GLOBALIZING CONSERVATION EASEMENTS: PRIVATE LAW APPROACHES FOR INTERNATIONAL ENVIRONMENTAL PROTECTION

GERALD KORNGOLD*

For the past thirty years, nonprofit organizations have revolutionized open space and habitat conservation in the United States through the use of conservation easements. Pursuant to legislation, nonprofits may now acquire and hold perpetual restrictions that prevent alteration of the subject land's natural and ecological features. These rights can be held "in gross," with the result that the nonprofit need not own land near the restricted property and can be based in a distant location.

Based on this success, proponents in more recent years have advocated the export of "conservation easements" from the United States to other countries. A vehicle like a conservation easement, having some or even perhaps all of its attributes, could be employed in other countries to achieve various local and national conservation goals. My thesis, however, is that while conservation easements could be a useful tool for preservation of land outside of the United States, they may not be the most effective or suitable framework to advance conservation in all countries. Rather than pushing for adoption of an American-style "conservation easement" elsewhere, other countries and American (and global) advocates of conservation devices should engage in a process to determine a given country's appropriate conservation toolbox. That process should be free of American legal and conservation jargon and without a predisposition for U.S. legal structures, values, and policy choices. Each country must determine on its own whether private conservation restrictions meet its economic, social, and political realities and aspirations (many of which are quite different than the American experience reflected in U.S. conservation easements) and which attributes the device should have on key issues such as duration, in gross enforcement, role of government, etc. These national and local goals can then be given life by finding an appropriate legal structure, ideally consistent with the country's own jurisprudence and system.

This article will provide a framework of the major policy and legal issues that could, and in my view should, inform a country's decision to adopt private conservation restrictions. These include considerations of cost, efficiency, preference for private versus governmental actors, the benefits and costs of perpetual limits on land, public regulation of land as an alternative, the specter of neocolonialism in environmental controls, the nature and capacity of the country's nonprofit sector, and the local legal system. Finally, the learning about conservation restrictions should be a two-way street, not just the export of American methods: the views of some other countries about governmental involvement in private conservation may teach valuable lessons to U.S. jurisdictions about the need for an increased role of government and the public in certain aspects of the selection, modification, and termination of some conservation easements.

INTRODUCTION

For the past thirty years, nonprofit organizations have revolutionized open space and habitat conservation in the United States through the use of conservation easements. Pursuant to legislation in all states, nonprofits (NPOs) have been authorized to acquire and hold perpetual restrictions that prevent alteration of the subject land's natural and ecological features.[1] These rights can be held "in gross," with the result that the nonprofit owning the conservation easement need not own land near the restricted property and can be based in a distant location. Between 2000 and 2005, land owned by (nonprofit) land trusts increased 48 percent to a total of 1.7 million acres while, during that period, land trusts increased their conservation easement holdings to 3.7 million acres

* Professor of Law, New York Law School; Visiting Fellow, Lincoln Institute of Land Policy, Cambridge, Massachusetts. © Gerald Korngold 2010. Email: gkorngold@nyls.edu; Tel: 212-431-2154.

1 *See* discussion *infra* Part I.A, I.B (describing the attributes of conservation easements).

for an increase of 148 percent.[2] Conservation easements in gross have presented a lower-cost, effective, far-reaching American conservation tool.

Based on this success, in more recent years, proponents have advocated the export of conservation easements from the United States to other countries, specifically calling for or reporting on the establishment of "conservation easements" abroad.[3] A vehicle like a conservation easement and having some or perhaps all of its attributes could be employed in other countries to achieve various local and national conservation goals. For example, conservation restrictions could be used for watershed protection, thus preserving drinking water; habitat and biodiversity conservation, safeguarding threatened species for psychic or aesthetic enjoyment or perhaps for economically beneficial ecotourism or controlled harvesting of wildlife and plants;[4] open space preservation,

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[2] ROB ALDRICH & JAMES WYERMAN, LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT 8 (2006), http://www.landtrustalliance.org/land-trusts/land-trust-census/2005-national-land-trust-census/2005-report.pdf. *See infra* Part I.C (discussing additional data on conservation easements).

[3] *See* JOANNA COPE, THE CONVENTIONAL WISDOM ON CONSERVATION EASEMENTS IN LATIN AMERICA (2005), *available at* http://*www.ibcperu.org/doc/isis/8380.pdf;* WORLD BANK, WORLD DEVELOPMENT REPORT 2003: SUSTAINABLE DEVELOPMENT IN A DYNAMIC WORLD 131, 171 (2003), http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/09/06/000094946_02082404015854/Rendered/PDF/multi0page.pdf (discussing environmental and conservation easements for urban and natural areas); *Paraguay*, USAID, http://www.usaid.gov/locations/latin_america_caribbean/environment/country/paraguay.html (last updated Nov.13, 2009); *Global Climate Change: Country and Regional Information*, USAID, http://www.usaid.gov/our_work/environment/climate/country_nar/paraguay.html (last updated March 11, 2009) (describing USAID's assistance in introducing "conservation easements" to Paraguay); *Spectacular Hummingbird Protected by First Conservation Easement in Northern Peru*, AMERICAN BIRD CONSERVANCY (July 18, 2006), http://www.abcbirds.org/newsandreports/releases/060718.html; INT'L UNION FOR CONSERVATION OF NATURE & WORLD LAND TRUST, RECORD OF PROCEEDINGS: LAND PURCHASE AS AN INTERVENTION STRATEGY FOR BIODIVERSITY CONSERVATION 15, 23 (Sept. 24–28, 2006), http://www.worldlandtrust.org/landpurchase/pdf/2006%20Symposium%20Proceedings.pdf (suggesting that use of conservation easements helps combat corruption); *see also infra* Part III.C.1 (arguing that the various interests described as conservation easements do not actually meet the definition as defined in this article).

[4] *See* Anastasia Telesetsky, *Graun Bilong Mipela Na Mipela No Tromweim*: *The Viability of International Conservation Easements to Protect Papua New Guinea's Declining Biodiversity*, 13 GEO. INT'L ENVTL. L. REV. 735, 760 (2000-2001); Elizabeth Garland, *The Elephant in the Room: Confronting the Colonial Character of Wildlife Conservation in Africa,* AFR. STUD. REV., Dec. 2008, at 51, 62 (describing efforts of rural African communities "to assert their right to exploit wildlife through community-based conservation and tourism projects"); THE NATURE CONSERVANCY, CUATROCIÉNEGAS, MEXICO: PARKS IN PERIL END-OF-PROJECT REPORT 3 (2007), http://www.parksinperil.org/files/cuatro2b.pdf (describing need for habitat, biodiversity, and species protection in Mexican state of Coahuila); WORLD BANK, *supra* note 3, at 163–64 (giving various examples of threats to habitats and biodiversity across the world); *see also* Ralph Blumenthal, *Texas Proceeding With Plan to Auction Nature Preserve*, N.Y. TIMES, Nov. 3,

providing views and needed breaks in a developed or developing landscape; soil conservation, preventing loss of key farmland through deforestation, certain farming practices, and other activities;[5] or carbon sequestration, to meet national or global goals and perhaps for compensation from other countries or actors.[6] Conservation restrictions may also be used to address cross border concerns, such as preserving habitat in various countries along the path of migrating birds.[7] Moreover, the preservation of habitat and views may serve cultural, heritage, and intergenerational imperatives within a given country.

My thesis, however, is that while conservation easements *could* be a useful tool for preservation of land outside of the United States, they may not be the most effective or suitable framework to advance conservation restrictions in all countries. Rather than pushing for adoption of an American-style "conservation easement" elsewhere, other countries and American (and global) advocates of conservation devices should engage in a process to determine a given country's appropriate conservation toolbox. That process should be free of American legal and conservation jargon and without a predisposition for American legal structures, values, and policy choices. The U.S. conservation easement is useful, however, as a model to examine many of the policy and legal issues that arise whenever adopting private, perpetual, nonpossessory conservation restrictions on land of another. But each country must determine on its own whether or not private conservation restrictions meet their economic, social, and political realities and aspirations (many of which are quite different than the American experience reflected in American conservation easements) and what attributes the device should have on key issues such as duration, in gross enforcement, role of government, etc. These national and local goals can then be given life by finding an appropriate legal structure, ideally consistent with the country's own jurisprudence and system.

2007, at A12 (discussing a conservation easement permitting hunting "to maintain a sustainable population of healthy native species").

5 *See* Robert Mitchell, *Property Rights and Environmentally Sound Management of Farmland and Forests, in* LAND LAW REFORM: ACHIEVING DEVELOPMENT POLICY OBJECTIVES 175, 176 (John W. Bruce et al. eds., 2006) (explaining need for soil conservation).

6 *See* Susan Subak, *Forest Protection and Reforestation in Costa Rica: Evaluation of a Clean Development Mechanism Prototype,* 26 ENVTL. MGMT. 283, 283 (2000) (describing carbon offset purchases in Costa Rica).

7 *See* AMERICAN BIRD CONSERVANCY, *supra* note 3; *Land Protection Programs*, DUCKS UNLIMITED, http://www.ducks.org/conservation/land-protection (last visited May 19, 2011).

This article will provide an analytical framework for the major policy and legal issues that could, and in my view should, inform a nation's decision to adopt private conservation restrictions. These include cost, efficiency, preference for private versus governmental actors, the benefits and costs of perpetual limits on land, and public land use regulation as an alternative. Moreover, specific issues related to other countries are examined: the tradeoff between development and conservation, the specter of neocolonialism in exporting conservation methods and values, the mission and capacity of the NPO sector, and the legal system. I argue that adopting an American off-the-shelf "conservation easement" model that is inconsistent with a country's needs and culture will make it less likely that the conservation goals will actually be achieved and become more real than words on paper. Finally, I demonstrate that the learning about conservation restrictions should be a two-way street, not just the export of American methods: the views of some other countries about governmental involvement in private conservation may teach valuable lessons to American jurisdictions about the need for an increased role of government and the public in certain aspects of the selection, modification, and termination of some conservation easements.

I make two disclaimers up front. First, this article and my other writings support the use of private conservation easements *in the United States*; my critique and suggested changes in U.S. law are intended to make these interests more effective for current and future generations.[8] Second, I do not pretend to have expertise in the law of the over two-hundred countries that might consider adoption of private conservation restrictions. Rather, this article seeks to raise the questions that countries might, and in my view should, consider when deciding whether to take such a path. In exploring the issues, I refer to the law of some specific countries for illustrative purposes.

Part I discusses conservation easements in the United States and their attributes, legal validity, and proliferation. Then, Part II critically examines the policy framework inherent in conservation easements and alternative private land restrictions that other nations may contemplate. This Part explores efficiency benefits, cost issues, the advantages and disadvantages in nonprofit as opposed to governmental ownership, the blessings and burdens of perpetuity, and the alternative of conservation regulation as opposed to acquisition of a property interest. Part III

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[8] *See* source cited *infra* note 11.

assesses additional considerations for other countries in considering private conservation restrictions: whether their NPO sectors are willing and able to take on acquisition and stewardship of conservation interests, concerns about colonialism in adopting the policy and legal structure of conservation easements in lieu of development, and civil law and other domestic legal roadblocks to instituting conservation easements. Part IV critiques and compares, in light of the policy considerations that the article develops, some alternatives to U.S.-style conservation easements (such as payments for environmental services, usufruct, leases, etc.) that other countries could employ to impose private conservation restraints. Finally, Part V discusses the experience of non-U.S. common law nations in adopting conservation easements, and how differences and similarities to the U.S. form reflect those countries' policy choices.

I. CONSERVATION EASEMENTS IN THE UNITED STATES

Conservation easements have emerged in the United States over the past thirty years as an essential vehicle for private efforts in the preservation of ecological and environmental features of land.[9] This section will discuss the key attributes of private conservation easements in the American experience, the legal issues involved in their validation, and the (limited) data on the number of such restrictions.

A. ATTRIBUTES

A definition of a private conservation in gross is essential to understand these interests as well as the variables that can be adjusted when creating alternate conservation restrictions. The features of private conservation easements in gross are:

- a private interest, i.e., held by a nonprofit organization rather than a governmental entity[10]

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[9] *See infra* Part I.A, I.C.

[10] For examples of governmental conservation easements see, e.g., Harris v. United States, 19 F.3d 1090, 1092 (5th Cir. 1994) (discussing federal Farmers Home Administration placing conservation easements on property at urging of Fish and Wildlife Service); Mira Mar Mobile Cmty. v. City of Oceanside, 14 Cal. Rptr. 3d 308, 318–19 (Cal. Ct. App. 2004) (stating that city required conservation easements to mitigate impact of proposed building project); Conservation Law Found., Inc. v. Town of Lincolnville, 786 A.2d 616, 618–20 (Me. 2001) (stating that the town's conditioning subdivision plans on developer granting conservation easement was permitted); *see also* Frederick W. Cubbage & David H. Newman, *Forest Policy Reformed: A United States Perspective,* 9 FOREST POL'Y & ECON. 261, 270 (2005) (noting that there is ongoing use of conservation easements by federal forest programs); Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin's Great River Road: A Progress Report on*

- restricts the owner of the servient (i.e., burdened) land from altering the environmental features of the property, and is enforceable by the nonprofit organization[11]
- a "less-than-fee" interest (i.e., a limited, nonpossessory, enforcement right), with the servient owner otherwise retaining fee ownership of and rights to the land[12]
- "in gross," i.e., the nonprofit owner of the easement does not need to own land near the servient property in order to enforce the easement and the nonprofit can be located far away from the servient land (i.e., no appurtenancy requirement)[13]
- perpetual, or at least capable of perpetual ownership
- a property interest in the holder, i.e., assertable *in rem* against the land itself and not merely a contractual obligation of the servient (aka burdened) owner
- binding on successor owners of the servient property
- assignable as a property right to other nonprofits or governmental entities
- created voluntarily by the parties, not by governmental compulsion

The conservation easement developed in the United States as a response in part to an increased environmental consciousness of the citizenry in light of urban, suburban, and commercial expansion threatening pristine sites, as well as a desire for a private (i.e., non-governmental) land interest that could promote conservation values.[14]

Perpetuity, 66 J. AM. PLANNING ASS'N 177, 177–78 (2000) (reporting the state of Wisconsin's creation of conservation easements adjacent to the Mississippi River in the 1950s and 1960s).

[11] GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES § 2.02 (2d ed. 2004).

[12] KORNGOLD, *supra* note 11, § 2.01 (the terms "fee" or "fee simple absolute" refer to the maximum ownership interest under the Anglo-American legal system, allowing for perpetual, fully transferable, inheritable, and devisable tenure, giving full rights of possession and power to exclude others. The use of the term "fee" herein is meant to include analogs within other legal systems that grant maximum land ownership rights); *see generally* UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 77 (2000).

[13] KORNGOLD, *supra* note 11, § 2.03.

[14] *See* Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements,* 34 HARV. ENVTL. L. REV. 119, 125–31 (2010) (explaining that modern conservation easement movement was part of American environmental awakening).

