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Facing the Growing Tension between Conservation Easements and the Common Law

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FACING THE GROWING TENSION BETWEEN CONSERVATION EASEMENTS AND THE COMMON LAW

J. Brady Hagan[1]

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Conservation easements provide a great opportunity for landowners to participate in environmental conservation.[2] At a time when solutions to environmental problems are needed, land management strategies, including conservation easements,[3] continue to play an important role in the country's complex set of environmental policy efforts.[4] Accordingly, Congress has found it important to provide tax incentives in the form of charitable deductions to donors of qualifying property interests so that donors of scenic and natural resources can be amply compensated for their contributions.[5] Conservation easements provide a mechanism by which private landowners can exchange interests in land for considerable tax deductions and, for some, a sense that they are contributing to something positive, to a greater public benefit.[6] By conveying an easement to an eligible entity, the landowner is able to limit what can be done with the land in a way that the landowner and future generations can be assured that such land will be long protected from development or wasteful exploitation.[7] The effectiveness of conservation land contributions and the corresponding return on the public's investment can and do vary, however.[8]

After a meteoric rise in the popularity of conservation easements in the last several decades,[9] problems with how conservation easements are drafted have begun to surface, and disputes have resulted accordingly.[10] These disputes are not limited to academic and theoretical squabbles, though the academic dispute continues to be

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[2] *See* John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 323 (1997) ("The laws enacted during the past forty years to facilitate and encourage the use of conservation easements are among the most powerful and effective of environmental protection laws."); Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 283–84 (2006).

[3] *See Conservation Easements and the National Conservation Easement Database*, NCED: NAT'L CONSERVATION EASEMENT DATABASE (2017) [hereinafter *NCED*], https://conservationeasement.us/storymap/index.html [https://perma.cc/K5YL-ZPDE] (stating that an estimated 40 million acres of land are currently held under conservation easements); *see also* LAND TR. ALL., 2015 NATIONAL LAND TRUST CENSUS AT A GLANCE, http://s3.amazonaws.com/landtrustalliance.org/2015NationalLandTrustCensusReportGlance.pdf [https://perma.cc/X65F-S9SB].

[4] This very fact is evident just from an account of several government agencies tasked with land preservation and management, including the National Park Service (NPS), the U.S. Fish and Wildlife Service (FWS), and the U.S. Forest Service and the Bureau of Land Management (BLM), all governed in part by the Wilderness Act of 1964. Robert L. Glicksman, *Wilderness Management by the Multiple Use Agencies: What Makes the Forest Service and the Bureau of Land Management Different?*, 44 ENVTL. L. 447, 448 (2014); *see also* Charles Wilkinson, *Land Use, Science, and Spirituality: The Search for a True and Lasting Relationship with the Land*, 21 PUB. LAND & RESOURCES L. REV. 1, 4 (2000).

[5] *See* S. REP. NO. 96-1007, at 9 (1980).

[6] *See infra* Section II.B.

[7] *See* Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 2013 UTAH L. REV. 755, 755–56.

[8] *Id.* at 756.

[9] *See NCED*, *supra* note 3 (describing the figure of a line graph as "total acres under conservation easement in NCED (by year)").

[10] *See* W. William Weeks et al., *ABA RPTE Conservation Easement Task Force Report: Recommendations Regarding Conservation Easements and Federal Tax Law*, 53 REAL PROP. TR. & EST. L.J. 245, 253 (2018).

active.[11] Conservation easements have begun to face legal challenges,[12] requiring further investment of resources to maintain them, on top of forgone tax revenue and the opportunity cost of forgone alternative land use.[13] As disputes become more common, the formal perpetuity requirement in our tax code should be identified as a source of vulnerability for conservation easements, not as a source of strength. The perpetuity requirement exists in tension with the common law, and it is unlikely that the two are readily reconcilable so as to ensure truly perpetual restriction. And in any case, it is questionable whether requiring conservation easements to be perpetual is the most effective way to ensure the greatest public and environmental benefit from charitable conservation donations, at least in light of their significant and rising public cost.[14]

There are several overlapping and interacting reasons for this skepticism. The first concern arises out of a real possibility of economic and environmental waste. Conservation easements in perpetuity, whatever their individual merit and productivity, are not without social and economic costs, and those costs are embodied in part by wasted environmental and economic opportunities caused by perpetual restriction. Second, the lack of tailored terms could further diminish or prevent great conservational opportunities, with standard perpetuity clauses being either unnecessary or outright inhibitive to the achievement of conservation objectives. Third, the tax policies that blanketly reward perpetual burdens on land necessarily aggravate these problems, creating a game of chicken between a rather artificial prescription for how conservation easements should be arranged and the existing common law principles against unreasonable restraints on property. For these and other omitted reasons,[15] the generous charitable deduction given in exchange for the grant of a perpetually effective conservation easement amounts to a positive-sounding incentive program that ultimately rewards inefficient conservation.[16] It is that inefficiency that itself threatens both the longevity of conservation easements and the continuing public support for an otherwise effective conservation method.[17]

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[11] *See* Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 136 (2010).

[12] Adena R. Rissman, *Conservation Defense and Enforcement in the Land Trust Community*, LAND TR. ALLIANCE (2011), https://www.landtrustalliance.org/news/conservation-defense-and-enforcement-land-trust-community [https://perma.cc/C53F-PC4A] ("Nearly half of surveyed land trusts (47%, 97 of 205) reported at least one legal challenge or violation of any size or significance. Of these 97 land trusts, 17 prevailed in court at least once and 15 recovered expenses in negotiation out of court.").

[13] *See id.* ("For major legal challenges or violations costing more than $5,000, the average legal or non-staff cost incurred by land trusts was $37,700. However, one dispute cost more than $400,000, and two were between $100,000 and $300,000. Overall, the 205 land trusts reported 43 major challenges and violations, costing those organizations a total of $1.6 million.").

[14] *See* Colinvaux, *supra* note 7, at 756; Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement*, BROOKINGS INST. (Dec. 20, 2017), https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement/ [https://perma.cc/Y6XB-PNF7] (noting that the deductions for conservation easements rose "from $971 million in 2012 to $1.1 billion in 2013 to $3.2 billion in 2014").

[15] This is a robust topic of discussion, so this Note must narrow its criticisms to a few grounds.

[16] GianCarlo Canaparo, *The Lesser of Two Inefficiencies: An Anticommons Alternative to Perpetual Conservation Easements*, 102 GEO. L.J. 219, 228–29 (2013).

[17] *See* Bray, *supra* note 11, at 137–38.

In this Note, I focus on one of the several common issues with conservation easement implementation. With regard to conservation easements, I argue that the inclusion of perpetuity clauses inherently offends the common law and that they subvert public expectations of how economic and social costs are justified by environmental preservation.[18] To disregard longstanding common law doctrine by mandating perpetuity for tax-benefit eligibility is, in effect, perhaps counterintuitively, to compromise the longevity of the conservation easement itself, while allowing many taxpayers and policymakers to kick the can down to road.[19] The common law doctrines that long precede even the earliest conservation easements protect valuable economic and moral policies of property ownership and will be applied where necessary to meet future generations' needs.[20] The true social and economic costs of these easements will become apparent, especially as they become increasingly vulnerable to challenge.[21] It is predicted that litigants will soon have to mend the flaws of yesterday's transactions, perhaps resulting in the reduction or transformation of America's conservation easements.[22]

Contributing further to the problem is the artificial insulation of conservation easements from general common law prohibitions regarding heavy restraints on land use.[23] This arbitrary exception to common law principles will not survive later challenges from both public and private parties, and the exception to the rule will ultimately bend under the pressures of changing social values.[24] Regardless of how valuable a restriction on property use might be argued, the duration of a restraint on property is a factor in considering its reasonableness and usefulness, and, as will be

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[18] *See infra* Part III.

[19] *See* discussion *infra* Section II.E; *see generally* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 744 (2002) (warning of the possibility that conservation easements "impose significant potential costs on future generations by deliberately making non-development decisions hard to change").

[20] *See* Jeffrey M. Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 296 (2002).

[21] *See* Rissman, *supra* note 12.

[22] *See* Mahoney, *supra* note 19, at 744; *see also* Rissman, *supra* note 12.

[23] *E.g.*, RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. i (2000) ("The social utility of devoting property to conservation, historic preservation, and charitable purposes is strong enough to justify severe restraints on alienation that are reasonably necessary or convenient to assure that the property will be used to carry out the intended purposes."). It may be true that conservation easements *can* provide significant social utility. But even the Restatement goes on to say that the reasonableness of these restraints is only justifiable insofar as the restraints are connected to the purported social purpose. *Id.* This connection must necessarily be made by virtue of tailored, purposeful terms, not uniform ones.

[24] *Compare id.* § 3.4, 3.4 cmt. c. ("A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. . . . Determining reasonableness of a restraint on alienation requires balancing the utility of the purpose served by the restraint against the harm that is likely to flow from its enforcement. . . . The harmful effects that may flow from restraints on alienation include impediments to the operation of a free market in land, limiting the prospects for improvement, development, and redevelopment of land, and limiting the mobility of landowners and would-be purchasers."), *with* UNIF. CONSERVATION EASEMENT ACT § 4 (UNIF. LAW COMM'N 1981) (proclaiming the general validity of a conservation easement even if "it is not appurtenant to an interest in real property; . . . it is not of a character that has been recognized traditionally at common law; . . . it imposes a negative burden; . . . it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; . . . the benefit does not touch or concern real property; or [] there is no privity of estate or of contract").

discussed, the infinite duration is a condition that courts tend to find unreasonable and overly restrictive.[25] Perpetual restrictions on property have long been considered offensive, wasteful, and economically untenable, with few exceptions made for their effectiveness.[26] Two of those exceptions are the exception for charitable trusts and the donation of conservation easements in gross.[27]

This Note points out the inconsistency between the policy values of our common law property doctrine and the blanket requirement of perpetuity in conservational transfers. Whenever a restriction on property is challenged in a court of competent jurisdiction, the court is more likely to strike down the restriction the weaker the connection is between the weight of the restriction and the restriction's purported purpose.[28] This Note is by no means intended to argue that the common law should be used to challenge those easements that are productive. Quite the contrary. Rather, it is meant to insist that the common law *will* be used to strike down excessive restrictions given the right circumstances no matter how important our society currently regards the restriction.[29] Perhaps counterintuitively, it is evident that a perpetuity clause may work to shorten the life of a conservation easement, making it worthwhile to seek alternatives to perpetuity so that practitioners can better craft conservation easements for longevity and effectiveness.[30]

Conservation easements are still relatively novel.[31] Though they are supported by popular policy objectives often pertaining to environmental conservation, they are not as exceptional in their legal character as they have been regarded under federal and state law, particularly our federal tax code. Because sound environmental policy is apparently more important than ever, and because conservation easements have the potential to play an important and effective role in the furtherance of environmental causes, I provide an evaluation and case study of the rehabilitation of native Kentucky wildlife as a model for active conservation projects.[32] The purpose of the case study is to provide an exceptional example of success in conservation, partially supported by conservation servitudes, and how it embodies the conscious,

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[25] *See infra* Section III.A; *see also* 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 91 (2019) ("The factors tending to support the conclusion that a restraint on alienation is unreasonable are: . . . (4) the restraint is unlimited in duration . . . .").

[26] The most notable for our purposes are the exceptions made for charitable contributions like charitable trust donations and conservation easements. *See infra* Section II.C.

[27] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. i (2000).

[28] *See* Tapick, *supra* note 20, at 278–81.

[29] *See infra* Part II. Some statutes already expressly authorize and anticipate such actions, permitting them in accordance with existing principles of law and equity. *See, e.g.*, ARK. CODE ANN. § 15-20-409 (West 2019); KY. REV. STAT. § 382.820 (West 2020) ("(1) An action affecting a conservation easement may be brought by: (a) An owner of an interest in the real property burdened by the easement; (b) A holder of the easement; (c) A person having a third-party right of enforcement; or (d) A person authorized by other law. (2) KRS 382.810 to 382.860 shall not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."); OKLA. STAT. ANN. tit. 60, § 49.4 (West 2019); VA. CODE ANN. § 10.1-1013 (West 2019); *see also* UNIF. CONSERVATION EASEMENT ACT § 3 (UNIF. LAW COMM'N 1981). All of these state statutes in the same provisions that establish conservation easement validity provide for remedies against them, conferring standing to different classes of parties.

