McLaughlin*, *supra* note 172, at 431-32.

¹⁹¹ See, e.g., R. CHESTER, G.G. BOGERT & G.T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 418, at 91-93 (3rd ed. 2005) (“The taking of the property of the charitable trust by eminent domain proceedings should not be held to constitute a failure of the trust . . .”).

¹⁹² See *SACKMAN*, *supra* note 23, § 5.02[5][a] (providing that mere possibility of reverter is not compensable property interest; owners of reversion are entitled to compensation only if “the event upon which the property is to revert is imminent” at time of taking).

¹⁹³ See *CHESTER ET AL.*, *supra* note 191, § 418, at 93-97.

¹⁹⁴ See, e.g., *In re Estate of Zahn*, 93 Cal. Rptr. 810 (Dist. Ct. App. 1971) (holding that upon taking of land bequeathed to Salvation Army for purpose of establishing rest home for women and girls, Salvation Army was required pursuant to doctrine of cy pres to use condemnation proceeds to establish home in another location); *Hiland v. Ives*, 228 A.2d 502 (Conn. 1967) (holding that statute of charitable uses required city to hold condemnation proceeds subject to substantially same restriction placed on condemned lands by their dedication for park purposes); *Winchester v. Cox*, 26 A.2d 592, 597 (Conn. 1942) (holding that money received by town upon taking of land held subject to restriction that it be used as public park “must be used only for proper park purposes”); *State v. Rand*, 366 A.2d 183 (Me. 1976) (holding that upon taking of land conveyed to city to be used as public park, condemnation award payable to city had to be applied pursuant to doctrine of cy pres to create similar park within mile of location of original park); *State v. Fed. Square Corp.*, 3 A.2d 109 (N.H. 1938) (holding that upon taking of land conveyed to city to be used as public library, city had duty to use compensation award in connection with new public library); *State by State Highway Comm’r v. Cooper*, 131 A.2d 756 (N.J. 1957) (holding upon taking of land that had been dedicated to municipality for use as public square, municipality had to use compensation received to approximate fulfillment of dedicator’s general charitable intent pursuant to doctrine of cy pres). For a discussion of the doctrine of cy pres, see *CHESTER ET AL.*, *supra* note 191, § 431, at 113-27.

in the deed of conveyance in perpetuity.¹⁹⁵ Because the holder of a conservation easement is generally not free to sell or otherwise transfer the easement (except to another government entity or charitable organization that agrees to continue to enforce the easement),¹⁹⁶ conservation easements are often described as having “zero value” in the hands of the holder and, indeed, as imposing a net financial burden on the holder due to the costs associated with monitoring and enforcement.¹⁹⁷ Some have suggested that, because a conservation easement effectively has no value in the hands of the holder, the holder may not be entitled to compensation upon the taking of the encumbered land.¹⁹⁸

But this zero value phenomenon is not particular to conservation easements. Any property held by a government entity or charitable organization subject to a restriction that it be used for a particular charitable or public purpose arguably has a reduced (or zero) value

¹⁹⁵ Perpetual conservation easements donated in whole or in part as charitable gifts, or acquired with funds received or raised for the purpose of purchasing such easements, should be treated as restricted charitable gifts or charitable trusts. See McLaughlin, *supra* note 2, at 677-700. Similar equitable principles should also generally apply to perpetual conservation easements acquired in the nondonative context — to easements purchased by government entities and charitable organizations with general funds, or easements exacted as part of a development approval processes. See *id.* at 701-04.

¹⁹⁶ See Treas. Reg. § 1.170A-14(c)(2) (1999) (providing that tax-deductible conservation easements are transferable only to another government entity or charitable organization that agrees to continue to enforce easement); McLaughlin, *supra* note 2 (discussing support for treating conservation easements as charitable trusts and limitations imposed on holder’s ability to sell or otherwise transfer a conservation easement).

¹⁹⁷ See, e.g., BYERS & MARCHETTI PONTE, *supra* note 1, at 67 (“Since a typical conservation easement . . . has no measurable value to the holder, many nonprofits use the ‘zero-value’ approach when recording the easement on their books.”); William T. Hutton, *Easements as Public Support: The “Zero-Value” Approach*, in THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 135-36 (Janet Diehl & Thomas S. Barrett eds., 1988) (“[T]he typical conservation easement [furnishes] little or no measurable benefit to the donee. . . . [I]ndeed, most nonprofit easement managers are all too aware that monitoring and enforcement of easement obligations create net balance sheet liabilities.”).

¹⁹⁸ This suggestion was made by a presenter at a workshop on condemnation that I attended at the national conference of land trusts sponsored by the Land Trust Alliance in 2006 in Nashville, Tennessee. See also Email from Mark Weston, Appraiser, to Land Trust Listserv (Sept. 30, 2006) (on file with author) (“As many land trusts book the value of donated conservation easements at \$1 or less, it could be difficult to argue that the market value of a donated conservation easement, once this interest has been conveyed to the trust, has any value above zero.”).

from the holder's perspective because it cannot be freely sold or exchanged.¹⁹⁹ Moreover, as discussed in Part II.A.2.a, when such property is taken by eminent domain, a majority of courts hold that the entity or organization is entitled to compensation based on the value of the property as if it were not subject to such a restriction (i.e., based on its *unrestricted* value).²⁰⁰

Others may suggest that a conservation easement has no value because the development and use rights restricted by the easement have been "extinguished."²⁰¹ But a conservation easement does not technically extinguish the development and use rights it restricts.²⁰² Rather, such rights are merely held in abeyance until the condemnation proceeding, at which time they will be reunited with the fee title to the land.

Accordingly, pursuant to the majority rule, the condemnation of a conservation easement should be viewed as involving a two-step process: (1) removal of the restriction on the holder's use of the easement, followed by (2) the condemning authority's taking of the easement free of such restriction. The condemning authority may then extinguish or release the easement (or the easement may simply merge with the fee title to the land), thereby freeing the land to be developed or used in manners formerly prohibited by the easement.²⁰³

Because a conservation easement is an in gross nonpossessory interest in land that is not bought and sold in a competitive and open market, the value attributable to the easement for purposes of providing just compensation to its holder should be determined by

¹⁹⁹ This was certainly the case with the parkland in *Fairfax County and Winchester v. Cox*, as well as the land used for a children's home in *Thormyer*. See discussion *supra* Part II.A.2.a.

²⁰⁰ See *supra* Part II.A.2.a.

²⁰¹ See BLACK'S LAW DICTIONARY 623 (8th ed. 2004) (defining "extinguish" to mean "1. To bring to an end; to put an end to. 2. To terminate or cancel.").

²⁰² See Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 116 (2002) ("The extinguishment analysis is rhetorically attractive because it provides a simple way to convey to nonlawyers the fact (or hope) that nobody will ever be allowed to develop the property in the future. However, the notion of a property right being completely extinguished has no basis in the common law.").