The concept of "conservation easement" first appeared in the late 1950s in the United States and has become legally and popularly accepted over the years.[15] Conservation easements restrict the owner of a property from altering the environmental, ecological, natural, open, or scenic features of the land.[16] The goal is to preserve the subject land in its current condition, free from additional development or degradation of natural features. Easement documents often provide a general statement of purpose to protect the property's natural attributes and then bind the owner not to take actions that would interfere with this purpose.[17] Additionally, easements include clauses barring specific actions by the owner such as subdivision of the parcel and the erection of new

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[15] William H. Whyte, Jr. popularized if not coined the phrase, and was an early proponent. *See* WILLIAM H. WHYTE, JR., *Securing Open Space for Urban America: Conservation Easements* (1959), *reprinted in* THE ESSENTIAL WILLIAM H. WHYTE 141, 143 (Albert LaFarge ed., 2000). Early influential legal writers and supporters of conservation easements included Russell Brenneman. *See* RUSSELL BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND 20 (1967); Roger Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENV. L.J. 167, 168 (1968). See RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA (2003), for a history of the land trust movement and its work on conservation easements. For prior work on the conservation easements, 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 (1984) for prior work on the conservation easements [hereinafter *Conservation Servitudes*]; Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 Utah L. Rev. 1039 (2007) [hereinafter *Contentious Issues*]. For other articles on conservation easements, *see* James Boyd et al., *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVT'L L.J. 209 (2000); 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 (1996); Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043 (2006); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVT'L. L. REV. 421 (2005); Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373 (2001); Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U. L. REV. 373 (2001); Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements Over Public Land*, 77 U. CHI. L. REV. 341 (2010); Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897 (2008); Julia D. Mahoney, *Land Preservation and Institutional Design*, 23 J. ENVTL. L. & LITIG. 433, 433 (2008); James L. Olmstead, *Representing Nonconcurrent Generations: The Problem of Now*, 23 J. ENVTL. L. & LITIG. 451, 458–59 (2008).

[16] UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 174 (1981).

[17] *See, e.g.*, Glass v. Comm'r, 471 F.3d 698, 703 (6th Cir. 2006).

buildings,[18] interference with the soil and drainage,[19] removal of timber, the building of roads, storage of trash, and use of certain vehicles.[20]

Conservation easements typically do not grant public access to the burdened property.[21] Rather, the public benefit of conservation easements is habitat protection and "visual access," rather than physical access, over open space.[22] Only in rare cases is the public granted access for recreational use.[23]

B. LEGAL VALIDITY

The path to legal validation of conservation easements was not easy. Under the common law, there were several legal impediments in various American states. First, a "conservation *easement*" is not a true easement. Typically, easements grant affirmative rights, such as a right of way over the land of another.[24] The conservation interest creates a restriction on the use of the subject property and, thus, is a *covenant*.[25] Because of a historic suspicion of the common law toward negative restrictions on land,[26] with courts stating that covenants are not "favorites of the law,"[27] there was a risk that some courts might have been biased against enforcement of conservation interests. In contrast, easements have long been respected and routinely enforced by the courts, so that choice of the term "conservation *easement*" by its proponents probably represented an attempt to bootstrap common law acceptance for these interests.[28]

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[18] *Id*.; *cf*. McLennan v. United States, 24 Cl. Ct. 102, 104 (1991).

[19] *See, e.g*., Goldmuntz v. Town of Chilmark, 651 N.E.2d 864, 867 (Mass. App. Ct. 1995).

[20] *See* ANTHONY ANELLA & JOHN B. WRIGHT, SAVING THE RANCH: CONSERVATION EASEMENT DESIGN IN THE AMERICAN WEST 61–67 (2004).

[21] *See* 26 C.F.R. § 1.170A-14(d)(3)(iii) (2010) (no public access required); BRENNEMAN, *supra* note 15, at 100.

[22] 26 C.F.R. § 1.170A-14(d)(4)(ii)(B).

[23] ANELLA & WRIGHT, *supra* note 20, at 66 ("The overwhelming majority of easements grant no rights to the public to enter the property."); Boyd et al., *supra* note 15, at 222; ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 21 (2d ed. 2005); *see* 26 C.F.R. § 1.170A-14(d)(2)(ii).

[24] KORNGOLD, *supra* note 11.

[25] *Id*. at 19, 287–88.

[26] *Id*. at 298–99.

[27] *See, e.g*., Genovese Drug Stores, Inc. v. Conn. Packing Co., 732 F.2d 286, 289 (2d Cir. 1984); Lacer v. Navajo Cnty., 687 P.2d 404, 411 (Ariz. Ct. App. 1983); Harbour v. Northwest Land Co., 681 S.W.2d 384, 385 (Ark. 1984).

[28] Under modern conceptions, covenants are viewed as valuable property interests. The Restatement (Third) of Property—Servitudes (2000) advocates merger of easements and covenants into a single interest known as a "servitude," to be fully recognized and enforced by the courts as per the parties' intent. *See* Susan F. French, *Highlights of the New Restatement*

Second, U.S. jurisdictions are split on the enforceability of in gross interests against successor owners of the burdened land. The traditional rule has been that burdens cannot run when the benefit is in gross.[29] A closer reading of these cases, however, might arguably allow in gross conservation interests.[30] Moreover, the minority American view,[31] now endorsed as the recommended view by the third Restatement of Property—Servitudes,[32] permits in gross enforcement of covenants. Indeed, at least one U.S. court has upheld a conservation easement based on common law principles where the enabling statute did not apply.[33]

Still, the important in gross feature sought by nonprofits in conservation easements is, at a minimum, in doubt under the common law of many states. The uncertainty factor would dissuade responsible nonprofits from expending capital, time, and expenses to acquire dubious conservation interests.

Finally, the perpetual nature of private conservation easements—viewed by their proponents as essential to the goal of preservation of land for future generations[34] and required by the Internal Revenue Code for income tax deductibility[35]—raises some potential red flags under the common law of covenants. Where parties fail to specify the duration for a conservation easement, courts suspicious of restraints on land[36] may apply a minority view that imposes a "reasonable," not perpetual, duration on the covenant.[37] Even if a perpetual duration is specified, courts may use tools of interpretation and enforcement to limit the reach of a conservation restriction.[38]

(Third) of Property: Servitudes, 35 REAL PROP. PROB. & TR. J. 225, 227 (2000). Courts are not bound by the Restatement, however, and old rules and inclinations are likely to continue for some time. *See, e.g.*, AKG Real Estate, LLC v. Kosterman, 717 N.W.2d 835, 842 (Wis. 2006) (specifically rejecting Third Restatement rule on modification or termination of easements).

29 *See* KORNGOLD, supra note 11, at 381 (citing cases).

30 *See Conservation Servitudes*, *supra* note 15, at 470–79 (arguing that while the cases may not support enforcement of all conservation easements they may indicate enforcement of certain ones), particularly *id.* at 475–76 (discussing Inhabitants of Middlefield v. Church Mills Knitting Co., 35 N.E. 780 (Mass.1894)).

31 *See* KORNGOLD, *supra* note 11, § 9.15, 383–88; *see, e.g.*, Streams Sports Club, Ltd. v. Richmond, 440 N.E.2d 1264 (Ill. App. Ct. 1982), *aff'd*, 457 N.E.2d 1226 (Ill. 1983).

32 RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.6, cmt. d (2000).

33 *See* Bennett v. Comm'r of Food & Agric., 576 N.E.2d 1365 (Mass. 1991) (involving a governmental, not private, conservation easement).

34 *See* ANELLA & WRIGHT, *supra* note 20, at 153 (form document providing for perpetuity).

35 I.R.C. § 170(h)(2)(C) (2011).

36 *See* KORNGOLD, *supra* note 11, § 2.02.

37 *Id.* at 436–37 (citing cases).

38 *Id.* at 402–03.

Therefore, private conservation easements might be legal and enforceable in some U.S. states under the common law but questionable or impermissible in many other states. As indicated above, the uncertainty is a great disincentive for transactions. Clarity was required to allow the conservation easement to become a powerful environmental protection tool.

As a result, proponents sought and obtained in all U.S. states legislation that recognizes and permits conservation easements (perhaps under different names such as conservation restrictions).[39] The Uniform Conservation Easement Act (the "Act") was first promulgated by the National Conference of Commissioners on Uniform State Laws in 1981, and twenty-two states have adopted legislation following this model.[40] The Act specifically addresses questions raised by the common law, erasing doubt, ratifying viability, or reversing rules so that conservation easements are a fully valid interest within the jurisdiction. The Act specifically allows conservation easements to be held by NPOs[41] and allows for them to be assigned to other NPOs or governmental entities.[42] Conservation easements are valid even though they are in gross[43] and negative restrictions.[44] The Act states that conservation easements are legitimate, nonpossessory property interests[45] and are treated as all other easements in terms of creation, enforceability, and administration.[46] Conservation easements are presumed to be perpetual unless limited by the instrument creating them.[47] Finally, the preface to the Act recognizes conservation easements as part of the U.S. belief in "private ordering of property relationships as sound public policy."[48]

Courts have applied conservation easement statutes to uphold the validity of privately held conservation restrictions. These decisions, for example, have barred fee owners from introducing commercial recreational activities that would interfere with the property's natural conditions[49] and found that the fee owners' re-grading of their land

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[39] *See, e.g.*, MASS. ANN. LAWS ch. 184, §§ 31–32 (LexisNexis 2010).
[40] UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1981).
[41] UNIF. CONSERVATION EASEMENT ACT § 1(2)(ii) (1981).
[42] *Id*. § 4(2).
[43] *Id*. § 4(1).
[44] *Id*. § 4(4).
[45] *Id*. § 1(1).
[46] *Id*. § 2(a).
[47] *Id*. § 2(c).
[48] *Id*. at 3 (see Commissioners' Prefatory Note for discussion).
[49] Windham Land Trust v. Jeffords, 967 A.2d 690 (easement holder was local land trust).

violated a conservation easement requiring them to maintain the land in its natural condition.[50]

C. DATA

There is only limited data on the number of conservation easements in the United States and the amount of acres under restriction. The available numbers, however, indicate significant growth in the number of American conservation easements. The Land Trust Alliance, the national professional association of land trusts, reported that in 2005, local and state land trusts held conservation easements on over 6.2 million acres, a 148 percent increase from the 2000 figure of 2.5 million acres.[51] Additionally, The Nature Conservancy reports that it holds 3.2 million acres under conservation easements.[52] Other nonprofit organizations also hold conservation easements in addition to these two major players.[53]

In at least some states, the percentage of land under private conservation easements is not insignificant. For example, 6.58 percent of the total land in Maine and 6.49 percent in Vermont is subject to conservation easements held by land trusts only (i.e., this figure does not reflect easements owned by other entities).[54]

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[50] Nature Conservancy, Inc. v. Sims, No. 07-112-JMH, 2009 WL 602031 at *3 (E.D. Ky. Mar. 5, 2009) (easement held by The Nature Conservancy, Inc.).

[51] ALDRICH & WYERMAN, *supra* note 2, at 5. A public-private partnership involving key players in conservation easements has launched a project to create a database of U.S. conservation easements. NAT'L CONSERVATION EASEMENT DATABASE, http://www.conservationeasement.us/ (last visited May 20, 2011). The data will be developed from self-reporting by land trusts and agencies. *Id*. However, there is no discussion of independent searching of recorders' offices across the country to create a complete database (which would be a difficult and expensive endeavor). Thus, at best, the database project, even if completed, will not give a full picture of private conservation holdings in the U.S.

[52] *Fast Facts about Conservation Easements*, THE NATURE CONSERVANCY (March 2, 2011), http://www.nature.org/aboutus/privatelandsconservation/conservationeasements/fast-facts-about-conservation-easements.xml; *see* Joseph M. Kiesecker et al., *Conservation Easements in Context: A Quantitative Analysis of Their Use by The Nature Conservancy*, 5 FRONTIERS IN ECOLOGY & ENV'T. 125 (2007).

[53] *See e.g., Conservation Easement Program,* DUCKS UNLIMITED, http://www.ducks.org/conservation/land-protection/conservation-easement-program (last visited May 20, 2011) (example of an active conservation easement program to protect habitat).

[54] These figures are calculated by taking the numbers of acres under easement held by land trusts according to the NATIONAL LAND TRUST CENSUS REPORT, *supra* note 2, and dividing this number by the total acres in the state according to the U.S. CENSUS BUREAU, STATE AND METROPOLITAN DATA BOOK, Table E-1, 2006, *available at* http://www.census.gov/compendia/smadb/TableE-01.pdf (using a factor of 640 acres per square mile; thus, Maine's conservation easement acreage of 1,492,279 is 6.58% of 22,646,400 and Vermont's conservation easement acreage of 399,861 is 6.49% of 6,152,960).

II. A POLICY CALCULUS OF CONSERVATION EASEMENTS AND ALTERNATIVES

Private, perpetual conservation easements in gross bring substantial benefits but also raise policy questions. These issues have marked the American experience with these interests, and other countries contemplating the adoption of a U.S. model of easements must closely consider them. Moreover, this policy calculus is also relevant to alternative private conservation vehicles that other nations may adopt, such as payments for environmental services, real rights under civil law, and others.[55]

This Part will develop and apply a policy framework for analyzing private conservation easements in gross and alternatives to achieve preservation of open space and natural habitat. It will consider conservation easements and the following other vehicles: (1) fee ownership to achieve conservation purposes, (2) governmental, rather than nonprofit, ownership, (3) limited, non-perpetual land rights, and (4) governmental regulation, instead of a property-based regime, to accomplish conservation goals. I conclude that private conservation easements in gross have great advantages in the United States and deserve continued validation and enforcement, albeit with a few changes to achieve greater public input and protection of future generations. Other nations will have to work within the policy framework developed below to determine their own course of action.

A. EFFICIENCY: FEE OWNERSHIP VS. CONSERVATION EASEMENTS

Land could be conserved by acquiring full possessory title (i.e., fee ownership in the United States) rather than a conservation easement. Easements are generally a lower-cost alternative to fees for both nonprofits and the public.

1. CONSERVATION COSTS

Acquisition and stewardship costs for fees are higher than for easements, thus reducing the total amount of land that can be preserved through the fee route.[56] First, acquiring fee title is more expensive as a fee purchaser must pay for the full value of the land while an easement

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[55] *See* discussion of alternatives *infra* Part IV.

[56] Robert E. Coughlin & Thomas Plaut, *Less-Than-Fee Acquisition for the Preservation of Open Space: Does It Work?*, 44 J. AM. INST. PLANNERS 452 (1978); *see also* Paul R. Armsworth & James N. Sanchirico, *The Effectiveness of Buying Easements as a Conservation Strategy*, 1 CONSERVATION LETTERS 182 (2008).

buyer only has to compensate for the loss of the unused development rights of the property, which the owner may not have intended to exploit in any case.[57] Moreover, many landowners choose to donate conservation easements rather than to sell them for consideration since § 170(h) of the Internal Revenue Code permits a federal income tax deduction for restrictions for conservation purpose given to a qualified nonprofit.[58] Thus, there may be no easement acquisition costs at all for the NPO in the United States, with the cost subsidized by the public through the tax deduction.[59] Finally, since conservation easements have been authorized by law in all states,[60] transaction costs for engaging in and enforcing such arrangements have been greatly reduced. One might expect that the acquisition cost of a less than full interest in property in other countries would also be cheaper than a fee. Uncertainty as to land titles in general, enforceability of conservation rights, and overall rule of law concerns, however, may effectively prevent such conservation transactions or make transaction costs extremely high in other countries.[61]

Holders of conservation interests face stewardship and perhaps maintenance responsibilities. An entity that purchases a fee for conservation purposes, like other owners, must expend funds to generally maintain the property, engage in risk management, and inspect it to ensure that trespassers or visitors are not interfering with its conservation values. An easement owner, in contrast, is not responsible for the general expenses. For the conservation easement to be effective and achieve its purpose, though, the easement holder must regularly inspect and monitor the burdened property to ensure that the terms of the restriction are not being violated (for example, impermissible building, tree cutting, commercial activities, etc.).[62] This is especially challenging not only because of the cost but also because the burdened owner is on the

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[57] *See* Joan M. Youngman, *Taxing and Untaxing Land: Open Space and Conservation Easements*, STATE TAX NOTES, Sept. 11, 2006, at 749–51, *available at* http://www.landprotect.com/files/39299417.pdf. For example, beautiful natural features may increase the value of a home on the property that may help offset the loss of the ability to develop the property further.

