

A R T I C L E S

Drawing the Line: Striking a Principled Balance Between Regulating and Paying to Protect the Land

by John Echeverria and Jeff Pidot

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Editors' Summary

Effective conservation is at times frustrated by a lack of balance between regulation and payment, the two tools most often used for land protection. Efforts to determine which protection tool to use should consider factors such as the proper roles of payment and regulation, use of eminent domain or permanent easements, the temptations of political expediency, and public participation in the decisionmaking process.

The federal government did not consciously plan the current mix of regulation, government acquisition, grants, and tax incentives. Nor has Congress or the executive branch ever thought carefully about the ideal mix of conservation tools.

—Barton Thompson Jr.¹

[I]f financial incentives are used in lieu of (rather than as a complement to) regulation, they may undermine regulatory efforts and the legitimacy of the regulatory process itself.

—Federico Cheever & Nancy McLaughlin²

I sympathize with colleagues in the conservation movement, who work tirelessly to protect ecologically important lands and to promote sound practices on farms, rangelands, and forests. They mean well and largely do good. But I disagree with their rising, often uncritical embrace of payment programs, and not only because they can burden taxpayers unfairly. . . . Payments to landowners can blur the exceedingly vital link between private rights and public welfare, tilting the institution too far toward the former. Ironically, these payment programs and the related labors of land trusts are adding potent fuel to the property rights movement.

—Eric Freyfogle³

Both approaches have advantages, and disadvantages; thus, conserving resources by relying on only one or the other is like trying to win at football by playing only offense or defense. A better approach—perhaps the only approach—is to use both in a deliberate and concerted way.

—Edward Thompson Jr.⁴

Somewhere, somehow, we need to draw a line. We need to decide when it's appropriate to tell a person to stop some land use, and when we should offer payment to stop. But where should the line go?

—Eric Freyfogle⁵

Regulation and payment, the two principal tools for land protection in the United States, are largely uncoordinated and sometimes conflict and undermine each other. After describing the problems created by the overlapping uses of these divergent approaches, this Article offers

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1. Barton Thompson Jr., *Conservation Options: Toward a Greater Private Role*, 21 VA. ENVTL. L.J. 245, 246 (2002).
 2. Federico Cheever & Nancy McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ELR 10223, 10233 (Mar. 2004).
 3. ERIC FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND xiii-xiv (2007).
 4. Edward Thompson Jr., *Reconciling Property Rights and Land Conservation: The Hybrid Paradigm*, 26 J. LAND RESOURCES & ENVTL. L. 57 (2005).
 5. FREYFOGLE, *supra* note 3, at 116.

some proposed principles and policies on how they might be modified and better coordinated in order to create a more coherent, effective, and equitable system of land protection.

For our purposes, regulation refers to the panoply of local, state, and federal government requirements and procedures controlling private land use, including zoning, growth management ordinances, wetlands permitting statutes, and so on. The payment approach consists of all forms of government subsidies to landowners, including direct grants and tax benefits, designed to induce owners to voluntarily sell or donate land or interests in land to public agencies or nonprofits.

This Article studiously ignores questions of political practicality and expediency. Instead, we have sought to develop policy solutions from the ground up, relying on basic economic, legal, and political science principles. By doing so, we want to break through the mental barriers established by what has been done in the past and what is deemed politically viable in the near term. Indeed, one of our premises is that some conservation policymakers, in an anxious rush to use whatever means are at hand to save open space, apparently have lost sight of questions about what mechanisms are best suited to the protection and management of lands of different types, in different contexts, and for different purposes. If our proposals appear to some as overly idealistic, our answer is that thinking outside the currently available political and cultural box is the only way that change begins to happen.

In the course of preparing this Article, we have springboarded from the valuable if modest literature related to this topic,⁶ as well as the knowledge and experience of land use practitioners and academics with diverse perspectives,⁷ to each of whom we are indebted for their opinions freely shared with us even while some may not share our views. We hope that this Article will represent one contribution to a continuing dialogue. This Article is organized into the following sections: (1) description of the two principal approaches to protecting the land and the recent, rapid changes in the relative importance of each approach; (2) key issues and concerns raised by the choice between the regulatory and

payment approaches; (3) principles that ought to guide this choice in the future; (4) proposed policies on drawing the line between these approaches and combining them into a better unified system; and (5) conclusion.

I. Shifting Private Land Conservation Policies

Sixty percent of the land in America, and far more in many eastern and midwestern states, is owned privately.⁸ Three quarters of all threatened or endangered species depend on private land for habitat, food, or breeding grounds.⁹ Private lands also contain most of the nation's wetlands and are essential to the conservation of much of its remaining open space.¹⁰ Accordingly, successful strategies for protecting land have to take account of the primacy of private land ownership.

The current U.S. approach to private land protection involves a bewildering mix of regulatory and payment tools. At the federal level, regulatory restrictions are based on such major legislation as the Endangered Species Act,¹¹ the Clean Water Act,¹² and the Coastal Zone Management Act.¹³ There are also many state statutes addressing growth management and protecting specific resource areas, as well as innumerable county and municipal growth control and zoning ordinances of widely varying stringency and complexity. While land use regulation of one sort or another exists everywhere, its scope and intensity vary from place to place.

The largest direct-payment conservation programs involve federal agricultural subsidies supporting environmental compliance and management of selected farmlands. These programs, which provided \$165 billion in payments between 1995 and 2005, are designed to induce farmers to restore wetlands and perform other environmentally beneficial management measures and/or to reimburse farmers for the costs of meeting regulatory standards.¹⁴

The most significant recent development in land conservation is the rapid deployment from coast to coast of conservation easements.¹⁵ A relatively new invention in real estate law, a conservation easement typically involves a perpetual promise by a landowner to restrict the future use of property. The promise is enforceable by a private land trust or pub-

6. Representative of this literature are the following: FREYFOGLE, *supra* note 3; J. Peter BYRNE, *Property and Environment: Thoughts on an Evolving Relationship*, 28 HARV. J.L. & PUB. POL'Y 679 (2005); Cheever & McLaughlin, *supra* note 2; John Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1 (2005); Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process* (Case W. Reserve Univ., Case Legal Studies Research Paper No. 07-24, 2007); Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541 (2006); Thompson, *supra* note 1.