²⁰³ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 7.8 cmt. a ("[E]xtinguishment [of a servitude] may take place either as a direct result of the condemnation, or as the result of release or merger after the government has acquired the property benefited by the servitude. As the owner of a servitude benefit, a governmental body may use any of the means available to a private owner to extinguish the servitude.").

applying the before and after method to the parcel burdened by the easement.²⁰⁴ This would be consistent with the majority rule, which dictates that the value attributable to the right to restrict the development and use of the encumbered land as set forth in the easement be viewed as having been conveyed to the holder of the easement, although that value lies dormant and inaccessible by the holder until the restriction on the holder's use of the easement is removed in the context of the condemnation proceeding. Finally, the holder of the conservation easement should be required to use the compensation it receives to accomplish similar conservation purposes in some other manner or location.²⁰⁵ These various principles are further discussed below in the context of the total and partial takings examples.

B. Condemnation Scenarios

1. Total Taking

Assume a condemning authority wishes to acquire land encumbered by a conservation easement for a public use that would be inconsistent with the easement, such as for use as part of a regional airport or highway expansion. In such a case, the condemning authority would need to take both the encumbered land and the conservation easement, and either extinguish or release the easement (or the easement might simply merge with the fee title to the land), thereby freeing the land to be used in manners formerly restricted by the easement.²⁰⁶ Assume also that, immediately before the taking, the fair market value of the land encumbered by the easement is \$3 million,²⁰⁷ but if the easement were extinguished, the fair market value of the land would increase to \$5 million.²⁰⁸

²⁰⁴ See *supra* Part II.A.1.c.

²⁰⁵ See *supra* Part II.A.2.b.

²⁰⁶ See *supra* note 203 and accompanying text. Condemning authorities acquiring land frequently also acquire and extinguish any servitudes burdening the land because continuance of the servitude burdens would interfere with the purposes for which the property is acquired. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 7.8 cmt. b. If the condemning authority already owned the land encumbered by the conservation easement, then, as in *Hartford*, it would need only to condemn the easement. See discussion *supra* Part I.B.3.a.

²⁰⁷ This is the price a willing buyer would pay a willing seller in a competitive and open market for the land subject to the perpetual restrictions on its development and use set forth in the easement.

²⁰⁸ This is the price a willing buyer would pay a willing seller in a competitive and

When a tract of land, the ownership of which is divided, is condemned, the unit rule (sometimes referred to as the undivided fee rule) is generally applied to determine the compensation payable to the various owners of interests in the land.²⁰⁹ The unit rule involves a two-step process. First, the property physically taken is valued as if it were owned by one person — that is, as if it were an undivided or unencumbered whole — and that amount constitutes the total compensation award.²¹⁰ Second, the total compensation award is apportioned among the various owners of interests in the land in accordance with their respective rights.²¹¹ The unit rule protects condemning authorities by ensuring that the total compensation award will never exceed the fair market value of the property actually taken.²¹²

open market for the land free of the easement's restrictions.

²⁰⁹ The unit rule has been described as follows:

[I]t is still the law in the usual case, that when a tract of land is taken by eminent domain, because the land itself is taken by a paramount title rather than through the separate estates of different persons having interests in the land, the compensation awarded is for the land itself and not for the sum of the different interests therein. The duty of the public to make payment for the property which it has taken is not affected by the nature of the title or by the diversity of interests in the property. The public pays what the land is worth, and the amount so paid is to be divided among the various claimants, according to the nature of their respective estates.

See SACKMAN, *supra* note 23, § 12.05[1].

²¹⁰ See, e.g., *id.* § 13.01[16][a] (“Pursuant to the unit rule, the proper course is to determine the entire compensation to be awarded as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights.”); U.S. DEP’T. OF JUSTICE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 53 (2000) (“[I]f there are several interests or estates in the property, the property should be valued as a whole, embracing all of the rights, estates, and interests of all who may claim, and as if in one ownership. The market value of the whole property is later apportioned among those who hold various interests in the property . . .”). In *Morley*, the court mandated the application of the unit rule to determine the just compensation payable to the various owners of interests in the King Edward hotel, which was subject to negative restrictions on its use effectively held in gross. See discussion *supra* Part I.B.3.b.

²¹¹ See sources cited *supra* note 210.

²¹² See, e.g., SACKMAN, *supra* note 23, § 13.08[2] (discussing rule in context of leasehold interests). The two major exceptions to the application of the unit rule are (1) appurtenant easements and appurtenant restrictive covenants, which generally are valued by reference to the benefited rather than the burdened parcel, and (2) life tenant and remainder interests. See *id.* § 12.05[4][a]. The unit rule is also not applied if the property condemned is subject to an encumbrance, such as an easement, but the condemnor does not take the easement. See, e.g., *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910) (holding that condemnee was entitled to value of

If the owners of interests in the land have entered into a contract regarding the apportionment of the compensation award, that contract generally will control.²¹³ Courts do not, however, look with favor on contract clauses that cause forfeiture of a party's interest in a condemnation award.²¹⁴ In the absence of a contract, if one of the interests in the land is an easement or similar nonpossessory interest in land, the before and after method should generally be used to determine its value for purposes of compensating its owner.²¹⁵

Applying the unit rule to the example: (1) the total compensation award would be \$5 million, or the fair market value of the land as if it were an undivided or unencumbered whole, and (2) that compensation award would be apportioned between the owner of the encumbered land and the holder of the easement based on the value of their respective rights. Assuming no provision to the contrary in the conservation easement deed²¹⁶ or an applicable state statute,²¹⁷ the owner of the encumbered land should receive the fair market value of his or her interest in the land, or \$3 million, and the holder of the easement should receive the remaining \$2 million, which is the value of the easement as determined under the before and after method at the time of condemnation (as set forth in Table 1).

its land as encumbered by easement and owner of easement could recover nothing as it lost nothing by superposition of public easement upon its own); *Montgomery Ward & Co. v. City of Sterling*, 185 Co. 238, 244 (1974) (“[T]he condemnor need not pay for an interest which was not lost by the condemnees.”).

²¹³ In *Simpson v. Fillichio*, 560 So. 2d 331, 332 (Fla. Dist. Ct. App. 1990), the court denied a lessee the right to share in the condemnation award upon the taking of the leased premises because the condemnation clause in the lease entitled the lessor to the “portion of the award made for the land taken.” The court noted that while it was “not insensitive to the cogent argument advanced by the lessees that . . . the lessors would receive a windfall if compensated as if the land were unencumbered,” the condemnation clause in the lease controlled, and lessees were “not entitled to be rescued from what may well have been a bad bargain.” *Id.*

²¹⁴ See POWELL, *supra* note 137, § 16B.07[3] (“The decisions show that courts do not look with favor on clauses causing the forfeiture of the lessee’s interest in the condemnation award, and that a lease covenant will not be construed to have that effect if the language and the circumstances of the transaction permit another construction.”).

²¹⁵ See *supra* Part II.A.1.b (explaining that before and after method is standard method used to value nonpossessory interests in land for condemnation purposes).

