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The Trouble with Time: Influencing the Conservation Choices of Future Generations

ABSTRACT

Current generations dictate the conservation decisions of future generations in a variety of ways: they mandate land preservation in state constitutions, establish parks and other reserves, and create "perpetual" conservation easements. Because conditions, preferences, and knowledge change over time, such "intergenerational conservancies" may not always seem to be wise decisions 50 or a hundred years after they are made. But intergenerational conservancies do not inescapably bind future generations. The law provides various means, in particular, for future generations to escape conservation easements that have outlived their societal usefulness. There are various reasons, moreover, why society should allow the creation of intergenerational conservancies. These include the need to reduce the transaction costs of land conservation, to avoid future temptation, to ensure effective private and public ordering, and to solve a temporal tragedy of the commons. The law should be careful not to require or encourage "perpetual" conservation easements where shorter-term conservation easements would benefit society more, but intergenerational conservancies of all types often can be exceptionally valuable to both current and future generations.

Time complicates virtually everything, particularly environmental issues. Examples abound in the environmental field. The "latency" of many environmental harms, for example, increases uncertainty and raises questions whether and how policy makers should discount future harms in deciding whether current regulations are worthwhile. We often do not know whether a particular chemical is toxic or whether the destruction of a particular habitat will lead to the extinction of a species until after the harm occurs. The future benefits of

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banning the chemical or preserving the habitat, moreover, must be balanced against current costs, requiring some metric for comparing across time and across generations. Yet the choice of a metric is highly contested, in part because it reflects judgments about intergenerational equity.

At a more subtle level, the passage of time makes it difficult for us to analyze and judge the causes and nature of environmental damage. Each generation tends to view environmental problems within the space of a few decades at best. When environmental degradation has been relatively gradual over a lengthy period of time, the current generation may not appreciate the full loss that has occurred and thus the consequences of continued degradation. Declines in marine fisheries, for example, look serious when viewed from the perspective of the last several decades, but catastrophic when viewed from the vantage point of the last century.¹ Each generation also tends to focus on current or recent events when trying to explain environmental changes, even though the culprit might have a much older origin. Faced by declining populations of stellar sea lions, for example, environmentalists have focused on current fishing and human predation, while the best explanation may be destructive whaling practices in the early- and mid-twentieth century.²

Because humans have not yet found a way to bridge time, future generations also cannot have a direct say about current resource uses that inevitably will impact them. When resource decisions impact members of the current generation, the affected parties have various means of expressing their displeasure and trying to change the decisions. When one region of the world imposes externalities on another, for example, the second region can respond diplomatically, economically, or even militarily.³ In various international forums, resource-poor regions also can challenge the distribution of resources among regions.⁴ Future generations do not have that luxury, but must depend on representation by foresighted members of the current generation. The current genera-

1. See Daniel Pauly, *Anecdotes and the Shifting Baseline Syndrome of Fisheries*, 10 TRENDS IN ECOLOGY & EVOLUTION 430 (1995).

2. See A.M. Springer et al., *Sequential Megafauna Collapse in the North Pacific Ocean: An Ongoing Legacy of Industrial Whaling?*, 100 PROC. NAT'L ACADEMY SCI. 12,223 (2003).

3. Thus nations that share rivers or other waterways have had little difficulty resolving current transnational disputes over the impact of upstream water use on downstream nations. See Aaron T. Wolf, *Conflict and Cooperation Along International Waterways*, 1 WATER POLICY 251 (1998) (describing the resolution of international water disputes).

4. A number of international negotiations have dealt either explicitly or implicitly with the current distribution of resources. See, e.g., DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW & POLICY 760-61 (2d ed. 2002) (discussing dispute over allocation of resources on the deep sea bed).

tion can decide to consume all of the world's mineral resources, destroy ecosystems that provide valuable natural services such as water purification or pollination, contaminate ground water, and alter the planet's climate path, yet future generations are powerless to do anything about it. Both the political and economic systems, moreover, are structured, perhaps inevitably, in a fashion that is biased toward current consumption.⁵ The trend is to consume as much as possible, with little thought for those who will come after us.

In both her provocative article on *Perpetual Restrictions on Land and the Problem of the Future*⁶ and her paper for this conference, Professor Julia Mahoney focuses on the related issue of the degree, if any, to which the current generation should be able to dictate the environmental practices of future generations. The current generation cannot use land and other resources without affecting future generations; to this extent, the actions of the current generation and the options of future generations are inevitably intertwined. But as Professor Mahoney astutely observes, the current generation can leave land undeveloped today without dictating that future generations do the same. Should the current generation go further and try to prevent future generations from developing that land? Does the current generation have the right to do so?

The issue that Professor Mahoney raises is of broad and growing importance. Professor Mahoney focuses strictly on private conservation easements purporting to be perpetual. However, current generations have a variety of other measures at their disposal to impose land conservation decisions on future generations. State constitutions provide one of the most effective means of constraining the decisions of future generations because they typically are more difficult to change than statutes or private agreements. The constitutions of at least seven states set aside and preserve lands in the form of "commons trusts." New York took the lead in 1895 when it created the Adirondack forest preserve.⁷ In the last decade or so, a handful of other states have followed suit with such efforts as the "Alabama Forever Wild Land Trust," the "Great Outdoors Colorado Program," and the North Carolina "State Nature and Historic Preserve."⁸ A number of these constitutional provisions

5. See Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675, 687-88 (2003) (criticizing failure of market to represent future generations' interests); Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 900-01 (1996) (discussing bias in the political process).