[30] *See* Weeks et al., *supra* note 10, at 255.

[31] *Id.* at 252.

[32] *See infra* Section III.C.

active efforts that would justify an existing conservation easement for as long as its meaningful life despite embodying a severe restriction on use and alienation.

If it is unclear by now, and it is understandable if that is the case, this Note is fundamentally about competing human values, about social policy borne out of varying and changing social priorities. More specifically, it is about the American courts' recognition of this competition between values and what the courts consider when circumstances require that one value give way to another. Further, the successful practitioner must be expected to account for such considerations when their work product is meant to operate over a long period of time. Thus, those drafting conservation easements must consider why and how their instrument can be challenged, and how the terms of the easement can be strengthened to endure challenge so that the client's and public's expectations regarding the instrument will be realized.[33]

Part I of this Note describes the nature and rise in popularity of conservation easements as a legal mechanism. Part II describes the common law doctrines that concern restrictions on the alienation and use of property, the policy reasons justifying their existence, and how courts review perpetuity clauses and other terms of restriction under their multi-factor considerations. Part III will tie the concepts together, suggesting a solution to the vulnerability of perpetuity clauses in the form of more tailored terms for conservation efforts and offering a positive model through a Kentucky conservation project that benefited from the use of land trusts and conservation lands. In this last Part, alternatives to uniform term requirements will be suggested so that our environment can be preserved and rehabilitated more effectively and land can be put to a more optimal public use in ways that do not so blatantly conflict with common law doctrines or compromise the longevity of conservation servitudes. The more conservation easements comport with established common law doctrine, the more evident their actual and continuing benefits will become and, therefore, the more resilient they will be in the face of future legal challenge. The common law is quietly exerting pressure upon modern conservation easements in a way that effective practitioners and policymakers alike should be aware of.

I. CONSERVATION EASEMENTS: THEIR NATURE AND HISTORY[34]

A conservation easement is, generally speaking, "[a] nonpossessory interest . . . in real property" that imposes "limitations or affirmative obligations," the purposes of which most often include the protection of the "natural, scenic, or open-space values of real property."[35] The transferors of these interests officially purport conservational motivations through the instruments they execute—usually for deduction eligibility—and such eligibility hinges on the donation being made

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[33] *See* Tapick, *supra* note 20, at 296.

[34] For a wonderful, thorough, and well-supported exposition of this history, see generally Bray, *supra* note 11.

[35] Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1082 (1996) (quoting UNIF. CONSERVATION EASEMENT ACT § 1(1) (UNIF. LAW COMM'N 1981)).

exclusively for a conservational purpose.[36] The terms of these arrangements often condition the transfer on certain requirements for the use and management of the property in light of qualifying conservational objectives,[37] such as strong restrictions, sometimes absolute, on development and use of the land. These transfers can be made inter vivos between living parties, passed as part of one's estate in fee, or in trust to an entity, such as a private trustee or state government tasked with managing and protecting the transferred property according to the grant's terms.[38] The most common legal apparatus for the management and protection of lands under conservation easements is the private land trust,[39] although states and localities assume this role to a lesser but significant extent.[40] In general, these encumbrances impose perpetual limitations in the terms of the transfer as a condition of tax deduction eligibility, although the transfer instruments can be drafted without perpetuity clauses if the transferor is willing to forego the charitable deduction under Section 170(h).[41] It is this perpetual term that is the focus of the inquiry of this Note.

The means and purposes of establishing conservation easements is by now well-established, although changing.[42] For the transferor of conservation land, the transfer of land in fee or partial interest in the form of the servitude to a qualifying government or land trust confers remarkable tax benefits to the land owner.[43] Simply put, the charitable-donation deduction is available to donors of a qualified real property interest when they transfer a sufficient interest in land to a qualifying organization exclusively for certain conservational purposes.[44] The sharp historical rise in popularity of conservation easements is due in large part to the tax incentives available to transferors, first experimented with by individual states and then eventually added to the United States Tax Code.[45]

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[36] Belk v. Comm'r, 140 T.C. 1, 7 (2013), *aff'd*, 774 F.3d 221 (4th Cir. 2014) ("For a contribution to constitute a qualified conservation contribution, the taxpayer must show that the contribution is (1) of a 'qualified real property interest' (2) to a 'qualified organization' (3) '*exclusively for conservation purposes*.'" (emphasis added) (citing I.R.C. § 170(h)(1))).

[37] See Treas. Reg. § 1.170A-14(d)(1)–(5) (2018), for both a definition of and examples of qualifying "conservation purposes."

[38] *See generally* Weeks et al., *supra* note 10.

[39] *See* Bray, *supra* note 11, at 129–30 ("By 1996, private land trusts were recognized, in the words of a former director of the Sierra Club, as 'the strongest arm of the conservation movement.'" (citing RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 11 (2003))).

[40] *See id.* at 128–29.

[41] Taxpayers are permitted to reduce their income tax liability by deducting the value of contributions to certain organizations, including charities, federal, state, local, and Indian tribal governments, and other qualifying organizations. STAFF OF JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO THE FEDERAL TAX TREATMENT OF CHARITABLE CONTRIBUTIONS, JCX-4-13, at 1 (2013). The general requirements for receiving a deduction, qualified by more specific provisions like Section 170(h) of the tax code, are (1) the recipient of the contribution must qualify under Section 170, (2) "the transfer must be made with gratuitous intent," and (3) the transfer must be a complete and irrevocable transfer of the donor's entire interest, among other requirements depending on what is donated. *Id.* at 6.

[42] *See* Carpenter v. Comm'r, 103 T.C.M. (CCH) 1001, *2–3 (2012) (discussing how the IRS determines deductibility qualifications regarding a conservation easement arrangement).

[43] *See, e.g.*, I.R.C. § 170(b)(1)(E) (2018) (stating the extent to which a federal tax deduction is allowed for qualified conservation contributions).

[44] *Id.* § 170(h).

[45] *See* Bray, *supra* note 11, at 126–33.

Under the common law, conservation easements are still somewhat novel, and their implementation is still being refined and changed as time passes.[46] Some sources trace the origin of the conservation easements as a legal mechanism to Massachusetts in 1891.[47] Especially early on, conservation easements were not widely used, and their legitimacy was in serious question under the common law.[48] States gradually adopted enabling acts, such as the Uniform Conservation Easement Act ("UCEA"), to validate and legitimize conservation easements.[49] The Tax Code, in Section 170(f)(3)(B), provided deductions for transfers of the land for conservational purposes to federal, state, and local governments for the first time in 1976,[50] in the wake of the 1960s environmental movement.[51] By 1980, just a year before the UCEA was drafted,[52] the federal government expanded deduction eligibility to transfers of land to private land trusts, not just public organizations, so long as the easement was made for qualified environmental purposes and made in perpetuity.[53] A deduction on one's estate tax was subsequently made available for land transferred at death to a qualifying public entity or private land trust.[54] It was in the 1980s, when tax deduction eligibility was expanded, that the use of conservation easements most suddenly proliferated.[55] Americans soon began to realize the tax benefits of such transfers, and the conservation easement saw a remarkable increase in use and public support, coaxed further by the expansion of the categories of transfers eligible for the tax deduction.[56]

There was one significant requirement upon which the deduction, particularly under the federal tax code, was conditioned: perpetuity.[57] This means that the conservation easement must, at least on the face of the transfer agreement, be made

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[46] Weeks et al., *supra* note 10, at 252–53.

[47] *E.g.*, BREWER, *supra* note 39, at 13; Bray, *supra* note 11, at 126.

[48] Bray, *supra* note 11, at 127 ("Without specific state statutory authorization, conservation easements existed in a state of 'dubious legality' because some of their central characteristics were disfavored at common law: first, conservation easements are 'negative' easements that tend to prevent rather than to grant land uses in perpetuity; and second, conservation easements are easements in gross." (footnote omitted) (quoting Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 749 (2002))).

[49] *See* K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 775 (explaining that the UCEA was model legislation intended to be adopted by state legislatures to enable the creation of conservation and historical preservation easements). By 1998, forty-seven states had adopted some form of easement-enabling statutes, such as the UCEA. Bray, *supra* note 11, at 129 n.47.

[50] Bray, *supra* note 11, at 131, 131 n.62.

[51] BREWER, *supra* note 39, at 40 ("From 1965 to 1975, growth rate was around 9 percent per year. This corresponds with the blossoming of the public environmental movement.").

[52] Bray, *supra* note 11, at 128.

[53] *Id.* at 131.

[54] *Id.* at 132.

[55] *See id.* at 129, 132 ("[T]he growth rate was at its highest, about 16%, from 1985–1988—a period coincident with the early expansion of the federal tax deduction." (citing BREWER, *supra* note 39, at 40)).

[56] *See generally id.* at 130–36 (explaining how the federal tax deduction for easement donations gave rise to conservation easements and private land trusts).

[57] I.R.C. § 170(h)(5)(A) (2018).

effective forever.[58] For example, if an agreement forbids removal or exploitation of the flora, fauna, or mineral resources from a particular parcel, that restriction carries on, running with the land forever, effective against everyone as a restriction held in gross.[59] While the terms of these servitudes might be negotiated and dickered to an extent, perpetuity clauses must be included for tax deduction eligibility, regardless of the dynamic environmental and social needs of future generations as they relate to a particular parcel of donated land.

As the reader may already correctly suspect, the connection between a perpetuity requirement and the purported conservational purpose is not obvious. Federal tax policy has assumed its necessity from the start; otherwise, it wouldn't require it as an element of deduction qualification.[60] The federal government thus foregoes remarkable tax revenue under the assumption that perpetuity is an important feature of effective environmental conservation.[61] While the empirical studies on the costs and benefits of conservation easements are still relatively young and developing, it is very easy to surmise that a uniform perpetuity requirement for deduction eligibility is inherently incapable of serving the purpose it purports and is in fact not genuinely or thoughtfully designed to do so. Ecological and environmental changes in a given country, state, or ecosystem occur all the time and at different rates.[62] Accordingly, so do the methods and terms needed to allow conservation easements to work effectively within their surrounding ecological context. These changes are so various and even unpredictable that such uniform tax requirements cannot possibly incentivize optimal management of protected lands in a way that meets their official conservational purpose.[63] It is this assumption that uniform perpetual restriction is necessary, and thus must be required for deduction eligibility, that this Note investigates.

Real world examples demonstrate how successful environmental management requires thoughtful and tailored approaches, not a uniform approach and implementation. The way that California manages its tinderbox forests with controlled-burn fires is going to look very different from the way in which Maine will conserve its lush forests and streams. The demand for public access to remote portions of the Mojave Desert is going to be very different (presumably much more limited) than a beach-front reservation on the Florida coast. The needs of each ecosystem require more serious reflection, particularly because of the unlimited differences in how states and land trusts could possibly engage in the responsible

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[58] *See* Bray, *supra* note 11, at 136 (citing "the potential inefficiencies conservation easements may present to future decision makers as a result of the facial pretense of perpetuity required by the federal deduction" as among the major criticisms and bases for reform in regard to conservation easements).

[59] *See* I.R.C. § 170(h)(5) (2018).

[60] *See* Bray, *supra* note 11, at 131.

[61] *Id.* at 147 ("Conservation easements, in other words, are not cheap, and the foregone government revenue attributable to fraudulent conservation easement donations might well be a huge amount of money, even if it is only a small percentage of the total amount of foregone revenue attributable to all conservation easement donations.").

[62] *See* Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 432–35 (2002).

[63] *Cf. id.* at 431 (arguing that "the inherent qualities of the legal institutions . . . [of] property make that type of institution more suitable for the maintenance of wildlife habitat than the legal institutions . . . [of] regulation").

management of conservation lands. In doing so, we will necessarily reflect on how perpetual encumbrances actually serve the ecosystems on such lands and how much of a returned benefit to the public actually accrues by their use.[64] Because conservation easements are "negative" servitudes, meaning they prevent certain uses and transfers of the affected parcel,[65] the duration of a conservation easement's effect is an important component of its implementation, as is implied by the tax code's perpetuity requirement.