²¹⁶ See *infra* notes 226-28 for a discussion of easement deeds that inappropriately limit the holder’s share of the award upon condemnation.

²¹⁷ See *infra* Part III.A for a discussion of the easement-enabling statutes that address the issue of compensation upon condemnation and the few that do so inappropriately.

Table 1. At the Time of Condemnation

FMV of land if <i>unencumbered</i> by the easement	\$5 million
FMV of land <i>encumbered</i> by the easement	\$3 million
Value of the conservation easement	\$2 million

Calculating and apportioning the condemnation award as recommended in this example would comply with the mandate of the U.S. Supreme Court that compensation be fair and equitable to all parties involved.²¹⁸ The owner of the encumbered land would be paid full fair market value for his property interest — the land *encumbered* by the easement — or \$3 million. Lands encumbered by conservation easements (or similar development and use restrictions) are bought and sold in competitive and open markets.²¹⁹ Accordingly, fair market value is the appropriate standard to apply in determining just compensation for the taking of such land.²²⁰ Moreover, paying anything more than fair market value to the owner of the encumbered land would confer an undue windfall on such owner at the expense of the public, which owns the easement. As one commentator explained:

If land that is subject to a right or way or other easement is [condemned], it is fair and equitable that the amount paid to the owner of the easement should diminish the damages of the owner of the fee, for his land was less valuable by reason of the encumbrance.²²¹

The public, in its capacity as payor of the bill for the acquisition of the land, would be required to pay only fair market value for the property it acquires — the land *unencumbered* by the easement — or \$5 million.²²² And the holder of the easement would receive the

²¹⁸ See *supra* notes 161-63 and accompanying text.

²¹⁹ See McLaughlin, *supra* note 15, at 81 (noting that appraisers have begun to compile databases of sales prices of easement-encumbered land).

²²⁰ See *supra* Part II.A.1.a.

²²¹ SACKMAN, *supra* note 23, § 12.05[1]; see also *supra* notes 26-27 and accompanying text (discussing inappropriateness of paying more than fair market value of encumbered land to owner of such land).

²²² Condemning authorities should not be permitted to acquire easement-encumbered land for a lower price simply because ownership of that land is divided. If condemning authorities could acquire easement-encumbered land for its value as restricted (that is, pay nothing for the conservation easements), such land would

difference between those two values — \$2 million — on behalf of the public, which invested in and was beneficiary of the conservation or historic values provided by the easement. Moreover, pursuant to the doctrine of cy pres or similar equitable principles, the holder should be required to use its share of the compensation award to accomplish similar conservation or historic purposes in some other manner or location (in other words, to replace as nearly as possible the conservation or historic benefits that were lost as a result of the condemnation).²²³

Calculating and apportioning the condemnation award as recommended in this example would also comport with the intent of all parties involved in the easement's creation. To paraphrase the Supreme Court of Ohio in *Thormyer*, it cannot be seriously suggested that landowners granting conservation easements intend to benefit condemning authorities by enabling them to take the encumbered land for its restricted value.²²⁴ The same can be said for the policymakers investing public funds in easement purchase and tax incentive programs, and the individual and institutional donors of cash, property, and services to the government entities and land trusts acquiring conservation easements. In short, it cannot be seriously suggested that any of the parties involved in the creation of a conservation easement intend to make the encumbered land a cheap and, therefore, attractive target for condemnation.²²⁵

become an attractive target for condemnation because it would be less expensive (and, in many cases, much less expensive) to condemn than similar unencumbered land. See *supra* INTRODUCTION (discussing perversity of this situation).

²²³ See *supra* Part II.A.2.b.

²²⁴ See *supra* notes 187-88 and accompanying text (discussing *Thormyer*).

²²⁵ For a similar result in a different context, see *County of San Diego v. Miller*, 532 P.2d 139, 144 (Cal. 1975), in which the California Supreme Court held that the owner of an unexercised option to purchase land was entitled to a portion of the condemnation award upon the taking of the optioned land in an amount equal to the extent by which the award exceeded the option price. That is, the owner of the option was entitled to an amount equal to the difference between (1) the amount of the award for the land and (2) the price at which the owner could have purchased the land under the option. The court noted that “compensation issues [in eminent domain proceedings] should be decided on considerations of fairness and public policy.” *Id.* at 143 (citing *United States v. Fuller*, 409 U.S. 488, 490 (1973)). The court explained that during the life of the option, the owner of the land could have no reasonable expectation of receiving a purchase price exceeding the option price, having relinquished that right by selling the option; the owner of the option had a reasonable expectation of receiving the benefit of the option, having purchased the option; and denying the owner of the option a share of the compensation award would provide the owner of the land with “an inequitable and unjustifiable windfall.” *Id.* at 144. The court also noted that its holding would not increase the total condemnation

In some cases, conservation easement deeds may provide that the holder's percentage of any condemnation award is limited to the percentage that the easement represented of the value of the subject land at the time of the easement's donation ("donation percentage").²²⁶ This type of provision, although technically permissible under the Treasury Regulations interpreting the federal charitable income tax deduction offered to easement donors, is contrary to the spirit of those regulations. The Treasury Regulations describe a conservation easement as a "property right . . . vested in the donee" and provide that, upon involuntary conversion, the holder must be entitled to at least (rather than only) the donation percentage of the proceeds, unless state law provides otherwise.²²⁷ Accordingly, if a conservation easement contains an apportionment provision, it should provide that upon condemnation of the easement the holder is entitled to a percentage of the condemnation award equal to the greater of: (1) the donation percentage or (2) the percentage that the easement represents of the value of the unencumbered land at the time of the condemnation as determined under the before and after method ("condemnation percentage").²²⁸ In other words, any appreciation in the value of the conservation easement over time should be payable to the holder of the easement on behalf of the public, which is the beneficial owner of the easement.

2. Partial Taking

Assume a public utility exercises the power of eminent domain delegated to it under either state or federal law to acquire a 150-foot wide right-of-way through land encumbered by a conservation easement, and the public utility plans to erect 150-foot tall steel towers to support high-voltage transmission lines in the right-of-way.

award payable by the condemning authority because it merely required that such award be apportioned between the two parties with interests in the property taken. Moreover, failing to pay an appropriate portion of the condemnation award to the owner of the option would frustrate the growing market in options contrary to public policy. *Id.*

²²⁶ See, e.g., BYERS & MARCHETTI PONTE, *supra* note 1, at 462-63 (providing example of such apportionment provision).

²²⁷ Treas. Reg. § 1.170A-14(g)(6)(ii) (1999); see also McLaughlin, *supra* note 172, at 482-84 (discussing inappropriateness of limiting holder's share of proceeds in this manner).

²²⁸ See BYERS & MARCHETTI PONTE, *supra* note 1, at 464 (providing example of such apportionment provision); *id.* at 463 ("An additional principle that may be operative here is that the donor gave a property interest to the charity, which is a fully vested charitable asset that should not be transferred back to the landowner.").