[58] I.R.C. 170(h)(1)(B)–(C), 170(h)(2)(C) (2010); *see* C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1, 8–10 (2005); Stephen J. Small, *Real Estate Developers and Conservation Easements—Not As Simple As It Sounds*, 19 PROB. & PROP. May/June 2005, at 24.

[59] *See* the policy aspects of this deduction discussed *infra* Part II.B.1.

[60] *See supra* Part I.B.

[61] *See infra* Part III.D.1.

[62] *See* ANELLA & WRIGHT, *supra* note 20, at 142–43.

property with virtually unlimited opportunities to violate the covenant.[63] To address the cost concern, some nonprofits require that donors of conservation easements also provide stewardship funds.[64] Still, the maintenance and stewardship costs are less for easements than fees.

2. THE PUBLIC

Utilizing easements serves the goal of enhancing efficient use of our world's limited land resources. A conservation easement owner can accomplish its land preservation goal; at the same time, the owner of the burdened land can make productive use of the property consistent with the terms of the easement (perhaps as a residence, for farming, etc.) and to receive compensation for the lost right. The easement purchaser only pays the amount of consideration necessary to acquire the right that it needs and wants. If a fee were used, however, the fee purchaser would be forced to "overinvest" in conservation by paying for full possessory right to the property when a lesser restriction would have accomplished its goal. More expensive fee purchases would mean that NPOs would be able to conserve less land with their funds. At the same time, purchasing a property in fee for conservation takes it fully out of the market.

Financial incentives for conservation raise some concerns. Programs of NPO purchase of conservation easements or fees (or accepting donations with accompanying tax deductions) may lead to strategic behavior by landowners. For example, owners may attempt to "extort" direct or indirect payments by threatening to destroy environmental features on their land.[65] The conservation environmental purchaser must also avoid overpaying when the landowner has no current plans to develop, since the owner has no current opportunity costs and is only selling the future option value of the land.[66] Finally, payments for

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[63] For discussion of the difficulties faced in enforcing conservation easements, *see* JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 18–19 (2005) *available at* http://www.lincolninst.edu/pubs/1051_Reinventing-Conservation-Easements.

[64] *See* ANELLA & WRIGHT, *supra* note 20, at 28; BYERS & PONTE, *supra* note 23, at 126.

[65] *See* SVEN WUNDER, NECESSARY CONDITIONS FOR ECOSYSTEM SERVICE PAYMENTS 4 (Jan. 31–Feb. 1, 2008), *available at* http://www.rff.org/Documents/08_Tropics_Conference/Tropics_Conference_Papers/Tropics_Conference_Wunder_PES_markets.pdf; Paul J. Ferraro, *Global Habitat Protection: Limits of Development Interventions and a Role for Conservation Performance Payments*, 15 CONSERVATION BIOLOGY 990, 997 (2001).

[66] One way for a nonprofit with limited funds to purchase easements and a number of potential easements to acquire would be to conduct an auction among the landowners of the available conservation dollars. Paul Ferraro, *Asymmetric Information and Contract Design for Payments for Environmental Services*, 65 ECOLOGICAL ECON. 810, 819 (2008).

conservation easements may also undermine a conservation ethic already observed by the landowner based on non-monetary values.[67] But these are issues with both fee and easement purchases.

3. RECOMMENDATION

The use of a less than fee interest for conservation protection has tremendous advantages and few, if any, disadvantages. These interests promote an efficient use of the world's limited land resources while providing a vehicle to achieve ecological protection. In the United States, the conservation easement has been an effective and legally valid vehicle. Other countries, however, can develop a conservation restriction with similar attributes within their own legal systems.

B. NONPROFIT VS. GOVERNMENTAL OWNERSHIP

1. COSTS

Nonprofit ownership of conservation easements means that government does not have to bear direct expenses to acquire and steward conservation easements.[68] In an era of tight governmental budgets and cuts, private resources may be essential (if not the only way) to sustain open space and habitat conservation.[69] There are, however, significant tax subsidies to private conservation easements that, in effect, transfer acquisition costs to the federal, state, and local government.

The federal income tax deduction for contributions of qualifying conservation easements under IRC § 170(h)[70] yielded a tax expenditure by the U.S. Treasury for 2007 of approximately $700 million.[71] There are additional Treasury losses as conservation easements lower the value of property subject to federal estate taxes.[72] There are also state and local tax subsidies. The imposition of a conservation easement reduces the property's assessment for state and local ad valorem (property) tax

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67 WUNDER, *supra* note 65, at 4.

68 *See* BYERS & PONTE, *supra* note 23, at 9–10.

69 *See* Brett Zongker, *Grants That Saved Historic Relics Now Endangered*, ASSOCIATED PRESS, Mar. 7, 2010, *available on Westlaw at* 3/7/10 APDATASTREAM 19:26:05 (reporting on proposed federal budget cuts in fund preserving American historical artifacts).

70 *See generally supra* Part I.B.

71 In 2007, almost $2 billion in deductions were taken in conservation easements. Pearson Liddell & Janette Wilson, *Individual Noncash Contributions, 2007,* STATISTICS OF INCOME BULLETIN, Spring 2010, Figure B at 54, http://www.irs.gov/pub/irs-soi/10sprbulindcont07.pdf. This would mean a public revenue loss of approximately $700 million (as donors are in high brackets).

72 26 C.F.R. § 25.2703-1(a)(4) (2010).

purposes because of its limited potential use.[73] This forces the local government to cut back services because of diminished revenue or to increase the tax rate on other citizens.[74] Moreover, some states give state income tax deductions or credits for conservation easement donations.[75] These government subsidies are additional expenditures that must be calculated in the true cost of private conservation easements. Other countries adopting similar tax subsidies must consider these costs.[76]

2. THE ETHOS OF PRIVATE ACTION

Part of lore and reality is that Americans tend to rely more on individual and private sector solutions to communal problems and less on governmental intervention than other countries do.[77] For many Americans, this belief manifests itself in a normative preference that private rather than governmental holding of land increases social welfare.[78] Americans generally value the personal freedom of allowing owners to do what they want with their property—subject to others' rights and the rare imposition by the law on owners' rights for overriding reasons—and to thereby achieve personal satisfaction.[79]

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[73] *See, e.g.*, Jet Black, L.L.C. v. Rout Cnty. Bd. of Cnty. Comm'rs, 165 P.3d 744, 750–51 (Colo. App. 2006); Gibson v. Gleason, 798 N.Y.S. 2d, 541, 544–45 (N.Y. App. Div. 2005); *see also* Daniel C. Stockford, Comment, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823 (1990).

[74] A fee purchase by government or a nonprofit organization will take the property entirely off the tax rolls for the purposes of state and local ad valorem property taxation as government and nonprofits are exempt from tax.

[75] For credits, *see*, *e.g.,* N.Y. TAX LAW § 210(38) (2010); N.C. GEN.STAT. § 105–151.12 (2010). Deductions are usually reflected not by a specific state tax code provision but by the state tracking the federal income tax structure and its deductions. *See also* Jeffrey O. Sundberg & Richard F. Dye, *Tax Property Value Effects of Conservation Easements*, nn.15–16 & accompanying text (Lincoln Inst. of Land Policy, Working Paper No. WP06JS1, 2006), *available at* http://www.lincolninst.edu/pubs/1128_Tax-and-Property-Value-Effects-of-Conservation-Easements.

[76] *See, e.g., Income Tax Assessment Act 1997* (Cth) s 31.5 (Austl.) (providing for a deduction for a perpetual conservation covenant that decreases the market value of the property, subject to other conditions); *Land Tax Assessment Act of 2002* (WA) s 41 (Austl.) (providing for a land tax exemption for any year where land is used solely or principally for the conservation of native vegetation).

[77] Helmut K. Anheier & Lester M. Salamon, *The Nonprofit Sector in Comparative Perspective, in* THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK 89, 90 (Helmut K. Anheier & Lester M. Salamon eds., 2d ed. 2006).

[78] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 33 (6th ed. 2002); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 5 (1985) ("[T]he end of the state is to protect liberty and property").

[79] *See* Loeb v. Watkins, 240 A.2d 513, 516 (Pa. 1968) ("Where a man's land is concerned, he may impose . . . any restrictions he pleases"); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (2d ed. 1998); *see also* John

This American belief in private action and personal freedom, especially with respect to land arrangements, directly supports the adoption and use of private conservation easements in gross—it is a comfortable fit.[80] Moreover, there is a belief that a conservation easement held by an NPO will be more secure and permanent since NPOs, unlike government officials, are not subject to the political and financial pressures of pro-development forces demanding the watering down of an easement.[81]

For other countries, however, private ownership and administration of conservation rights may not fit with cultural, social, and political values. Other nations may prefer reliance on government action for provision of environmental protection.[82] This is in addition to questions about the capacity of the nonprofit sector, a matter discussed later.

3. CLASS ISSUES

Despite the benefits of nonprofit action in the American context, there is a risk of elitism in the decisionmaking and composition of the nonprofit boards controlling conservation easements. Conservation easements can in effect achieve "private large lot zoning" and prevent the building of affordable housing or environmentally friendly planned unit developments.[83] Thus, conservation easements may result in an increase of neighborhood exclusivity, the barring of newcomers, and the frustration of new ideas in residential communities.

William H. Whyte, the early promoter of conservation easements, cautioned against the "muted class and economic conflicts"

Stith, *A View for the Ages*, POST STANDARD (Syracuse, NY), Nov. 30, 2009 at A4 (describing growth of local land trust).

[80] *See* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982); UNIF. CONSERVATION EASEMENT ACT, *supra* note 41, at 2 (see Commissioners' Prefatory Note that states "There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. . . . If it is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions.").

[81] *See generally* James M. Buchanan, *Constraints on Political Action, in* PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE 107 (James M. Buchanan & Richard Musgrave eds., 1999) (reviewing public choice theory and pressures on politicians).

[82] *See* discussion comparing nonprofit sectors *infra* Part III.A.

[83] *See* Miriam Jordan, *In Tony Monterey County, Slums and a Land War*, WALL ST. J., Aug. 26, 2006, at A1 (dispute between environmentalists seeking to preserve scenery and supporters of development of lower income housing for immigrant workers).

inherent in conservation easements.[84] He posited that the "gentry" would be the donors of conservation easements and would have an interest in natural areas in the countryside rather than open space for parks and playgrounds that middle-income citizens would prefer. Thus, there is a danger that nonprofit organizations seeking conservation easements may represent and adopt the "gentrified" viewpoint, a position that does not encompass the broader population. Yet, under a regime of private conservation easements, the nonprofit board is invested with significant power over communal land decisions affecting the entire citizenry. In contrast, if government owned such conservation easements, all voters could express their views through a democratic process on choices relating to conservation easement acquisition and administration.

4. CREATION OF EASEMENTS

By not requiring governmental action in the creation of conservation easements and by permitting NPOs as holders,[85] the U.S. model allows for NPOs to react nimbly to conservation needs and the market. This process is likely to be more efficient, allowing the preservation of land that might slip through the bureaucratic cracks of a governmental program. Nonprofits can respond quickly to a threatened development of a property with high ecological value and get an easement deal in place.

There is a cost, however, to independent private action by nonprofits. Private groups have virtually unlimited discretion in purchasing or accepting donations of easements and are not bound to follow standards or a general conservation plan in these decisions.[86] NPOs may accept any conservation easement that appears on its doorstep, even though it is of doubtful environmental benefit.

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[84] WILLIAM H. WHYTE, JR., URBAN LAND INSTITUTE, TECHNICAL BULLETIN 36: SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 37 (1959).

[85] Massachusetts is the only U.S. state requiring government approval (local and state) before a conservation easement may be created. MASS. ANN. LAWS ch. 184, §§ 31–32 (LexisNexis 2010).

[86] The Uniform Conservation Easement Act only states values inherent in conservation easements and does not provide standards. UNIF. CONSERVATION EASEMENT ACT, *supra* note 41, § 1(1). IRC § 170(h) (2010) provides only minimal requirements for deductibility, not an optimal level. For example, to qualify for an open space deduction the easement must only provide "scenic enjoyment" with a "significant public benefit." 26 C.F.R. § 1.170A-14(d)(4)(i)–(ii), (iv) (2010). The factors to define these terms set out in the Regulations are vague and highly elastic, giving wide latitude. *See Contentious Issues*, *supra* note 15, at 1067–70 (dealing with these tax standards). "Best practices" followed by many land trusts and provided by the Land Trust Alliance are not binding. *See* LAND TRUST ALLIANCE, STANDARDS AND PRACTICES at i (2004), *available at* http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf.

Governmental officials are accountable to the citizens for their conservation easement decisions through the election and recall processes. Nonprofits and individual actors lack this public accountability.

Furthermore, the various NPOs do not acquire or accept easements pursuant to a public land use and conservation plan. As a result, the sum of conservation easements in an area may be less than its parts—there could be a patchwork of easements that do not equal an effective community-wide conservation plan.[87] Thus, the decisions and missions of non-accountable individuals and nonprofits, rather than community preferences, could drive open space and habitat preservation acquisition and management in a given area. In comparison, in the arena of public land use controls the modern trend is away from localized planning to county, statewide, and regional approaches to environmental issues.[88] Especially with the significant tax subsidies for the creation and continuation of conservation easements in the U.S. context,[89] it is fair to question whether an uncoordinated private system maximizes the public's interest.

5. IN GROSS OWNERSHIP

In gross ownership of conservation easements has the benefit of allowing nonprofits to engage in far-reaching conservation efforts and freeing them from the expense and difficulty of acquiring neighboring land to anchor a conservation easement. In gross ownership, however, exacerbates the concern over private control, as it allows a distant nonprofit to own easements that affect the local community.[90] Thus, local land use decisions and choices can be controlled by an entity that has little or no stake in the economic and social issues facing a community.

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[87] *See* Heidi J. Albers & Amy W. Ando, *Could State-Level Variation in the Number of Land Trusts Make Economic Sense?*, 79 LAND ECON. 311, 312 (2003) ("local land trusts specializing in providing open space often do not consider the impact of their decisions on regional conservation benefits"; "lack of coordination" among land trusts "has become . . . a serious problem.").

[88] *See* ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 26–30, 132–34 (1994); Robert Fishman, *The Death and Life of American Regional Planning*, *in* REFLECTIONS ON REGIONALISM 107–23 (Bruce Katz ed., 2000).

[89] *See supra* Part II.B.1 (discussing initial deductions for donations and ongoing property tax savings).

[90] *See supra* Part I.A (defining in gross ownership).

6. LESSONS LEARNED FOR ALL COUNTRIES

NPO ownership of conservation easements presents great opportunities but also some risks. I have suggested in earlier work that I believe that the risks in the creation of conservation easements have been understated and that some adjustments in the U.S. model would make these interests even more effective. Primarily, I have urged that the federal income tax deduction for conservation easements should only be granted if the easement is approved by local, state, or federal authorities as being consistent with a governmental conservation plan.[91] This will ensure that the public financial investment through the tax subsidy is being well spent, with the easement being a part of a valid conservation goal. Such a process would also provide for community input through the election of local officials who approve the conservation plans. The requirement of approval is consistent with the treatment of historical easements where prior governmental approval of the significance of the building or site is needed for a deduction.[92] Finally, freedom of choice of owners is being maintained because owners may still donate easements—the public simply will not pay for those that do not serve a defined public interest.