7. Of particular help in reviewing and commenting on this Article have been Len Barson, Peter Byrne, Fred Cheever, Kim Elliman, Theodore Feitshans, Thekla Hansen-Young, Nancy McLaughlin, Molly McUsic, Jesse Richardson, and Tim Searchinger. In acknowledging their contributions, however, we must point out that some of them disagreed heartily with different elements of our thesis.

8. Stern, *supra* note 6, at 545.

9. *Id.*

10. *Id.*

11. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

12. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

13. 16 U.S.C. §§1451-1465, ELR STAT. CZMA §§302-319.

14. Timothy Searchinger, *A Brief Summary of Agricultural Conservation Programs* (2005) (presented at the ABA Section of Environment, Energy, and Resources 34th Annual Conference on Environmental Law).

15. See Korngold, *supra* note 6, at 11-12; Jeff Pidot, *Reinventing Conservation Easements, A Critical Examination and Ideas for Reform*, POL'Y FOCUS REP. (Lincoln Inst. of Land Pol'y, Cambridge, Mass.), Sept. 2005, at 1-7.

lic entity to which the conservation easement is conveyed. While in most jurisdictions there is no tracking system for conservation easements, estimates of the amount of easement land held by private land trusts alone exceed 7 million acres today, up from 300,000 acres just two decades ago.¹⁶ Easements covering many additional millions of acres are held by federal, state, and local governments.

Many easements have been created through privately arranged yet publicly subsidized donations to nonprofit land trusts. The number of these organizations has grown explosively in recent years to over 1,700 nationwide. In addition to these donations, various government programs, such as Forest Legacy at the federal level and state and local land bond and other funding mechanisms, provide direct public financing for the purchase of conservation easements.¹⁷

Some easements are purchased at estimated full market value while most are acquired at a discount to the taxpayer through a subsidized charitable donation. While this public subsidy is different in degree from outright purchase, there is no difference in kind. Tax subsidies are the same as any other form of public payment in terms of imposing financial losses and opportunity costs on government and conferring financial gains on landowners. While tax subsidies may result in payment for only part of the value of the donated property interest, they still involve public money expended or foregone.

The current mix of land protection tools partly reflects the remarkable transformation over the last few decades in the politics, culture, and structure of land protection. As opponents of regulatory measures have strengthened politically, the number of private land trusts has exploded.¹⁸ Meanwhile, the regulatory approach, which seemed to reach its zenith in the 1970s, has become less pervasive. As a result, there has been a nationwide trend of conservation payment incentives in various forms becoming a substitute for regulation.¹⁹

This trend in private land conservation strategies has been significantly fueled by important changes in the nation's tax laws that began a little over one-quarter of a century ago.²⁰ During this period, the Internal Revenue Code has extended income tax deductions and other tax benefits to landowners who donate conservation easements in transactions that go largely if not entirely unsupervised by government, even as to the amount of its investment.²¹ Unlike direct appropriations of federal tax dollars, tax subsidies are not subject to any periodic review or even precise accounting by the U.S. Congress or anyone else. Some states (notably Virginia and Colorado) have added tax credits to encourage private

conservation easements that are so generous that they can approach full payment for the value of the rights the landowner gives up, giving rise to conservation easement businesses on a grand scale.²²

II. Key Issues and Concerns

To develop coherent policies concerning when to regulate and when to pay for land conservation, it is first necessary to define the issues and concerns at stake. This section tackles that task.

A. Economic Fairness

The basic economic distinction between regulatory and paying mechanisms is whether or not affected landowners receive financial payments for maintaining the conservation values of their property. One fundamental question raised by this difference is whether regulations impose unfair economic burdens on landowners to advance community goals or, conversely, whether payment programs impose unjustified burdens on taxpayers and/or confer windfalls on landowners.

This question is challenging, for the answer varies from case to case depending on the nature of the regulation or payment program, the expectations of the affected landowner, and the location and economic prospects of the property involved. Regulations may have only modest adverse effects on land values, so long as some development or other economically productive use is still allowed on the property.²³ Communitywide land use regulations, including even relatively aggressive open space or agricultural zoning, typically create networks of reciprocal burdens and benefits that make it difficult to determine whether the net effect of a restriction is positive or negative.²⁴ We know, at a minimum, that it is incorrect to assume that restricting uses of land through regulation necessarily reduces property values in a significant way.

At the same time, stringent regulations, particularly those targeting relatively few parcels, can reduce property values because the owners do not benefit from application of the same restriction to their neighbors. Even here, however, there is a question about the appropriate frame of reference for addressing the issue of economic fairness. For example, why should special tax or other government policies favoring certain lands or landowners, which tend to increase land values or landowner wealth, not be treated as a set-off against economic burdens caused by government regulation restricting property development? More generally, are many regulatory restrictions not simply the acceptable price of the advantages of life in modern society?

Furthermore, while a restriction imposed through an easement placed on an individual property may reduce the

16. Ronald Zumbun, *Focus Column: Conservation Easements*, DAILY J., July 20, 2007.

17. U.S. Forest Service, Northeastern Area Forest Legacy Program, <http://www.na.fs.fed.us/legacy> (last visited Aug. 5, 2009); Maine State Planning Office, Land for Maine's Future, <http://www.maine.gov/spo/lmf> (last visited July 22, 2009).

18. FREYFOGLE, *supra* note 3, at 79; Echeverria, *supra* note 6, at 4; Stern, *supra* note 6, at 542.

19. Echeverria, *supra* note 6, at 4, 39; Cheever & McLaughlin, *supra* note 2, at 10227.

20. Pidot, *supra* note 12, at 2-3; Cheever & McLaughlin, *supra* note 2, at 10225.

21. Thompson, *supra* note 1, at 281; Echeverria, *supra* note 6, at 24.

22. Korngold, *supra* note 6, at 26; Stern, *supra* note 6, at 575-76.

23. Echeverria, *supra* note 6, at 6, 24.

24. Georgetown Environmental Law & Policy Institute, *Property Values and Oregon Measure 37: Exposing the False Premise of Regulation's Harm to Landowners*, Georgetown Univ. Law Center 9-10, 23, 25, 30 (2007) [hereinafter *Property Values*].

market value of the property, paying for the easement may be unfair to the taxpaying public if the same restriction could have been imposed by regulation. Easement restrictions offered by volunteers may be less comprehensive than regulatory programs, and therefore result in fewer reciprocal benefits than regulatory programs could generate. As a result, voluntary easements may impose costs on taxpayers to address landowner fairness concerns that could have been avoided or minimized by instead pursuing the regulatory option to its reasonable limits.