Conservation easements in perpetuity are essentially bought at the expense of the public, not just through the charitable tax deduction, but also the opportunity cost of alternative uses for donated land.[66] The tax code's requirement thus incentivizes the very sorts of relatively excessive burdens on property use, management, and transfer that individuals are otherwise prevented from placing on property through their own private transfers under common law doctrine and related public policy. It is by no means my intention to question the need for conservational efforts generally, much less the promising role that conservation easements can or could play in the grand scheme of environmental protection. But it is important that we measure the desired benefits of *perpetual* burdens so that standardization of easement terms can be more rationally connected to their purported conservational end. As this inquiry unfolds, it should become evident that common law doctrines opposed to perpetual burdens on property will be used to strike down or limit conservation servitudes in the not too distant future.

II. COMMON LAW AND STATUTORY TREATMENT OF RESTRICTIONS ON ALIENATION AND PERPETUAL INTERESTS

Since the introduction, this Note has alluded to common law doctrine. American common law has descended in part from its English predecessor.[67] Significantly, these doctrines arose and have since endured in large part because they promote enduring social values and in part because of America's traditional reverence for the common law it adopted.[68] The English common law developed doctrines that limited

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[64] *See infra* Part III.

[65] JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS & LICENSES IN LAND § 2:10 (2019) ("[A] negative easement enables the holder to prevent the owner of the servient estate from doing things the owner would otherwise be entitled to do. A negative easement does not permit the holder to enter or use the servient estate; it limits the right of the servient owner to utilize the servient owner's own land." (footnotes omitted)). As a matter of technical distinction, negative easements are not to be confused with restrictive servitudes. *Id.* at n.14.

[66] *See* Bray, *supra* note 11, at 145–48.

[67] Randy J. Holland, *Anglo-American Templars: Common Law Crusaders*, 8 DEL. L. REV. 137, 138 (2006) ("[H]istory reflects that the common denominator of the Anglo-American legal system is the English common law. The fundamental principles found in the Magna Carta, 1628 Petition of Right, 1689 English Bill of Rights, United States' Bill of Rights, and the rights set forth in our respective written and unwritten constitutions all have common law origins." (footnotes omitted) (first citing BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 8 (1971); and then citing A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968))).

[68] *See id.* at 148 ("In his speech on conciliation with America in 1775, Edmund Burke noted 'that in no country in the world was law so generally studied.' In making that assertion, he referred to the fact that as many copies of Blackstone's Commentaries had been sold in America as in England." (footnote omitted)).

how property owners exercised their freedom of disposition, focusing primarily on actions that would have decreased the alienability of property.[69] These doctrines addressed the social harm caused by effectively removing property from commerce and placing restrictions on the efficient use of property. Significantly, these common law doctrines have been around longer than the earliest conservation easements.[70] The reader should notice a common thread of underlying social policy that embodies a skeptical tilt against restrictions on real property, especially those held in gross or held by no ascertainable party.[71] The inference should be further drawn that, despite special treatment of conservation easements for policy reasons, conservation easements cannot remain permanently insulated to future social and economic pressures.[72] Since the common law endures in part to uphold long-acknowledged human values, the arbitrary elevation of environmental conservation will only work to the detriment of land-based conservation efforts, including conservation easements, precisely because that elevation works to compete with other social values that remain to exert pressure upon artificially prioritized human endeavors. This Part seeks to clarify why this is the case and to explain more deeply why perpetual conservation easements are vulnerable precisely because of their perpetuity.

A. Colonial History and the Inheritance of the English Common Law

Several common law doctrines have developed in American property law jurisprudence, inherited in part from our English common law predecessors, and have ultimately been tailored to meet the policy values of American states.[73] In contrast to the English tradition, the law in the States has historically placed more value on a donor's freedom of disposition and considerations of the circumstantial benefits of arrangements of property ownership.[74] Compared to American law, the original English doctrines placed limitations on an individual's freedom of disposition, at least in part out of concern for the relative scarcity of real property in England and the threat of mass concentrations of inalienable wealth amongst the few landed gentry.[75] The American experience has been historically less concerned with these issues because the American territory had such immense expanses of surplus

[69] *See* David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History—Part II: How Anglo-American Land Law Diverged After American Colonization and Independence*, 34 REAL PROP. PROB. & TR. J. 295, 298–300 (1999); *see generally* George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977) (providing a historical account of the Rule Against Perpetuities).

[70] *See* Thomas, *supra* note 69, at 297, 299.

[71] *See* Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here?*, 33 UTAH ENVTL. L. REV. 1, 10–11 (2013).

[72] *See* Rissman, *supra* note 12.

[73] *See generally* Thomas, *supra* note 69, at 324–54 (providing an individualized state by state discussion of the American adoption of English common law).

[74] *See id.* at 297–98.

[75] *See id.* at 298–300 ("Through the centuries, the tension between landowners seeking to preserve their family dynastic landholdings and landowners wishing to increase alienability and boost their property values has shaped English property interests.").

land and because enterprise and property ownership has long been promoted and encouraged in American culture.[76]

The colonies and later-formed states frequently adopted the English common law, often expressly by statute.[77] Yet, the English common law was usually adopted only insofar as it comported with existing natural and physical conditions in the New World, and only to the extent the common law could exist in harmony with the United States Constitution and the statutory law duly passed by the legislatures of a given territory.[78] In particular regards to property ownership and transfer, there were marked differences in the common law as it developed in the states because the aforementioned conditions of property ownership in England were very different.[79] What is demonstrated in the careful adoption of the English common law is an emphasis on the existing physical and natural conditions of a young United States, rather than a disregard for the needs and values of the American people who lived in different circumstances than England.

While the adoption and evolution of the common law in the states resulted in altered permutations of the English doctrines and variation among the states, the underlying policies of the adopted doctrines were still shaped by similar policy concerns as in England, policy concerns discussed below.[80] These policy concerns have lead American courts to account for the resulting economic, social, and political costs, such as waste,[81] social inequity,[82] and resulting constitutional issues caused by excessive or inequitable restraints placed on property.[83] This Part briefly discusses a few of the inherited policies underlying some such common law doctrines, emphasizing from the start that exceptions to such doctrines have been arbitrarily made conservation easements, as if these easements were any other charitable transfer of property. The discussion to follow in Part III will elaborate on why these relatively young doctrinal exceptions made for conservation easements may be misguided, even naïve, at least in light of the standard inclusion of perpetuity clauses common to these servitudes. The natural conclusion should be that rather than carving out unnatural exceptions for arguably unexceptional property transfers, transferors and governments should seek to establish *actual* exceptionality as to *particular* conservation easements, because the common law favors—and, indeed, frequently requires—that a restriction be proportional and connected in some way to the restriction placed on property.

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[76] *See id.* at 298, 324–25 ("The American colonials were stubborn, cocky, independent minded, and they had almost unlimited available land. Not surprisingly, they began shaping a land law that took into account the new environment and that diverged from the more gradual changes occurring in England.").

[77] *Id.* at 325–54.

[78] *E.g.*, Kroeger v. Twin Buttes R.R., 114 P. 553, 554 (Ariz. 1911) ("The [English] common law, so far only as it is consistent with, and adapted to the natural and physical condition of this territory, and the necessities of the people thereof, and not repugnant to, or inconsistent with, the Constitution of the United States, or Bill of Rights, or laws of this territory . . . is hereby adopted and shall be the rule of decision in all courts of this territory.").

[79] *See id.* at 554–55; Thomas, *supra* note 69, at 298–300.

[80] *See infra* Section II.B.

[81] *See, e.g.*, Rogers v. Atl., G. & P. Co., 107 N.E. 661, 661 (N.Y. 1915) (defining permissive waste).

[82] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 12–13 (1948) (demonstrating the social inequity of common law principles when the Fourteenth Amendment is implicated by racism).

[83] See generally *id.*, for an example of a socially unacceptable restraint on property.

B. The Common Law and its Underlying Principles

At the core of the American common law tradition is a complex set of evolved social values, sifted through and screened by human experience. It is particularly the American experience that has worked to refine much of the property law we know in the United States.[84] The product of this historical process is not merely black letter law, but, more significantly, a logic that endures through time and changing circumstances.[85] In large part, the ingenuity of the common law system is owed to the decentralized balance it strikes between the durability of its precedent on the one hand, essentially its reluctance to abandon past assumptions about the world and about society, and its careful adaptability to new circumstances on the other.[86] What the states inherited from the English is more than just a civil system of judicial governance. The common law system is the product of a legal and social philosophy,[87] one that is based on an assumption that there exists discoverable principles and truths, which, once discovered, should guide future generations as applicable under varying and changing circumstances.[88] But none of these truths are absolute, and no principle among them is so uncompromising that public policy fails to reflect the course of human progress and shifting social priorities. Legal principles endure through common law precedent, to some extent removed from the more fashionable and ultimately temporary public policy de jure.[89] Despite changing policy contexts, the principles underlying the common law do not disappear so

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[84] *See supra* Section II.A.

[85] At the risk of cliché, this sentiment, though put differently, was articulated well by a personal hero and, perhaps, the greatest personality to ever grace the Supreme Court of the United States, Oliver Wendell Holmes: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1923). While Holmes says it is not "logic," I believe that he meant "logic" in a certain sense, that the common law is not entirely rational in the Enlightenment sense. But I might say, though the origins were far from logic in this Enlightenment sense, the collective experience that brought forth the common law over the centuries does have a social logic as it were, one that addresses problems in the most sophisticated and enduring way yet known.

[86] Indeed, this balance is most needed here, considering the competing interests that conservation easements present. *See* Weeks, *supra* note 10, at 253 ("A conservation easements binds together three parties with potentially conflicting interests: (1) the owner of the encumbered land (who may or may not be the original easement donor), (2) the non-profit or governmental holder of the easement, and (3) the public, which invested in and is beneficiary of the easement's conservation protections.").

[87] *See* OLIVER WENDELL HOLMES, *The Bar as a Profession*, *in* COLLECTED LEGAL PAPERS 153, 156 (1920) ("[O]ur law has reached broader and more profound generalizations than the Roman law, and at the same time far surpasses it in the detail with which it has been worked out.").

[88] Justice Cardozo and Sir Frederick Pollock have even used the phrase "Our Lady of the Common Law." John C. H. Wu, *The Natural Law and Our Common Law*, 23 FORDHAM L. REV. 13, 13 (1953) ("I shall start from the full-blooded experience of the Common Law. We may mount higher and higher until we attain a transcendental vision of the Natural Law *or even of the Eternal Law*. But our starting point must be a juridical experience." (emphasis added)). Wouldn't it be nice if law review articles were still written like this?

[89] *See* Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 72–74 (2006). Of course, that may be equity's proper role: to offer individualized exceptions to the common law where the common law's application is a clear affront under that slippery notion of "judicial conscience" and "decency." *See* CASES CONCERNING EQUITY AND THE COURTS OF EQUITY 1550–1660 xxx (William Hamilton Bryson ed., 2001) ("A grossly unfair and harsh bargain that 'shocks the conscience' will be set aside by principles of equity even though the common law rules of making the contract were followed.").

readily, even under statutory direction. The common law remains relevant, and it would be extremely unwise to fail to consider it without the thought that is due to it.[90] As new priorities emerge under new circumstances, such as environmental protection in light of global climate change, it is our duty, as heirs of the common law, to figure out how the greatest harmony can be struck between these new priorities and long-held principles under the common law. It is therefore crucial to understand what the common law tells us and why we still apply it today.

Deriving from and embodying the common law, American property law grants individual property owners exceptionally broad freedom to control the use and disposition of their property.[91] This freedom of disposition is grounded in a deep, culturally embedded respect for the sovereignty of the individual over the fruit of his life and labor.[92] The individual's lawful dominion over his property therefore occupies a persistently elevated level of regard in American property law. As a result, we protect the individual's right to alienate, use, invest, and otherwise dispose of their property as they see fit, although within certain limitations, and generally with lesser regard to popularly, democratically determined ideas about how one ought to dispose of their property in relation to others in society.[93]

A second principle of American property law, which is characteristically strong in the English common law ancestry, is the idea that property, as well as other forms of wealth, should not sit idle and unproductive.[94] In other words, property ownership should not be so within the owner's domain that it accrues to the disproportionate detriment of society or other social units. Thus, even strong protection for individual ownership is not truly paramount but is, in fact, subject to limitations based on this general limiting principle. One could argue that this principle has broader, perhaps deeper application through the common law judicial governance of property ownership because, after all, arguments can be made for individual investment and

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[90] After all, basic rules of statutory construction seek to reconcile statutes with the common law. *See, e.g.*, Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established, as are the rules of preclusion, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" (citations omitted)); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

[91] RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please."); 70 C.J.S. *Perpetuities* § 12 (2019) (stating that certain common law rules share similar purposes in that they "are aimed against the withdrawal of property from commerce").