Both the United States and other countries can learn from each other's views on the governmental/private organization dichotomy. For those nations that tend to prefer governmental provision of services, the significant benefits of NPOs owning conservation easements may encourage experimentation with these nongovernmental actors and interests. U.S. jurisdictions might learn from other countries about the value of governmental participation in the conservation easement process and consider ways to inject governmental involvement consistent with a private action model.

C. THE BLESSINGS AND BURDENS OF PERPETUITY

Perpetual duration is the gold standard for American conservation easements.[93] Proponents value infinite conservation easements as they preserve the land forever, leaving the habitat and open space benefits for future generations. In contrast, conservation easements

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[91] *Contentious Issues*, *supra* note 15, at 1066–70.

[92] *See* I.R.C. § 170(h)(4)(A) (iv) (2010); 26 C.F.R. § 1.170A-14(d)(5)(iii) (2010); *see* Herman v. Comm'r, 98 T.C.M. (CCH) (2009).

[93] *See supra* Part I.A.

(or alternatives) with limited durations will not protect the land far into future.

Perpetuity, though, has its disadvantages. First, the environmental value of particular parcels and community needs change over time. Land once thought important for habitat or open space may no longer be necessary or viable and other environmental priorities may emerge.[94] For example, a parcel of land might be best suited to use for production of alternative energy such as a solar panel field[95] or a wind farm[96] even though it would violate a conservation easement preventing changes in the natural features of the property, including the erection of structures. Moreover, there may come a time when the public interest would be better served by allowing a parcel of land to be shifted to a use that would violate a conservation easement on the property. For example, there may be a communal need for affordable housing or economic development in a depressed area.[97]

If a governmental entity owned a conservation easement, the decision to modify the easement would be made in the public arena by the voters or their elected representatives.[98] With private conservation easements in gross, however, a non-elected, non-representative nonprofit, perhaps located in a different city, would be making this decision. There is no opportunity for public input to the nonprofit's

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[94] "[W]e have over a 100-year investment nationally in a large suite of protected areas that may no longer protect the target ecosystems for which they were formed." Cornelia Dean, *The Preservation Predicament*, N.Y. TIMES, Jan. 29, 2008, at F1 (statement of Healy Hamilton, director of the California Academy of Sciences). Consider also how maintenance regimes might need to change. For example, assume a conservation easement that bars the use of pesticides on the property but over time the land is threatened by an invasive plant species. Non-chemical techniques to control the invasive species fail. Can the NPO use pesticides in order to preserve the original plant ecosystem that the donor wished?

[95] *See* Todd Woody, *Desert Vistas vs. Solar Power*, N.Y. TIMES, Dec. 22, 2009, at B1 (report was unclear as to whether the conservation interest was a fee or easement, but conflict would be the same in either situation).

[96] *See* Eileen M. Adams, *Residents to Decide on Town Ownership of Lots*, SUN J. (Lewiston, Me.), Dec. 1, 2009 (town meeting to vote on release of conservation easement to allow wind farm).

[97] For a more prosaic example, *see* Stephen Beale, *Dog Park Site Denied in Bedford Due to Easement*, UNION LEADER (Manchester, N.H.), July 23, 2008, at B1 (land trust holding conservation easement denied use of land for dog park sought by town).

[98] *See, e.g.*, Friends of the Shawangunks, Inc. v. Clark, 754 F.2d 446, 452 (2d Cir. 1985); see Trent Spiner, *Hopkinton Preserves Farmland; Special Town Meeting Approves Conservation Easement*, CONCORD MONITOR (N.H.), Dec. 6, 2009 (describing New Hampshire town meeting to determine whether town should invest in a farmland conservation easement). The governmental decision may be subject to a judicial *cy pres* action to determine the validity of the proposed modification. *See* UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (amended 2007) *available at* http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.pdf; *see also Contentious Issues*, *supra* note 15, at 1078.

decision and no accountability through the electoral process. The NPO's unitary mission of conservation may not encompass the flexibility that the community needs to implement other values.[99]

The danger of perpetual conservation restrictions can be ameliorated if there are ways to modify the duration in those rare and extraordinary cases when the public interest requires. First, the law must be made clear that nonprofit directors are shielded from liability if they modify a particular easement as long as they are obedient to the overall mission of the nonprofit.[100] This will make directors willing to modify or even terminate restrictions in special circumstances. Second, the courts can be more aggressive in applying traditional covenant modification doctrines to conservation easements. For example, the doctrine barring enforcement of covenants violating public policy might be employed to deal with the affordable housing, economic development, or alternative energy scenarios described above.[101] The doctrine of relative hardship, which limits enforcement to monetary damages rather than an injunction, could be applied by a court to limit a NPO's remedy where the public interest is at stake and in effect force a buyout of the easement.[102] Finally, the cy pres rule could be applied to modify a conservation restriction held by a charitable corporation when the interest of the public would be served.[103] U.S. jurisdictions and other countries would be well advised to consider adopting or strengthening these doctrines when instituting perpetual conservation rights.

D. REGULATION INSTEAD OF A PROPERTY RIGHT

As an alternative to the acquisition of a conservation property right by a nonprofit or government, the government could enact

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[99] Market solutions are not likely to work to remove undesirable easements since conservation groups rarely sell conservation rights and may face regulatory issues if they do. *See Contentious Issues*, *supra* note 15, at 1064–65. Eminent domain of the easement may no longer be a viable solution to acquit the public's interest in the post-*Kelo* era as state legislators and state courts have increasingly limited takings for economic development and have required blight (not likely present in conservation land). *See id*. at 1081–83.

[100] *Id*. at 1072–73; *see also* Jeremy Benjamin, Note, *Reinvigorating Nonprofit Directors' Duty of Obedience*, 30 CARDOZO L. REV. 1677, 1694 (2009).

[101] For discussion of termination and modification of covenants violating public policy, see KORNGOLD, *supra* note 11, at § 10.02; *see also Contentious Issues*, *supra* note 15, at 1080.

[102] *See* Bjork v. Draper, 886 N.E.2d 563, 575 (Ill. App. Ct. 2008) (requiring balancing of the equities in enforcement of conservation easement); Fox Chapel v. Walters, No. CV 07-8008-PCT-JAT, 2007 WL 2265684, at *3 (D. Ariz. Aug. 6, 2007) (denying temporary restraining order as plaintiff did not show balance of hardships favoring it); *Contentious Issues*, *supra* note 15, at 1078–79.

[103] *See Contentious Issues*, *supra* note 15, at 1078.

regulations to preserve the environmental values of land. Public regulation has various benefits. It theoretically is the culmination of a transparent, public process where the citizenry can exert control through their duly elected representatives. Regulation can be based on thoughtful study and professional planning as to environmental goals and tactics. Moreover, regulations maintain flexibility as they can be modified to address newly arising concerns.

There are significant disadvantages to the regulation approach, however, that make a property-based solution superior. First, with a regulatory approach, all benefits of private initiative and action are lost.[104] Government wheels may move too slowly, if at all, to adequately preserve threatened land. Furthermore, regulation may not be permanent enough to adequately protect the environment. Government officials are subject to short-term pressures and interest groups lobbying to remove protective land regulations. These forces might include the need to raise revenue to cover short-term deficits by increasing the tax base through development, developers and owners seeking to maximize the values of their parcels, and election fundraising. Facing these current pressures, government officials might compromise the long-term preservation goals of the community by repealing or modifying land protection regulation. The presence of a land right such as a conservation easement gives a greater sense of psychic and legal permanence than a land regulation. Legislative bodies can repeal regulations. In contrast, sale of real property held by cities and towns can be prohibited or subject to certain conditions.[105]

Conservation regulations impose nonconsensual limitations on property owners, in direct contrast to conservation easements, which are agreed to by the parties. Nonconsensual restrictions are less desirable as they may give rise to claims by the owners for compensation under regulatory takings theory,[106] create ill will among the community, and lead to a flouting or subversion of the regulation by a disgruntled owner.[107] There may be some equal protection or "reverse" spot zoning

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[104] *See supra* Part II.B.

[105] *See* 56 AM. JUR. 2D *Mun. Corp.* § 486 (2010) (discussing limits on property held for the public, arguably including governmental conservation easements); 81 N.Y. JUR. 2D *Parks* § 143 (2010); N.Y. GEN. CITY LAW § 20(2) (2010) (barring sale of park lands).

[106] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978) (beginning the modern era of Supreme Court land regulatory takings cases).

[107] *See* Charles E. Di Leva, *The Conservation of Nature and Natural Resources Through Legal and Market-Based Instruments*, 11 REV. EUR. COMMUNITY & INT'L ENVTL. L. 84, 90–91 (2002) (describing a situation ignoring public conservation regulation in Brazil).

claims if the legislature restricts some individual parcels more than neighboring ones.[108]

Regulation, therefore, lacks many of the benefits of private land restrictions. Relying solely on a governmental regulatory approach may not yield the most effective preservation model.

E. CONCLUSIONS ON POLICY CONSIDERATIONS

There are great advantages, as well as some potential costs, to private conservation restrictions. It seems clear that private restrictions offer an efficient and effective alternative and complement to governmental regulatory systems. Each country can fashion a conservation restriction device that takes into account its particular emphases and sensitivities to issues such as duration, governmental involvement in creation and termination, and preservation of the public voice and process in conservation decisions. One size of conservation restriction does not fit all; fortunately, by being creative, countries can fashion bespoke models that suit their needs.

III. ADDITIONAL CONSIDERATIONS FOR NON-U.S. CONSERVATION EASEMENTS

In addition to the general policy considerations involved in private conservation easements discussed in the prior section, there are some specific issues when countries outside of the United States consider adopting private conservation easements in gross (or a similar alternative based on local law). These include whether the NPO sector in the given nation has the capacity and willingness to assume ownership and stewardship of conservation rights, the specter of colonialism, when a country's goal of resource use conflicts with an American legal vehicle and conservation values, and whether the country's legal system can accommodate an in gross private conservation restriction.

A. DIFFERENCES IN NONPROFIT SECTORS AND ACTIVITIES

The size, structure, culture, and missions of NPOs in the United States have made them suitable, prepared, and willing to generate conservation easement donations and acquisitions and subsequently to

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[108] *See* Palmer Trinity Private Sch., Inc. v. Vill. of Palmetto Bay, 31 So. 3d 260, 262 (Fla. Dist. Ct. App. 2010) ("[r]everse spot zoning occurs when a zoning ordinance prevents a property owner from utilizing his or her property in a certain way, when virtually all of the adjoining neighbors are not subject to such a restriction . . . ." (quoting City of Miami Beach v. Robbins, 702 So.2d 1329, 1330 (Fla. Dist. Ct. App. 1997))); Andrews v. Town of Amherst, 862 N.E.2d 65 (Mass. App. Ct. 2007); C/S 12th Ave., LLC v. City of New York, 815 N.Y.S.2d (N.Y. App. Div. 2006).

steward these interests. Differences in the culture and histories of other countries have led to varying nonprofit structures and functions. As a result, the American model of nonprofits holding conservation easements may not necessarily be appropriate or effective in other settings.

1. THE AMERICAN NPO SECTOR

In the United States, NPOs are well suited to take on the acquisition and stewardship of conservation easements. There is particular strength in land trusts and related environmental organizations.

(a) IN GENERAL

The nonprofit sector in the United States is large, robust, and part of the national fabric, providing health, education, welfare, arts, and other services. "The scale of the nonprofit sector is larger in the United States than in most other countries."[109] There were at least 1.4 million nonprofits in the United States as of 2005, representing a 27.3 percent increase from 1995.[110] Total assets in 2005 were $3.4 trillion, representing a 125.6 percent increase,[111] but, of course, this does not account for the 2008 financial and endowment meltdown. Only three other countries have a higher percentage of employment in the nonprofit sector than the United States.[112]

(b) LAND CONSERVATION ORGANIZATIONS

The environmental nonprofit sector is strong in the United States. In 2005, there were 13,399 public charities under the IRS category of organizations addressing "environment, animals." This represented 4.3 percent of all public charities, having $31.6 billion in assets.[113] Care must be taken with these numbers, though, as this category would appear to include animal protection organizations and not only groups devoted to land conservation and the environment.

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[109] Lester M. Salamon, *Scope and Structure: The Anatomy of America's Nonprofit Sector*, *in* THE NATURE OF THE NONPROFIT SECTOR 23, 34 (J. Steven Ott ed., 2001).

[110] These figures include only Internal Revenue Service-registered nonprofits, AMY BLACKWOOD ET AL., THE NONPROFIT SECTOR IN BRIEF 2 (2008), *available at* http://nccsdataweb.urban.org/kbfiles/797/Almanac2008publicCharities.pdf. There are probably an additional 175,000 religious nonprofits, which are not required to register with the IRS. *Id*. at 1.

[111] *Id*. at 2.

[112] Helmut K. Anheier & Lester M. Salamon, *supra* note 77, at 96; *see* Laura Leete, *Work in the Nonprofit Sector*, *in* THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 77, at 159, 160.

[113] BLACKWOOD ET AL., *supra* note 110, at 4.

There had been a considerable history of NPO involvement in U.S. land conservation by the time the private conservation easement movement began to gain strength in the 1970s. Groups advocating and lobbying for governmental land conservation, preserves, and parks have existed for over a century. The Sierra Club was founded by the legendary John Muir in 1892—just over one hundred years after the forming of the American republic—and currently has 1.4 million members.[114] Other nonprofit organizations were established beginning in the nineteenth century to acquire and hold land for conservation purposes. The first nongovernmental land trust—the Trustees of Public Reservations—with a mission to acquire and hold "for the benefit of the public, beautiful and historic places in Massachusetts," was created in 1891.[115] Land trusts and other land conservation organizations, such as the various Audobon societies, were established across the country.[116] As of 2005, the Land Trust Alliance reported 1,667 member land trusts.[117] The Nature Conservancy, founded in 1951, but with roots extending back to an organization established in 1915,[118] began acquiring land for conservation purposes in 1955 and continues to be a major holder of conservation lands and facilitator of collaborative land conservation transactions.[119]

2. NONPROFITS IN OTHER COUNTRIES

While NPOs have proven to be capable holders of conservation easements in the United States, before other countries adopt private conservation restrictions it must be determined whether their nonprofits are willing and able to acquire and hold these interests. This necessitates an analysis of the mission and capacity of NPOs in other countries.

(a) MISSION

The first question is whether the missions and structures of NPOs in other nations (where they are often referred to as "nongovernmental entities" or NGOs) might embrace the acquisition and stewardship of conservation easements. The nature, roles, and missions

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[114] *Welcome to the Sierra Club*, SIERRA CLUB, http://www.sierraclub.org/welcome/ (last visited May 22, 2011).

[115] BREWER, *supra* note 15, at 13, 17.

[116] *Id*. at 24–25; *see also* Erin B. Gisler, Comment, *Land Trusts in the Twenty-First Century: How Tax Abuse and Corporate Governance Threaten the Integrity of Charitable Land Preservation*, 49 SANTA CLARA L. REV. 1123, 1125–27 (2009).

[117] ALDRICH & WYERMAN, *supra* note 2, at 3.

[118] BREWER, *supra* note 15, at 186–90.