Tax subsidies are not intended to cover the full economic value of donations, meaning that gifted conservation easements should involve some financial sacrifice. In theory, this may allay concerns about impacts on taxpayers and place a practical cap on the number of easements likely to be created.²⁵ Yet, the self-selection inherent in a voluntary system means that individuals who donate tax-subsidized conservation easements may derive a net benefit from the transaction. For example, a landowner who neither wants nor intends to develop a property for the foreseeable future benefits from a tax-subsidized conservation easement donation by which she agrees to do what she intends in any event; by the same token, the public benefit of such an investment over at least the near term will be negligible.²⁶ Further, the lack of accurate methodologies for valuing a tax-deductible conservation easement, particularly when the easement may have little effect on the property's marketability, can result in undue rewards to participating landowners at the cost of the rest of society.

The complexity of our land use policies, including the current, disorderly mix of regulatory and payment approaches, may itself be a source of another form of economic unfairness. Paying certain landowners to comply with environmental restrictions makes it unfair to impose the same or similar restrictions on other landowners through regulation. In other words, while regulations may not be unfair in an absolute sense, they may be unfair in a regime in which many landowners are paid to maintain the conservation value of their lands.

Perhaps more than any genuine concern about landowner fairness, today's prevailing emphasis on payment strategies may reflect the fact that, faced with public demands for environmental protection and opposition by certain landowners to regulation, taxpayer subsidization of voluntary land conservation represents the path of least political resistance. Given the fact that tax incentives for land conservation tend to favor relatively wealthy and politically powerful taxpayers

who volunteer for this treatment, it should be no surprise that this conservation strategy generates little effective political opposition, even while it can present significant issues of fairness to the taxpayer. The strategy is even more politically appealing because the costs of local conservation projects may be largely borne by the distant national government.

B. Conservation Effectiveness

Regulations typically apply to both those who embrace and those who oppose the restrictions, whereas payment programs depend on voluntary landowner participation and, in the case of easement donations, typically involve self-selection by the landowner. This difference has important implications for the likely conservation effectiveness of each approach. (Issues raised by the relative adaptability of regulations and relative permanence of conservation easements are discussed in another section below).

Communitywide land use regulations seek to channel different types of development to selected areas and leave other parts of the landscape comparatively undeveloped. While landowners can seek regulatory relief, they have no choice about whether to participate in the system. Although not immune to the influence of development interests, a regulatory system in which all landowners must participate is at least capable of succeeding in protecting the integrity of a community, landscape, or ecosystem. By contrast, under the payment-to-volunteers approach, holdouts can undermine the integrity and comprehensiveness of conservation efforts. Thus, even where much of a valuable conservation area can be protected through this process, the prospect looms large that the effectiveness of the effort will be jeopardized by the refusal of one or a few owners to participate. Ironically, conservation efforts focused on some properties may increase the attractiveness of neighboring lands for development, because the restrictions will provide added assurance that nearby amenities will be safeguarded. Further, landowner-driven conservation easements may undermine public land use policies by preventing future development on lands that the community has or might have chosen for eventual growth through a community planning process. Unless focused on very high-value conservation areas, easements have the potential to produce leap-frog "green sprawl" that preserves relatively undistinguished land and disperses development away from concentrated areas where it might best occur in the future from an efficiency and community planning perspective.

On the other hand, one of the benefits of conservation easements is that they can be tailored to each property more easily than regulatory policies, and thereby can maximize the owner's economically productive use of the property while also achieving identified conservation goals. While the prevalence today of individualized site-plan review and contract zoning has made land use regulation a far more customized process than suggested by traditional Euclidean zoning theory, regulations still generally provide fewer opportunities for tailored, site-specific land use planning than private,

25. Thompson, *supra* note 1, at 298, 302; Cheever & McLaughlin, *supra* note 2, at 10227.

26. Prof. Nancy McLaughlin, in review commentary on a draft of this Article, rightly points out that this analysis of the benefits and costs of an easement transaction engaged in by a willing landowner who would not develop the property in any event does not consider longer term effects. That is, the landowner's easement donation may not impact her use of the property but will (it is assumed, although not always correctly) depress its value at the time of later disposition. Likewise, even if there is no near-term public benefit to the donation of a property that is not threatened by development, there may be a benefit some day by reason of the restraint placed by the easement upon a future landowner.

nuanced conservation easements. At the same time, the legal intricacies and lack of uniformity of highly negotiated conservation easements give rise to various problems with their interpretation, monitoring, and enforcement.²⁷

C. Financial Accountability

The two approaches produce different kinds of costs for different actors and therefore raise different challenges in terms of public and private accountability for these costs.

Critics of regulations contend that government officials operate under a “fiscal illusion” that regulations are cost-free, because the costs are not borne by government but instead are imposed on regulated landowners.²⁸ For the reasons discussed above, however, it is often debatable whether regulations actually produce significant net costs to landowners. In addition, requiring government officials to internalize (by paying) the costs of regulations would arguably lead, not to a more carefully calibrated weighing of costs and benefits, but to the evisceration of government regulatory authority, since government officials generally cannot implement regulatory policies that generate unpredictable costs not covered by current appropriations.

For example, in Oregon, which experimented with this approach under Measure 37, state and local officials routinely and unquestioningly responded to landowner claims for compensation by waiving regulations.²⁹ Thus, at least at the state and local levels, even if regulators might theoretically err on the side of overregulating if regulation appears costless to them, they appear likely to err even more in the other direction if they have to pay to enforce land use restrictions. Moreover, in many instances, government officials already take full account of the costs of regulation to landowners based on the substantial (and sometimes overpowering) input they receive through the political process.

Under a payment scheme, the level of public financial accountability appears to turn in part on the type of funding mechanism involved. When land acquisition is carried out based on a specific appropriation, the expenditures generally receive a great deal of public scrutiny. On the other hand, because federal and state subsidies through the tax system are not subject to the appropriations process, they are largely invisible even while we know them to be substantial.