[92] *See* JOHN LOCKE, *The Labor Theory of Property*, *in* RATIONAL BASIS OF LEGAL INSTITUTIONS 195, 196 (1923) (explaining the labor theory in which every man has the right to "the *work* of his hands"); D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 44, 47–48 (2009) (discussing the zones of autonomy with respect to one's property and freedom over that property).

[93] *See, e.g.*, Matteson v. Walsh, 947 N.E.2d 44, 46–47 (Mass. App. Ct. 2011) (reviewing waste of property); *see also* Zauner v. Brewer, 596 A.2d 388, 393–94 (Conn. 1991) (discussing permissive waste as it applies to a plaintiff's allegation that defendant committed waste because the defendant neglected the property).

[94] *See* Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 658–59, 690 (2006) (discussing the emphasis on property to be productive and maximize the self-interest of the owner).

property ownership on the basis of efficiency and maximal social benefit.[95] But significantly and necessarily, the principle of efficient use of property finds itself manifested in common law rules that limit the individual's sovereignty over their property. These limitations count for a large part of this Note's discussion of common law rules because only by understanding the rule's underlying rationale can a reasonable prediction be made that conservation easements are compromised by the very thing that was supposed to strengthen them: their facial perpetuity.

Finally, a third principle, or another human value if you prefer, enters consideration to limit and to be limited by the other two principles. Environmental consciousness now enjoys growing priority in American law, with land use and preservation playing a key role in the preservation and rehabilitation of the environment.[96] But the need for environmental protection, like the other two values, is not without its own costs. Those costs include the limitation of a property owner to do what he wishes with his land,[97] as well as the prospect of inefficiency and waste.[98] Interestingly, though, conservation easements are not exclusively of common law origin. Rather, they are largely creatures of statute.[99] Limits on development, exploitation, and use of land are common in laws that promote environmental protection,[100] and the recognition of the conservation easement under the federal tax code is just one more example of the statutory origin of much environmental law.[101] How environmental law and policy will interact with and be balanced against preexisting common law is where its fundamental tension with conservation easements lies.

While all three of these values are upheld in both American law and culture, the law cannot possibly promote all of them maximally and simultaneously in every circumstance or jurisdiction, and it certainly cannot do so with total uniformity, as is the case with competing public policy in other areas of the law.[102] Because not all

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[95] *Id.* at 656–57.

[96] *See* Joseph L. Sax, *Reflections on Western Water Law*, 34 ECOLOGY L.Q. 299, 302 (2007). Much of this environmental consciousness has been injected into the national, legal mainstream by federal legislation. *See* 1 LAW OF ENVTL. PROT. § 10:53 (ENVTL. LAW INST. 2018) ("Congress instituted these procedures, however, as part of a broad national policy to encourage a 'productive and enjoyable harmony between man and his environment; "to . . . prevent or eliminate damage to the environment . . . ."' (quoting the National Environmental Policy Act, 42 U.S.C. § 4321 (2018))); *see also* Wilkinson, *supra* note 4, at 4.

[97] Though, to be fair, it can be safely assumed that the grantee of a conservation easement does so voluntarily and, especially in the case of private land trusts, may even have a pecuniary interest in its investment. Stretch this principle to how a political unit might be prohibited from certain land uses, however, as in the case of a public grantee, and you may see a limitation of sovereignty, though also voluntary at the time the land is transferred.

[98] Canaparo, *supra* note 16, at 237 ("In sum, perpetual conservation easements resist attempts at modification or termination. As a result, they guarantee perpetual nonuse even when perpetual nonuse is inefficient.").

[99] Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 137 (2015).

[100] *See* Glicksman, *supra* note 4, at 448; *see generally* Wilkinson, *supra* note 4.

[101] *See* I.R.C. § 170(a)(1) (2018).

[102] *See, e.g.*, Alan Frank Pryor, *Balancing the Scales: Reforming Georgia's Common Law in Evaluating Restrictive Covenants Ancillary to Employment Contracts*, 46 GA. L. REV. 1117, 1146 (2012) (discussing Georgia's legislative attempts to balance the competing interests of businesses and employees in the context of employment law) ("The Restrictive Covenant Act marks a turning point in Georgia employment law. The Act is designed to attract businesses to Georgia, boost employment, raise wages,

values in property law can be maximally and simultaneously supported, the law acts as a mechanism by which society chooses which values it will promote and to what extent it will promote each value in relation to one another, as well as what general circumstances it will consider in reaching the decision.[103] It is one significant role, therefore, of the courts through common law and legislatures through regulatory systems to ensure that such values are balanced in a way that is tailored to maximize the social benefits of property creation, use, and transfer, whatever the final hierarchy of values might be for a given group of people at a given time.[104] Conservation easements present the issues in peculiar and difficult ways. This is so because the country is currently seeking an effective implementation of some sort of coordinated environmental response to meet global climate change and more localized ecological problems.[105] Conservation easements have come to be regarded, by at least one scholar, as a significant contributor to that response.[106] Of course, despite the

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and increase the standard of living. The Act significantly shifts public policy by adding pro-firm policies to balance its predominantly pro-employee common law. Further, a careful study of these provisions shows that Georgia will not unduly harm employees' interests. The reasonableness test codified in the Act is substantially similar to the common law, and the pro-employee policies espoused in the common law remain strong considerations for courts."); *see also* Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 864 (2001) (discussing both the utilitarian and non-utilitarian social values and norms under common-law balancing tests as exercised by juries in the context of negligence actions, arguing that previous conceptions of jury deliberation are not as utility-heavy as once thought) ("Informal social norms play a crucial, albeit largely unheralded, role in negligence law. The reasonable person standard is an empty vessel that jurors fill with community norms. Jurors do this rather than performing cost-benefit analysis.").

[103] *Cf.* Joseph L. Sax, *Reflections on Western Water Law*, 34 ECOLOGY L.Q. 299, 302 (2007) (discussing doctrinal reevaluation in water law in light of changing environmental circumstances) ("[W]ater law is turning out to be a new central battlefield for the definition of property rights. This is perhaps the preeminent area in which you see the law responding through doctrinal reinterpretation to changes in the social agenda."). Environmental change and its effect on the law provides a rich source of conversation on this topic. The change in American water law acts as a clear example in which real-world circumstances change, which change human needs, which results in a shift of human values, which finally requires the law to adapt to serve those values. Fortunately, Americans live in a legal and representative system that is built to be receptive to these changes, capable of adapting over time to meet changing human needs in light of enduring principles. Such is the genius of the common law system.

[104] This balancing is fundamental to many ongoing and lively discussions in intellectual property law, where ethical, economic, and incentivization considerations guide the formulation of both statutory and common-law intellectual property regimes. Seeking to balance the numerous factors for the sake of sound social policy of property ownership frequently informs the considerations of conscientious legislatures and courts. The inheritance of the economic and social considerations in the common law's treatment of real property can be seen in similar policy discussions pertaining to intellectual property. *See* Michael A. de Gennaro, *The "Public Trust" Servitude: Creating a Policy-Based Paradigm for Copyright Dispute Resolution and Enforcement*, 37 TEX. TECH L. REV. 1131, 1141–42 (2005) (discussing the policy balancing in the context of real-property servitudes as a mechanism for promoting economic and social efficiency, while carefully emphasizing important economic distinctions between real property and intellectual property) ("This is not to suggest that intellectual property is interchangeable with common-law property. The standard argument is that intellectual property rights should be more limited than common-law property rights, due to the uniquely nondepletable nature of the former." (footnote omitted)). The point of this and the preceding footnote is to show how courts and legislatures must balance competing social values by virtue of the impossibility of promoting all social values maximally and simultaneously.

[105] *See* Hollingshead, *supra* note 2, at 321–22.

[106] *See id.* at 322–24.

approaching plateau of the world's population and reorientation of our relationship with the environment[107], the problem remains that human development is still necessary and demand for land development remains steady, if not on the rise.[108]

In America, a donor has exceptionally broad freedom to place conditions and restrictions on a donee-beneficiaries' subsequent use and disposition of transferred property.[109] The donor is afforded this authority over his property by the law, even where the donee, if she had her way, would otherwise desire to use the property transferred to her in a way contrary to the donor's intent.[110] In other words, this conflict manifests in the fact that interested persons in the distant future may be bound by the intent of donors who, by effecting an irrevocable grant in probate or trust, have no actual remaining interest in their transferred property.[111] Here, the freedom of the donor and the alienability of property are both valued as a matter of public policy in American law, but they cannot be simultaneously and maximally promoted.[112] The promotion of those values may be further limited in circumstances that require consideration of relevant social values other than the desires of the donors and donees, such as society's interest in the efficient or environmentally

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[107] *See* Anthony Cilluffo & Neil G. Ruiz, *World's Population is Projected to Nearly Stop Growing by the End of the Century*, PEW RES. CTR. (June 17, 2019), https://www.pewresearch.org/fact-tank/2019/06/17/worlds-population-is-projected-to-nearly-stop-growing-by-the-end-of-the-century/ [https://perma.cc/M6AH-EMMW].

[108] *See* Hollingshead, *supra* note 2, at 321 ("Development of land, unlike consumption of renewable resources, is generally irreversible. As the world population continues to expand, areas that retain their natural condition are increasingly scarce. These remaining areas are subject to mounting pressure for development."); *see also* Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, L. & CONTEMP. PROBS., Fall 2011, at 199, 218 (discussing conservation easements as a way of addressing global climate change, but also as a method that presents its own complex issues in a world of changing needs and circumstances).

[109] RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) ("Property owners have the nearly unrestricted right to dispose of their property as they please. . . . [T]he controlling consideration in determining the meaning of a donative document is the donor's intention; and [] that the donor's intention is given effect to the maximum extent allowed by law.").

[110] *See id.*

[111] *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1189 (1985) ("Individual freedom to dispose of consolidated bundles of rights cannot simultaneously be allowed and fully maintained. If the donor of a property interest tries to restrict the donee's freedom to dispose of that interest, the legal system, in deciding whether to enforce or void that restriction, must resolve whose freedom it will protect, that of the donor or that of the donee."). While the rigor mortis of "dead hand" control is often cited as a primary justification for several common law property doctrines, the testator's subjective happiness and welfare form an important, unspoken basis for fulfilling the testator's intent even after death. *See* J.D. Trout & Shahid A. Buttar, *Resurrecting "Death Taxes": Inheritance, Redistribution, and the Science of Happiness*, 16 J.L. & POL. 765, 789–90 (2000) (arguing that a materialist view of property ownership and transfer may place less emphasis on the intent of a deceased loved one in life, but might still appreciate that "what *will* happen after one is dead is relevant to one's level of welfare" in life because, "[f]or example, one might be concerned that, without an inheritance, one's offspring would be left vulnerable, and this worry about the future of one's offspring may erode one's happiness" in life). It is arguably an indispensable, even if not routinely mentioned, justification for the American emphasis on donative control by the donor's intent. The possible policy concerns over which courts and legislatures are tasked with exercising wise consideration could be innumerable and complex. This complexity further compounds the difficulty of striking the best possible balance under varying and changing interests and circumstances affecting human activity touched by the law.

[112] *See* Alexander, *supra* note 111, at 1189.

conscious use of property.[113] But generally, as a matter of American legal tradition and public policy, the intention of the donor carries such strong value that it will overshadow and defeat even legitimate donee and non-donee interests alike, absent a strong countervailing legal or policy justification.[114]

This is one such reason that the common law has evolved to balance the freedom of donors against the freedom of future beneficiaries in relation to property use.[115] Neither is given unlimited freedom, and the law may, depending on the circumstances, work to limit the expression of one value in order to preserve or adequately promote another based on predetermined but changing priorities of competing public policy. Thus, several legal policies have emerged that seek to strike a balance of values so that property can be put to the most just and efficient uses, even where such uses may not fully comport with the desire of the donor or strike absolute harmony with other policy values.[116] The common law has evolved to address not only the most capricious restrictions,[117] but also those contained in well-intentioned conveyances, where there is an apparently benevolent motivation behind a transfer.[118] What might be considered as one such benevolent conveyance

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[113] *See* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1138–39 (2013) ("In each of these situations, there is, ostensibly, a countervailing policy for not effectuating the donor's ex ante wishes. Similarly, the UPC qualifies the freedom of testation in several situations, including the elective share for surviving spouses, rule against perpetuities, and rights of creditors." (footnotes omitted)). Notice here how American legal policy gives strong consideration to parties who may not even be donors or intended donees with respect to the donative instrument but are nonetheless interested parties by virtue of their being directly, and often indirectly, affected by the transfer. Considerations for both direct and indirect effects, even for parties not privy to the transfer of property interest, can also be seen in the context of conservation easements, and it will become clear why conservation easements may be vulnerable to challenge as changing circumstances and weak document drafting allow the class of interested parties to broaden, especially with the mandate of perpetuity on easements essentially held in gross.