Assume also that, immediately before the taking, the fair market value of the land encumbered by the easement is \$3 million, but if the easement were extinguished, the fair market value of the land would increase to \$5 million. The value of the easement immediately before the taking, as determined under the before and after method, is thus \$2 million. Accordingly, immediately before the taking (and as set forth in Table 2 below), the easement represented forty percent of the value of the unencumbered land (\$2 million of \$5 million), and the land encumbered by the easement represented the remaining sixty percent of the value of the unencumbered land (\$3 million of \$5 million).

Table 2. Immediately Before the Taking

FMV of land if <i>unencumbered</i> by the easement	\$5 million	100%
FMV of land <i>encumbered</i> by the easement	\$3 million	60%
Value of the conservation easement	\$2 million	40%

a. Calculating and Apportioning the Compensation Award

When only a portion of a parcel of land is taken through the exercise of eminent domain (i.e., when there is only a partial taking), one of two valuation methods is generally employed to determine the total compensation award — the before and after method or the severance damage method.²²⁹ Under the before and after method as employed in this context, the total compensation award is equal to the difference between (1) the fair market value of the entire parcel immediately before the taking (and as unaffected thereby) and (2) the fair market value of the portion of the parcel remaining immediately after the taking (and as affected thereby).²³⁰ Under the severance

²²⁹ See SACKMAN, *supra* note 23, §§ 13.01[17], 14.02[1][a]. For a discussion on how to identify the relevant parcel, see *id.* § 14.02[4] (“[T]he first inquiry that must be made . . . in dealing with either the ‘before and after’ rule or the ‘severance damage’ rule is the ability to establish the identity of the pre-taking parcel.”).

²³⁰ See *id.* §§ 13.01[17] n.120, 14.02[1]. The before and after method is considered the simplest and is perhaps the most widely used method of valuation in partial takings situations. See *id.* § 14.02[1]. It is also the method generally employed in federal condemnation proceedings involving partial takings. See, e.g., *United States v. 91.90 Acres of Land*, 586 F.2d 79, 86 (8th Cir. 1978). As the reader has hopefully gathered, the before and after method is applied in a number of contexts, and the precise manner in which it is applied depends on the context. In the case of a partial

damage method, the total compensation award is generally equal to (1) the value of the part of the land actually taken plus (2) any severance damages the owner suffers with respect to part of the land not taken.²³¹ Regardless of the method employed, however, the goal in any partial takings situation is to compensate the owner of the land for both the portion of the land actually taken and any incidental injury or damage to the remaining land.²³²

The condemnation of a right-of-way through a portion of a parcel of land for the construction and maintenance of electric transmission towers constitutes a partial taking. When the right-of-way is condemned with respect to land encumbered by a conservation easement there is the added complication of the divided ownership of the land. In this situation, the just compensation payable to the two owners of interests in the land should be determined by combining the two-step unit rule process²³³ and the applicable partial taking valuation methodology.

In step one of the process, the total compensation award should be determined using the applicable partial takings valuation methodology. In employing that methodology, however, it should be assumed that the land is *not* encumbered by a conservation easement. In other words, in determining the total compensation award under either the before and after or severance damage method, it should be

taking of easement-encumbered land, the before and after method may be employed first to determine the total compensation award and then again to determine the easement holder's share of that award.

²³¹ See SACKMAN, *supra* note 23, § 14.02[2]. When a public utility condemns a portion of land for electric transmission facilities, under the severance damage method the owner of the land is generally entitled to: (1) the fair market value of the land actually occupied by the poles or towers, (2) reimbursement for the diminution in the value of the balance of the right-of-way taken, and (3) reimbursement for any decrease in the value of the remainder of the tract. *Id.* § 16.07[1]-[2]. In some jurisdictions, however, the taking of the easement in the part of the right-of-way that is not physically occupied by poles and towers is deemed tantamount to the taking of a fee. *Id.* The severance damage method has been criticized as tending to allow for duplication of damages and overpayment to the condemnee. See *id.* § 14.02[2][a][ii].

²³² As one commentator explained, subject to certain caveats:

[I]t is a touchstone of all taking procedure that the just compensation required by the Fifth Amendment of the Constitution of the United States requires that an owner in a partial taking case be compensated not only for the land taken, but for the incidental injury to the part not taken. When the part not taken is left in such condition by reason of the taking, as to be of less value than before, the owner is entitled to those additional damages.

See *id.* § 14.02[1][a].

²³³ See *supra* notes 209-12 and accompanying text (describing unit rule).

assumed that the land at issue is owned by one person and is therefore an undivided or unencumbered whole.

In the second step of the process, the total compensation award should be apportioned between the owner of the encumbered land and the holder of the easement. If there is an enforceable apportionment provision in the easement deed, that provision generally will control.²³⁴ If there is no such provision, and if there is no credible means of more precisely apportioning the award between the two parties, the award should be apportioned based on the percentage that each party's interest represented of the value of the unencumbered land immediately before the condemnation.

Applying these principles to the example, assume that step one yields a total compensation award of \$2.5 million. Although the precise dollar figure for the total compensation award may vary depending on whether the before and after or severance damage method is employed, the more important point is that the valuation methodology must be employed in step one assuming the land is *not* encumbered by the easement (i.e., that the land is an undivided or unencumbered whole). Only then will the total award reflect the decline in the value of both the land encumbered by the conservation easement *and* the conservation easement as a result of the condemnation.

In step two of the process, assuming no enforceable apportionment provision in the easement deed and no credible means of more precisely apportioning the award, the \$2.5 million award should be apportioned between the owner of the encumbered land and the holder of the easement based on the percentage that each of their interests represented of the value of the unencumbered land immediately before the taking. Thus, as set forth in Table 3 below, sixty percent of the total compensation award (or \$1.5 million) should be allocated to the owner of the encumbered land, and forty percent of the award (or \$1 million) should be allocated to the holder of the easement.

²³⁴ See *supra* notes 213-14 and accompanying text. See also *supra* notes 226-28, which discuss the inappropriateness of a provision limiting a holder's share of the compensation award; *infra* Part III.A, which discusses the few easement-enabling statutes that address the issue of compensation inappropriately.

Table 3. Apportionment of Award

Total Compensation Award	\$2,500,000
60% to Owner of Encumbered Land	\$1,500,000
40% to Holder of Conservation Easement	\$1,000,000

Using the percentage interests determined immediately before the condemnation to apportion the compensation award is, of course, a somewhat blunt instrument, at least with respect to the portion of the award attributable to the incidental injury or damage to the land that is not actually taken. In some cases, the incidental injury to the land not taken will be primarily to the development value of that land. And in many cases, that development value will effectively have been transferred to the holder of the conservation easement, although that value lies dormant and inaccessible by the holder until the restriction on the holder's ability to agree to sell, extinguish, release, or otherwise transfer the easement is removed in the context of the condemnation proceeding.²³⁵ Accordingly, if a credible means of more precisely apportioning the award is available, it should be utilized.²³⁶

b. Right-of-Way Inconsistent with the Conservation Easement

The public utility might try to argue that the holder of the conservation easement should not be entitled to any compensation because the proposed use of the land will not be inconsistent with the easement.²³⁷ To understand why that argument should fail, it is necessary to analyze the two aspects of the taking separately: (1) the taking of the 150-foot wide right-of-way in which the electric transmission facilities will be constructed and maintained, and (2) the incidental injury or damage to the remaining land. It is also important to keep in mind that, in each case, the land is subject to divided

²³⁵ See *supra* Part II.A.2.c.