Adding to the issue of financial accountability, a landowner’s appraiser determines, subject only to broad government guidelines, the size of the tax deduction (and, in some states, credit) for donated conservation easements and hence the amount taxpayers will expend to support the landowner-selected conservation project. Determining the market value of donated easements, which vary widely in scope, restrictiveness, and terminology, is a challenging case-by-case exercise involving considerable subjectivity.³⁰ This system inevitably produces both good-faith disparities as well as less benign

abuses. Traditionally, the Internal Revenue Service (IRS) has not made scrutiny of donated conservation easements an audit priority. While that may have changed recently,³¹ even an aggressive IRS enforcement posture cannot correct for the inherent subjectivity and uncertainty in conservation easement valuations under current tax rules. Thus, the latitude of tax laws applicable to conservation easement donations may be seen as practically guaranteeing the lack of financial discipline that has been experienced.

D. Political Accountability

The two approaches also differ significantly in terms of political accountability. Regulations are generally adopted and enforced in politically transparent and democratically accountable processes. To be sure, the large dollar amounts at stake sometimes foster political corruption, and developers can play an outsized role in the process. Nonetheless, politicians can, and often do, run for office on the basis of the regulations they will or will not support; if citizens do not like the regulatory policies their elected representatives have adopted, they can urge their defeat at the next election.

The situation is typically very different with payment approaches, particularly conservation easements donated to private land trusts and subsidized by public tax incentives. While the public subsidies are substantial, the decisions they finance are largely invisible to the public. As aptly stated by Prof. Barton Thompson, “through charitable tax deductions, the federal government effectively delegates to non-profits and their contributors the discretion to spend federal tax dollars with virtually no accountability to voters or to the government.”³²

Conservation easements are commonly negotiated and administered in private by land trusts with little or no public accountability. Except for generalized IRS requirements for income-tax deductibility of donations, easement creation is largely unconstrained by legal standards or public processes.³³ Massachusetts is the only state that requires prior public review and approval of land trust-held conservation easements, including at both state and local levels.³⁴ In other jurisdictions, there is generally no requirement that government officials review or approve easements (other than those directly held by government, and even many of them are privately negotiated by nongovernmental organizations on behalf of the government). There is typically no opportunity for public comment or information before these permanent restrictions are put in place.³⁵ Even after conservation easements have been created, most states lack easement-tracking systems or any other method by which the public can read-

27. Pidot, *supra* note 12, at 8-10.

28. Thompson, *supra* note 1, at 288-90.

29. *Property Values*, *supra* note 25, at 5.

30. Echeverria, *supra* note 6, at 29; Pidot, *supra* note 12, at 27-31.

31. U.S. Internal Revenue Service, Conservation Easements, <http://www.irs.gov/charities/article/0,,id=137244,00.html> (last visited Aug. 5, 2009).

32. Thompson, *supra* note 1, at 281.

33. Korngold, *supra* note 6, at 25-27; Pidot, *supra* note 12, at 8-17.

34. See MASS. GEN. LAWS ch.184, §§31-33 (2009); Pidot, *supra* note 12, at 11-12, 17.

35. Echeverria, *supra* note 6, at 37-38; Pidot, *supra* note 12, at 13-15.

ily determine easement locations, terms, holders, benefits, or costs.³⁶

By way of illustration, the portion of northern Maine subject to the jurisdiction of the state's Land Use Regulation Commission has more land under conservation easement than any other comparable area in the United States. Yet the Commission, which is legally vested with comprehensive planning and land use regulatory responsibilities for this half of Maine, has historically had no control, oversight, involvement, or prior knowledge of the easements occurring in its jurisdiction other than those offered in connection with regulated development projects.³⁷ Prof. Gerald Korngold has written

the worst case scenario would be a patchwork of conservation easements substantially paid for with public dollars, of dubious public value and not part of an overall conservation plan, controlled by a private not public entity, that perpetually remain on the property, frustrating the legitimate land use, conservation and development goals of citizens in their area.³⁸

The present legal controls on conservation easements are too anemic to prevent Professor Korngold's worst-case scenario from becoming a reality in many parts of the country.

E. Lack of Coordination

In the majority of jurisdictions, there is little or no coordination between regulatory and payment approaches. The regulatory process is directed by elected and appointed government officials, with various opportunities for public input. Generally, land use regulatory decisions are guided, at least in part, by publicly adopted comprehensive plans. Likewise, public acquisition of parkland often proceeds in accordance with long-term planning goals and may be coordinated with regulatory policies.

By contrast, under the laws in most states, there is no requirement that permanent conservation easements be in furtherance of local comprehensive plans or land use policies. As a result, in most places conservation easements may place off-limits to development lands the community might wish now or in the future to see developed. In this way, regulations and private conservation efforts may work at cross-purposes to produce unforeseen or unintended consequences for the community as a whole. At best, there is much overlap between the two approaches and little or no effort at coordinating their deployment.

F. Constitutional Constraints

Another issue is the extent to which the Takings Clause of the U.S. Constitution constrains available policy options for land conservation. Generally speaking, takings law places

modest constraints on the ability of the public to regulate uses of private land to advance the public welfare. The U.S. Supreme Court has said that regulation will be deemed a constitutional taking, requiring compensation, if it imposes such an extreme economic burden that it is the "functional equivalent" of outright appropriation of private property.³⁹ At the same time, the Supreme Court has declared that the Takings Clause should not be viewed as a bar to communities engaging in the "commendable task of land use planning."⁴⁰ In other words, as a practical matter, the choice between regulation and payment to restrict land uses is often, although not always, an issue of policy and politics rather than constitutional law.

On the other hand, because the "right to exclude" is perhaps "the most cherished stick" in the proverbial bundle of property rights, the Takings Clause usually demands compensation when the government requires an owner to grant the public access to private property.⁴¹

G. Regulating and Paying?

Regulation typically involves imposing mandates on landowners who are not paid, whereas payment involves providing financial incentives to volunteers. But our legal tradition offers a third option, that is, paying those subject to a government mandate. In an eminent domain proceeding, the government can acquire fee title, or an interest in land such as a conservation easement, by paying the owner just compensation for the interest taken. Likewise, the government can adopt regulations that, in some applications, would result in an intentional constitutional taking for which the government would then pay. Thus, there is a spectrum of possibilities between the two approaches, with a hybrid involving regulation whereby landowners are compensated for such property rights as may be constitutionally taken while achievement of public conservation goals is not dependent on volunteerism.