[114] RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an *overriding* rule of law. The term 'rule of law' is used in a broad sense to include rules and principles derived from the U.S. Constitution, a state constitution, or *public policy* . . . [and] rules and principles of the *common law* and of *equity* . . . ." (emphasis added)). Note: "overriding," as used in Comment c of Section 10.1, implies a balancing and comparison of legal authority and social policy when the intent of the donor is brought into question before a court.

[115] *See* Alexander, *supra* note 111, at 1189 ("Although post-realist American property lawyers acknowledge this conflict, at least nominally, it did not emerge into legal consciousness in so starkly visible a form until the end of the nineteenth century." (footnote omitted)).

[116] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations. The foregoing list is illustrative, not exhaustive.").

[117] *See, e.g.*, Cape May Harbor Vill. & Yacht Club Ass'n v. Sbraga, 22 A.3d 158, 167–68 (N.J. Super. Ct. App. Div. 2011) (stating that restraints that are placed on land out of caprice or by a donor with no interest in the land are factors tending to show unreasonableness (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 reporter's note (AM. LAW INST. 2000))).

[118] *See, e.g.*, 56 N.Y. JUR. 2D *Estates, Powers, and Restraints on Alienation* § 175 (2019) ("Where land is held, whether or not in trust, for benevolent, charitable, educational, public, or religious purposes . . . [such as] by an agreement to convey, reconvey, or surrender the land or the estate so held upon a contingency relating to its use, an

is a restrictive transfer of land made for environmental purposes in the form of a conservation easement.[119]

Both our law and American culture recognize the value of allowing people to control the way their property is distributed and expended, both in life and upon death. Made to be complementary to this freedom, both state and federal governments may create rules and incentives to ensure that property can be put to better social use, including environmentally conscious land use. A now significant and somewhat controversial way of incentivizing such use is offering tax benefits to donors of property for conservational purposes, with the receipt of a federal deduction contingent on the transfer being made in perpetuity.[120] In the context of conservation easements and environmental efforts generally, there arises a clear tension between promoting essential environmental values and alternative uses for encumbered land, land which might be put to a different, perhaps more efficient use.[121]

C. The Rule Against Perpetuities

Perhaps one of the more famous doctrines preventing perpetual property interests is the Rule Against Perpetuities ("RAP"). This is one such doctrine that American law has inherited, in one form or another, from England,[122] where judges, as landowners themselves, were tasked with forming a rule satisfying the public's desire for an active land market and the landowner's desire to keep land within the family.[123] As one legal historian put it:

> The world in which the [R]ule evolved was that of the landed aristocracy and gentry, and [the Rule's] function was to impose limits which seemed reasonable in that world to the degree to which the head of the family, the patriarch for the time being, could make binding dispositions of the family estates which controlled their destination long into the future.[124]

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action may be brought in the [New York] supreme court to obtain relief from such restriction." (first citing Gale v. Bath Cent. Sch. Dist., 829 N.Y.S.2d 359 (N.Y. App. Div. 2007); and then Long v. Pompey Hill Volunteer Fire Dep't, Inc., 539 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1989))).

[119] *See* BREWER, *supra* note 39, at 17.

[120] I.R.C. § 170(a)(1), (h)(1), (h)(5)(A) (2018).

[121] *See* Hollingshead, *supra* note 2, at 321 ("Development of land, unlike consumption of renewable resources, is generally irreversible. As the world population continues to expand, areas that retain their natural condition are increasingly scarce. These remaining areas are subject to mounting pressure for development."); *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. LAW INST. 1998) ("The traditional constraints on servitude creation and the traditional constructional preference in favor of free use of land grew out of concern that servitudes pose substantial risks to the value and alienability of land, to competition, and to other social values. Although widespread use of servitudes has established their great value in land development and conservation, they also may create social harm.").

[122] John G. Shively, *The Death of the Life in Being—The Required Federal Response to State Abolition of the Rule Against Perpetuities*, 78 WASH. U. L.Q. 371, 371 (2000) ("The Rule is a product of English law that has been part of American common law since the birth of the Republic.").

[123] A. W. B. SIMPSON, A HISTORY OF THE LAND LAW 208–09 (2d ed. 1986).

[124] A. W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 76 (1995). Note the echoes of this sentiment in today's discussion on conservation easements, with hints of class inequity at the expense of public benefit.

The bane of many first-year law students for its unintuitive, common articulation, and still codified in only a few state statutes,[125] the RAP states: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[126] The long history of this rule in English and American law has seen varying evolution and adherence over the course of its history and has since been tailored by certain exceptions and mitigating doctrines under changing needs and circumstances.[127] It should be noted briefly at this point that conservation easements do not actually violate the Rule Against Perpetuities, as they do fit, at least officially, into the exception for donative transfers of property for charitable purposes.[128] The RAP, like the other rules to follow, is brought up to discuss its underlying rationale and to argue that the exception to the RAP that was made for conservation easements does not square with the way that the easements will likely function in application.

The underlying public policy against dead-hand control animates the RAP in many states today, and, as it did in England, it survives in American property law as an expression of apprehension towards the idea that a transferor should have an unlimited right to hold the ownership and benefit of the property in a sort of limbo of non-ownership.[129] The uncertainty of future beneficiaries and their needs, along with the often-tenuous familial and personal connections between the transferor and unascertained beneficiaries can lead to the unproductive use of property and, arguably, could cause the property to fall into the hands of beneficiaries who lack the interest or expertise to make efficient use of the property, regardless of how "efficiency" is measured.[130] Some of the public interests concerned under the RAP are the economic benefits of freely transferrable property, especially in regard to land.[131] But at least one of the RAP's primary purposes was to keep property out from under the thumb of long-deceased persons who could neither experience concern for or foresee future needs of unascertainable and often non-existent future beneficiaries.[132]

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[125] HELENE S. SHAPO ET AL., BOGERT'S TRUSTS AND TRUSTEES § 214 intro. summary (2019) ("The large majority of states, however, have either abolished the rule, thus permitting perpetual trusts, or modified it, for example, by adopting a wait-and-see rule, or by giving the courts a cy pres power to reform the offending language, or by imposing an absolute limit on the number of years by which time an interest must vest, or by excepting trusts where the trustee has the power of sale." (footnotes omitted)).

[126] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (Roland Gray ed., 4th ed. 1942).

[127] *See* HELENE S. SHAPO ET AL., BOGERT'S TRUSTS AND TRUSTEES § 213 description of the rule (2019).

[128] RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 27.3(2) (AM. LAW INST. 2011).

[129] *Id.* § 27.1 cmt. a ("The principal rule of public policy for curtailing excessive dead-hand control is the Rule Against Perpetuities . . . .").

[130] *See id.* cmt. b (explaining the benefits to the generations-based perpetuity period in comparison to the requirement that the measuring lives be "in being" because the latter "produces a perpetuity period that is not tailored to the individual trust and family circumstances").

[131] *Id.* ch. 27, intro. note.

[132] *See* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 122–24 (1955) (discussing the tendency for charitable purposes of trusts to lose utility over time due to changes in circumstances).

The aforementioned exception to the RAP made first for charitable donations generally,[133] and now for conservation easements specifically,[134] however, is an important part of the criticism of perpetual restriction. Unlike other private transfers, conservation easements do not require ascertainable beneficiaries and are essentially held in gross for the benefit of an amorphously defined group of people, such as a state, municipality, or community unit.[135] Conservation easements have been exempted from the RAP notwithstanding the inherent tension between the perpetual easements and the policy underlying the Rule. But why was this exception adopted by the various Restatements and other reputable authorities? It may be popularly assumed by legal authorities that perpetuity is part of what makes conservation easements effective, but this conclusion is not obviously true. More probably, the exception was made as a matter of public policy, manifested in the tax code and modern property treatise conclusions that qualifying transfers of real property interests justify existence in perpetuity.[136] The ultimate justification for mandated perpetuity probably lies somewhere in a legislative compromise, one which allowed the investment of foregone tax revenue in exchange for exclusively permanent grants of land.

D. *The Rule Against Unreasonable Restraints on Alienation*

There is yet another rule with similar policy underpinnings: The Rule Against Unreasonable Restraints on Alienation ("RAURA"). This rule more generally forbids transferors of property from, as the name suggests, unreasonably restricting the ways that current or future interested parties may use, acquire, or dispose of property.[137] While they share overlapping policy bases,[138] one distinction between the RAP and the RAURA is that the RAP forbids transferors of property from creating interests with indeterminate future dates of vestment that are considered too far removed from a certain group of eligible takers.[139] By contrast, the RAURA forbids a property owner from creating provisions that unreasonably restrain a

[133] *See* RESTATEMENT (FIRST) OF PROP. § 396 (AM. LAW INST. 1944) (predating the inclusion of the conservation easement exception that exists in modern Restatements).

[134] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.3 cmt. a (AM. LAW. INST. 2000).

[135] The Uniform Trust Code, for instance, permits charitable trusts, such as conservation easements, to have non-specific, i.e. unascertainable, beneficiaries. *See* UNIF. TRUST CODE §§ 402(a)(3)(A), (c) (UNIF. LAW COMM'N 2000). This allowance for specifically unascertainable beneficiaries in the context of charity is an example of the law accepting the potential costs associated with such arrangements as justifiable in light of the social benefits of charitable contributions.

[136] *But 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, 457 (1984) ("[T]he more important goal of limiting dead hand control may outweigh the value of freedom of contract in the context of private conservation servitudes.").

[137] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (AM. LAW INST. 2000).

[138] *Id.* § 3.1 reporter's note (stating "the similarity in objective between the rule against direct restraints on alienation and the relatively modern rule against perpetuities" and noting that "[b]oth rules come from the struggle of the English courts to preserve property free from inconvenient interference with the alienation of property interests").

[139] *See* GRAY, *supra* note 126, at § 201.

grantee's right to alienate property otherwise lawfully transferred to him.[140] For this reason, the RAURA is especially relevant in the conservation easement context because they have the potential to offend this rule's clear underlying public policy notwithstanding the statutory exception also made under the RAURA for conservation easements.

As discussed above, private property ownership and transfer have long enjoyed significant policy support in America because property owners have a right, some would argue a natural right,[141] to dispose of their belongings as they see fit.[142] While American property owners possess peculiarly strong rights to dispose of property compared to other countries, even here there are limits based on countervailing social and economic policies.[143] Fundamentally, a restriction on the right to property must not offend other fundamental rights of the transferee or intended beneficiary or be unreasonable under the circumstances.[144] This is the essence of the RAURA. Put another way, the restriction must not offend public policy,[145] and if it is a serious restraint, it must also be amply justified under the circumstances.[146] The premium that American law places on individual autonomy over one's property still acts as a strong default consideration in favor of permitting some restrictions.[147] But American law upholds other values as well, and the RAURA is one way in which it does so.

Springing from concerns toward lost public benefits or, even worse, affirmatively imposed social costs, the RAURA prevents donors and transferors from rendering property excessively inalienable. As a form of public policy, the RAURA is based in "the desirability of keeping property responsive to the current exigencies of its current beneficial owner and upon the desirability of avoiding the retardation of the *natural development of a community by removing property from the ordinary channels of trade and commerce.*"[148] Of course, removing property from such channels by a legal mechanism like a conservation easement can very well be

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[140] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1(3) (AM. LAW INST. 2000).

[141] *See* Wu, *supra* note 88, at 20 ("As St. Thomas has said, 'All law proceeds from the reason and will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason.' In other words, 'in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason.'" (footnotes omitted) (quoting Summa Theologica Ia, IIae, Q. 90, a. 1, ad 3., Q. 97, a. 3, in corp.)).