6. 88 VA. L. REV. 739 (2002).

7. N.Y. CONST. art. XIV, § 1.

8. See, e.g., ALA. CONST. amend. 543, § 3; COLO. CONST. art. XXVII, § 1; MASS. CONST. art. XLIX; MICH. CONST. art. IX, § 35, art. X, § 5; N.C. CONST. art. XIV, § 5.

expressly contemplate that the commons trusts will be perpetual. New York's constitution, for example, explicitly states that the lands set aside, or later acquired, for its Adirondack forest preserve "shall be *forever* kept as wild."⁹

Federal, state, and local governments, too, actively try to protect private lands from future development by acquiring the lands and then awarding the lands special status as parks, wildlife refuges, wilderness areas, or other forms of preserves. In the three decades from 1964 to 1994, for example, the four major land agencies of the federal government (Bureau of Land Management (BLM), U.S. Fish & Wildlife Service, U.S. Forest Service, and National Park Service) purchased over five million acres of private land.¹⁰ The best estimate is that the government acquired at least 3.7 million acres of this land for conservation purposes.¹¹ States and local governments also have played a significant role in preserving land in the form of parks, preserves, or other public lands.¹²

Turning to the private sector, land trusts and conservation easements have assumed increasing importance. During the 1990s, the number of land trusts increased by 42 percent (to over 1250 local, regional, and national organizations as of 2000).¹³ More importantly, the amount of private land protected through the land trusts increased by over 220 percent.¹⁴ In 1998, these nongovernmental organizations held almost 1.7 million acres of land in fee simple absolute and over 2.3 million acres in conservation easements.¹⁵ Through its tax laws, moreover, the federal government encourages the creation of "perpetual" conservation easements. To obtain a charitable deduction or estate tax benefits, a property owner must convey a perpetual easement;

9. N.Y. CONST. art. XIV, § 1 (emphasis added).

10. U.S. GENERAL ACCOUNTING OFFICE, LAND OWNERSHIP: INFORMATION ON THE ACREAGE, MANAGEMENT, AND USE OF FEDERAL AND OTHER LANDS 6 tbl. 1, 12 tbl. 27 (1994).

11. Barton H. Thompson, Jr., *Conservation Options: Toward a Greater Private Role*, 21 VA. ENVTL. L.J. 245, 270-71 (2002).

12. As of 1997, states had established over 12 million acres of state parks and recreation areas. U.S. Census Bureau, Statistical Abstract of the United States: 1999, at 263 tbl. 429, available at <http://www.census.gov/prod/99pubs/99statab/sec07.pdf> (last visited Apr. 6, 2004). See also Chad P. Dawson & Pauline Thorndike, *State-Designated Wilderness Programs in the United States*, INT'L J. OF WILDERNESS, Dec. 2002, at 21 (describing state efforts to preserve lands with wilderness qualities), available at <http://www.wilderness.net/library/documents/Dawson1.pdf> (last visited Apr. 6, 2004); Peter S. Duncan, *New York State's Open Space Conservation Program*, 4 ALB. L. ENVTL. OUTLOOK 18 (1999) (discussing New York efforts to preserve open space through parks and other mechanisms).

13. Land Trust Alliance, *National Land Trust Census*, at <http://www.lta.org/newsroom/census2000.htm> (last visited Apr. 7, 2004).

14. *Id.*

15. See Thompson, *supra* note 11, at 276-77.

limited duration easements do not qualify.¹⁶ Other programs of the federal government also encourage the creation of perpetual conservation easements. The Conservation Reserve Enhancement Program (CREP), for example, pays farmers to establish perpetual conservation easements in agricultural lands.¹⁷

The current generation's efforts to control future environmental behavior do not stop, moreover, with land preservation. Over a third of the state constitutions, including all of the constitutions drafted since 1960, include general environmental mandates meant to control the *activities* not only of the current generation but also of generations to come.¹⁸ Various of these constitutions, for example, require the legislature to provide "clean and healthful" environments for their populations, reclaim mining lands, protect wetlands, or "preserve the environmental life support system."¹⁹ Several impose similar responsibilities on the citizens of the state.²⁰ By questioning the efficacy of "perpetual" land preservation, Professor Mahoney thus also implicitly questions how closely constitutions should try to dictate the environmental behavior of future generations, given that there are likely to be significant changes in environmental norms, conditions, and technology. Professor Mahoney, in short, raises an extremely important issue that often has been ignored in the legal and policy literature.

My goal in this comment is to scrutinize and challenge Professor Mahoney's analysis to see whether conservation easements and other

16. I.R.C. §§ 170, 2031(c) (2001). See Maureen Randolph & Adrian Gosch, *A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications*, 4 GREAT PLAINS NAT. RESOURCES J. 143, 161-75 (2000).

17. See U.S. DEP'T OF AGRIC., FARM SERVICE AGENCY, CONSERVATION RESERVE ENHANCEMENT PROGRAM (CREP), available at www.fsa.usda.gov/daftp/cepd/crep.htm (last visited Apr. 7, 2004) (describing the CREP program).

18. For an overview and critical appraisal of such constitutional provisions, see Thompson, *supra* note 5, at 867-77; Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157 (2003).