[119] *Id*. *at* 192, 204–06, 210–14.

of nonprofit organizations differ among countries, as a function of different cultures, histories, and values.[120] For example, the U.S. form of voluntarism and nonprofit organizations grew out of a compromise between American values of individualism and collective responsibility.[121]

The NPO sectors of other countries vary from the U.S. model according to factors such as a higher degree of state-provided social, cultural, educational, and health services; religious influences; varying amounts of civil liberties; less adherence to a capitalist model; increased communitarian focus; tribal traditions; and other factors.[122] Differing values in various countries also explain a related phenomenon—the degree of involvement in voluntary associations.[123] Anheier and Salaman suggest that the particular current structure of the NPO sector reflects a country's history.[124] They identify four different NPO national models: *liberal* (low government social welfare spending, with a large nonprofit sector), *social democratic* (extensive state sponsored and delivered social welfare, with limited nonprofit sector), *corporatist* (sizeable government social welfare spending, with a sizeable nonprofit sector), and *statist* (limited public social welfare, with limited nonprofit development).[125] The authors cite examples of nations arguably following the models: liberal—the United States, the United Kingdom, Australia; social democratic—Sweden, Norway, Finland, Italy; corporatist—Germany, Belgium, the Netherlands, France; statist—Japan, Brazil, and "much of the developing world."[126] In countries following models with limited nonprofit development and activity, there may not be adequate organizations with sufficiently broad missions to acquire and steward conservation easements. Moreover, there may be a preference in particular societies for government, rather than private associations, to assume environmental activities. For example, early on, France centralized historic preservation planning under a government agency,

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[120] Anheier & Salamon, *supra* note 77, at 89–91.

[121] *Id*. at 90.

[122] *Id*. at 90–91.

[123] Evan Schofer & Marion Fourcade-Gourinchas, *The Structural Contexts of Civic Engagement: Voluntary Association Membership in Comparative Perspective*, 66 AM. SOC. REV. 806, 806 (2001).

[124] Anheier & Salamon, *supra* note 77, at 105–06.

[125] *Id*. at 106–107; *see* Schofer & Fourcade-Gourinchas, *supra* note 123, at 811–15.

[126] Anheier & Salamon, *supra* note 77, at 107–08.

the Commission des Monuments Historiques, while in England nongovernmental groups dealt with such activities.[127]

(b) CAPACITY

There is also the issue of capacity—are there enough NGOs and resources in other countries to take on a role with conservation restrictions even if this activity fits within their missions? Data on the size of the non-U.S. NGO sector is limited. Available indicators show a smaller sector when compared to the United States. For example, the average percentage of the nonprofit workforce in the economically active population of thirty-five nations (including advanced industrial, transitional, and developing countries worldwide) is 4.4 percent.[128] The number for the United States, in contrast, is 9.8 percent.[129] In addition to the relatively smaller size of the NPO sector in other countries compared to the United States, the nonprofit sector is relatively larger in the developed countries outside of the United States as compared to the less developed and transitioning countries.[130] Unless there is external assistance, this might mean that land conservation efforts, as well as other NGO activities, are less likely to be provided in those countries that arguably have the greatest need and opportunity for habitat preservation.

While there are indications that the size of the NPO sector outside the United States is growing,[131] the current capacity of the nonprofit sphere in a given country may be insufficient to take on a conservation easements program. For example, as of 2005 there were only seven land trusts in Latin America,[132] compared to the 1,667 in the

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[127] Diane Barthel, *Historic Preservation: A Comparative Analysis*, 4 SOC. F. 87, 88 (1989) (also noting that in the United States nongovernmental associations filled this role); *see also* Nerys Jones et al., *The Role of Partnerships in Urban Forestry*, *in* URBAN FORESTS AND TREES 186, 201 (Cecil C. Konijnendijk et al., eds., 2005) (describing private association holding recreational woodland in Iceland).

[128] Anheier & Salamon, *supra* note 77, at 95–96 (this is an unweighted average, and the U.S. is included in the sample).

[129] *Id*.

[130] *Id*. (developed countries' workforce in NPO sector is proportionately more than four times as large as in developing countries).

[131] *Id*. at 100; Burton A. Weisbrod, *The Future of the Nonprofit Sector: Its Entwining with Private Enterprise and Government*, 16 J. POL'Y ANALYSIS & MGMT. 541, 542 (1997); THE CENTER FOR GLOBAL PROSPERITY, HUDSON INST., THE INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES 54 (Patricia Miller ed., 2009) *available at* http://www.hudson.org/files/documents/Index of Global Philanthropy and Remittances 2009.pdf. For case studies of biodiversity conservation NGOs outside of the U.S., see INT'L UNION FOR CONSERVATION OF NATURE & WORLD LAND TRUST, *supra* note 3, at 2–60.

[132] COPE, *supra* note 3, at 13, Table 2.

United States.[133] Proponents of private land restrictions may have to wait until a particular county's nonprofit arena is willing and able, if ever, to embark on this program. These proponents must recognize as well that for many countries, conservation easements held by NPOs are not currently a viable, let alone the preferred, means to preserve habitat and open space.

B. THE SPECTER OF COLONIALISM

The underlying ethic of conservation easements raises important social, political, and equity questions for a country considering whether to embrace these interests. Some countries may choose to embrace development to a higher degree than developed nations and reject conservation as a "Western" priority. These issues must be addressed or a conservation easement program will likely have little chance of success.

1. ENVIRONMENTAL EQUITY AND GLOBAL AGREEMENTS

Countries that suffered through colonialism, perhaps lasting several centuries, have an understandable concern about control of their resources and legal systems by external forces. Developing countries attempting to use their natural resources to improve the lives of their citizens to acceptable living standards are often skeptical of calls from developed nations for land conservation for purposes ranging from aesthetic to carbon sequestration.[134] They wonder why the burden of non-development should fall on them. This tension has played out in various global environmental initiatives between governments, such as the Kyoto protocol, where developing nations fear they will be allocated inadequate carbon emission levels to permit industrialization.[135] Environmental

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[133] ALDRICH & WYERMAN, *supra* note 2, at 3.

[134] *See* JONATHAN S. ADAMS & THOMAS O. MCSHANE, THE MYTH OF WILD AFRICA XVII–XIX (1992) ("The entire modern conservation edifice rests on the ideals and visions of people other than Africans."); Diana K. Davis, *Neoliberalism, Environmentalism, and Agricultural Restructuring in Morocco*, 172 GEOGRAPHICAL J. 88 (2006) (questioning the "colonial environmental narrative" that land degradation was due to local practices); Elizabeth Garland, *The Elephant in the Room: Confronting the Colonial Character of Wildlife Conservation in Africa*, AFR. STUD. REV., Dec. 2008, at 51, 59 (2008) ("The unequal, and frequently racialized, transnational aspects of African conservation practice remain something of an unacknowledged elephant in the room.").

[135] *See* Adil Najam, Saleemul Huq & Youba Sokona, *Climate Negotiations Beyond Kyoto: Developing Countries' Concerns and Interests*, 3 CLIMATE POL'Y 221, 223–26 (2003), *available at* http://fletcher.tufts.edu/ierp/pdfs/NajamCliPol%20Climate%20and%20SD.pdf; MUSTAFA BABIKER, JOHN M. REILLY & HENRY D. JACOBY, THE KYOTO PROTOCOL AND DEVELOPING COUNTRIES 1–4 (1999), *available at* http://web.mit.edu/globalchange/www/MITJPSPGC_

equity issues have made finalization of international agreements difficult.[136]

2. PRIVATE CONSERVATION EASEMENTS IN THE DEVELOPING WORLD

There may be similar concerns with global initiatives promoting private conservation restrictions. Neo-colonialism, cultural, and market issues must be considered.

(a) NEOCOLONIALISM

If the introduction of conservation easements is seen as part of an attempt of the developed world via the instrument of NGOs to achieve preservation at the expense of the aspirations of developing countries, the likelihood of adoption of this private conservation technique will decrease. This will mirror the conflict that William H. Whyte warned of with conservation easements in the United States between the "gentry" favoring undisturbed open space and the rest of the population seeking accessible recreational—or even developable—land.[137]

Some local parties have raised questions about the activities of international NGOs—i.e., transnational, nongovernmental organizations devoted to human rights, environmentalism, economic development, and other causes—similar to concerns voiced about actions of foreign governments.[138] Critics have charged international NGOs with imposing Western biases on other countries, preferring universal principles to local practices and cultures, and engaging in "cultural imperialism."[139] The imposition of conservation on the developing world by global NGOs might be viewed by some as motivated by a desire to yield environmental and psychic benefits for the developed world, regardless of any constraints this may cause for the host country. This may not in fact be the impetus of NPOs and NGOs promoting conservation easements, and there is much that demonstrates that these organizations operate for salutary and altruistic motives. Nevertheless, the burdens

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Rpt56.pdf; John Vidal, *China Leads Accusation that Rich Nations Are Trying to Sabotage Climate Treaty*, GUARDIAN (U.K.) (Oct. 5, 2009, 12:02BST), http://www.guardian.co.uk/environment/2009/oct/05/climate-change-kyoto.

[136] *See* Peter Baker, *Poorer Nations Reject a Target on Emission Cut*, N.Y. TIMES, July 9, 2009, at A1.

[137] *See supra* Part II.B.3.

[138] John Boli, *International Nongovernmental Organizations*, *in* The NON-PROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 77, 333, 333 (international NGOs are estimated at 6,000–7,000 in number).

[139] *Id*. at 344.

imposed by conservation restrictions are indeed real, and negative perceptions must be countered.

(b) CULTURE AND LAW

The drive to introduce American-style conservation easements to other countries could trigger additional resistance if, as in much of the world, the traditional "conservation easement" is a legal concept that diverges from the host nation's legal system and property rights matrix and is viewed as an imposed "foreign" device.[140] Also, there might likely be problems enforcing new formal legal rules that are inconsistent with informal local practices and norms,[141] especially if the formal rule is viewed as serving foreign interests.

Private conservation easements may run up against historical conflicts in a given country. For example, some countries are still addressing a pattern of a small number of large landholders and a large population that does not own land.[142] In response, one country instituted a reform that makes land that is not cultivated or ranched subject to expropriation (and ultimate redistribution); there is a risk that land held for conservation purposes could be so seized.[143]

(c) EFFICACY OF MARKET SOLUTIONS

It must be determined whether the market model of conservation easements—where the landowner is compensated for foregoing development rights—is viable or appropriate in a particular country and culture. Experience with environmental treaties between nations has shown that payments have not "trickled down" to the affected landowners. Typically, payments made by other nations to restrict development to achieve carbon sequestration or habitat preservation are made to the government and do not get in the hands of the people who actually live in the area and are losing resources from the new

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[140] *See supra* Part III.C.

[141] *See* Mitchell, *supra* note 5, at 181.

[142] *See, e.g.*, Tim Hanstad, Roy L. Prosterman & Robert Mitchell, *Poverty, Law and Land Tenure Reform, in* ONE BILLION RISING: LAW, LAND AND THE ALLEVIATION OF GLOBAL POVERTY 17, 31–37 (Roy L. Prosterman et al., eds., 2009); *see* Cheryl Walker, *Agrarian Change, Gender and Land Reform: A South Africa Case Study* (United Nations Research Inst. for Social Dev., Soc. Policy and Dev. Programme Paper No. 10, 2002), *available at* http://www.unrisd.org/unrisd/website/document.nsf/%28httpPublications%29/C1DBAEB28DE8D074C1256C08004694EE?OpenDocument.

[143] Byron Swift et al., *Private Lands Conservation in Latin America: The Need for Enhanced Legal Tools and Incentives*, 19 J. ENVTL. L. & LITIG. 85, 97–99 (2004).

measures.[144] This may often lead to conflict between those individuals and global environmental goals, and might cause enforcement issues.[145]

Additionally, a Western, market-based incentive system of conservation may clash with local values. It has been argued that existing nonmonetary (e.g., communal, cultural) pressures for environmental preservation of land may be preferable and more effective than monetary means.[146] Moreover, introducing cash payments may undermine existing conservation customs.[147]

3. POSSIBLE APPROACHES

The decision as to whether a given nation should adopt private conservation restrictions of some variety is one that should be made alone by that sovereign nation. When proposing or recommending (as advisers) conservation easements in other countries, care must be taken to engage and collaborate with the host country to examine if the model, or some variation, can work. The economic interests, people, culture, priorities, norms, and legal systems of the host country must be recognized and respected, while solutions to broad based conservation goals are sought.[148] Even if a landowner voluntarily agrees to a restriction and receives compensation for it, the limitation will likely be more successfully enforced if there is a demonstrable, clear benefit to personal, local, and national interests.

If a country turns to outside advisers or partners on conservation restriction issues, these advisers and partners must clearly respect the national autonomy of the host country in advising on models and in eventual conservation restriction projects. Indeed, there are examples of sophisticated global NGOs, such as The Nature Conservancy, laudably working in partnership with local interests to achieve a preservation goal

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[144] Di Leva, *supra* note 17, at 90.

[145] *See* Barry Bearak, *Tottering Rule in Madagascar Can't Save Falling Rosewoods*, N.Y. TIMES, May 25, 2010, at A1 (quoting reaction of an illegal harvester of rare trees in national parks in the face of outcry from global environmental groups: "God gave us the forest so that we could take what we need. My ancestors are not angry. There are still many trees in the forest.").

[146] Wunder, supra note 65, at 4.

[147] *Id*.

[148] *See* Fikret Berkes, *Community-Based Conservation in a Globalized World*, 104 PROC. NAT'L ACAD. SCI. U.S. 15188 (2007), *available at* http://www.pnas.org/content/104/39/15188.full.pdf+html. In implementing global accords such as the Kyoto protocol, according to the World Bank, the key to success in countries such as Bolivia and Costa Rica has been the linking of global ideas to domestic interests, players, and political skills. WORLD BANK, *supra* note 3, at 161. "Attuned to ideas from abroad but deeply immersed in domestic social movements and policy debates, these countries have been at the forefront of an impressive record of environmental policy innovations." *Id*.

that meets the needs of the host country and region.[149] These collaborative efforts by private groups are analogous to "community natural resources management" or "community-based conservation," where the central *government* involves local or indigenous institutions or people in conservation decisions as it attempts to balance traditional values, development goals, and conservation methods.[150] By being open to the legal systems and values of others and by using partnerships, outside conservation advocates will be more likely to develop programs that respect national and personal autonomy, culture and heritage, and democratic values.[151] Moreover, local input and cooperation may increase the likelihood of success of the conservation program.[152]

C. CIVIL LAW HURDLES TO PRIVATE CONSERVATION EASEMENTS

Assuming that a country desired to implement conservation easements after evaluating the various policies, existing law may present obstacles. There are various reasons why traditional civil law systems do not provide fertile ground for the adoption and use of conservation easements. These include the prohibition of in gross interests, rejection of affirmative obligations, and the *numerus clausus* principle. This would suggest that alterations to existing rules or specific conservation "easement" legislation, as well as a shift in civil law conceptualizations, would be required to permit private conservation easements in gross under traditional civil law. While there are variations and exceptions

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[149] *See, e.g.*, Daniel White, *Africa: Exploring Parks and Partnerships Along the Zambezi*, THE NATURE CONSERVANCY (Jan. 26, 2011), http://www.nature.org/ourinitiatives/regions/africa/facesofconservation/up-the-zambezi-life-along-one-of-africas-longest-rivers.xml (describing The Nature Conservancy's new initiatives in community-based conservation); WORLD BANK, *supra* note 3, at 161–62; Margaret Southern, *In Costa Rica, There's Strength in Numbers*, THE NATURE CONSERVANCY (Oct. 21, 2010), http://www.nature.org/ourinitiatives/regions/centralamerica/costarica/explore/cr-chocolate.xml (describing TNC's work with local inhabitants to manage ecotourism); *see* Boli, *supra* note 135, at 344.

[150] Stephen R. Kellert, Jai N. Mehta, Syma A. Ebbin & Laly L. Lichtenfeld, *Community Natural Resource Management: Promise, Rhetoric, and Reality*, 13 SOC'Y & NAT. RESOURCES 705, 706 (2000); *see* Tomas M. Koontz & Craig W. Thomas, *What Do We Know and Need to Know About the Environmental Outcomes of Collaborative Management?*, 66 PUB. ADMIN. REV. 111 (2006).