H. Permanence Versus Flexibility

One of the primary asserted advantages of the payment approach is that it achieves "permanent" land protection, such as in the case of most conservation easements. For donation of a conservation easement to be tax deductible, IRS rules require that the easement be "in perpetuity."⁴² This requirement is based on the policy concerns that donations for a limited term would be extremely difficult to value and might be used abusively to allow a public subsidy for long-term speculative investment in property held for development. By contrast, as is often said, regulations can be changed with needs over time. Because land development is far more irreversible than land protection, a familiar argument asserts

36. Korngold, *supra* note 6, at 10; Pidot, *supra* note 12, at 6, 12.

37. Jeff Pidot, Presentation to Maine Land Use Regulation Commission, Dec. 7, 2005 (on file with author).

38. Korngold, *supra* note 6, at 38.

39. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539, 35 ELR 20106 (2005).

40. *Dolan v. City of Tigard*, 512 U.S. 374, 396, 24 ELR 21083 (1994). See *Tahoe Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 32 ELR 20627 (2002).

41. *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 10 ELR 20042 (1979). See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

42. *Treas. Reg. §1.170A-14(b)(2)* (as amended in 2009).

that the long-term public interest is served best by a policy of making land protection decisions extremely hard to undo.

While this reasoning is credible, it is subject to several important responses. First, in practice, certain kinds of land use regulations, especially those in areas with settled land use patterns, tend to have remarkable durability; indeed, communities come to depend on them, as is their purpose. On the other hand, conservation easements are not as permanent as they may seem; the land trust community has recently begun to debate how easements should be subject to amendment and termination over time.⁴³ Thus, it is not so clear, even when relatively permanent protection is an appropriate goal, that regulation is always inferior to easements.

Second, even assuming easements are relatively more capable of furnishing a durable form of conservation than regulation, there is the additional question whether permanence is always a valid objective. Rather than rushing to preserve the next parcel under conservation easement, a policymaker might first inquire whether the land involved has the kind of extraordinary, lasting, publicly valuable conservation attributes appropriate to justify protection under a perpetual easement. Too often, such decisions default to conservation methods readily at hand applied to lands readily at hand. These decisions are based upon the rationalization that, although regulation may be the more appropriate tool in many situations, land conservation achieved through payment methods such as conservation easements is simply easier to implement, so long as the landowner, *any* landowner, is willing.

An additional concern is that relatively permanent conservation easements may inappropriately lock up lands that, from a broader view of the public interest, ought to be set aside for future development, or at least should be considered for future development through a public planning process.⁴⁴ In other words, with no input from the public, a private land trust's "permanent" conservation decision may contradict the judgment of the present or future body politic and certainly will impair it from considering new needs or options.

Finally, the goal of establishing permanent easement protections is in tension with the fact that ecosystems are naturally dynamic, even more so in this era of climate change and accelerating sea-level rise. In many instances, permanent protection, even if it is possible, with the passage of time may turn out to have been a mistake. Easements that might be deemed sensible today may become anachronistic sooner than we may think as natural conditions and the needs of people inevitably change. We have not yet begun to seriously consider the consequences of our present actions taken in the name of conservation perpetuity, and it may be short-sighted and even arrogant to think we can actually know what the future will require in protecting and utilizing the land.

43. LAND TRUST ALLIANCE, *AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES* (2007); Nancy McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 424-28 (2005).

44. Echeverría, *supra* note 6, at 21; Korngold, *supra* note 6, at 5, 28; Jesse J. Richardson Jr., *Conservation Easements: Smart Growth or Sprawl Promotion?*, AGRIC. L. UPDATE (Am. Agric. Law Ass'n), Sept. 2006, at 4.

I. Potential Displacement of the Regulatory Option

There is legitimate concern that widespread use of the payment approach threatens to crowd out available regulatory tools that are capable of serving the same purpose in many instances more fairly and efficiently. As Edward Thompson has written, financial incentives can "create an entitlement mentality among landowners; the notion that they are owed compensation for land use restrictions."⁴⁵ At a more practical level, if some landowners are paid to achieve identified conservation goals, such as acquisition of agricultural easements to preserve open space, other similarly situated landowners will naturally object if they are subject to the same kinds of restrictions through regulation.

The payment approach also threatens to create "moral hazards." As Prof. Peter Byrne has written: "There are moral hazard problems when one pays for preventing pollution. . . . If farmers are rewarded for not polluting the river, does it not give every farmer an incentive to become, or at least threaten to become, a polluter?"⁴⁶ Whereas the regulatory approach encourages investors to avoid projects that generate adverse effects on the community, the payment approach may encourage investment in environmentally sensitive areas, based on the expectation that government (or someone) will then pay the owner to avoid development. If private-property owners feel an entitlement to do whatever they want with their property, no amount of money will be sufficient to protect a community or state, much less the planet.

Some advocates contend that, but for use of conservation easements and other payment devices, there might be much less land protection since meaningful land use regulation is not an option in some parts of the country. While this might be true in the immediate term, to the extent that paying drives out the regulatory option, this argument represents a self-fulfilling (and never ending) prophecy. In addition, the argument ignores the fact that at some point the spigot on the flow of money needed to finance the paying approach may be turned off. If regulation has essentially been abandoned, we may no longer have the means to resort to it when the money runs out.