²³⁶ As one commentator noted, however, the desire for precision in these cases must be weighed against the reality that "the greater the reliance upon convoluted formulas, the greater would seem to be the risk of misaddressing the true damage." See SACKMAN, *supra* note 23, § 14.02[1][c].

²³⁷ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 4, § 7.8 cmt. b (2000) ("If the servitudes are not inconsistent with the contemplated governmental use . . . the acquiring entity may choose to condemn the servient estate only.").

ownership and each owner of an interest in the land should be compensated for its loss as a result of the condemnation.

(1) Taking of Right-of-Way

The public utility's proposed use of the strip of land underlying the right-of-way is likely to be inconsistent with both the terms and the purpose of the conservation easement. First, the construction and maintenance of 150-foot tall steel towers to support high-voltage transmission wires on the strip, and the type of clearing and ongoing maintenance of the strip that would be necessary to prevent interference with the towers and lines (through, for example, hand cutting, machine mowing, and herbicide application), would likely violate one or more of the specific terms of the conservation easement.²³⁸ Some conservation easements expressly prohibit the use of the encumbered land as a utility corridor.²³⁹ Most (if not all) conservation easements limit the types of buildings and other structures that can be constructed or maintained on the land, and 150-foot tall steel towers supporting high-voltage transmission lines generally do not fall within the category of permitted structures.²⁴⁰ Many conservation easements prohibit the type of surface alterations and changes to vegetation and forest land that would be required to construct and maintain the towers and lines.²⁴¹ And many conservation easements prohibit the division of the land that would be required to transfer ownership of the right-of-way to the public utility.²⁴²

The proposed use of the strip would also likely be inconsistent with the charitable or public purpose of the conservation easement. The purpose of a conservation easement is generally to (1) preserve the conservation or historic values of the encumbered land in substantially their condition at the time of the easement's conveyance, and (2) prevent any use of the land that would significantly impair or interfere with those values.²⁴³ The construction on the strip of 150-foot tall

²³⁸ For sample conservation easement terms, see BYERS & MARCHETTI PONTE, *supra* note 1, at 315-84.

²³⁹ *See id.* at 322.

²⁴⁰ *See id.* at 325-34.

²⁴¹ *See id.* at 335, 338-39.

²⁴² *See id.* at 323-24.

²⁴³ *See id.* at 318-19 (providing sample purpose statements for conservation easements). Easement holders routinely prepare "baseline documentation," which is a report of the condition of the subject property at the time of the conveyance of a conservation easement. *See id.* at 100-15. This documentation provides the holder

steel towers supporting high-voltage transmission lines, and the type of clearing and ongoing maintenance that would be necessary to prevent interference with such towers and lines, would likely be inconsistent with the preservation of the conservation or historic values of the strip.²⁴⁴ Further, in determining whether the public utility's use of the strip would violate the terms or purpose of the conservation easement, it should be assumed that the utility would exercise its rights to the fullest extent.²⁴⁵

Many conservation easements also contain a general "overarching" provision prohibiting the use of the encumbered land in any manner inconsistent with the purpose of the easement.²⁴⁶ Many further provide that the easement should be liberally construed to effect both the purpose of the easement and the policy and purpose of the applicable easement-enabling statute.²⁴⁷ Moreover, if the terms of a conservation easement are at all ambiguous, the easement should "be construed beneficially, according to the apparent purpose of protection or advantage . . . it was intended to secure or promote."²⁴⁸

with "an accurate record on which to rely if controversy arises about any future damage to a protected condition." See *id.* at 100.

²⁴⁴ For an analogous situation, see *Minnesota Power & Light Co. v. State*, 177 Minn. 343 (1929), which involved a power company's proposed taking of a strip of land running through a state park for electric transmission facilities. The strip was to be 50 feet wide and three-fourths of a mile long; all trees, shrubs, and brush were to be removed from the strip; four or five tower structures carrying a power line were to be erected on the strip; timber outside of the strip within falling reach of the line was to be removed; guy wires at the towers were to extend beyond the strip and timber was to be cleared away for such wires; and power company employees were to be given the right to access the strip for all necessary construction, repairs, maintenance, and inspection of the line. *Id.* at 350-51. The court determined that the proposed line would be inconsistent with the purpose of maintaining the land as a park; materially interfere with the use of the park, especially in view of the careful provisions made by the legislature for preserving the park land from injury or interference; detract from the beauty and usefulness of the park; and destroy trees, shrubs, and plants therein. *Id.* at 351.

²⁴⁵ For example, in *Morley*, the court held that the restrictive covenant burdening the King Edward hotel was "plainly being extinguished" when the property was taken by the redevelopment agency. See *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1298 (Miss. 1994). The court explained that because the condemnee's entire right and the condemnor's entire liability must be resolved in single action, it is presumed that "the construction will be of such character as to do the most injury to the remaining property of the landowner." *Id.*

²⁴⁶ See BYERS & MARCHETTI PONTE, *supra* note 1, at 367 (providing example of such provision).

²⁴⁷ See *id.* at 376.

²⁴⁸ *Weston Forest & Trail Ass'n v. Fishman*, 849 N.E.2d 916, 922 (Mass. App. Ct. 2006) (quoting *Chatham Conservation Found. v. Farber*, 779 N.E.2d 134, 139 (Mass.

Finally, it is useful to consider that had the owner of the easement-encumbered land attempted to voluntarily convey the right-of-way to the public utility, such owner would likely have been viewed as violating not only the specific terms but also the purpose of the easement. Accordingly, the taking of the right-of-way should be viewed as effectively extinguishing the portion of the conservation easement encumbering the strip, and the government entity or land trust holding the easement should be entitled to compensation for the taking of that portion of the easement.

(2) Incidental Injury or Damage to Remaining Land

The construction and maintenance in the strip of 150-foot tall steel towers supporting high-voltage transmission lines might also reduce the development and use potential of the remaining land, thereby causing incidental injury or damage to both the value of the remaining encumbered land *and* the value of the conservation easement encumbering that land. In the case of the conservation easement, the injury or damage would be to the value of the holder's "right to restrict" the development and use of the remaining land. That is, the easement holder's right to restrict the development and use of the remaining land will decline in value as the development and use potential of that land declines. Accordingly, the easement holder should be entitled to compensation for the injury or damage to the value of the portion of the easement encumbering the remaining land.