[142] But important to note for our purposes, the recipient, the party assumed to benefit from the transfer, possesses robust rights as well, subject to reasonable limitations. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1(2)–(3) (AM. LAW INST. 2000).

[143] *See supra* Section II.B.

[144] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (AM. LAW INST. 2000).

[145] For example, "[e]ven Kentucky, which allows 'reasonable' forfeiture restraints and often construes what are apparently disabling restraints to be forfeiture restraints, refuses to do so with respect to restraints on involuntary transfer, and holds such restraints void." RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.1 reporter's note (AM. LAW INST. 1983) (citing Smith v. Smith, 73 S.W. 1028 (Ky. 1903)).

[146] *See* RESTATEMENT (FIRST) OF PROP. § 405 cmt. a (AM. LAW INST. 1944) ("All restraints on alienation run counter to the policy of freedom of alienation so that to be upheld they must in some way be justified.").

[147] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (AM. LAW INST. 2000) ("A servitude created as provided in Chapter 2 is valid *unless* . . . ." (emphasis added)).

[148] 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 88 (2019) (emphasis added) (first citing Venture Stores, Inc. v. Pacific Beach Co., 980 S.W.2d 176 (Mo. Ct. App. 1998); and then citing Winecellar Farm, Inc. v. Hibbard, 27 A.3d 777 (N.H. 2011)).

justified under some forms and circumstances, and perhaps in some cases, at least in theory, in perpetuity. The RAURA, like the RAP, is another voice echoing from the common law that cautions parties to conservation easements from drafting conservation conveyances in ways that work against the needs of our future environments and communities.

E. The Doctrine of Changed Circumstances

The doctrine of changed circumstances is yet another example of a common law rule that could be applied to conservation easements and which should be applied if necessary to promote the environmental purpose of an easement in light of changing environmental circumstances.[149] This doctrine confers authority on a court to alter a servitude when a change in circumstances makes it impossible to accomplish the purpose for which the servitude was created,[150] or even to terminate an easement when the purpose of the easement is finally accomplished.[151] Under the Restatement of Property: Servitudes, conservation and preservation easements are excluded from operation of the doctrine.[152] But why is this so? The reasons given in Comment (a) of the Restatement are that (1) conservation easements have a clear perpetual duration, (2) their creation is subsidized through tax deductions by the federal government, and (3) a strong component of public interest leads to their exclusion from this general rule.[153] On the other hand, Comment (a) states that the fundamental rationale behind the doctrine is that "potentially unlimited duration of servitudes creates substantial risks that, absent mechanisms for non-consensual modification and termination, *obsolete servitudes will interfere with desirable uses of land*."[154] It must then be asked, what constitutes a desirable use of land? Surely environmental preservation can be a desirable use of land for the foreseeable future, thus justifying the continuation and validity of the servitude, perhaps in perpetuity given the right circumstances. But the rationale offered under a strong component of public interest as a universal assumption for this doctrine's application removes conservation easements entirely from alteration, seemingly regardless of whether the servitude can continue to serve its environmental purpose in perpetuity.

It must be understood that social conditions, environments, and true ecosystems are far from static. They change. Perpetuity clauses, if they are not illusory in light

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[149] UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (UNIF. LAW COMM'N, amended 2007) ("A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries.").

[150] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (AM. LAW INST. 2000).

[151] JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 10:8 (2019) ("An easement created to serve a particular purpose ends when the underlying purpose no longer exists."). This statement about the termination of easements regards the cessation of purpose doctrine, which is akin to or even a product of a broader doctrine of changed circumstances. *See id.*

[152] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10(3) (AM. LAW INST. 2000).

[153] *Id.* § 7.11 cmt. a.

[154] *Id.* § 7.10 cmt. a (emphasis added).

of future public needs,[155] instill maximal rigidity in an easement notwithstanding a need for flexibility in the arrangement.[156] It is not solely the length of time that is the necessary condition for environmental progress that is important but a conscious, careful evaluation of how circumstances change and the conditions under which environmental objectives can and will be met.[157] Aside from temporal rigidity of a perpetual term, conservation easements are often (or at least permitted and incentivizes to be) created without a conscious effort to craft the instrument to be adaptable to changed circumstances, and so such terms are more likely to be held unreasonable as a result.[158]

A pattern should start to emerge as the logic of the common law runs across these several doctrines. Our law has decided that conservation easements are so exceptional in their purposes these doctrines will be expressly inapplicable to them. The reason this exception is made is at least partly a matter of definition. Lawmakers and legal institutes have seemingly decided a priori that the public interest in conservation easements is so great that their perpetuity must be upheld even though perpetuity would not otherwise be upheld under the common law. The further implication, implied by the statutory tax requirements themselves, is that this exceptional public interest is best served by restriction in perpetuity. But that cannot be uniformly true if it is understood that environmental and economic needs change significantly and sometimes rapidly over time in a very wide variety of ways peculiar to the corresponding variety of ecosystems and diverse public needs. Meanwhile, the significant benefits to the donor takes place only once, when that individual gets a tax deduction for their donation.[159]

The common law exceptions for conservation easements are wishful and idealistic and, arguably, improper because conservation easements are not usually

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[155] *See* Bray, *supra* note 11, at 138–40 (speaking of critics, like myself, as pointing out the illusory promise of perpetuity) ("Indeed, it is precisely their point: '[t]he permanence of conservation easements is a false goal, because it's simply not possible—in a physical sense, in a legal sense, in a sociological sense—that today's easements are going to endure.'" (quoting JEFF PIDOT, LINCOLN INST. OF LAND POLICY, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 22 (2005), https://www.lincolninst.edu/sites/default/files/pubfiles/reinventing-conservation-easements-full.pdf [https://perma.cc/X7MH-UQGU])).

[156] Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 151 (2011) ("Conservation biologists and environmental scientists advise addressing such problems through holistic programs that incorporate principles of adaptive management. Current conservation easement use rarely involves holistic planning or adaptive management." (footnote omitted)).

[157] Owley, *supra* note 108, at 225–27.

[158] *Id.* at 199.

[159] Apprehension towards possible one-sided benefits of the deduction is a major part of the suggestions for conservation easement policy reform. *See, e.g.*, Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 L. & CONTEMP. PROBS., Fall 2011, at 29, 32, 48 (recommending the replacement of the current tax deduction with capped tax credits and further oversight by the Bureau of Land Management); Dana Joel Gattuso, *Conservation Easements: The Good, the Bad, and the Ugly*, NAT'L CTR. PUB. POL'Y RES. (May 1, 2008), https://nationalcenter.org/ncppr/2008/05/01/conservation-easements-the-good-the-bad-and-the-ugly-by-dana-joel-gattuso/ [https://perma.cc/6D99-XFHN] (recommending the "[p]hasing out [of] government funding of land trusts," the elimination of estate taxes, and an amendment to the "tax code to allow for fixed-term, rather than perpetual, conservation easements").

fundamentally exceptional in their purpose or operation. The reality is that the common law doctrine still exists and still operates in the background. The common law can and will be applied to conservation easements in the future as individual conservation easements begin to become either obsolete or an outright hindrance to the needs of an ever-evolving environment and community.[160] The rigidity with which conservation easements are formed actually threatens both their efficacy and legitimacy, and future generations may not be willing to tolerate them under evolving needs and circumstances.[161]

III. A NEW LOOK AT HOW CONSERVATION EASEMENTS ARE TREATED UNDER COMMON LAW PROPERTY DOCTRINES AND PRACTICAL ALTERNATIVES TO PERPETUAL ENCUMBRANCE

It should be laboriously reiterated that perpetual restrictions on land are not categorically without merit all the time. To take such a position would be to support the very kind of evil this Note addresses: excessive generalization about the merits of certain forms of conservation easements. Though it was not the topic of this Note, a good comparison might be addressed. One type of charitable donation under Internal Revenue Code Section 170(h) is a conservation easement on property of qualifying historic value. Like their environmentally-oriented counterparts, historic conservation donations must also be made in perpetuity to qualify for a deduction.[162] But perhaps that can be justified for different reasons than your average environmental conservation easement.

A perpetual limitation used to protect a historical landmark in a growing metropolitan area, for instance, can be appropriate because of the inherent value it brings to the community.[163] The social and cultural benefits that accrue to the people who pass by a historical site justifies the forgone economic development as the site meets higher community needs in the form of historical and cultural identity.[164] It is crucial to emphasize that the value of these protected, encumbered plots do not come from a city or state's arbitrary official designation of the property as having historical significance but essentially from its continuing and independent real-world cultural value. The restriction on use, alteration, development, and transferability in perpetuity remains justified for historical easements, though alternative uses might be imagined, such as to develop or change the property in a way that would be more economically "efficient" in the form of a new job center or middle-income housing.

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[160] *See* Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 608–11 (2004) ("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.").

[161] *Id.* at 608, 610–11, 618.

[162] I.R.C. § 170(h)(2)(C), (h)(4)(A)(iv) (2018).

[163] That's not to say especially in large metropolitan areas where there might be significant demand for land, as such a restriction is not without the cost of alternative beneficial uses for the land.

[164] *See* David A. Lewis, *Identifying and Avoiding Conflicts Between Historic Preservation and the Development of Renewable Energy*, 22 N.Y.U. ENVTL. L.J. 274, 287 (2015) (listing the great benefits of historical conservation).

Despite the costs of preserving these sites, there is little to no disproportionate conflict between common law principles and the preservation of property with historical value. The value of historical conservation easements is largely derived from their function and purpose of freezing a piece of property "in time." The historical easement's cultural value directly relies on the relative stasis of the use and historical form of the property. Because the value of such historic property is clear, continuous, and directly attributable to its perpetuity, the eventual opportunity costs of foregoing alternative uses is justified. This justification, which lies in the connection between perpetuity and the public interest, is far less likely to offend common law rules. Thus, as to conservation easements that protect historic property, the tax deduction from the transfer of such property under perpetual restriction is clearly justified, and the public investment in the maintenance of the easement is assuredly sound.

On the other hand, in regard to environmental conservation easements, the value of perpetual restraint must also be justified, particularly in terms of their assured ecological and environmental purposes, and the terms of the servitude must be designed to serve those ends. The goal of conservation easements, though they similarly restrict alteration or development, should not necessarily be to do as little with the land as possible, but, like a garden or museum, to actively prune and curate the covered land. Conservation easements are not currently subject to the common law doctrines limiting restrictions on property, but the policies underlying the doctrines should be a lens through which we now shape policy around environmental conservation easements and draft future easements. Because the common law smiles on the efficient and socially beneficial use of property, it will protect and uphold the creation of conservation easements that truly and directly serve the public interest.

To be clear, there are a significant number of conservation easements that have been curated and made available to the public, including bike trails, accessible nature preserves, and scenic attractions.[165] But even without direct community access or enjoyment, demonstrable environmental benefits can justify their existence.[166] The concern is the systemic incentivization of costly, inflexible restrictions, which are disconnected from the specific environmental needs of a particular ecosystem and community.[167]

It seems that one of the primary sources of the predictable disconnect between environmental benefits and perpetual restrictions is that much of the incentivization coming from federal tax policy is so centralized and standardized that it may fail to account for the peculiar environmental, economic, and community needs of a particular region or parcel of land. Rather, as discussed, by requiring conservation easements to be perpetual, our federal tax policy assumes from the start that perpetual restrictions are more effective at furthering the environmental and community benefits of a particular easement than more flexible arrangements.[168] It must have

[165] *See* Bray, *supra* note 11, at 161–66.

[166] *See* Lewis, *supra* note 164, at 289–90.

[167] *See* Cheever, *supra* note 62, at 433–35 (discussing "habitat particularity"); *see also* Nancy A. McLaughlin & Jeff Pidot, *Conservation Easement Enabling Statutes: Perspectives on Reform*, 3 UTAH L. REV. 811, 813 (2013).

[168] *See supra* Part I.

been further assumed by policymakers, perhaps unwittingly or in denial, that state common law will forever cede to the seemingly arbitrary exception carved out for conservation servitudes, and that the costs of forgone tax revenue and eventual transaction costs of altering these easements would be justified.