J. Redefining Property and Community

Ultimately, widespread use of the payment tool has the potential to change our conceptions of community and property, and even the constitutional balance of private property and public rights. Paying landowners to induce them to conserve undermines the traditional understanding that property ownership is accompanied by obligations to respect the common good.⁴⁷ Because landowner expectations are a pivotal factor in constitutional takings analysis, the unthinking default choice of paying may also have unintended but

45. Thompson, *supra* note 4, at 58.

46. Byrne, *supra* note 6, at 687.

47. FREYFOGLE, *supra* note 3, at xiii, 80, 116-17, 129-30.

long-term consequences for future judicial rulings on property rights issues.⁴⁸

For example, one perverse implication of agricultural subsidy programs is that they grant landowners what can become understood as an entitlement to be paid to comply with environmental standards, failing which they may do as they please. According to Prof. Eric Freyfogle: “A message is embedded in these payment schemes, and it’s coming through loud and clear: to own land is to have the right to degrade it ecologically. Payments are based upon the truth of this assumption, and they help solidify and perpetuate it.”⁴⁹

K. Some Illustrations

While the possibilities, real and imagined, are limitless, let us illustrate some of these issues with a handful of examples:

- Some conservation easements contain provisions that substantially mirror regulations. A payment-based approach, particularly in the form of permanent conservation easements, is a poor choice where its essential objective is to superimpose restrictions already established or readily available under zoning or other land use regulations. There are two evident problems here: incorporating what are or should be regulatory standards into a “permanent” conservation easement will ossify those standards, including beyond the time of their public usefulness should the regulation be later repealed; and payment for certain landowners’ compliance with regulatory standards is unfair to other landowners who do not get such generous treatment, as well as to the taxpayers who foot the bill.
- A coastal flood plain destined to be inundated by projected sea-level rise may be a prime candidate for protection through appropriate regulation but would seem a poor choice for a publicly subsidized, permanent conservation easement. Where the forces of nature or the interests of the public militate against permanence in land conservation, easements should be avoided.
- Conservation easements are suspect as a waste of money and effort where they “protect” the landowner’s residential backyard. Where a primary beneficiary of an easement, particularly one that provides no public right of access, is the landowner’s remaining estate or neighborhood, there is good reason to question whether a sufficiently *public* benefit and conservation purpose derives from a subsidized easement that could not readily and more inexpensively have been achieved through regulation.
- Some forest land acquisitions are elaborately packaged by brokers who arrange nearly simultaneous sales to government or its surrogates of working forest conservation easements, in order to provide a healthy and immediate return on investment without impairing

the underlying value of the land for timber production. This type of transaction can make investments in working forests much more lucrative, with the significant downside of inflating prices in selected forest land markets beyond their inherent resource values. These inflated prices in turn make conservation land and easements more expensive and at the same time encourage conversion to development and subdivision of nonconserved lands.

In sum, the fundamental shortcoming of our current land conservation system is that, by and large, it is no system at all. The nation has arrived at a strategy of incomplete and scattershot solutions that can compete and conflict with each other. Without principles guiding the deployment of paying and regulatory approaches, choices are often made based purely on the political and economic expediency of the moment, resulting in policy design that fails to meet basic tests of efficacy and fairness. Can we not do better?

III. Principles to Guide Policy Development

In our judgment, the following principles and considerations should govern the development of an integrated approach to land protection that balances and utilizes the best of both regulatory and payment approaches.

A. The Need for a Principled Line

There is a need to draw a line, even if imprecise and wavering, between the circumstances in which we should regulate and those in which we should pay to achieve land conservation. The two approaches are so fundamentally different and inherently competitive that they should not overlap in a broad set of cases. In most situations, either it is fair and appropriate for the government to regulate without compensation or it is fair and appropriate to pay to acquire rights in the land society wishes to protect. Moreover, for the reasons discussed, as a practical matter, reliance upon the payment option has an inherent tendency to drive out the regulatory option. Over time, expansion of the former works as a one-way ratchet, continuously narrowing the potential availability of the latter. If society becomes addicted to the quick fix of land conservation based upon the politically easy, payment-to-volunteers approach, do we really think that we can buy all the protection that we need, or that it will be for sale at affordable prices, or even that it will be for sale at all?

In short, drawing a principled line requires moving beyond the demands of short-term conservation exigencies in order to meet long-term public goals. If we want to maximize publicly valuable conservation, the work must be structured so that the payment mode does not swallow up the regulatory mode in cases where the latter is a perfectly appropriate and lawful option. Even so, we acknowledge that the optimal line, rather than fixed in stone, must be sufficiently flexible to deal with different geographical, political, and cultural contexts. Our purpose is not to establish universal precision, but rather to

48. Echeverria, *supra* note 6, at 41.

49. Eric Freyfogle, *The Culture of Owning*, ORION, Mar.-Apr. 2005, at 16, 20.

suggest a system of inputs, considerations, and benchmarks that will yield an appropriate decisionmaking system.

B. Global Fairness

Fairness should be a central, if inevitably amorphous, goal of any well-reasoned land conservation system. This includes fairness to landowners who are subject to regulations *and* to landowners who may be (or may need to be) protected by regulations from harmful actions by their neighbors and other landowners in the community. It also includes fairness to taxpayers, communities, and the public at large. Fairness for all of these stakeholders in the land use system involves not only consideration of economic distributional effects but weighing competing concepts of basic liberty: *freedom to* and *freedom from*.⁵⁰

One key to achieving fairness is framing the issue through a sufficiently large lens to accurately capture all the relevant burdens and benefits associated with land use policies. Regulatory impacts cannot be properly measured in isolation, but require consideration of the benefits to the landowner within the context of the entire regulatory regime. This calculus may result in net costs being significantly or even more than offset by net benefits.⁵¹ Tax relief and other government benefits targeted at landowners also need to be counted alongside regulatory impacts.

At the same time, we recognize that donated interests in land sometimes entail some degree of sacrifice by the donor, which constitutes a true gift to and net gain by the public. In devising an optimal system, we want to try to minimize transaction costs of bona fide charitable conservation donations while creating a process that assures that the public benefits of such donations are worthwhile.

C. The Constitutional Divide

The Supreme Court's regulatory takings jurisprudence offers a constitutionally based line of demarcation between the two approaches, reflecting the Court's painstaking effort over nearly a century to define a standard that furthers the goals of "fairness and justice."⁵² The constitutional takings standard provides an important benchmark for determining when government *must* pay as against when it *may* regulate without payment. This standard is designed to establish a relatively fixed, judicially enforced, outer boundary within which the political branches may operate in making social and economic policy decisions. While the constitutional standard does not preclude the political branches from paying when the courts will not require it, policymakers should do so only with an acute recognition of the long-term implications.