If the easement holder is not so compensated, easement-encumbered land would become an attractive target for partial takings because it would be much less expensive to condemn rights-of-way through easement-encumbered land than through similar unencumbered land. For example, assume a public utility could choose to condemn a transmission line right-of-way through either easement-encumbered parcels or unencumbered parcels. If the public utility condemns the right-of-way through unencumbered parcels, it would be required to compensate the landowners for both the value of the interest actually taken and any incidental injury or damage to the

App. Ct. 2002)); *see also* RESTATEMENT (THIRD) OF PROP.: SERVIDUES, *supra* note 4, at § 4.1(1) ("A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created"); *id.*, cmt. a. ("The rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs from the often expressed view that servitudes should be narrowly construed to favor the free use of land.").

value of the remaining land. In areas where there is significant development pressure, both amounts would reflect the reduction in the development value of the land. Alternatively, if the public utility condemns the rights-of-way through parcels encumbered by conservation easements, and the utility is not required to pay compensation to the holders of the easements for the reduction in the value of the portion of the easements encumbering the remaining lands, the utility would avoid having to pay for some or all of the reduction in the development value of the remaining lands.

The inappropriateness of failing to compensate the holder of a conservation easement for the reduction in the value of the portion of the easement encumbering the remaining land is further highlighted by the following example. Assume that some years after the taking of the right-of-way and attendant failure to appropriately compensate the holder of the conservation easement, fee title to the remaining land is taken for a public use that is inconsistent with the easement. If the taking of the right-of-way in the first condemnation proceeding significantly reduced the development value of the remaining land, the holder of the easement would receive a much reduced amount upon the taking of fee title to the remaining land in the second condemnation proceeding. In other words, much of the value attributable to the easement would have been transferred without compensation to the condemning authority in the first condemnation proceeding. The prospect of not having to pay compensation for the development value of the remaining lands would, of course, make land encumbered by conservation easements a cheap, and therefore attractive, target for partial takings. This could, in turn, cause the strong public policy in favor of the use of conservation easements as a land protection tool to be subverted through the condemnation process.

c. "Just" Compensation

Calculating and apportioning the condemnation award as recommended in this example would comply with the mandate of the U.S. Supreme Court that compensation be fair and equitable to all parties involved.²⁴⁹ As in other partial taking situations, the condemning authority would be required to pay only: (1) fair market value for the portion of the land actually taken (in this case, the portion actually taken *unencumbered* by the conservation easement), plus (2) an amount attributable to the incidental injury or damage to

²⁴⁹ See *supra* notes 161-63.

what remains (which, in this case, consists of both the remaining encumbered land *and* the conservation easement encumbering that land). The owner of the encumbered land would receive (1) fair market value for his or her interest in the land actually taken (the strip taken *encumbered* by the easement), plus (2) an amount attributable to the incidental injury or damage to his or her interest in the remaining land (the remaining land *encumbered* by the easement). And the holder of the easement would receive, on behalf of the public: (1) the value attributable to the portion of the easement encumbering the strip that is effectively extinguished, plus (2) an amount attributable to the incidental injury or damage to the portion of the easement that encumbers the remaining land. Calculating and apportioning the condemnation award as recommended in this example would also comport with the intent of all parties involved in the easement's creation, none of whom intended to make the encumbered land a cheap and, therefore, attractive target for partial takings.

C. *Substitute Facilities Doctrine*

Property owned and devoted to a public use by one governmental entity is sometimes taken by another governmental entity for a different public use. In such cases, courts have on occasion held or recognized that the proper measure of just compensation to be paid to the condemnee is the cost of providing necessary substitute facilities.²⁵⁰ For the “substitute facilities doctrine” to apply, however, the condemnee must be obligated to continue to furnish the facilities that are taken, or the facilities must be reasonably necessary for the continued use or operation of the governmental function involved.²⁵¹ It is not clear if or when a government entity holding a conservation easement could successfully argue that the substitute facilities doctrine should be applied to determine just compensation for the taking of the easement. Even if the government entity were able to establish that it is obligated to furnish a substitute easement, or that the easement is reasonably necessary for the continued use or operation of the governmental function involved, the U.S. Supreme Court significantly constrained the use of the substitute facilities doctrine in a 1984 decision.²⁵²

²⁵⁰ See SACKMAN, *supra* note 23, § 15.01[1][b]; Gene A. Noland, Annotation, *Eminent Domain: Cost of Substitute Facilities as Measure of Compensation Paid to State or Municipality for Condemnation of Public Property*, 40 A.L.R. 3d 143, § 2[a] (1997).

²⁵¹ See Noland, *supra* note 250, § 2[a].

²⁵² In *United States v. 50 Acres of Land*, 469 U.S. 24 (1984), the U.S. Supreme Court

In addition, in some circumstances the cost of a substitute conservation easement could be substantially less than the value of the conservation easement that is taken as determined under the before and after method.²⁵³ After all, what constitutes an appropriate substitute easement is a subjective inquiry, and an easement in a less developed area with a much lower before and after value may be offered as a substitute. This is important. If condemning authorities are able to condemn land encumbered by conservation easements and pay the easement holders less than the value of the easements as determined under the before and after method, land encumbered by conservation easements would become an attractive target for condemnation because it would be cheaper to condemn than similar unencumbered land.²⁵⁴ If the condemnation award is calculated and apportioned as recommended in Part II.B, however, the condemning authority would be required to pay full fair market value for the property it acquires — the land *unencumbered* by the easement — and it would not have a financial incentive to prefer easement-encumbered land.²⁵⁵

III. EASEMENT-ENABLING STATUTES

As noted in the Introduction, all fifty states and the District of Columbia have enacted some form of easement-enabling statute.²⁵⁶ The following sections discuss the easement-enabling statutes as they relate to the condemnation of easement-encumbered land. The

held that the substitute facilities doctrine is not applicable when the market value of condemned property is ascertainable and application of the market value rule would not be manifestly unjust. The Court noted that this view is consistent with its earlier holding that fair market value constitutes “just compensation” for private citizens who must replace their condemned property with more expensive substitutes. *Id.* at 33; see also SACKMAN, *supra* note 23, § 15.05 (noting that cases applying substitute facilities doctrine generally predate *50 Acres of Land*, and several authors have questioned continued application of doctrine).

²⁵³ See Noland, *supra* note 250, § 2[a] (noting that cost of substitute facilities may in some circumstances be more, and in other circumstances less, than value of property taken).

²⁵⁴ See *supra* INTRODUCTION for a discussion of the perversity of this situation.

²⁵⁵ Condemning authorities may, of course, prefer easement-encumbered land for other reasons, including the fact that condemning undeveloped land can minimize or eliminate the political difficulties associated with locating unpopular public works projects in populated areas. This preference for condemning undeveloped land argues in favor of requiring condemning authorities to give some weight to the protected status of easement-encumbered land when considering condemnation alternatives.