19. See, e.g., FLA. CONST. art. II, § 7 (providing for the conservation and protection of "natural resources and scenic beauty"); HAW. CONST. art. XI, § 9 ("Each person has the right to a clean and healthful environment"); MICH. CONST. art. IV, § 52 ("legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction"); MONT. CONST. art. IX, § 1(3) (requiring legislature to "provide adequate remedies for the protection of the environmental life support system from degradation"); MONT. CONST. art. IX, § 2 (mandating reclamation of all lands "disturbed by the taking of natural resources").

20. See, e.g., ILL. CONST. art. XI, § 1 ("the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations"); MONT. CONST. art. IX, § 1 (imposing a duty on each citizen to "maintain and improve a clean and healthful environment").

existing efforts to conserve land across generations (intergenerational conservancies) are quite as troubling as she suggests. Professor Mahoney certainly is correct that the perpetual conservation of any particular tract of land can prove improvident as time passes—and that environmentalists (as well as many politicians) often have ignored this important issue. But as Professor Mahoney also recognizes, none of the current efforts to protect land into the future is *truly* perpetual. As I discuss in part II, by creating a “perpetual” conservation easement or converting private land into a public park, the current generation shifts the decision-making authority over future uses of the land from a single private landowner to a land trust or to various segments or representatives of the public. This shift makes it less likely that land will be developed but still leaves the ultimate decision to future generations.

Professor Mahoney, moreover, does not address the legitimate and important reasons why one generation might want to make future development more difficult. Part III of this comment explores four of those potential justifications. The critical question, which Professor Mahoney does not reach, is how society should balance the potential benefits of perpetual conservation easements and other intergenerational conservancies against the possible costs to future adaptability. Are there some situations, for example, where constricting future generations is more legitimate than others? Could the degree of constriction be more gradated than in current institutions? What degree of institutional constriction is justified? I conclude in part IV with some brief thoughts on these and other policy questions.

I. THE PROBLEMS WITH TEMPORAL COMMITMENTS

The problem with any temporal commitment, of course, is that circumstances change. In deciding whether it is wise to make the commitment, we try to predict the future, with varying degrees of success. Uncertainty, and thus the risk of making the wrong decision, increases as our decision horizon increases. Absent a good reason for making commitments into the future, it always is best to leave these decisions open until we have greater information. Where a commitment lasts beyond one generation, moreover, there also is an equity concern that the predictions of one generation will bind the actions of future generations living in a quite different world with potentially quite different values.

These concerns are as applicable to “perpetual” conservation easements and other intergenerational conservancies, such as constitutional and statutory reserves, as they are to any other long-term commitment. The value of land in its “natural” state might be very high

today but much less valuable tomorrow. An example illustrates the point. Sand dunes near Riverside, California, are home to the endangered Delhi Sands flower-loving fly.²¹ But sand dunes move, the species may go extinct or be found to thrive elsewhere, and society someday may decide that preserving this species is not as valuable as we believe it is today. The value of developing a parcel of land also might increase. As other land in the vicinity of Delhi sand dunes is developed, demand may grow to build on the sand dunes themselves. Any decision to preserve the sand dunes thus may seem wise today but improvident (and even inequitable) ten, fifty, or a hundred years from now.

These concerns should worry environmentalists and the most rabid of land developers alike. Recognizing that our knowledge of the natural environment is limited and that ecosystems constantly are changing, environmental scientists increasingly have called for adaptive management of the environment.²² And adaptive management requires flexible institutions, not rigidly defined perpetual protections. In working to restore a species, for example, biologists may learn that land initially appearing to be valuable habitat is valueless, while other land is more valuable than expected. Conditions also can change. Consider, for example, the implications of climate change on efforts to preserve biodiversity. The federal government's principal approach to protecting biodiversity has been to create static preserves such as national wildlife refuges or regional habitat conservation program-based reserves.²³ But as climate changes, habitat also will shift, requiring the government continually to refocus its preservation efforts geographically. Even if the government could predict the shift in habitat, it would face the challenge of protecting one land area today and a different area tomorrow. Rather than preserving particular land in perpetuity, the government should retain the option of exchanging land parcels (or selling existing preserves and reinvesting the funds in new lands) as habitat moves.

II. SHIFTING ENTROPY

As Professor Mahoney recognizes, however, the notion of "perpetual" land conservation is a bit of a canard. No matter how much we might want to ensure that a piece of land is preserved forever, we

21. Travis Longcore, *The Endangered Delhi Sand Dunes*, 63 WESTERN Tanager 1 (1997).

22. The foundational book in the movement toward adaptive management is KAI N. LEE, *COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT* (1993).

23. Barton H. Thompson, Jr., *Can the Endangered Species Act Protect the "Working Landscape"?*, in *THE ENDANGERED SPECIES ACT AT 30: LESSONS AND PROSPECTS* (Frank Davis et al. eds., forthcoming 2004).

simply cannot do it. In its attempts to stop future generations from developing land, the present generation is at a decisive disadvantage: it will not be around to enforce its preferences. Nothing we say, whether in conservation easements, trusts, statutes, or even constitutions, can force future generations to defer to our view. We can make land worthless for future development by, for example, irradiating it. But the only way to avoid future development entirely is to damage the land to such a degree that the land is not worth using, and that would thwart preservation as effectively as it would preclude development.