[151] *See generally* Mark Roseland, *Sustainable Community Development: Integrating Environmental, Economic and Social Objectives*, 54 PROGRESS IN PLAN. 73 (2000) (discussing the democratic process).

[152] *See* Fikret Berkes, *Rethinking Community-Based Conservation*, 18 CONSERVATION BIOLOGY 621, 622 (2004) ("More inclusive, people-oriented and community-based approaches to conservation are in part a reaction to the failures of exclusionary conservation, in a world in which social and economic factors are increasingly seen as key to conservation success."). The data and results of community-based approaches are not yet clear. *See* Kellert et al, *supra* note 150, at 707; Koontz & Thomas, *supra* note 150.

among civil law countries, some generalizations about the issues may be offered.

1. PROHIBITION OF IN GROSS INTERESTS

Traditional civil law regimes, stemming from the Roman model, do not recognize in gross servitudes.[153] Rather, they contemplate that a "predial" (aka "praedial") servitude—i.e., a property right running with the land[154]—can only be created between two pieces of land. For example, the laws of France,[155] Italy,[156] South Africa,[157] Greece,[158] Quebec,[159] and Argentina[160] require a burdened and benefitted parcel. The Louisiana Civil Code, the only U.S. jurisdiction with a predominantly civil law tradition, similarly requires the existence of two parcels of land to create a predial servitude.[161] The requirement of a benefitted parcel frustrates the basic model of in gross private conservation easements, where a nonprofit organization holds a right over land without owning a neighboring property.

The rejection of in gross servitudes appears to be rooted in history, as Roman law required two parcels.[162] Scholars have noted that the post-Revolution, nineteenth century French civil code generally sought to limit servitude law as it had been expanded during feudal times as a means for lords to exact additional income from tenants.[163]

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[153] JAMES GORDLEY & ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW: READINGS, CASES, MATERIALS 198 (2006).

[154] 3 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE: PERSONAL SERVITUDES § 3 (4th ed. 2010); *see generally* Paul McCarthy, *The Enforcement of Restrictive Covenants in France and Belgium: Judicial Discretion and Urban Planning*, 73 COLUM. L. REV. 1 (1973).

[155] GORDLEY & VON MEHREN, *supra* note 153, at 198 (quoting CODE CIVIL [C.CIV.] arts. 637, 638 (Fr.)).

[156] See JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 92 (2006) for a discussion of Italian Civil Code art. 1027.

[157] *See* C.G. van der Merwe, *Law of Property, in* INTRODUCTION TO THE LAW OF SOUTH AFRICA 201, 224 (C.G. van der Merwe & Jacques E. du Plessis eds., 2004) for a discussion of how South African property law is mainly influenced by Roman-Dutch law, rather than English common law.

[158] See A.N. YIANNOPOULOS, 4 LOUISIANA CIVIL LAW TREATISE, PREDIAL SERVITUDES §§ 3, 9 (3d ed. 2010) for a discussion of Greek Civil Code art. 1118.

[159] Québec Civil Code, S.Q. 1991 c. 64 s. 1177.

[160] Cód. Civ. art. 2971 (2011) (Arg.), *available at* http://www.justiniano.com/codigos_juridicos/codigos_argentina.htm.

[161] *See* A.N. YIANNOPOULOS, *supra* note 158, § 3; La. CIV. CODE ANN. art. 646 (2011).

[162] *See* GORDLEY & VON MEHREN, *supra* note 153, at 198.

[163] Francesco Parisi & Ben W.F. Depoorter, *Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes* 12 (Geo. Mason U. Law & Econ., Working Paper No. 03-

Commentators have also suggested that the requirement of both dominant and servient lots helps to "avoid the proliferation and undue encumbrance of the land,"[164] echoing some of the anti-restrictions proclamations of common law courts.[165]

Some proponents of land restrictions have argued that "conservation easements" are permissible under the current legal systems of Latin American and have, in fact, been created.[166] They claim that it is possible to create a real property right that could restrict an owner from doing certain things—presumably altering environmental features—on the property. These rights, however, are not true "conservation easements" as understood in the U.S. context as they require that such agreements be between two property owners.[167] This would require the NGO to purchase a property neighboring or somehow related to every parcel on which they seek a conservation right in order to "anchor" it. This would add at the minimum great expense and, in some cases, it may be impossible as a practical matter to acquire an anchor. The civil code tradition of Latin America and its rejection of in gross rights frustrate the efficacy of the conservation concept. It appears that as of 2005, all "conservation easements" in Latin American have been appurtenant rather than in gross.[168]

A few civil law countries have more recently adopted an interest often known as a "limited personal servitude," which serves as a charge on the servient land in favor of a person rather than a dominant property.[169] German[170] and Greek[171] codes provide for such rights, which might include the right to take fruit from a property or fishing or hunting rights.[172] Even in the few civil law nations that have adopted limited personal servitudes, this interest is not likely a sufficient vehicle for a conservation restriction as limited personal servitudes are typically not

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24, 2003), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/03-24.pdf.

[164] van der Merwe, *supra* note 157, at 224.

[165] *See supra* Part I.B.

[166] *See generally* COPE, *supra* note 3.

[167] *Id*. at 9 (quoting the definition of the conservation easement in Latin America as "a real property right established by the agreement of two or more property owners . . . .").

[168] *Id*. at 13.

[169] GORDLEY & VON MEHREN, *supra* note 153, at 92.

[170] See GORDLEY & VON MEHREN, *supra* note 156, at 92 for a discussion of German Civil Code § 1090.

[171] A.N. YIANNOPOULOS, *supra* note 154, § 231.

[172] *Id*. § 231.

transferable[173] and not perpetual. Rights held by individuals terminate on death, and those held by juridical beings terminate upon dissolution[174] or after a period of years set by the code.[175] Proponents of U.S. conservation easements found these types of shortcomings to be antithetical to successful restrictions.[176]

2. AFFIRMATIVE OBLIGATIONS ON SERVIENT OWNER

Moreover, traditional civil law does not recognize a servitude that creates an affirmative obligation on the servient owner, but rather typically prevents the servient land's owner from performing acts on the property, such as a building restriction, or gives the dominant owner the right to do something on the burdened land, such as a right of way.[177] There are some examples, nevertheless, of civil law courts allowing an affirmative obligation ancillary to an otherwise valid predial servitude,[178] but it is risky to rely on such judicial leniency in light of code provisions that do not contemplate imposing affirmative duties on the owner of the servient land. Thus, in a civil law regime, a conservation servitude might not be enforceable to the extent that it obligates the servient owner to perform affirmative acts,[179] such as maintenance of the easement area,[180] that are typically required in U.S. conservation easements.

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[173] *See* GORDLEY & VON MEHREN, *supra* note 153, at 203, for a discussion of German Civil Code § 1092.

[174] A.N. YIANNOPOULOS, *supra* note 154, § 14; A.N. YIANNOPOULOS, *supra* note 158, § 4.

[175] South African law terminates personal servitudes held by a "juristic person" after 100 years. van der Merwe, *supra* note 157, at 224.

[176] Louisiana, however, has rejected the restraints on limited personal servitudes by providing for their full transferability and heritability. LA. CIV. CODE ANN. arts. 643–44 (2011). As discussed below, Louisiana has adopted Conservation Servitude Act, LA. REV. STAT. ANN. § 1271 *et seq*. (2011).

[177] GORDLEY & VON MEHREN, *supra* note 153, at 198; A.N. YIANNOPOULOS, *supra* note 158, § 14.

[178] *See* Parisi & Depoorter, *supra* note 163, at 41, citing Lebbe v. Pelseneer, [1965] J. Trib. 87 (Cour d'appel, Bruxelles, 1964) (upholding an obligation to build and plant a yard as part of a servitude not to construct a building in front of a house).

[179] A.N. YIANNOPOULOS, *supra* note 158, § 4, n.4 and accompanying text.

[180] *Frequently Asked Questions About Conservation Easements*, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, http://www.floridaswater.com/landmanagement/conservationeasements.html (last visited May 23, 2011) (protecting easement is duty of servient owner); *Benefits of Saving Land*, MONTGOMERY COUNTY LANDS TRUST, http://www.mclt.org/benefits.htm (last visited May 23, 2011) (discussing the duty of maintenance on fee owner); *Easement FAQ*, MINNESOTA LAND TRUST, http://www.mnland.org/easement-faq/ (last visited May 23, 2011) (fee owner has duty to maintain).

3. *NUMERUS CLAUSUS* AND THE LIMITS ON JUDICIAL LAW

Finally, the doctrine of *numerus clausus* (literally, "the number is closed")[181] prevents parties and courts in civil law countries from creating property interests not specifically recognized by the governing code.[182] The code is recognized as the sole source of the law, and the *numerus clausus* concept is an express corollary of that concept.[183] The code will typically delineate the types and content of absolute property rights, such as mortgages and servitudes, defining what each right means and bestows.[184] The parties cannot create by contract or transfer rights not recognized in the code, nor can the courts invent new obligations; the only way to increase or decrease the types of interests of the rights is by legislation to amend the code.[185] The principle of *numerus clausus* also exists, albeit not by that name, in other code-based countries such as China.[186]

The *numerus clausus* rule, combined with a law of servitudes that allows only a limited number of discrete interests, has the effect of denying property owners the freedom to carve out efficient, personally rewarding, and socially beneficial property rights. Under the common law system, however, courts, along with legislatures, have the power to make binding, precedential law. Moreover, there is no formal doctrine of *numerus clausus* in the common law, and courts have expanded legal rights and interests significantly, based on the agreements of the parties

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[181] John Merryman, Comment, *Policy, Autonomy, and Numerus Clausus in Italian and American Property Law*, 12 AM. J. COMP. L. 224 (1963).

[182] MATTEI, *supra* note 12, at 39; Sjef Van Erp, *Comparative Property Law, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1043, 1053 (Mathias Reimann & Reinhard Zimmermann eds., 2006); *see also* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 9–10 (2000); Parisi & Depoorter, *supra* note 163, at 13; and Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008).

[183] Merrill & Smith, *supra* note 182, at 10–11.

[184] Van Erp, *supra* note 182, at 1053.

[185] See MATTEI, *supra* note 12, at 91; Merrill & Smith, *supra* note 182, at 10; Jan M. Smits, *Applied Evolutionary Theory: Explaining Legal Change in Transnational and European Private Law*, 9 GERMAN L.J. 477, 485 (2008); and J.H. Dalhuisen, *Custom and Its Revival in Transnational Private Law*, 18 DUKE J. COMP. & INT'L L. 339, 350–51 n.21 (2008), for a discussion of questioning the claimed benefits of standardization of *numerus clausus* versus the cost of loss of contractual autonomy. There are but rare instances in a few countries where the parties' contract has been allowed to trump this doctrine. Van Erp, *supra* note 182, at 1054.

[186] *See* Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 347 (2008) for a discussion of referencing Article 5 of the Property Law; Parisi & Depoorter, *supra* note 163, at n.43, for a discussion of stating that the principle exists under other non-civil law, albeit code, jurisdictions such as Korea, Thailand, Japan, Ethiopia, and Argentina.

and public policy considerations.[187] Much of the pioneering of conservation easements in the United States came by parties operating under the common law ground rules that provide that courts have the power to legitimize newly developing property interests by extending, manipulating, and sometimes overruling existing doctrines.[188] Thus, the early proponents of conservation easements claimed that no enabling statutes were necessary to validate these interests and maintained that the judicial system could and would ultimately sustain these interests.[189] These proponents made the case for convincing courts of the validity of conservation easements based on minority-view American case law and policy.[190]

D. OTHER PROPERTY SYSTEM ISSUES

Additionally, other variations in property rights concepts in civil law and non-civil law countries present hurdles to the adoption of American-style conservation easements.

1. ADEQUATE TITLE SYSTEMS AND ENFORCEMENT

As a fundamental prerequisite, there must be a sufficiently developed property rights regime in a given country to sustain investment in and enforcement of a conservation easement right. The conservation restriction must be clearly recognized and accepted by parties and the legal system so that people will be willing to enter into such arrangements without high premiums for transaction costs or discounts for uncertainty. There also must be a registration system to

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[187] While Merrill & Smith state that there is no formal *numerus clausus* principle, *supra* note 182, at 10–11, they assert that common law judges nevertheless adhere to a similar philosophy, recognizing only a closed list of property rights. *Id*. Moreover, Merrill & Smith describe the efficiency benefits of this standardization. See also John A. Lovett, *Meditations on* Strathclyde*: Controlling Private Land Use Restrictions at the Crossroads of Legal Systems*, 36 SYR. J. INT'L L. & COM. 1, 8 (2008). While it is true that common law courts might not create brand new property interests sui generis, Merrill & Smith appear to underplay the power and track record of common law courts to expand or contract traditional property interests while purporting to maintain traditional boundaries. *See, e.g*., Sawada v. Endo, 561 P.2d 1291 (Haw. 1977) (describing judicial revolutionizing of common law tenancy by the entirety by reworking rights of husbands and wives). See *supra* note 185 for additional examples.

[188] *See, e.g*., Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982) (court applies nuisance law to find owner has right to receive sunlight to solar-heated residence, essentially creating new variety of servitude); Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604 (N.H. 1994) (recognizing increased use of public trust doctrine as essentially an expansion of traditional prescriptive easement law); *see also* Sara C. Bronin, *Modern Lights*, 80 U. COLO. L. REV. 881 (2009) (arguing for judicial adaptation of current water law doctrine to validate solar rights).

[189] *See, e.g*., BRENNEMAN, *supra* note 15, at 58.

[190] See supra notes 27–31 & accompanying text.

demonstrate adequately that the purported owner of the property has title to the land sufficient for the conveyance of an easement, and the system must accept an in rem conservation right for registration or recording.[191] Additionally, there must be a sufficient rule of law to enforce conservation easement rights and to deter potential violators. Ownership and enforcement rights must extend to non-domestic entities if global NGOs hold the interests, or sufficient local partners or affiliates must hold the conservation right. Without reliable and defensible title for the grantor and grantee of a conservation right, parties will be unlikely to enter into such transactions.

2. COMMUNAL RIGHTS

Some legal systems may include other property interests that run counter to privately held conservation rights. For example, the Swedish tradition of "Allemansrätt" permits any person to have passage over and to camp on woodlands and fields owned by others, as well as the right to gather wild flowers and mushrooms.[192] Conservation easements barring changes in the environmental condition of such lands would run afoul of this tradition. Similarly, extensive practice of "common lands" in some legal systems may prevent the acquisition of conservation easements since there may be no "owner" with authority to grant rights over the common land.[193] Finally, squatters may have acquired rights of ownership trumping that of record owners.[194]

Thus, in order to have a successful regime of private conservation restrictions, certain conditions must exist in the adopting country. The NPO sector must be willing and with sufficient capacity to

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[191] *See* Tim Hanstad, *Designing Land Registration Systems for Developing Countries*, 13 AM. U. INT'L L. REV. 647, 652 (1998); Hugh A. Brodkey, *Land Title Issues for Countries in Transition: The American Experience*, 29 J. MARSHALL L. REV. 799, 799 (1996).

[192] HENRI A.L. DEKKER, THE INVISIBLE LINE: LAND REFORM, LAND TENURE SECURITY AND LAND REGISTRATION 69 (2003).