There are many highly creative solutions offered as of late that cannot be given due attention in this Note.[169] But I offer one primary solution—to mandate more consistent investigation into the costs and benefits of a perpetual duration, particularly whether perpetuity would serve the environmental ends that the public should come to expect of such heavy restriction. Otherwise, it is worth seriously reevaluating the common law exceptions made for conservation easements so that more effective and beneficial easements can be incentivized. Implementing such steps will require more involvement by state agencies and local volunteers, and possibly by private landowners especially, as well as more effective temporal requirements for federal deduction eligibility.[170] Models of state and community participation show that it is more important to consider what the public can do with land under a conservation easement in light of changing circumstances than the duration of the servitude is to be effective.[171] Such a reemphasis would likely lead to better outcomes and more resilient conservation easements. The combination of more flexible temporal terms and more involved environmental management strategies will lead to the greatest public benefit, among other factors of easement formation and administration.

Ultimately, when a greater public benefit is possible, the underlying common law policies will not be so affronted and the easement will more harmoniously exist in the surrounding policy context. The goal is to strike a healthy balance between the needs and desires of communities today and future communities, especially between current environmental issues and eventual public endeavors. To strike this balance, the bar for deduction qualification should be raised based on the quality of the donation and the specific donative purpose must better justify the costs borne by the public in maintaining the easement.

A. Reevaluation of the Common Law Exceptions Made for Conservation Easements

The exception made for conservation easements, as discussed, is grounded in an assumed public benefit.[172] But, in actuality, the perpetuity requirement makes an unrealistic, blanket overestimation of the value of perpetual servitudes held in gross and underestimates the costs and burdens to both present and future generations. No public benefit, even one as noble as preserving natural health and beauty, is so high as to be absolute or interminable. A call to reexamine the applicability of the foregoing common law doctrines to conservation easements is in order so that future generations do not bear the excessive costs of long-past donations of land

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[169] *See, e.g.*, Cheever, *supra* note 62, at 445–50; McLaughlin & Pidot, *supra* note 165, at 813–16, 821–25.

[170] *See infra* Section III.B.

[171] *See infra* Section III.C.

[172] *See supra* Section II.E.

purportedly made in the name of a good cause but more realistically for the immediate tax benefit of relatively few people.

In this reevaluation, it is necessary to keep the specific policies underlying the common law in mind so that environmental objectives can be reconciled with the common law of property. For instance, the Rule Against Perpetuities is guided primarily by the policy that dead-hand control of assets should be balanced against the interests of those it currently and eventually affects, the donor and the alleged beneficiaries of conservation easements in our case.[173] Because private land trusts are considered to hold land under a conservation easement in gross for the benefit of the community generally,[174] courts will soon have to balance the costs and benefits of maintaining conservation easements as challenges to their continuation and terms arise or as interested parties begin to find existing trust administration lacking. This is especially true for perpetual land trusts where the transferor of trust property has deceased and the "rigor mortis" of dead-hand control eventually sets in.[175] Recognizing the policy of balancing the interests of the dead with those living under different circumstances is the first priority of the RAP.[176]

Under the Rule Against Unreasonable Restraints on Alienation, the common law balances private and public interests for another policy reason: that "[t]o be enforceable, restraints against the alienation of land must be reasonable in view of the justifiable interests of the parties, and unreasonable restraints will be held invalid."[177] Therefore, "the validity or invalidity of a restraint depends upon its long-term effect on the improvement and marketability of the property."[178] In general, the heavier the restraint, the greater its justification must be to support its reasonableness and ultimate validity.[179] One of the factors that shows a restraint to be unreasonable is indefinite duration, i.e., perpetuity, even in light of other *valid* reasons for a restraint such as environmental conservation.[180]

Conservational purposes, as discussed, are generally considered, and understandably so, to be of such great public interest that the very category of conservation easements justifies severe restraint (such as perpetual burdens on land).[181] This exceptional treatment should not be taken for granted. As important as conservation efforts are, many other noble purposes, such as property allocated in trust for children's hospitals, biomedical research, and the assistance of indigent citizens, are all subject to reasonable ways of terminating or altering the terms

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[173] *See supra* note 129 and accompanying text.

[174] *See* NANCY A. MCLAUGHLIN, UNIF. LAW COMM'N, UNIFORM CONSERVATION EASEMENT ACT STUDY COMMITTEE BACKGROUND REPORT 1 (2017), https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1123&context=scholarship [https://perma.cc/76NS-SY6E].

[175] *See supra* note 111.

[176] *See supra* Section II.C.

[177] 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 90 (2019) (citing Horse Pond Fish & Game Club, Inc. v. Cormier, 581 A.2d 478 (1990)).

[178] *Id.*

[179] Alfaro v. Cmty. Hous. Imp. Sys. & Planning Ass'n, 124 Cal. Rptr. 3d 271, 290 (Cal. Ct. App. 2009) (quoting City of Oceanside v. McKenna, 264 Cal. Rptr. 275, 279 (Cal. Ct. App. 1989)).

[180] *See* RESTATEMENT (FIRST) OF PROP. § 406 cmt. i (AM. LAW INST. 1944).

[181] *See supra* Section II.E.

burdening alienability of property, land in particular.[182] We can agree that donations for these purposes deserve higher protection in the form of higher thresholds for finding unreasonableness, but not so unlimited and inflexible as to categorically enforce restraints on alienability, marketability, and use in perpetuity, at least not without regard to the varying conservational value of particular parcels. The legitimacy and longevity of such restraints, perhaps counterintuitively, will rely on their limitation and flexibility, not their rigid perpetuity. The strength of the conservation easement as an institution depends, in part, on established connection to environmental conservation efforts.

B. *Ways to Reconcile Environmental Objectives with Common Law Principles While Bolstering the Legitimacy of Conservation Easements*

The turn of the century saw an upsurge of concern regarding climate change and ecological conservation, with focus in large part on human activity and its effect on ecological change.[183] As a result, many specific efforts began in response, and with some remarkable success.[184] It is necessary in the course of both conservational and rehabilitative environmental efforts to determine specific areas of need and to devote resources efficiently towards specific goals. Not generally characteristic of those successful policy efforts is the implementation of arbitrary standards and timelines.

Aside from completely rethinking the relatively disinterested, hands-off approach of requiring standard terms like blanket perpetuity, states and localities should be more involved in (1) evaluating the statement of express, specific objectives for a particular donation as the conservation easement is being considered for creation and (2) pursuing investigations through cooperation between expert land trusts, universities, and state environmental agencies to determine the legitimate necessity of the easement and, in particular, an empirically supported duration for the servitude. Most specifically, these two requirements should consider the time it will take to accomplish the easement's specific objectives. The current practice of rewarding only perpetual restriction does not take adequate account of the conservational value of a particular parcel of land.[185] What should be emphasized is

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[182] *Cf.* UNIF. TRUST CODE § 412 (UNIF. LAW COMM'N 2000).

[183] The publication of *Silent Spring* by Rachel Carson in 1962 is seen as a critical turning point in American conservation and environmentalism in the mid-twentieth century. *See* Bray, *supra* note 11, at 127; *see generally* RACHEL CARSON, SILENT SPRING (3rd prtg. 1962). You see an increase in conservation easement donations around this time. Bray, *supra* note 11, at 127–28.

[184] One such example is in the reclamation of strip mines, many of which are found in eastern and western Kentucky. In part mandated or incentivized by the Surface Mining Control and Reclamation Act of 1977 (SMCRA), but also initiated in partnership between state and non-profit actors, new measures were introduced to return land mutilated by coal surface mining to a state habitable by wildlife. Not only have these reclamation efforts been successful, they have actually created new habitats for vulnerable non-native species and have allowed for the expansion of new, vibrant ecosystems. *See generally* Sarah Lazarovic, *How to Restore a Million Acres of Strip-Mined Land? Bring in the Elk*, YES! (Mar. 18, 2019), https://www.yesmagazine.org/issue/dirt/2019/04/13/land-recovery-elk-wildlife-habitat-appalachia/ [https://perma.cc/RN3K-CVB8] (discussing the massive 16-county initiative to introduce elk to the eastern Kentucky region, among other similar efforts).

[185] *See* Owley, *supra* note 156, at 151 ("Current conservation easement use rarely involves holistic planning or adaptive management.").

that the end to perpetual easements altogethr is not a reform that is called for, but rather a shift to implement proper timelines for achieving an environmental objective for a given parcel. This is not a demand that people establish deadlines for completion of an environmental objective but a suggestion to use time frames, should they be applicable, verified by a reviewing entity, preferably local, to determine and encourage expedient progress towards a specified environmental goal. What is expected from this reform would be a reconciliation of the common law and our more common restrictions on land with the effect that conservation easements will, in general, become more insulated from foreseeable challenges. Rather than giving courts a reason to invalidate an easement for imposing an excessive and unreasonable temporal restriction, [186] conservation easements should be more thoughtfully connected to the purpose of their restrictive nature.

An express statement of how an environmental goal relates to a servitude's temporal effect provides a clearer, more particular purpose for the donation, prevents the public subsidization of relatively unimportant or non-beneficial parcels of land, and solidifies concrete goals with a realistic timeline. Eventual critics of environmental efforts, such as a developer who might eventually challenge the necessity of a conservational servitude, gain an advantage when environmentalists fail to articulate locally relevant, specific, and concrete objectives for the restriction. Putting yourself in the position of a judge, consider which of the following options sounds more reasonable and valuable:

> (A) "The terms of this qualifying conservation easement are to have perpetual effect, not subject to change as long as this restriction exists in perpetuity. This land shall not be sold, alienated, or used for [V, W, X, Y, Z purposes]." Assume some such prohibited purposes (V through Z), while carrying environmental costs, have social and economic benefits. Also assume that at the time the easement is challenged it serves little or no remaining public interest based in part on its location near a growing rural population and because of its relatively inconsequential ecological value. Assume finally that under current circumstances not foreseen by the land's initial grantor, the community would be more benefited by its development or through the pursuit of some alternative management or use.
>
> or
>
> (B) "This conservation easement shall be effective for a term of fifty (50) years beginning at transfer, subject to the state or municipal government body tasked with reviewing the management and environmental need of the servitude. During that time, this land shall be held in trust, subject to oversight by the pertinent government body to ensure that its environmental purpose is being actively met. This servitude has been granted subject to eventual review at the end of its term, though it is being granted with the expectation [perhaps the assumption] that the reviewing

[186] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. LAW INST. 2000) ("Through legislation and decisions, use restrictions are now invalidated if they are arbitrary or unreasonable.").

> body will prolong/reinstate its effective date by at least another fifty (50) years. Of particular but not sole import, this easement is granted for the rehabilitation of [X, Y, and Z native species found on this *specific* donated parcel], which is essential to the balance of [Region/State's] ecological state, agricultural productivity, and recreational/tourismq value. (cites several scientifically substantiated reasons). For this reason, in our analysis of similar conservational efforts, we believe that this fifty-year term is necessary to achieve the rehabilitation of these species and to ensure the public benefit of this land. Upon reevaluation, which should consider the sort of changes or development of the land that would be compatible with the easement's purpose, renewal for a similar 50-year term is permitted when the following are demonstrated: [A, B, and C specific, scientifically substantiated reasons]." Assume that at the time of review fifty years later, there may be some economic benefit to the land's development or alternative use, but the progress made in those fifty years of existence are of sufficient popular benefit that a reviewing body finds both significant environmental progress and substantial public support for the easement's continuation.

Example (A) is arguably what is currently encouraged, and it should be noted how highly vulnerable it can be to an eventual challenge for the lack of a specific, dynamic purpose. It is characterized by a disconnection between the specific conservational goal and the duration of the servitude in its region.[187] Perhaps more subtly, its inflexibility is more likely to impress those in the future with a sense of imposition rather than of possibility and purpose. The arrangement could be made stronger by connecting its perpetuity with a reason for that temporal effect. Something as simple as natural beauty, the desire of the public to avoid blotchy development at the foot of a pristine mountain range, for instance, could amply justify an extremely long-term restriction.[188] As with a historic landmark, a particular parcel of land might have significant enough scenic value alone to justify the restriction. It need not confer some grand, far-reaching ecological benefit.