The current generation, however, can increase the difficulty of future development. At the most protective end of the spectrum, we can constitutionalize land preservation as New York did a century ago with the Adirondacks and other states are doing today. By design, state constitutions generally are difficult to amend. To develop a portion of the Adirondack forest preserve, for example, both houses of the New York legislature would have to approve the idea in two consecutive years, and a majority of state voters then would have to vote in favor of the constitutional amendment.²⁴

Statutory preservation also is generally difficult to terminate. Once the federal government creates a park, wildlife refuge, national forest, or other conservation area, both houses of Congress typically must vote to remove the protected status—a tough task given congressional inertia and the vested interests that often grow up around the protected land. Not surprisingly, there are virtually no examples of national parks or wildlife refuges that have been voted off the map. Modification of public land holdings at the edges is somewhat easier. Congress has authorized the U.S. Forest Service and the BLM, for example, to exchange small parcels of land for land of equal value.²⁵ Congress, and sometimes the administering agency, also can decide to permit some forms of commercial activity, such as mining.²⁶ However, exchanges are hobbled by process and subject to increasing scrutiny.²⁷

24. N.Y. CONST. art. XIX, § 1.

25. See Ryan M. Beaudoin, *Federal Ownership and Management of America's Public Lands Through Land Exchanges*, 4 GREAT PLAINS NAT. RESOURCES. J. 229 (2000); Melanie Tang, *SNPLMA, FLTFA, and the Future of Public Land Exchanges*, 9 HASTINGS N.-NW. J. ENVTL. L. & POL'Y 55 (2002).

26. See Roger Flynn & Jeffrey C. Parsons, *The Right to Say No: Federal Authority over Hardrock Mining on Public Lands*, 16 J. ENVTL. L. & LITIG. 249 (2001). Absent a statutory exception, the Surface Mining Control and Reclamation Act prohibits surface mining within national parks, wildlife refuges, and wilderness areas. 30 U.S.C. § 1272(e)(1) (2000). Other forms of mining, however, are permitted on wildlife refuges if compatible with wildlife needs. See Robert L. Glicksman, *Pollution on the Federal Lands III: Regulation of Solid and Hazardous Waste Management*, 13 STAN. ENVTL. L.J. 3, 77 n.74 (1994).

27. See Tang, *supra* note 25.

And some commercial uses, such as real estate development, are totally off the table.

Freeing land from a perpetual conservation easement, although difficult, may be far easier to accomplish than changing a constitutional conservancy or public park. The land trust itself can eliminate the conservation easement in most states by transferring it to the holder of the underlying fee interest and thus "merging" the instruments²⁸ or by agreeing to release the owner of the fee simple from the easement.²⁹ Under federal tax laws, land trusts, like all tax-exempt organizations, cannot confer "private benefits" on landowners without risking monetary sanctions and even loss of tax-exempt status.³⁰ Accordingly, land trusts cannot release a conservation easement that will provide "more than incidental" economic value to the owner of the fee simple without jeopardizing the land trust's tax-exempt status. Land trusts, however, can and do amend, and in some cases release, conservation easements for equivalent value where the land trust believes that the amendment or release will increase or enhance public benefits. For example, some land trusts have modified building restrictions specified in an easement where the landowner agreed to place more land under easement elsewhere or made a cash payment to compensate the "public" for the loss of conservation rights.³¹

Even if the land trust has no interest in giving up its easement, the owner of the fee simple may be able to escape the easement's restrictions on various legal grounds. The Uniform Conservation Easement Act explicitly provides that courts retain the power "to modify or terminate a conservation easement in accordance with the principles of

28. See Jeffrey Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 280-82 (2002) (discussing the application of the doctrine of merger to conservation easements).

29. See *id.* at 275-76 (noting that most state statutes permit holders of conservation easements to release the easements, usually without having to require any compensation for the easement or obtaining judicial permission); see also Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 120 (1997) (noting that land trusts can release easements but suggesting that this is bad policy for the trusts). As discussed in part IV, *infra*, however, a few states restrict the ability of land trusts to release conservation easements. See, e.g., MASS. GEN. LAWS ch. 184, § 32 (2004) (conservation easements can be released only after public hearing and approval by specified public officials); NEB. REV. STAT. § 76-2,113 (release permissible only if the easement's purpose is not "substantial"); N.J. STAT. ANN. § 13:8B-6 (releases must be approved by the State Commissioner of Environmental Protection).

30. I.R.C. § 501(c)(3) (2000).

31. See René Wieser, *Conservation Easement Amendments: Results from a Study of Land Trusts*, EXCHANGE, Spring 2000, at 9 (noting that four percent of conservation easements in 1999 had been amended).

law and equity.”³² Courts, for example, may refuse to enforce a conservation easement if the fee owner can prove that changed circumstances make the purposes of the easement impossible or impracticable to accomplish.³³ The ease with which a property owner can successfully assert changed circumstances will depend on the breadth of the easement’s purposes. Where the purpose of a conservation easement is to preserve the habitat of an endangered species and either the species has gone extinct or the property is no longer useful habitat, for example, the doctrine of changed circumstances would seem particularly applicable.³⁴ The doctrine would seem less relevant where a conservation easement has broad and multiple purposes because, although some of the purposes might become impracticable, others are likely to remain achievable.