²⁵⁶ See *supra* note 5 (listing easement-enabling statutes).

following sections do not discuss the agricultural protection statutes that various states have enacted in addition to their easement-enabling statutes.²⁵⁷

A. Existing Statutory Approaches

In forty-nine states and the District of Columbia conservation easements are identified in the easement-enabling statute as interests in real property or land.²⁵⁸ In the remaining state, Illinois, they are identified as such in case law.²⁵⁹ However, most of the easement-enabling statutes do not address whether a conservation easement constitutes compensable property for eminent domain purposes, or how a conservation easement should be valued for purposes of providing just compensation to its holder.²⁶⁰ In jurisdictions where these issues are not addressed by statute, the principles discussed in Parts I and II should apply.

Of the easement-enabling statutes that address these issues, two do so in an appropriate manner, although they do not indicate precisely how the compensation payable to the holder of a conservation easement should be calculated. Thus, while the Virginia statute provides that the holder of a conservation easement shall be compensated for the “value of the easement” in any eminent domain proceeding, it does not explain how the value of the easement should be determined.²⁶¹ The Pennsylvania statute provides a bit more guidance, but it is still ambiguous. The statute first provides that nothing in it shall be construed to restrict any right the holder of a conservation easement may have to compensation under applicable law.²⁶² The statute then states that a court order issued in an eminent domain proceeding shall provide for the holder of a conservation

²⁵⁷ See *supra* note 142 and accompanying text (discussing agricultural protection statutes).

²⁵⁸ See, e.g., COLO. REV. STAT. ANN. § 38-30.5-103 (West, Westlaw through 2007) (providing that conservation easement “shall constitute an interest in real property notwithstanding that it may be negative in character”); VT. CODE ANN. tit. 10 § 823 (West, Westlaw through No. 83 of 2007-08 Sess.) (providing that conservation easements are “deemed to be interests in real property and shall run with the land”).

²⁵⁹ Illinois identifies conservation easements in its case law as property interests distinguishable from the underlying fee that the legislature may give a condemning body the right to acquire. See, e.g., *Libertyville v. Connors*, 185 Ill. App. 3d 317, 330-31 (App. Ct. 1989).

²⁶⁰ See *supra* note 5 (listing easement-enabling statutes).

²⁶¹ VA. CODE ANN. § 10.1-1010.F (2006).

²⁶² 32 PA. CONS. STAT. § 5055(d)(2) (2001).

easement to be compensated either in accordance with the easement's terms, or, if the easement does not address the issue, for the "fair market value of the easement."²⁶³ As in Virginia, the Pennsylvania statute fails to explain how the fair market value of a conservation easement should be determined. The statute does, however, provide that in adjudicating damages to a conservation easement the court shall be guided by principles generally applicable to condemnation proceedings (which presumably would include the principles discussed in Parts I and II).²⁶⁴

A few of the other easement-enabling statutes could be interpreted to provide that the holder of a conservation easement is entitled to compensation upon condemnation. Florida's statute provides that "[i]n any legal proceeding to condemn land for the purpose of construction and operation of a linear facility . . . the court shall consider the public benefit provided by the conservation easement and linear facilities in determining which lands may be taken and the compensation paid."²⁶⁵ South Carolina's statute provides that "[h]olders of the conservation easement must be parties to the [eminent domain] proceedings along with the owner of the land."²⁶⁶ Mississippi's statute provides that the statute does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity, and, in any such proceeding, the holder of the easement shall be compensated for the value of the easement.²⁶⁷

The easement-enabling statute in Nebraska gets it half right by providing that if a conservation easement was obtained by purchase or exchange, the holder of the easement shall be entitled to just compensation for the taking of the easement.²⁶⁸ However, the Nebraska statute also provides that if the easement was obtained by gift or devise, the owner [of the encumbered land] shall be entitled to compensation for the taking as if the property had not been subject to

²⁶³ *Id.* § 5055(e).

²⁶⁴ *Id.* The Pennsylvania statute also provides that "[t]he net proceeds of the condemnation received by the holder shall be applied in furtherance of the public benefit in accordance with its charter or articles of incorporation." *Id.*

²⁶⁵ See FLA. STAT. § 704.06(11) (West, Westlaw through Mar. 14, 2008). Linear facilities include electric transmission and distribution facilities, telecommunications transmission and distribution facilities, pipeline transmission and distribution facilities, and public transportation corridors. *Id.*

²⁶⁶ S.C. CODE ANN. § 27-8-80 (West, Westlaw through 2007 Sess.).

²⁶⁷ MISS. CODE ANN. § 89-19-7(2) (West, Westlaw through 2007 Sess. and 1st Extra Sess.).

²⁶⁸ NEB. REV. STAT. § 76-2117(3) (West, Westlaw through 2007 1st Sess.).

the easement.²⁶⁹ By implication, this means that the holder of the easement would not be entitled to compensation. The Massachusetts statute similarly provides that upon the taking of easement-encumbered land for certain specified purposes, the owner of the land shall receive the fair market value of the land as if it were not restricted.²⁷⁰ The Kentucky statute ambiguously provides that “[a] conservation easement . . . shall not operate to impair or restrict any right or power of eminent domain created by statute, and all such rights and powers shall be exercisable as if the conservation easement did not exist.”²⁷¹

Maryland law provides that if a conservation easement has been donated to either the Maryland Historical Trust or the Maryland Environmental Trust (both of which are state agencies that acquire conservation easements), “damages shall be awarded in any condemnation proceedings . . . to the fee owner . . . and shall be the fair market value of the land or interest in it, computed as though the easement . . . did not exist.”²⁷² The predecessor of this provision was enacted with the support of the Maryland Environmental Trust and was intended to guard against the danger that condemning authorities might try to acquire easement-encumbered land for its restricted value.²⁷³ Ensuring that land encumbered by a conservation easement

²⁶⁹ *Id.*

²⁷⁰ The Massachusetts statute specifically provides:

Nothing in this section shall prohibit the department of telecommunications and energy from authorizing the taking of easements for the purpose of utility services provided that . . . the applicant shall compensate the owner of the property in the same manner and the same fair market value as if the land were not under restriction.

MASS. GEN. LAWS ch. 184, § 32 (West, Westlaw through ch. 62 of 2008 2d Sess.).

Legislation was recently proposed in Massachusetts that would amend this provision to provide for the payment of compensation to the holder of the easement. See S.B. 470 (Mass. 2007) (providing for amendment of latter part of foregoing provision to read “the applicant shall . . . compensate the owner of the property *and each restriction holder* to the extent each interest may warrant.” (emphasis added); H.B. 798 (Mass. 2007) (same).

²⁷¹ KY. REV. STAT. ANN. § 382.850(2) (West, Westlaw through 2007 Sess.).

²⁷² See MD. CODE ANN., REAL PROP. § 12-104(g) (West, Westlaw through Jan. 1, 2008). This provision is found in the section of Maryland’s state code governing eminent domain. In writing this Article no attempt was made to review all of the state code provisions (including eminent domain provisions) that might apply to conservation easements. However, the issues discussed in this Article should be relevant regardless of where the provisions relating to the condemnation of a conservation easement may be found.