D. Property Law Evolution

A comprehensive approach to the balanced use of regulation and payment methods must recognize that private-property rights and responsibilities are in a constant process of evolution. In a democratic society, especially one dominated by private property, the legislature must act to create and refine the laws of property through the use of the police power in order to protect against newly discovered threats to the welfare of the community, including of property owners.⁵³ Regulations are "a part of the property system, rather than external to it. . . . They broaden the idea of ownership by protecting people who do not own property in the traditional sense, but also narrow it by making more private decisions subject to public control."⁵⁴ As a result, over the long term, the proper balance between regulation and payment cannot be static but must evolve in response to changing social and environmental conditions.

E. Democratic Accountability

Another key goal of an effective and fair land protection system should be democratic accountability; that is, fairness and inclusiveness of process. The public has a relatively well-defined role and self-evident stake in government regulatory policies. But the public also has at least as great a stake in payment programs, even if voluntarily accomplished in the private marketplace with no government agency directly involved. In part, this public stake derives from the fact that public dollars almost always subsidize such transactions.

But beyond its financial investment, the public has a vital and abiding interest in the future of its community and landscape, certainly no less so when land will be permanently set aside through conservation easements than when it will be subject to regulatory constraints. In this respect, conservation easements and other land conservation projects that shape the economic and environmental future of a community and region are imbued with a significantly greater public interest than other charitable donations.

Accordingly, there are compelling reasons for making major decisions affecting these projects publicly transparent and democratically accountable even while undertaken by private land trusts and landowners. Given the relative permanence of devices like conservation easements and their long-term impacts on a community, there is no good reason that the public should be left out of the process and not know what is happening until after the die is cast, if even then.

We recognize that some leaders in the land conservation community will raise concerns about this way of thinking, principally on the ground that it would make some land conservation efforts more time-consuming and cumbersome, result in potential political interference, and ultimately reduce the volume of conservation easements that might otherwise occur under today's unfettered system. On balance, however, we think the benefits of greater public involvement and

50. FREYFOGLE, *supra* note 3, at 8.

51. *Id.* at 27.

52. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

53. FREYFOGLE, *supra* note 3, at 5, 13, 22-25.

54. *Byrne*, *supra* note 6, at 683.

accountability are worth the costs. Apart from the inherent good we perceive in subjecting important community decisions to democratic review, public participation will improve conservation decisionmaking by bringing more information and relevant interests to the table. In addition, conservation decisions driven solely by private conservation groups and landowners have led in some situations to overuse and abuse of easements, which might be avoided under a more publicly transparent system. We regard current efforts at voluntary self-certification procedures for land trusts, while a positive development, as an inadequate substitute for genuine democratic review and involvement.

We can draw from existing models for involving the general public in conservation design. For example, Massachusetts has experienced considerable success with its approach of requiring state and local approval of privately held conservation easements, a system that has not appreciably dampened the use of such arrangements in that state.⁵⁵ Virginia requires that conservation easements be in furtherance of locally adopted comprehensive plans, a requirement often overseen by the Virginia Outdoors Foundation, a state agency that holds or co-holds many of the easements in that state.⁵⁶

While land use is typically considered a local issue, and therefore democratic accountability should translate into giving a participatory role to the local community, there is also good reason to reside some public participatory role at the regional or state level rather than allow it to be controlled exclusively by local and potentially parochial interests. Many land use decisions affecting both future development and conservation have a larger-than-local dimension. Most obviously, land use decisions can influence regional housing affordability, the infrastructure or amenities benefiting or burdening multiple communities, or the geographical and social structure of a larger region. Moreover, cumulative impacts of numerous, relatively small land conservation efforts by local land trusts may well affect surrounding communities and the region. The principle here is that land use policies affecting a community should provide some meaningful opportunity for input from the affected community; likewise, those affecting a larger area should provide opportunity for a regional or state role.

F. *The Need for Coordination*

Regulation and payment approaches should be coordinated to serve the overall objective of conserving appropriate lands in any given community or region. Despite their unified purpose, at present, these two tools are usually deployed independently of each other without sufficient regard for their effects on one another. Without effective coordination, there are too many instances when the two approaches work at cross-purposes.

G. *Preserving the Eminent Domain Option*

Eminent domain represents a useful but neglected conservation strategy, having elements of both regulation and payment methods. As with regulation, eminent domain's primary utility is in overcoming the holdout problem. For this reason, the use of eminent domain to acquire undeveloped property for transportation corridors or utility lines is widely recognized as a practical necessity. The use of eminent domain to set aside public trails, recreation facilities, wildlife habitat, and needed open space should logically proceed on the same basis. Eminent domain also may be essential for carrying out landscape-level ecosystem protection and restoration projects.

H. *Recognizing the Challenge of Climate Change*

As in so many other realms, the prospect of dramatic climate change promises to fundamentally alter the equation by emphasizing, more than any other event in history, the need for maintaining flexibility and applying resourcefulness in our land conservation efforts. The goal of permanent land protection, while emotionally appealing, may turn out to be naïve and misguided when the land itself is in flux. Climate change and other dynamic influences may convert once prime habitat into a publicly needed and environmentally benign development site, or convert highly productive coastal marsh into open water. As a result, it is appropriate to intelligently limit the use of permanent conservation easements, especially along the coast and in other areas vulnerable to these changes. Precisely because they are designed to be altered as conditions and needs change, regulations are the most appropriate tool in these situations.

IV. **Toward a Principled Policy on Drawing the Line**

Based on the foregoing diagnosis of issues and statement of governing principles, we offer the following policy suggestions.

A. *Consider Regulation First*

As a general proposition, regulation should be considered *first* before payment methods in order to provide, to the maximum extent possible, a common baseline of mutual expectations and protections for the benefit of all landowners and other members of the community. We should recognize that, as a matter of both constitutional and property law, the development rights that go with buying an economically viable working farm or forest do not necessarily include the right to develop a residential subdivision. We should not have to always resort to payment-based methods to protect land from inappropriate development; that is what regulation is for. Supporting the policy preference for regulation as a first resort are the following factors:

55. Pidot, *supra* note 12, at 11.

56. Jesse Richardson Jr. *Conservation Easements: Planners' Friend or Foe?*, CPEAV NEWSL. (Citizens Planning Educ. Ass'n of Va., Richmond, Va.), Summer 2006.