[193] Philip Burnham, *Whose Forest? Whose Myth? Conceptualisations of Community Forests in Cameroon, in* LAW, LAND AND ENVIRONMENT: MYTHICAL LAND, LEGAL BOUNDARIES 31, 38–40 (Allen Abramson & Dimitrios Theodossopoulos eds., 2000) (describing legacy of the different land ownership laws of French and English colonial rule in Cameroon and the current conflict between traditional common property notions and privatization and state ownership proposals); Veronica Strang, *Not So Black and White: The Effects of Aboriginal Law on Australian Legislation,* in LAW, LAND AND ENVIRONMENT: MYTHICAL LAND, LEGAL BOUNDARIES, *supra*, 93, 100 (describing legislation introducing Aboriginal concepts of community owned land into the dominant legal model of private ownership); Dekker, *supra* note 192, at 66 (referring to commons in Africa).

[194] *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL (2000); and Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 HARV. INT'L L. J. 433 (2003).

hold the restrictions; private restrictions based on market solutions have to be consistent with cultural norms and avoid equity issues among nations; and the legal system and existing rule of law must be receptive to the validation and enforcement of conservation restrictions.

IV. PRIVATE CONSERVATION ALTERNATIVES TO "IN GROSS CONSERVATION EASEMENTS"

When other nations encounter legal or policy impediments to employing in gross private conservation easements, in some countries, NGOs may employ other consensual less-than-fee vehicles to preserve environmental conditions.[195] (These are in addition to appurtenant servitudes for conservation purposes that may be,[196] and have been,[197] created under the civil law.) These alternatives may not have all the features of U.S.-style conservation easements because of limited duration, an appurtenancy requirement, lack of in rem status, and limited scope, etc. These alternatives may, however, be appropriate interim or final resolutions in light of a particular country's social and economic aspirations, title issues, and legal structure.

A. PAYMENTS FOR ENVIRONMENTAL SERVICES

One alternative to the U.S.-style conservation easement is a privately financed "Payment for Environmental Services," known as PES (or by similar names such as a "Conservation Performance Payment").[198] These are contracts requiring payments on a set schedule by a private party to a landowner for refraining from environmental degradation of the land.[199] As contracts, they should be enforceable in both common law, civil law, and most other legal systems, subject to local requirements. Private funders of PESs may include "service users," such

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[195] For an in-depth examination of vehicles and case studies for private conservation in Latin America, see ENVTL. L. INST., LEGAL TOOLS AND INCENTIVES FOR PRIVATE LANDS CONSERVATION IN LATIN AMERICA: BUILDING MODELS FOR SUCCESS 149–50 (2003); *See also* Telesetsky, *supra* note 4, at 759–63 (suggesting a "modified conservation easement" with a duration equal to one generation, but renewable).

[196] *See supra* Part III.C.1 (discussing appurtenant servitudes under civil law).

[197] *See, e.g.,* COPE, *supra* note 3, at 14, Table 4; ENVTL. L. INS., *supra* note 195, at 45, 109, 121, 139.

[198] *See* WUNDER, *supra* note 65 at 1; Ferraro, *supra* note 65 at 993–96.

[199] Typically the PES will be for the purpose of protection of landscape beauty, carbon sequestration, watershed protection, and biodiversity protection. Sometimes, government will essentially act as the agent of private parties seeking conservation by taxing them and then purchasing the PES, thus lending authority and legitimacy to the transaction. Sven Wunder, Essay, *The Efficiency of Payments for Environmental Services in Tropical Conservation,* 21 CONSERVATION BIOLOGY 48, 51 (2007).

as a safari operator interested in preserving landscape values for its business or a water company seeking to maintain the integrity of its watershed, or NGOs seeking to vindicate ecological goals.[200] The term of a PES is limited and typically short term, with the parties able to renew the arrangement, perhaps at a longer term.[201]

The limited term of the PES is a great disadvantage when compared to the perpetual preservation of a conservation easement. The environmental benefits of a PES will last only as long as payments—and funding for payments—continue.[202] Moreover, as a purely contractual arrangement, it does not appear that the typical PES would be an in rem right, enforceable against the land itself and binding purchasers of the preserved land.[203] There is some confusion on terminology, as it appears that some non-perpetual, non-in rem, contract-based rights between landowners are sometimes referred to as "conservation easements," perhaps because that term is considered a gold standard in conservation efforts. But in reality, rights not assertable against the property itself, and only for short terms, should not fairly be described as conservation easements. For example, one line of the literature describes the rights held by the government in Costa Rica as PES arrangements,[204] while others trumpet them as conservation easements.[205] The only way to truly tell is through close analysis of the governing legislation and documentation of each transaction. Attempting to label the interests does not advance understanding and may reinforce concerns about the imposition of American legal vehicles.[206]

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[200] Sven Wunder et al., *Taking Stock: A Comparative Analysis of Payments for Environmental Services Programs in Developed and Developing Countries*, 65 ECOLOGICAL ECON. 834, 835 (2008).

[201] *See* Ferraro, *supra* note 65, at 995 ("Performance payments are also amendable to the short time period during which conservation objectives must be met."); Wunder, et al., *supra* note 200, at 846–47.

[202] *See* Wunder et al., *supra* note 200, at 846.

[203] This would be especially true in civil law jurisdictions as the PES is not authorized by the code as a valid property right and thus would violate the *numerus clausus* principle. *See supra* Part III.C.3.

[204] Costa Rica has a comprehensive national PES program that has been highly successful in reversing deforestation, administered by the government. Costa Rica Ley Forestal 7575 (enacted 1996), http://www.pgr.go.cr/scij/Busqueda/Normativa/Normas/nrm_repartidor.asp?param1=NRTC&nValor1=1&nValor2=41661&nValor3=74079&param2=1&strTipM=TC&IResultado=2&strSim=simp; *see also* Stefano Pagiola, *Payments for Environmental Services in Costa Rica*, 65 ECOLOGICAL ECON. 712, 712 (2008); Subak, *supra* note 6; Ferraro, *supra* note 65, at 994; WORLD BANK, *supra* note 3, at 171–72.

[205] *See, e.g.*, COPE, *supra* note 3, at 12–15; Swift, *supra* note 143, at 115.

[206] Adding even more confusion is that a conservation easement can be thought of as a type of PES, but creating a property right rather than a mere contract right.

PESs have some useful features. First, by casting these as contract rights, parties avoid the rule of most civil law regimes that bar the enforcement of an in gross property right.[207] A host country and its citizens may see the acquisition of a contract right by a global NGO as less of a foreign intrusion than the purchase of a fee or lesser property interest. Moreover, when land titles in the country are insecure, the limited term prevents the NGO from paying up front for a longer— or perpetual—conservation right where title is not enforceable or the "owner" in reality lacks title. The structure of ongoing payments forces the owner to continue to comply for the entire term of the PES in order to receive compensation.[208] The owner thus has an incentive to protect the environment, and the dynamic between the owner and the environmental NGO shifts from adversarial to collaborative.[209] Compared to a conservation easement, the landowner has an interest in compliance, something that is not always the case with U.S. owners subject to conservation easements.[210] Finally, as with conservation easements, PESs offer the benefits of private acquisition, NGO administration, and a consensual rather than a regulatory approach.[211]

There has been limited use of PES programs involving nongovernmental entities in Latin America, Asia, and Africa.[212] Some noteworthy examples include an arrangement by a nonprofit (Fundación Natura) in Los Negros, Bolivia to protect threatened cloud forest habitat of migratory birds[213] and a contract obtained by Cedenera, an NGO, to protect watershed in Pimampiro, Ecuador.[214] A 2006 inventory of PES projects in Sub-Sahara Africa found only eighteen projects, a minority of which were performance based (i.e., true PESs).[215] In contrast, Latin

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[207] *See supra* Part III.C.

[208] *See* Wunder, *supra* note 199, at 50.

[209] Ferraro, *supra* note 65, at 995.

[210] *See* Nature Conservancy, Inc. v. Sims, No. 07-112-JMH 2009 WL 602031 (E.D. Ky. Mar. 5, 2009) (enforcing conservation easement against owner who regarded the property); Windham Land Trust v. Jeffords, 967 A.2d 690 (Me. 2009) (enforcing a conservation easement against an owner who planned commercial use of the land and admission of the public).

[211] *See supra* Part II.

[212] *See* Wunder et al., *supra* note 200.

[213] *See* Nigel Asquith et al., *Selling Two Environmental Services: In-Kind Payments for Bird Habitat and Watershed Protection in Los Negros, Bolivia*, 65 ECOLOGICAL ECON. 675 (2008).

[214] *See* Sven Wunder & Montserrat Albán, *Decentralized Payments for Environmental Services: The Cases of Pimampiro and PROFAFOR in Ecuador*, 65 ECOLOGICAL ECON. 685 (2008).

[215] Paul J. Ferraro, *Regional Review for Payments of Watershed Services: Sub-Saharan Africa,* 28 J. SUSTAINABLE FORESTRY 525, 527–29 (2009); *see* Sissel Waage et al., *A Scoping Assessment of Current Work on Payments for Ecosystem Services Asia, Latin America, and East & Southern Africa* 2, http://ibcperu.org/doc/isis/8003.pdf.

America has a larger number of PES arrangements.[216] This disparity has been attributed to weaker financial condition of potential purchasing entities in Africa,[217] especially high transaction costs,[218] and less reliable legal enforcement of contracts.[219]

B. CHILE'S PROPOSED *DERECHO REAL DE CONSERVACIÓN*

There is currently a legislative proposal in Chile to create a new right under the Chilean civil code called a *derecho real de conservación* (i.e., a real right of conservation).[220] The proposal expressly denotes the interest as a real estate right,[221] permits it to be held by nonprofit organizations as well as by the government,[222] and allows for perpetual duration.[223] There is no requirement that the right be appurtenant to a benefited property, thus in gross rights should be permitted. The right is for "environmental conservation" goals, defined as protection of biodiversity, species, habitat, and ecosystems, as well as the prevention of environmental deterioration.[224] The legislation also allows the interest holder a right of access to inspect the burdened property to determine compliance.[225] As of this writing, the proposal is still pending in the legislature.

There are several salutary aspects to the Chilean approach. First, the legislative proposal resulted from collaboration of The Nature Conservancy (a U.S. NGO also engaged in global issues)[226] with local constituencies interested in conservation activities and in creating a lasting conservation right, thus bringing outside expertise to in-country stakeholders and decision makers.[227] Second, there were indications that the social, economic, and political conditions in Chile were ripe for the

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[216] Ferraro, *supra* note 215, at 535.

[217] *Id*. at 536–39.

[218] *Id*. at 539–40.

[219] *Id*. at 540.

[220] Henry Tepper & Victoria Alonso, *The Private Lands Conservation Initiative in Chile,* in CONSERVATION CAPITAL IN THE AMERICAS, 49, 58–59 (James N. Levitt ed., 2010).

[221] Article 2 of Bill to Establish Derecho Real de Conservación (copy of English version kept on file by author.)

[222] *Id*. at art. 5.

[223] *Id*. at art. 8(4).

[224] *Id*. at arts. 4, 7.

[225] *Id*. at art. 11(5).

[226] BREWER, *supra* note 15, at 207–08. The Nature Conservancy established its International Program in 1980, first focusing on the Caribbean and Latin America and then expanding to other regions. The Nature Conservancy worked within countries to help support their national parks and to protect infringement on them, as these parks provided important biodiversity.

[227] Tepper & Alonso, *supra* note 220, at 50–51.

creation of a property-based, long-term conservation right.[228] Additionally, the proposed legislation does not attempt to impose the common law conservation easement on civil law, but rather offers a new interest—the *derecho real de conservación*—that the civil code would embrace.[229] This flexible, locally-based approach finesses the concerns of "legal imperialism" and respects existing legal regimes.

C. LEASES

If in gross servitudes are not legally permitted for fees, a sale-leaseback arrangement could be employed to create in gross conservation restrictions attached to the leasehold rights. For example, in England, easements[230] and covenants[231] are not enforceable in gross against successors.[232] Therefore, a conservation organization could not acquire a conservation easement from a fee owner. If, however, the owner conveyed the fee to an NPO, the organization could lease the property back to the former fee owner on a long term, automatically renewable lease, but including an express conservation covenant binding the tenant not to disturb ecological features.[233] The former owner would have full right of possession as tenant; and, since covenants in leaseholds are enforceable by the landlord against the tenant in England and both the landlord and the tenant can assign the lease,[234] the conservation covenant would bind successors to the leasehold estate. The preservation goal could thus be achieved.

The difficulty with this approach is that many owners would likely be unwilling to relinquish fee ownership in this manner even though the leasehold will give them and their successors potentially infinite possession. This arrangement may be more acceptable in

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[228] *Id*. at 51–54.

[229] *Id*. at 58.

[230] *See* In Re Ellenborough Park, [1955] 3 WLR 892 (Eng.); SPENCER G. MAURICE, GALE ON EASEMENTS 7–8 (14th ed. 1972); *see also* PAUL BUTT & NEIL DUCKWORTH, PROPERTY LAW AND PRACTICE 2008/2009 at 25 (2008).

[231] *See* Stillwell v. Blackman [1967] EWHC (Ch) 767, 1 W.L.R. 375 (Eng.). England also bars the running of the burden of affirmative covenants, so repair obligations on conservation easements may not be enforceable. *See also* BUTT & DUCKWORTH, *supra* note 230, at 30.

[232] *See infra* Part V.

[233] The provisions in leases preventing destruction of environmental features would essentially be an express modification of the law of waste, which limits alterations that a tenant can make to the premises.

[234] *See* Spencer's Case, (1583) 77 Eng. Rep. 72 (Q.B.) (running burden of leasehold covenant to assignee of tenant); BUTT & DUCKWORTH, *supra* note 230, at 44–45, 363.

countries where residential ground leases are common, such as in portions of England.[235]

D. EASEMENTS CONTROLLED BY GOVERNMENT

By definition, a private conservation easement is held and enforced by a private (nonprofit) organization. Governmentally-owned conservation easements are common in the United States,[236] but by definition they do not offer the benefits of private initiative and action.

In other countries, especially in civil law nations where private easements in gross would challenge existing legal paradigms, a good first step towards conservation property rights held by NGOs might be the adoption of *governmental* conservation property rights. By way of example, depending on definition, some of Costa Rica's governmentally held rights may be considered true conservation easements.[237]

Three Mexican states have enacted legislation that permits conservation easements to be held by NGOs, provided that the easements are approved by the government and the easement land becomes part of the state-protected conservation land system.[238] While the requirement of government approval may inject the difficulties of bureaucracy and governmental inaction, the involvement of government does help to address the concerns with current acquisition of American private conservation easements where there is no community or regional planning to set up an integrated easement plan.[239] Governmental approval of easements is not necessarily a roadblock to success of a conservation easement program, provided that there is a reasonably efficient,

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[235] *See* HERMANN MUTHEESIUS 2 THE ENGLISH HOUSE 13–15 (Dennis Sharp ed. 2007) (describing history through the nineteenth century and royal ownership; a considerable amount of residential and commercial land "owners" in London, for example, hold only ground leases with the underlying freehold held by others, formerly royals and now often investment funds); Chris Hamnett, UNEQUAL CITY: LONDON IN THE GLOBAL ARENA 141–43 (2003); CATHERINE FARVACQUE & PATRICK MCAUSLAN, REFORMING URBAN LAND POLICIES AND INSTITUTIONS IN DEVELOPING COUNTRIES 48 (1992); Susanne Gray, *What's the Difference Between Freehold and Leasehold?*, LUDLOWTHOMPSON.COM,http://www.ludlowthompson.com/property_advice/Whats_the_difference_between_freehold_and_leasehold/article.htm?id=16 (last visited May 22, 2011) (describing current practices in London).

[236] *See supra* note 9.

[237] *See supra* notes 199–202 and accompanying text.