²⁷³ See MD. ENVTL. TRUST, DEP’T OF NATURAL RES., Bill Report, S. 456 (1980) (on file

is not viewed as a cheap and therefore attractive target for condemnation is a laudable goal. However, statutes addressing the condemnation of easement-encumbered land should mandate the payment of just compensation to both the owner of the encumbered land and the holder of the easement in the manner discussed in Part II. Such statutes should not provide for the payment of a windfall to the owner of the encumbered land at the expense of the public.²⁷⁴

The Arizona and West Virginia statutes appear to deny compensation to the holder of a conservation easement. The Arizona statute provides that “the existence of a conservation easement shall not be considered an interest in real property for which compensation or damages may be awarded under the laws pertaining to eminent domain.”²⁷⁵ The West Virginia statute provides that “nothing in [the statute] may be construed to limit . . . the right of any real property owner to compensation [upon condemnation] for any estate or interest in real property except a conservation or preservation easement authorized by [the statute].”²⁷⁶

Easement-enabling statutes that deny the holder of a conservation easement appropriate compensation upon condemnation are not supportable from either a legal or a policy perspective. The significant adverse policy ramifications of denying compensation to the holders of conservation easements, and of paying the value attributable to a conservation easement as a windfall to the owner of the encumbered land, already have been discussed and need not be repeated here. From a legal perspective, conservation easements are valid, enforceable, and valuable interests in the land they encumber. As such, they fit neatly within the U.S. Supreme Court’s definition of compensable property for eminent domain purposes regardless of whether they are acquired by purchase, gift, devise, or exaction.²⁷⁷ In addition, courts have determined that the constitutional requirement of just compensation for the taking of property cannot be evaded or impaired by legislation and generally find statutes that conflict with the right to just compensation

with author).

²⁷⁴ The prospect of such a windfall could motivate owners of easement-encumbered land to actively encourage condemnation.

²⁷⁵ ARIZ. REV. STAT. ANN. § 33-275.3 (West, Westlaw through 2007 1st Sess.).

²⁷⁶ W. VA. CODE R. § 20-12-5(c) (West, Westlaw through H.B. 4147 of 2008 Sess.).

²⁷⁷ The distinction in the Nebraska statute between conservation easements acquired by donation and those acquired by purchase is unwarranted. See POWELL, *supra* note 137, § 34A.07[2] n.12 (noting that paying unrestricted value of encumbered land to owner of that land upon condemnation if easement was received as gift or devise “would appear to frustrate the intention of the original donor or testator and give an unexpected windfall to the owner”).

to be invalid.²⁷⁸ Accordingly, easement-enabling statutes that authorize the taking of conservation easements without the payment of just compensation to easement holders should be revised to address the issue of compensation appropriately or face a possible constitutional challenge. Until such revisions are made, however, certain measures can be taken to increase the likelihood that the holder of a conservation easement will receive appropriate compensation. At a minimum, all easement deeds should include a provision that apportions the value of the conservation easement upon condemnation to the easement holder, and provides that such value shall be determined in accordance with the principles discussed in Part II.

B. Recommended Revisions

To ensure that the public interest and considerable investment in conservation easements is protected, state easement-enabling or eminent domain statutes should be revised to either confirm or provide that: (1) conservation easements constitute a compensable form of property for eminent domain purposes, (2) governmental and nonprofit holders of conservation easements are entitled to just compensation upon the taking of such easements in whole or in part, and (3) holders of conservation easements must use such compensation to accomplish similar conservation or historic preservation purposes in some other manner or location.²⁷⁹ The statutes should also provide guidance as to how to calculate just compensation in this context, and that guidance should be consistent with the eminent domain principles and examples discussed in Part

²⁷⁸ See 26 AM. JUR. 2D *Eminent Domain* § 113 (2007); see also *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 366 (1936) (“The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.”); SACKMAN, *supra* note 23, § 8.08 (“A statute which authorizes the acquisition of property by condemnation must comply with the constitutional provision for compensation or it is of no effect.”). In assessing the constitutionality of a statute denying compensation to the holder of a conservation easement upon condemnation, it is useful to consider that conservation easements may be valid and enforceable interests in real property apart from their ratification under a state’s easement-enabling statute. See *supra* notes 8-11 and accompanying text.

²⁷⁹ See McLaughlin, *supra* note 172, at 499-502 (discussing use of proceeds payable to holder of conservation easement upon extinguishment of easement in cy pres proceeding). Many of the same considerations will be relevant when a conservation easement is extinguished in a condemnation proceeding.

II.²⁸⁰ Some jurisdictions may wish to go further and mandate that condemning authorities provide compensation to the holder of a conservation easement that is: (1) at least equal to the value of the easement as determined under the before and after method at the time of condemnation and (2) sufficient to enable the holder to acquire property or another easement that replaces the conservation or historic values lost as a result of the condemnation.²⁸¹ In all events, the compensation payable to the holder of a conservation easement should be such that easement-encumbered land is not cheaper to condemn than similar unencumbered land, and owners of easement-encumbered land are not provided windfalls at the expense of the public.

CONCLUSION

The payment of just compensation to the holder of a conservation easement upon condemnation is mandated under any reasonable interpretation of the Takings Clause of the Fifth Amendment. Accordingly, the few easement-enabling statutes that provide to the contrary should be revised. The public is investing substantial financial and other resources in conservation easements and the significant and often unique and irreplaceable conservation and historic values they preserve. To protect this investment in conservation and historic preservation, government and nonprofit holders of conservation easements must both receive appropriate compensation upon the condemnation of easement-encumbered land and use such compensation to replace the conservation or historic benefits destroyed by the condemnation. Paying the economic value attributable to a conservation easement upon its condemnation to the

²⁸⁰ Conservation easement deeds should contain similar provisions to both reduce the likelihood of disputes at the time of condemnation and promote the appropriate treatment of conservation easements in the absence of legislation.

²⁸¹ Such a statute could be modeled on the Virginia Open Space Land Act, which provides, in relevant part:

No open space land . . . or interest or right in which has been acquired under this chapter . . . shall be converted or diverted from open space land use unless . . . there is substituted other real property which is (a) of at least equal fair market value, (b) of greater value as permanent open space land than the land converted or diverted and (c) of as nearly as feasible equivalent usefulness and location for use as permanent open space land as is the land converted or diverted.

VA. CODE ANN. § 10.1-1704.A (West, Westlaw through 2007 Sess.); *see also* SACKMAN, *supra* note 23, § 12.01[3] (noting that state legislatures may require payment of compensation in excess of minimum required under U.S. Constitution).

owner of the encumbered land would confer an undue windfall benefit on the owner at the public's expense. Alternatively, allowing condemning authorities to take easement-encumbered land without paying for the easement would have the perverse effect of making land protected for its conservation or historic values cheaper to condemn than similar unprotected land. Either result would directly contravene the strong public policy in favor of the use of conservation easements as a land protection tool.