Courts that believe a conservation easement is no longer in the public interest because of changes in public preferences, scientific knowledge, or even land values might also turn to other doctrines to eliminate the outdated restrictions. If the social value of developing the property greatly exceeds the social value of the conservation easement, for example, a court might refuse to enforce the easement under the “relative hardship” doctrine, relegating the easement owner to seeking damages.³⁵ A court determining that a conservation easement no longer serves a valuable public function might also turn to a technical ground, such as ambiguity or impossibility, to invalidate the easement.³⁶ Finally, a court might assert its power to reexamine old and questionable conservation easements based on the general policies against enforcing servitudes that violate public policy and against permitting the “dead hand” of one generation to control the land use decisions of future

32. UNIFORM CONSERVATION EASEMENT ACT § 3(b) (1981), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.pdf> (last visited Apr. 7, 2004).

33. *Id.* § 3 cmt.; see Tapick, *supra* note 28, at 278–80; Baldwin, *supra* note 29, at 119–20. The unique statutory nature of conservation easements, however, raises the possibility that courts may refuse to apply the doctrine of changed circumstances (which historically applied only to real covenants and equitable servitudes) to conservation easements. See Tapick, *supra* note 28, at 279–80; Baldwin, *supra* note 29, at 120.

34. See Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U. L. REV. 373, 410 (2001) (suggesting that conservation easements with narrow purposes are at greater risk of failing because of changed circumstances).

35. See Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 486–89 (1984) (discussing the applicability of the relative hardship doctrine to conservation easements).

36. See, e.g., *Parkinson v. Bd. of Assessors of Medfield*, 481 N.E.2d 491 (Mass. 1985) (striking down conservation restriction on grounds of ambiguity).

generations.³⁷ Given the common law's flexibility, in short, it is difficult to imagine that courts would be powerless to free future generations from conservation easements that no longer make sense.

Where a conservation easement has outlived its usefulness either because conditions have changed or scientific knowledge has evolved, the conservation easement also might legally die of neglect. In a number of states, for example, marketable title acts might require land trusts to re-record conservation easements periodically in order to keep the easements effective.³⁸ Landowners who have violated the easement with impunity for a period of time might also be able to claim estoppel against any later effort to enforce the easement.³⁹

Although there are often means of reversing conservation easements and other forms of intergenerational conservancies, the conservancy makes future development more difficult in two distinct ways. First, all types of conservancies shift decision-making authority from a single individual or entity (the property owner) to a larger group (state voters, legislatures, a governmental agency, a conservation land trust, or the judicial system). This requires the proponent of development to convince more people, reflecting a broader set of public interests, that developing a particular parcel of land is more valuable than continuing to conserve the land. This, in turn, increases both the administrative costs of development and the likely burden of proof.

Second, all types of intergenerational conservancies are likely to increase the value that the public or land trust places on conserving the land, as a result of both an endowment effect and social signaling. Under standard endowment theory, the public (in the case of governmental ownership) or a land trust (in the case of a conservation easement) is likely to value conserved land more when it owns a conservation interest

37. See Tapick, *supra* note 28, at 281–82 (suggesting that the public policy against “dead hand” control might be used to challenge a perpetual conservation easement that has outlived its social usefulness); Korngold, *supra* note 35, at 494 (arguing that courts could apply a public policy test to invalidate conservation easements that no longer are in the public interest).

38. See, e.g., CONN. GEN. STAT. § 47-33b (2004); UTAH CODE ANN. §§ 57–59 (2003). Some states' marketable title acts, however, explicitly preclude conservation easements. See, e.g., GA. CODE ANN. § 44-5-60(b)–(c) (2002). Several commentators also have suggested that conservation easement enabling statutes may override the operation of marketable title rules, although there is no legal support for this position. See, e.g., Baldwin, *supra* note 29, at 119; Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 21 n.92 (1989).

39. See Baldwin, *supra* note 29 (discussing applicability of estoppel to conservation easements); Dana & Ramsey, *supra* note 38, at 36 (same).

in the land than if the land were in purely private ownership.⁴⁰ As a result, the public or land trust is likely to demand more to allow the land's development than it would have paid to preserve the land anew. The very act of giving the land special public or legal conservation status, moreover, signals the social importance of conservation and thereby may increase individual preferences for preserving the land.⁴¹

Is it troubling that intergenerational conservancies make land development less likely? Under all of the intergenerational conservancies, future generations *do* control how they use the conserved land. Each instrument shifts the locus of decision and increases the preference for conservation, but each generation still can choose to develop any land that it wishes. Assume, for example, that a century from now developmental patterns make it economically very valuable to subdivide a particular parcel of land restricted by a conservation easement held by a local land trust. Given the conservation easement, the decision whether to develop the land rests with the land trust, which could choose to release the easement; courts, which could choose not to enforce the easement; and the state legislature, which could choose to modify the law to make it easier to override the easement or could exercise its right of eminent domain to acquire the easement. These entities might be less likely than the fee owner to choose development over continued conservation for the reasons discussed, but the future generation still retains decision-making authority.

Nor is it clear that the new decision-making parameters are inferior a priori to the traditional single-landowner model. There is no reason to favor the conservation preferences that exist before an intergenerational conservancy is established over the conservation preferences that result from the conservancy's endowment effect and social signaling. Nor is there any value-neutral reason to favor individual decision making over group decision making, except that group decision making typically involves increased transaction costs.⁴²

40. See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1566 (1998) (endowment effect revealed in case of national parks and other recreational public lands).

41. For a discussion of the importance of norm development and social signaling to the development of effective environmental policy, see generally Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295 (2003).