[238] ENVTL. L. INST., *supra* note 195, at 149–50 (citing the states of Quintana Roo, Veracruz, and Nuevo Leon); Swift et al., *supra* note 195, at 116–17 (same); *see* Veracruz Ley Estatal de Proteccion Ambiental de Veracrux (Veracruz Environmental Protection Act) Arts. 77–81 (defining conservation easement), 76 (governmental approval) (2000), *available at* http://info4.juridicas.unam.mx/adprojus/leg/31/1016/.

[239] *See supra* Part II.B.4, 6.

transparent bureaucracy. For example, conservation easements have thrived in Massachusetts, which is the one U.S. state that requires both local and state approval of conservation easements.[240]

E. USUFRUCT

Under civil law regimes, property owners can create a right of usufruct in another person. While there are differences between countries, usufructs generally grant the holder the right to use and enjoy the land, subject to the obligation to preserve the property.[241] More specifically, the holder of a usufruct has the right to possession and "to derive the utility, profits, and advantages" that the property may produce.[242] Usufructs can be created only for a limited time period.[243] Typically, usufructs expire on the death of the holder.[244] For juridical persons, such as corporations, the traditional civil code approach is to limit the duration of a usufruct to twenty[245] or thirty years,[246] though some countries have recently extended the duration of the usufruct to the potentially infinite "life" of the entity.[247]

There are a variety of approaches and much nuance[248] on the transferability of a usufruct. Some civil codes bar transferability in all cases,[249] others prohibit transferability unless the parties provide

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[240] Mass. Ann. Laws ch. 184, §§ 31–32 (2011).

[241] Code Civil [C. CIV.] art. 578 (Fr.); Código Civil [CÓD. CIV.][Civil Code] Book III, Title XII, art. 2812, 2817 (Arg.), *available at* http://www.justiniano.com/codigos_juridicos/codigo_civil/codciv.htm; Astikos Kodikas [A.K.][Civil Code] art. 1142 (Greece); *Erlax Properties (Pty) Ltd. v. Registrar of Deeds* 1991 (1) SA 879 (A) at 888 (S. Afr.); KERT STAVORN, USUFRUCTS IN THAILAND, SIAM LEGAL, www.siam-legal.com/realestate/pdf-file/usufruct.pdf; L.F.E. Goldie, Comment, *Title and Use (and Usufruct)—An Ancient Distinction Too Oft Forgot*, 79 AM. J. INT'L L. 689, 691–92 (1989); A.N. YIANNOPOULOS, *supra* note 154, § 4; A.N. Yiannopoulos, *Usufruct: General Principles, Louisiana and Comparative Law*, 27 LA. L. REV. 369 (1967). In some ways, a usufruct resembles the life estate of the common law. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1859 (2000).

[242] LA. CIV. CODE ANN. art. 539 (2010).

[243] LA. CIV. CODE ANN. art. 539.

[244] A.N. YIANNOPOULOS, *supra* note 154, § 4.

[245] Código Civil [CÓD. CIV.][Civil Code] Book III, Title XII, art. 2812 (Arg.).

[246] LA. CIV. CODE ANN. art. 608; CODE CIVIL [C. CIV.] art. 619 (Fr.); A.N. YIANNOPOULOS, *supra* note 154, §16.

[247] Astikos Kodikas [A.K.][Civil Code] art. 1142 (Greece); A.N. YIANNOPOULOS, *supra* note 154, §16.

[248] *See* A.J. McClean, *The Common Law Life Estate and the Civil Law Usufruct: A Comparative Study*, 12 INT'L & COMP. L.Q. 649, 659 (1963).

[249] A.N. YIANNOPOULOS, *supra* note 154, § 37, citing German B.G.B. § 1059 (usufructs held by natural persons); F. Gregory Lastowka & Dan Hunter, *The Law of Virtual Worlds*, 92 CAL. L. REV. 1, 42 (2004). Roman law barred transferability. Boris Kozolchyk, *Modernization of*

otherwise,[250] and still others permit transferability as a matter of right provided the transferor makes certain guarantees to the owner of the underlying property.[251] There are also differences among commentators as to whether a purchaser of the underlying property is bound by a pre-existing usufruct.[252]

Usufructs have been used to create conservation restrictions by the owner granting the right to enjoy conservation values to a conservation group.[253] One benefit of this device is that there is no need for a second parcel of land—the conservation group holds the usufruct in the restricted property that is ultimately owned by the owner. A disadvantage of usufructs is that they usually have a limited duration and cannot be the basis of a long term conservation solution. Moreover, a usufruct may give the transferee conservation group far more rights than necessary (e,g., possession) and responsibilities (e.g., maintenance of the property) than are required to achieve conservation goals.

V. CONSERVATION EASEMENTS IN OTHER COMMON LAW JURISDICTIONS

There are a number of common law jurisdictions that have adopted conservation easement statutes that contain some or even many features of the American model.[254] Many are former British colonies, which is ironic, as England itself still prohibits easements in gross, does not allow covenants in gross to run,[255] and has not enacted conservation easement legislation.

Two civil law jurisdictions—Louisiana and Quebec—have also adopted conservation "easement" legislation. These jurisdictions are

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Commercial Law: International Uniformity and Economic Development, 34 BROOK. J. INT'L L. 709, n.56 (2009).

[250] A.N. YIANNOPOULOS, *supra* note 154, § 37, citing Greek Civil Code art. 1166.

[251] A.N. YIANNOPOULOS, *supra* note 154, § 37, citing LA. CIV. CODE ANN. art. 567 (transferor responsible for violations of transferee) and German Civil Code allowing transfer with usufructs granted to juridical persons; *see* Thailand Civil and Commercial Code § 1422, *discussed in* STAVORN, *supra* note 141.

[252] *Compare* A.N. YIANNOPOULOS, *supra* note 154, § 168 (owner may transfer but not free of the usufruct) *with* Swift et al., *supra* note 143, at 29 (usufruct does not bind subsequent owners).

[253] Swift et al., *supra* note 143, at 29, 139 (describing a usufruct in cloud forest as part of the Mayan Biosphere Reserve in Guatemala).

[254] Ironically, England has not adopted such legislation and would not permit "classical" private conservation easements because of in gross prohibitions. *See supra* Part IV.C; Town and Country Planning Act of 1990, § 106 (government can hold a type of conservation easement by way of a restriction enforceable by government recorded against land as part of granting an approval in the planning (i.e., zoning) process).

[255] *See supra* Part IV.C.

noteworthy as they exist in federations of states or provinces that otherwise follow the common law. These statutes indicate how at least two jurisdictions attempted to integrate a common law vehicle into an essentially civil law model, and the choices they made.

A. AFRICAN COUNTRIES

A number of African countries have adopted legislation providing for conservation easements of some type. For example, like the American model, Uganda permits perpetual,[256] in gross[257] "environmental easements" for various purposes including preservation of flora and fauna, view, ecological and physical features, open space, and water quality.[258] The Ugandan environmental easement is not consensual, however, as the easement is created not by agreement of the parties but by a decision of a court on the application of a "person or group of persons."[259] The applicant is required to compensate the landowner for the lost value of the use of the land,[260] though the government may pay the compensation if the easement is of national importance.[261] This nonconsensual creation diverges from the spirit and provisions of the American model. It carries the baggage of all compulsory takings, but perhaps may be worse as it is initiated by private parties (not government) and made effective by the judiciary (not the legislature) without the requirement of a carefully determined plan.[262] Kenya[263] in 1999 adopted an environmental easement statute virtually identical to the Ugandan legislation, and Tanzania in 2004 passed a statute with many of the same features.[264]

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[256] Uganda National Environmental Act, Ch. 153, § 72(3) (enacted 1995), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=180968.

[257] *Id*. § 72(6).

[258] *Id*. § 72(4).

[259] *Id*. §§ 73(1), 74(1).

[260] *Id*. § 76(1), (3).

[261] *Id*. § 76(4).

[262] *See* Kelo v. City of New London, 545 U.S. 469 (2005).

[263] Kenya Environmental Management and Co-ordination Act (1999) §§ 112–16, *available at* http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

[264] Tanzania Environmental Management Act of 2004 §§ 156–60, *available at* http://www.lead-journal.org/content/07290.pdf.

B. CANADA

Canadian provinces have adopted private conservation easement enabling legislation.[265] These statutes generally resemble the American model by specifically providing for nonprofit ownership,[266] in gross interests, [267] perpetual ownership if desired by the parties,[268] and typical environmental preservation purposes.[269] Like the American model, there is no requirement of government approval in creation of a conservation easement held by an NPO. On the termination and modification issue, the statutes sometimes exhibit mixed signals. For example, the Nova Scotia legislation attempts to ensure the viability of conservation easements to a greater extent than other easements or covenants by expressly stating that conservation easements do not lapse solely by reason of non-enforcement, change in the use of the servient land, or changed conditions in the surrounding land.[270] At the same time, though, the legislation permits the court to grant to the servient owner or "Her Majesty" any relief or remedy available at common law.[271] Such language might be applied to allow the government to seek modification of a conservation easement if and when the public interest requires, so providing needed flexibility into a perpetual private conservation arrangement.

C. AUSTRALIA

Some Australian states have adopted legislation that permits a conservation covenant held by a specific conservation trust created in the

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[265] *See generally* Arlene J. Kwasniak, *Conservation Easements: Pluses and Pitfalls, Generally and For Municipalities*, 46 ALTA L. REV. 651 (2009).

[266] *See, e.g.*, R.S.O., c. 28, § 3(f) (1990); R.S.N.B., c. C-16.3, § 5 (1998); R.S.S., c. C-27.01, § 6 (1996).

[267] *See, e.g.*, R.S.N.B., c. C-16.3, § 2(4) (1998); R.S.N.S., c. 28, § 6 (2001); R.S.S., c. C-27.01, § 3(3) (1996).

[268] *See, e.g.*, R.S.N.B., c. C-16.3, § 2(2) (1998); R.S.N.S., c. 28, § 5(1) (2001); R.S.S., c. C-27.01, § 3(2) (1996).

[269] *See, e.g.*, R.S.N.B., c. C-16.3, § 3 (1998); R.S.N.S., c. 28, § 4(c) (2001); R.S.O., c. 28, § 3(2) (1990); R.S.S. c. C-27.01, § 4 (1996).

[270] R.S.N.S., c. 28, § 12 (2001); *see also* R.S.N.B., c. 28, § 10(5) (1998) (providing for assignment of conservation easement to government in the event the original holder dies or ceases to operate, thus preserving the benefit of the conservation easement); R.S.O., c. 28, §§ 4.2, 4.3 (1990) (barring amendment or release of a conservation easement without Ministerial approval, thus preventing the loss to the public of valuable rights).

[271] R.S.N.S., c. 28, §§ 15(2)(a), 2(1)(f) (2001) (defining "owner); *see also* R.S.N.B., c. C-16.3, § 10(1)(b) (1998) (providing for termination on application of servient owner if continuation of conservation easement would produce a severe hardship); R.S.S., c. C-27.01, § 10(1)(b) (same).

statute.[272] Thus, there is no authorization for nonprofits generally to hold conservation restrictions. A government official appoints the members of the statutory conservation trust, thereby placing the trust under a degree of governmental control.[273] The conservation restriction is therefore not fully a "private" interest.

There is significant governmental involvement in the operation and administration of Australian conservation covenants. A government official must approve acquisition, amendment, and release of a covenant, after a period of public input.[274] This has benefits, in that it ensures that the restrictions serve public conservation goals and prevents the release of beneficial covenants; the costs, though, are the introduction of potential red tape and the loss of nonprofit initiative. One interesting provision states that when the parties are unable to agree on the release of a covenant, "the matter shall be determined by" a governmental official.[275] Again, this is a double-edged sword as it addresses the perpetuity problem by providing flexibility but potentially weakens conservation goals.

D. HYBRIDS: LOUISIANA AND QUEBEC

Louisiana and Quebec present interesting examples, as they are primarily civil law jurisdictions within a federal system comprised of other entities following the common law. Both Louisiana and Quebec have adopted statutes allowing NPOs to participate in conservation efforts, though Quebec's solution is less similar to the model used in the United States and the other Canadian provinces. These civil code regimes have modified the common law model, apparently to fit other facets of their legal systems.[276]

In 1986, Louisiana added a statue providing for a "conservation servitude" that is substantively consistent with many of the provisions of

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[272] *See, e.g.*, New South Wales Nature Conservation Trust Act of 2001 § 33; New South Wales National Parks and Wildlife Act of 1974 §69B; Victorian Conservation Trust Act of 1972 § 3A. Other Australian states have conservation covenant programs where a governmental entity, rather than a trust, is the covenantee. *See* ROMY GREINER, DANIEL GREGG & OWEN MILLER, CONSERVATION COVENANTS AND CONSERVATION MANAGEMENT AGREEMENTS IN THE NT: A PASTORIALISTS' PERSPECTIVE 4–7 (2008), *available at* http://www.riverconsulting.com.au/reports/NT_CCs-CMAs_Final-Report_2008.pdf.

[273] New South Wales Nature Conservation Trust Act § 18; Victorian Conservation Trust Act § 4.

[274] *See* Victorian Conservation Trust Act §§ 3A(3), (5), (6), (80); New South Wales Nature Conservation Trust Act §§ 30, 31(1)(b), 34(2).

[275] Victorian Conservation Trust Act § 3A(4).

[276] *See* Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 8 (2003) (describing Louisiana and Quebec as "mixed" civil law and common law jurisdictions).

the Uniform Conservation Easement Act: conservation servitudes are unlimited in duration unless the document provides otherwise, they can be held by NPOs, and they are enforceable like other servitudes.[277] Interestingly, there is no specific authorization of in gross ownership, leaving one to wonder whether the general Louisiana Code requirement of appurtenancy would apply to conservation servitudes.[278] If in gross ownership is in fact barred, Louisiana would lack a key feature of the American conservation easement model.

Quebec contemplates more governmental involvement than even Louisiana, let alone other Canadian provinces. A nonprofit can apply jointly with a landowner for recognition of the owner's land as a "nature reserve."[279] The agreement must indicate the conservation measures that the owner will undertake, as well as permitted and prohibited activities.[280] Presumably, these could be like restrictions in conservation easements. This agreement can last in perpetuity, or for a lesser period.[281] Unlike almost all conservation easement statutes, however, the Minister must approve the nature reserve agreement in order for it to be valid.[282] Similarly, the Minister must approve amendments and the Minister may terminate a nature reserve initiative on the Minister's own initiative if certain conditions are met.[283] While this article has explored the potential benefits of some increased governmental involvement in some situations involving conservation easements, the Quebec approach may threaten the vibrancy of NPO activities in conservation.

CONCLUSION

Nation states residing in our global community face difficult choices on the allocation and utilization of their limited, valuable land. Governmental entities can accomplish a great deal in conserving these resources. There is a role, however, for private organizations in the preservation effort. One relatively recent, successful, and game changing conservation device in the United States has been the in gross conservation easement acquired and stewarded by a nonprofit organization. This article has suggested that other countries may find that

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[277] LA. REV. STAT. ANN. §§ 1271–76 (2011).
[278] *See supra* note 162 & accompanying text.
[279] Natural Heritage Conservation Act, R.S.Q. c. C-61.01, § 54.
[280] *Id.* § 55.
[281] *Id.* § 54.
[282] *Id.* §§ 57, 60.
[283] *Id.* §§ 60–63.

some type of private conservation restriction is a helpful tool. But before so concluding, it is essential that a nation examine its own unique culture, history, and aspirations to determine if such a private device is suitable for it. Then the country can devise a legal structure, consistent with local law, for the type of restriction that will best meet the country's policy goals. It is far more likely that conservation efforts will succeed following this strategy, rather than through the unthinking imposition of an unfamiliar American-style conservation easement.