Example (B) is much less vulnerable than (A) because it clearly expresses how it is a source of environmental and public benefit and connects that benefit to a substantiated time frame to meet that end. It should ideally state the specific means and expectations for the easement, which include more than just environmental benefits, if possible. In addition, flexibility in terms of duration and particular terms should be encouraged by interested government and community entities, rather than be denied subsidization as it would be under today's tax and environmental policy. The language and specificity of (B) allows those who would challenge the easement to wait until the end of the term when review is due and provides such interested parties an opportunity to cleanly and efficiently challenge the easement if happened to fail to meet the easement's express purposes. In theory, these effects should also act as an incentive for the easement holder to manage land in accordance with the instrument's pro-environmental terms.

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[187] *See* Cheever, *supra* note 62, at 432–33 (discussing "habitat particularity").

[188] Indeed, it is already a qualifying conservational purpose in the tax code. I.R.C. § 170(h)(4)(A)(iii)(I) (2018).

C. A Case of Community Involvement and its Connection to Environmental Progress: A Kentucky Success Story

In Kentucky, Shaker Village of Pleasant Hill was an exciting project in which an unproductive beef pastureland operation was turned around to halt the significant population decline of a delicate native species, the Northern Bobwhite Quail.[189] Over the course of ten years,[190] the Kentucky Department of Fish and Wildlife Resources (KDFWR) and the Natural Resources and Conservation Service (NRCS), among other environmental agencies, successfully restored the valuable and rare prairie habitat, along with the natural grassland in which quail can reproduce and thrive, and which there are now a sufficient number to allow hunting.[191]

There was an initial comprehensive analysis of how the Northern Bobwhite Quail might return to various regions of Kentucky.[192] The specific goals and means of quail population rehabilitation would look very different in the flatter western portion of the state, where the grasses quail need grow more readily than in other potential Bobwhite habitats.[193] For instance, in the eastern portion of the state, where the dense, hilly forestation of the Appalachian Mountains ordinarily provides scant opportunity for resettlement of these prairie animals, an unlikely suspect, reclaimed and abandoned coal mines, provided fortuitous opportunities for restoration and conservation of quail populations.[194] Many individuals in eastern Kentucky now report hearing quail calls[195]—calls they likely have not heard in decades, if ever.

As a result of this and many other successful cultural and environmental efforts, "Shaker Village has become a research station for local, state and federal conservation partners."[196] The question is: If the conservational efforts of Shaker Village, or even a reclaimed mine in eastern Kentucky, were subject to a conservation easement that was created with a fifty-year review period, would the continuation of the conservation efforts be more or less vulnerable than if the easement were granted in perpetuity? For the reasons above, in this case, it seems clear that it would be less vulnerable, and environmental and community interests would be renewed semi-centennially as long as the conservation efforts were continued. This is because the temporal restriction has a meaningful, rational connection to the purported purpose of such a restriction, justifying any alternative

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[189] *See Land Conservation*, SHAKER VILLAGE, https://shakervillageky.org/land-conservation/ [https://perma.cc/F4HJ-RPXP].

[190] *The Preserve*, SHAKER VILLAGE, https://shakervillageky.org/the-preserve/ [https://perma.cc/2UHL-MWBA].

[191] *Land Conservation*, *supra* note 189.

[192] *See generally* JOHN J. MORGAN & BEN A. ROBINSON, KY. DEP'T FISH & WILDLIFE RESOURCES, ROAD TO RECOVERY: THE BLUEPRINT FOR RESTORING THE NORTHERN BOBWHITE IN KENTUCKY 5–7 (2008), https://fw.ky.gov/Hunt/Documents/quailplan08.pdf [https://perma.cc/N8NW-87SX] (outlining a ten-year restoration plan).

[193] *Id.* at 17–18.

[194] *Id.*

[195] Seth Lamar, *Quail Comeback of Kentucky*, GOLD STANDARD (Nov. 28, 2011, 3:21 PM), https://www.fkgoldstandard.com/content/quail-comeback-kentucky [https://perma.cc/QUN4-RUDC]. For those curious to hear what a bobwhite mating call sounds like, it can be enjoyed at the following link: https://fw.ky.gov/Hunt/mp3/Bobwhite.mp3.

[196] *Land Conservation*, *supra* note 189.

forgone benefit. Yet, the careful efforts and demonstrated success of such a restriction can be said to be so remarkable that even a substantial temporal restriction on the use of such property, say, in perpetuity, would be justified and enforced, perhaps even as long as the success persisted under the restriction.

What would likely happen if developers or adversely interested parties wished to challenge certain restrictions on ownership or transfer of the land? Sufficient public opposition to be sure,[197] but likely also a court that recognizes the legitimate, protectable connection between concrete conservational goals, the role of the land used for those goals, and its connection to the *temporal requirements* of meeting those goals. Even if our hypothetical servitude were subject to renewal, its evident popularity would be a force for renewal, and the public could be relied on to prevent the kind of development that initially forced the public to intervene and begin rehabilitation, particularly destructive industrial farming.[198] The public benefit to the community, Bobwhite hunters, tourists, local ecosystems, and natural beauty were shown to bear a legitimate connection to the project time-frame,[199] making it much harder to challenge under common law doctrines, even if it were renewed or ultimately held in perpetuity under the same relatively severe restriction.[200]

Remember what suggestions were made for conditional qualification and formation of conservation easements: (1) specific objectives associated with the temporal aspect of the restriction and (2) thorough, scientifically substantiated means of meeting those objectives within that concrete time-frame. *The Road to Recovery* demonstrates *precisely* that successful approach.[201] It states the specific problem—quail population decline, among other significant environmental needs—and provides a scientifically substantiated ten-year timeline for the implementation of a state-wide effort tailored to different regions.[202] The result: absolute success,[203] but no apparent thanks to any perpetual term of the grant. In other words, the success was achieved independent of an unlimited time-frame. A sophisticated plan was established, diligent and measured effort was taken during that time in stages, and organizations well-suited to make active progress were gathered to prosecute the effort. Progress was made in a decade, and the benefit of that success was so strong that its permanent protection would be wholly justifiable. It was not the authority to perpetually encumber land that would lead to success; it was what was specifically done with the land in a projected timeframe that justified any resulting social costs of the project.

The effort made in Kentucky to rehabilitate the Northern Bobwhite Quail population is an excellent example of success that owes itself to careful, particularized goals based in a scientific understanding of why that species

[197] *See* Rissman, *supra* note 12 ("Several land trusts benefited from involving community members and local government officials as 'watchful neighbors' who helped monitor land trust properties.").

[198] *See* MORGAN & ROBINSON, *supra* note 192, at 2, 4.

[199] *See id.* at 7, 30–31.

[200] See generally James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69 (2009), for an argument that land trusts are an effective vehicle for developing a sense of community.

[201] MORGAN & ROBINSON, *supra* note 192, at 6–8, 30–31.

[202] *Id.* at 4–6, 17–19, 30–31.

[203] See *Land Conservation*, *supra* note 189, for a summary of the various successes during the collaborative conservation and habitat restoration effort.

experienced such a marked decline in native numbers to the point that the quail had all but disappeared entirely in other regions. Notably, the plan to help quail populations focused on the vast variety and quality of resulting social benefits, set specific timelines to monitor and promote the success of the plan, and specified the regions of Kentucky that would most efficiently contribute to the restoration.[204] Not once was it emphasized that the success of this program required perpetual restrictions, even though it may have been incidentally executed partially on lands held under perpetual restriction.

The Kentucky case is a useful one to look to, not only because of the restoration plan's great success but also, for our purposes, because the territory of Kentucky contains many different regions and ecosystems with varying needs.[205] The plan inherently acknowledges this reality.[206] What the restoration plan clearly accounts for is the vastly different needs of a particular ecological entity, like the Northern Bobwhite, as it relates to a particular geographical and ecological situation. For instance, while the plan sees conservation grants and easements as a potentially valuable, perhaps even necessary, element of the rehabilitation plan, it sought only to focus conservation efforts on lands that would actually contribute to the Bobwhite population's rehabilitation.[207] Not all land in Kentucky has the same potential to contribute to that end, as the former prairies in which the Northern Bobwhite thrived in the past are not seen in every region of the Bluegrass State. For instance, it would make no sense for Kentucky's Conservation Reserve Program to arrange state subsidization of a perpetual restriction on a strip of land along the Ohio River in the hilly, more urbanized terrain of Covington, Kentucky where the Northern Bobwhite has not and is for now unlikely to exist due to denser forestation and concentrated human populations.[208] Perhaps there is another conceivable environmental objective to connect that land to, but not for quail rehabilitation.

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[204] MORGAN & ROBINSON, *supra* note 192, at 7, 20–31.

[205] For instance, the city of Berea, Kentucky sits at the foot of the Cumberland Plateau, at the outer edge of the Eastern Kentucky Coal Field. Berea's mountainous appearance comes from its geographical situation, against the backdrop of the Appalachian Mountains, with a maximum elevation of 1660+ feet above sea level at Bear Mountain. *Bear Mountain, Kentucky*, PEAKBAGGER.COM, https://www.peakbagger.com/peak.aspx?pid=7408 [https://perma.cc/V7RF-HDGX]. In contrast, less than 40 miles north in Lexington, Kentucky, sitting within the inner-Bluegrass region, the world-famous, horse-farm-dotted, rolling hills are scattered among more subdued geography, characterized by soil rich in limestone and land reaching a maximum altitude of 1069 feet above sea level. *Fayette County High Point, Kentucky*, PEAKBAGGER.COM, https://www.peakbagger.com/peak.aspx?pid=23346 [https://perma.cc/ZL5T-ZPYM].

[206] MORGAN & ROBINSON, *supra* note 192, at 17–19.

[207] *Id.* at 12.

[208] *Cf.* *Bobwhite Quail Management*, TEXAS PARKS & WILDLIFE, https://tpwd.texas.gov/landwater/land/habitats/high_plains/upland_game/bobwhite.phtml [https://perma.cc/5UA9-GF77] (discussing the ideal quail habitat under heading "Habitat") ("[Quail] prefer habitats with a mixture of grassland, cropland, brushy areas and woodland interspersed to provide abundant areas of "edge," which include the margins of habitats where two or more cover types come together."). It is for this reason that such lands may not even be eligible for a federal tax deduction due to a failure to apply to land constituting "a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem." I.R.C. § 170(h)(4)(A)(ii) (2018). In a regulation, the Department of the Treasury elaborated on what is meant by "relatively natural habitat" in section 170(h). Treas. Reg. § 1.170A-14(d)(3) (2019).

For the specific purpose of bringing back the Northern Bobwhite, such a conservation grant would be meaningless, or worse, deleterious to the cause, as it would syphon away scarce resources from an otherwise effective and targeted environmental agenda. A perpetuity clause may have only exacerbated that problem. Dubbing the grant a conservation easement and attempting to arbitrarily immunize it from subsequent challenges under the common law cannot be forever effective against such challenges when interested parties in the future might realize greater public benefit in alternative land use. To protect such an easement because its terms state its perpetual effect would merely delegitimize otherwise valuable conservational efforts through the acceptance of conservation easements that rely on circumstantially unnecessary and useless restrictions. Without an actual, legitimate, and specific reason to burden the alienability and use of particular lands in a demonstrably beneficial way, like a targeted environmental objective and purposeful time frame, any future challenges are more likely to be successful.

CONCLUSION

Establishing an actual, specific nexus between a particular restriction on land use and the purported environmental end can help to justify an otherwise severe limitation on land use and alienation. Because blanket perpetuity requirements are likely to create, rather than prevent, future opportunities for lateral attack on conservation easements under the common law, interested parties should strongly consider how they link temporal conditions, whether in perpetuity or in set terms, with a proportionate environmental need. Our current tax policy neither encourages this nor allows it, at least for landowners motivated by tax benefits, because perpetuity is a requirement for the charitable deduction. Such proportionality will be best evidenced by scientifically based investigations as a condition to and pursuant to grant-instrument creation. The federal government in particular should reevaluate the states' ability to severely restrict land use over extended periods of time. This is especially true because this deduction-for-perpetuity arrangement acts as an indirect public investment with a seriously uncertain long-term return for reasons just discussed. Until such adjustments are made to the tax code and to national environmental policy generally, community and government support for conservation easements will diminish over time as existing conservation easements with otherwise great potential are individually challenged and possibly defeated, all because of the false and arbitrary assumption that conservation easements were so special that they could be sustained in perpetuity. For the reasons discussed previously, this Note is offered as a voice in support of reevaluating section 170(h) deduction requirements and the perpetual restrictions mandated thereunder.