42. We might well prefer some forms of group decision making over others, of course. For example, political decision making might suffer from pathologies that would lead us to not award legislatures with the authority to decide on the use of conserved lands. But that does not necessarily call for the rejection of other forms of group ownership (e.g., ownership of conservation easements by land trusts).

Yet transaction costs inevitably are high when dealing with land conservation. Intergenerational conservancies simply shift who bears the transaction costs. When land is in individual private ownership, members of the public face significant transaction costs in trying to conserve the land (largely because of free-rider and holdout problems).⁴³ Conversely, when land has been conserved through public or trust ownership, developers face significant transaction costs in trying to develop the land. Unless there is reason to believe that the transaction costs are greater in one context or the other, the preferable form of ownership depends on whether conservation or development is likely to be the more valuable use of the land. If development is likely to be more valuable, the single-landowner model minimizes the expected transaction costs; if conservation is likely to be more valuable, group ownership minimizes the expected transaction costs.

III. WHY BIND THE FUTURE?

There may be affirmative and legitimate reasons, moreover, why someone might want to make future development difficult for both themselves and others. Even if one concludes that the creation of conservation easements or other forms of intergenerational conservancies strips future generations of the ability to make their own conservation decisions, this “dead hand” problem must be weighed against a number of potential justifications for “perpetual” conservation. This section discusses four potential justifications that seem particularly convincing or raise important issues. Although individual property owners might try to create intergenerational conservancies for reasons that arguably are illegitimate (e.g., a desire simply to dictate the moral norms of future generations), there are strong rationales in many, if not most, cases for moving beyond “at will” or short-term conservation and adopting some form of intergenerational conservancy.

A. Reducing Transaction Costs

Part II already has suggested one possible justification for using an intergenerational conservancy: minimization of transaction costs. As noted, land conservation inevitably involves large transaction costs because of its public-good character. Large numbers of people generally benefit from land that is conserved for its aesthetic, recreational, historic,

43. Christopher S. Elmendorf, *Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423, 428-31.

or cultural values or for the ecosystem services that it generates. As is the case of any public good, however, each beneficiary is tempted to free ride off of others' efforts to preserve the land, undermining effective collective action. The most realistic options for conserving the land—lobbying the government to acquire and preserve the land or raising money through a private land trust—are administratively costly.

If one expects that conservation will be the most valuable use of a parcel of land for a lengthy and indefinite period of time, an intergenerational conservancy is likely to minimize transaction costs. If a new agreement has to be worked out every *X* years (in the case of fixed-term conservation instruments) or each time the land changes hands through market transfers, wills, or intestate succession (in the case of conservation agreements personal to the current owner), the transaction costs would mount quickly. Although an intergenerational conservancy makes it more costly to move the land back out of conservation, the low probability that development will become in the public interest in the future makes it less troubling than having to negotiate new conservation agreements every time the land is transferred.

B. Avoiding Temptation

Like Odysseus and the Sirens, a property owner also may wish to avoid the future temptation to make a quick and sizable profit by developing her land. Imagine a farmer who owns several acres of wetlands in the middle of a rural area. The farmer may believe that preserving the wetlands in "perpetuity" will maximize the long-term value of the wetlands to society as a whole, including the value of the ecosystem services and aesthetic delight that the wetlands provide. The farmer, however, does not trust herself to make the "right" decision if, 30 years from now when suburbs are encroaching, a developer approaches the farmer to purchase the land for hundreds of millions of dollars in hard cash. Nor does the farmer trust her heirs to make the "right" decision if confronted by that same "big bucks" option or if forced to raise money to pay estate taxes upon the farmer's death. In these situations, the farmer fears that when "temptation knocks," she (or her successors) will be "weak willed" and act largely if not entirely out of self-interest. Because no developer is knocking on her door at the moment, however, the farmer is willing to transfer a conservation easement today to a local land trust.

While the farmer may think about the problem in common, homespun terms, economic theory provides support for her concern. A number of studies suggest that people often may engage in hyperbolic (rather than exponential) discounting: not only do we discount future

benefits, but we discount them more heavily as our time horizon grows shorter.⁴⁴ In other words, we grow more impatient. Thus, we might prefer \$10 today over \$11 tomorrow, but \$11 ten years from now over \$10 nine years from now. Given such dynamic inconsistency, landowners might well conclude that, even though land should be conserved, they (or their successors) will not be able to resist short-term personal gains or needs down the road. Better therefore to create an intergenerational conservancy before impatience or greed rears its ugly head.

Similar concerns may explain why states sometimes place governmental land into constitutional land trusts, such as New York's Adirondack forest preserve. Voters may fear that, even though particular land should be preserved in the long run for its ecosystem services (*e.g.*, the water quality value of the Adirondacks), recreational benefits, or aesthetic beauty, the government will be tempted to sell off the land if faced by an immediate budgetary need or heavy pressure from politically powerful development interests. Voters may feel that the short-term gains may be particularly tempting to the typical politician, who thinks in the short-term framework of the next election. If this is a fear, constitutionalizing the preservation of the land is an effective solution. One of the major purposes of constitutions, after all, is providing long-term rules (*e.g.*, due process and freedom of speech) that will help guide us through periods when the immediacy of other concerns makes us less prudent (*e.g.*, during wars or soon after terrorist events).⁴⁵

C. Private Ordering

As Professor Mahoney recognizes, property owners frequently use "perpetual" servitudes as part of private land-use regimes—and for good reason. To see their relevance to conservation, assume that you are developing a new subdivision of summer homes along the northern

44. For valuable discussions of hyperbolic discounting, see David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443 (1997); George Loewenstein & Richard H. Thaler, *Intertemporal Choice*, in RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 92 (1991). Whether hyperbolic discounting indeed occurs (or is simply a reflection of some other phenomenon) is the subject of current debate. A number of scholars recently have suggested that hyperbolic discounting might be the genetic vestige of behavior that made far greater sense to our ancient ancestors than it does to us today. For an interesting study of hyperbolic discounting in birds, see Leonard Green & Joel Myerson, *Exponential Versus Hyperbolic Discounting of Delayed Outcomes: Risk and Waiting Times*, 36 AM. ZOOLOGIST 496 (1996).

45. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (2000).

coast of California. You know that you can maximize the value of the subdivision by setting aside much of the land as a "perpetual" wildlife preserve, so that the buyers of your homes can sit in their hot tubs and observe the deer and birds in their natural habitat. After all, beauty and nature are values for which buyers will pay extra. Each of the purchasers, however, will want to know that they are not buying a pig in a poke, that the land indeed will be preserved for a long, long time, and that the land will not be subject to the whims of their neighbors (who they do not entirely trust). Like many developers before and after, the coastal developer may find it profit-maximizing to deed a "perpetual" conservation easement to a newly formed land trust or even to the local government.⁴⁶ The motivation here is no different from the motivation underlying scenic easements, park dedications, and subdivision CC&Rs (covenants, conditions, and restrictions). If the conservation easement were of only limited duration, home buyers (or their successors) would have to renegotiate the easement in 50 or 100 years, at which time the successor to the developer would have significant monopoly power (given that the homes already would exist).

At a more general level, intergenerational conservancies can promote land use planning by private developers, governmental regulators, and environmentalists by providing both stability and security. In deciding where to build, developers will find it valuable to know that certain lands are part of an intergenerational conservancy because neighboring lands will sell for a premium. In deciding whether to permit Riverside County, California, to build a new hospital directly on top of the sand dune habitat of an endangered species, both environmentalists and governmental regulators will find it valuable to know that other land in the area that provides valuable habitat for the species is protected by an intergenerational conservancy. If this other habitat is protected only for a limited time, environmentalists and governmental regulators may hesitate to let the hospital build because, after the hospital destroys the sand dunes on its property, the owners of the other habitat might develop their lands some day as well. For this reason, developers also might favor "perpetual" conservation of habitat, increasing the chances that the government and environmental groups will permit them to build on some areas of habitat in return for the preservation of other areas of habitat through conservation easements. Stability, in short, can be a virtue and not just a vice.

46. For examples of so-called "conservation subdivisions" and their advantages, see UGA ALLIANCE FOR QUALITY GROWTH, LAND PRESERVATION TOOLS, available at http://outreach.ecology.uga.edu/tools/slides_land_pres/land_pres_tools.ppt (last visited Apr. 8, 2004).

D. A Temporal Tragedy of the Commons

There also may be some situations in which a landowner will not preserve his land unless permitted to preserve it "perpetually." Assume that a rancher owns a particularly beautiful valley that is rich in biodiversity and Indian artifacts. Assume further that the rancher believes that the valley should be preserved for centuries to come for the enjoyment of everyone and that, based on everything we currently know, the valley will be more valuable to society as open space than as the site of a new subdivision. The rancher may be willing to tell interested developers to take a hike (despite the obvious financial advantage of selling the land and moving to the good life in Newport Beach) if he can be assured that the land will remain preserved in "perpetuity," but not if his "good for nothing" son or grandson can sell the land as soon as he dies. "Why," the rancher will say, "should I sacrifice if my sacrifice will not do any permanent good?"

The problem that the rancher faces is akin to the tragedy of the commons or prisoners' dilemma,⁴⁷ but looked at temporally rather than spatially. To remove time from the analysis, assume that the rancher, his son, his grandson, and several more generations are all currently alive and that each owns a fraction of the valley. Assume also that a developer wants to build in the valley and will offer more money to the first person who sells his land than to later sellers. Finally, assume that, if anyone develops the valley, the valley is effectively destroyed. All the generations of ranchers might want to preserve the valley, but each, nevertheless, will be tempted to sell his land to the developer before one of his relatives sells and gets the most money. In deciding whether to sell, the rancher thinks, "If I don't, my son probably will, so I might as well sell and get the premium myself." Each generation evaluates the decision in the same way and thus will sell out to the developer, even though every generation might prefer to preserve the valley in its current state. This is the traditional tragedy of the commons.

Now assume that the various generations own the valley *seriatim* across time. Even if every generation would prefer to save the valley, each generation will be tempted to sell out to a developer because, if that generation does not sell, the next generation is likely to do so. Each generation, in short, is likely to decide that, if the valley is going to be destroyed anyway, he might as well be the one to benefit financially. The coordination problem is worse, in fact, than in our

47. See ELINOR OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES* (1994) (discussing the tragedy of the commons and its game theoretical equivalent, the prisoners' dilemma).

single-time-frame example because the different generations in this second hypothetical cannot communicate effectively with each other. This is a temporal tragedy of the commons.

Perpetual conservation easements are a solution to the temporal tragedy of the commons. By entering into a perpetual conservation easement, the current property owner is able to bind both himself and future generations. As a result, the current property owner does not need to worry that he will give up economic profit by refusing to develop his land today only to find the land developed by the next generation or the generation after that.

IV. CONCLUDING THOUGHTS

In conclusion, I am slightly more sanguine than Professor Mahoney about conservation easements and other forms of intergenerational conservancies. Although intergenerational conservancies make it difficult for future landowners to develop their properties, future generations still retain ultimate control over how land will be used or conserved. A number of policy considerations, moreover, argue for intergenerational conservancies in specific situations. But a number of issues remain: Is current law and policy biased too much in favor of intergenerational conservancies, and are we creating intergenerational conservancies in the correct situations? In closing, therefore, let me suggest specific categories of potential reforms that deserve fuller discussion and consideration.

First, current laws may dictate or encourage "perpetual" conservation easements even when there is no justification for perpetuity and the parties to the easement prefer shorter-term easements. Although some state laws allow term easements, for example, others either mandate that conservation easements be perpetual or assume that the easement is perpetual, absent language to the contrary.⁴⁸ As discussed earlier, moreover, federal tax laws provide strong financial incentives for perpetual easements but not for limited-term easements. Indeed, much of the movement toward "perpetual" conservation easements that Professor Mahoney criticizes undoubtedly stems from the existing federal tax incentive. Although land trusts and others often prefer

48. See Tapick, *supra* note 28, at 274 n.66 (noting that four states—California, Colorado, Florida, and Hawaii—mandate perpetual easements). Cf. ME. REV. STAT. tit. 33, § 477(3) (authorizing term easements). The Uniform Conservation Easement Act and a number of states provide that "a conservation easement is unlimited in duration unless the instrument creating it otherwise provides." UNIFORM CONSERVATION EASEMENT ACT, *supra* note 32 at § 2(c).

perpetual easements for the reasons discussed in part III, state and federal laws should not outlaw or discourage term easements when parties prefer the shorter commitment.

Second, state and federal laws may unnecessarily deter land trusts and other easement holders from releasing or selling conservation easements that are of diminished environmental benefit. As noted earlier, land trusts may fear that the release or sale of a conservation easement for development purposes could jeopardize their non-profit tax status.⁴⁹ A number of state laws also either prohibit releases of conservation easements or place unique restrictions on such releases (*e.g.*, by requiring governmental approval).⁵⁰ Eliminating these drags on the release or sale of conservation easements that have outlived their value would help address Professor Mahoney's concerns without outlawing legitimate uses of intergenerational conservancies.

Third, courts and legislatures may want to develop new doctrines for evaluating over time whether particular conservation easements remain in the public interest and for eliminating those that are not. As discussed in part II, state statutes and common law already provide a variety of means for freeing property from problematic conservation easements, but most of the existing law developed with more traditional servitudes in mind. Perpetual conservation easements raise unique issues, calling for doctrines that more finely and appropriately balance the social importance of conservation, the need for adaptive management as conditions and knowledge change, and the legitimate interests of future generations.

Fourth, governments and land trusts should consider whether new forms of intergenerational conservancies might enable long-term conservation while providing greater flexibility for future generations. Most existing intergenerational conservancies are designed to make it difficult for future generations to develop conserved lands. Even conservation easements, which are the easiest to modify, still place the burden of terminating the easement on the future proponents of land development. Other, more flexible instruments, however, are readily imaginable that would respond to at least some of the arguments for intergenerational conservancies while providing future generations with greater flexibility. For example, a conservation easement might provide for an original fixed term followed by an infinite number of renewal terms; exercise of the renewal terms might or might not call for additional compensation payments. Existing federal tax rules, which

49. *See supra* text accompanying note 30.

50. *See, e.g.*, MASS. GEN. LAWS. ch. 184, § 32; NEB. REV. STAT. § 762,113; N.J. STAT. § 13:8B-6.

offer deductions only for "perpetual" conservation easements, again pose an obstacle to the development of such new forms of conservation easements and therefore should be revisited.

Finally, state and federal governments should reconsider what lands should be protectable through "perpetual" conservation easements. At the moment, landowners can put virtually any land into a conservation easement and gain a federal tax advantage to boot. Yet, most of the major justifications for intergenerational conservancies assume that the conserved land has significant public good characteristics. Assuming that private ordering can be achieved through other means, state and federal governments should scrutinize the broader public benefits of conserving a particular parcel of land before permitting the land to be tied up through a "perpetual" conservation easement (thus making it more difficult to develop the land in the future) and providing a federal tax advantage (at a cost to taxpayers).

"Perpetual" conservation easements, in summary, are not inevitably problematic. Indeed, strong policy arguments justify many, if not most, of the existing perpetual easements. But state and federal governments need to reexamine how existing laws and policies dictate or otherwise influence the choice between term and perpetual easements, and both land trusts and governmental conservation agencies should reconsider why and when to prefer perpetual over shorter-term easements. Although we lack empirical information, the current portfolio of conservation easements might suffer from an unjustifiable bias toward perpetuity. The need to reexamine current policies, moreover, does not stop with conservation easements. The same concerns with perpetual conservation easements that inform Professor Mahoney's article also raise questions regarding many of our current approaches toward parks and constitutional land conservancies. Reform is warranted, but that reform should reflect the important role that "perpetuity" has long played and should play in all forms of intergenerational conservancies.