- Reasonable regulation is designed to establish a common baseline of combined landowner protection and responsibility.
- Reasonable regulation is inherently fair, insofar as it provides legally and socially justifiable protection for the community, including for most property owners, while not placing unreasonable burdens on a landowner singled-out for special treatment.
- Regulation is readily capable of overcoming the hold-out problem; indeed, that is its design and purpose.
- Regulatory decisionmaking, by law, is a process that is publicly transparent, accountable, and often planning-based.
- Regulation avoids the moral hazard problem by discouraging investments that create conflicts with land conservation objectives.
- Regulation, when applied comprehensively, tends to create more reciprocal benefits for landowners than relatively scattershot, voluntary payment programs.
- Regulation is adaptable in addressing uncertain and changing resource, land protection, and community needs.

Most citizens recognize that a voluntary approach to controlling environmental problems like air and water pollution would be unworkable. The same basic conclusion applies to efforts to protect and manage the land.

B. *The Proper Role of Payment*

In situations where the land and the public interest require a layer of protection that regulation cannot reasonably achieve, we should be willing to turn to payment. These situations include: (1) when *public access* to the property is a priority; (2) when the property possesses *extraordinary and enduring conservation attributes* that warrant efforts to achieve permanent protection; and (3) when needed regulations involve *stringent or particularized restrictions or obligations* that are so unfairly burdensome as to reach the level of a constitutional taking.⁵⁷ While one or more of these factors may weigh in favor of (or against) either the payment or regulatory options, too often today their consideration is completely ignored by public and private conservation decisionmakers.

C. *Whither the "Line"*

The foregoing prescription (looking first to regulation to establish a baseline of community protections and then turning to payment options in the types of extraordinary situations noted above) sets a rough dividing line between the two approaches. This demarcation honors constitutional constraints, while avoiding both unfairly burdening landowners with regulations *and* unfairly conferring windfalls

upon landowners to the detriment of taxpayers. This line is not so much a fixed location as a state of mindfulness that seeks to achieve public conservation objectives in a way that considers and balances the interests and rights of public and private actors.

One idea, offered by the Joint Tax Committee of the U.S. Congress several years ago,⁵⁸ and worthy of further consideration, is to eliminate the tax deduction for a conservation easement if the donor retains the right to use a portion of the property as a personal residence. The use of conservation easements when the donor or successor retains the right to live on the property creates seemingly intractable problems in terms of distinguishing public from private benefit, arriving at an accurate value of the easement for tax purposes, and determining the conservation value of the donation. Adopting this proposal would establish at least one bright line that would reduce easement abuses while safeguarding limited public subsidies for higher value conservation projects.

D. *Adopt Regulatory Policies That Mitigate Severe Economic Burdens*

In order to systematically assure fairness, most regulatory programs should include some type of variance provision allowing government officials to mitigate the rigor of a regulatory requirement when necessary to deal with hardship cases where the regulation would "cross the line" by, among other things, being so stringent as to eliminate economic use of the property. If government wishes to impose mandatory restrictions by refusing to issue variances in such discretely defined situations, it should be prepared to pay. However, we should avoid laws, such as Oregon's former Measure 37, that emasculate land use regulations by requiring government to either waive regulatory requirements or pay the landowner whenever there is a purported reduction in property value.

E. *Provide for Public Participation in Major Conservation Easement Decisions*

The decision to set aside land conserved in perpetuity is simply too important to a community's future to be left entirely to an individual landowner and a private land trust or government agency operating without public transparency or accountability. Accordingly, a mechanism should be established for public review of such transactions, including efficient opportunities for public input and official sign-off concerning major decisions related to conservation easements. The review process should examine whether the proposed easement is consistent with public planning, complements and reinforces existing regulatory objectives, and otherwise furthers important public goals.

While not specifically embracing all of these considerations, the Massachusetts model is unique in requiring approval of all privately held conservation easements by both

57. See FREYFOGLE, *supra* note 3, at 129-30; Byrne, *supra* note 6, at 688.

58. STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 283 (2005), available at <http://www.house.gov/jct/s-2-05.pdf>.

state and local governments (the latter following a public hearing). While providing no forum for public participation, the Virginia model (overseen by the Virginia Outdoors Foundation when it will be a holder) requires that all conservation easements be in furtherance of a publicly adopted land use plan. In order to provide for a minimum of public transparency, there should be an opportunity for the public (including affected public agencies) to be informed of the essential terms of a proposed easement and to provide input on it.

In some cases, the appropriate review body might be the local governing council and/or planning board. However, in order to minimize parochial influences, where easements are designed to further a regional conservation program (or have the potential to subvert a regional plan), the review should appropriately be conducted by a government body with a geographically larger jurisdiction, perhaps the county or the state. Since federal taxpayer dollars are being expended for most conservation easements, IRS regulations should assure an opportunity for meaningful public participation at some level.

Just as there are good policy reasons favoring a public review process for establishing conservation easements, the same approach logically applies to terminations and substantive amendments that are detrimental to the land's conservation values. Under the common law in most states, conservation easements are charitable trust assets that cannot be disposed of without meeting strict judicial tests to reasonably safeguard the public interest and donor intent.⁵⁹ These tests are designed to ensure that the wishes of a charitable donor are carried out to the maximum extent possible and that the public trust created by a charitable gift is safeguarded.

However, to an even greater extent than with many other charitable donations, the long-term enforcement, termination, and substantial amendment of conservation easement restrictions have profound implications for the entire community, which necessitate public oversight. In addition, the issue of whether to lift or modify easement restrictions will often raise land use policy questions on which judges may not be expert. Accordingly, at least where there is a public agency responsible for the approval of easement creation, it makes sense to involve that agency in the process of easement termination or significant amendment. These agency decisions should be subject to judicial review, both as protection against arbitrary administrative action and to preserve the courts' traditional, independent role in safeguarding charitable trusts.

F. Coordinate Use of Easements and Regulation

Public oversight of conservation easements would facilitate coordinated use of the regulatory and payment approaches to further public land use goals. The government body charged with approving the establishment (and the removal) of ease-

ment restrictions should make its decision in light of their consistency with public land use plans and regulatory policies, among other factors. At the same time, the public planning process should be expanded so that it provides explicit guidance on areas where conservation easement protection is desirable.

The proposal to meld the regulatory and payment approaches in service of a single set of land use goals presents both a challenge and an opportunity for community planning. The traditional planning process would become more meaningful if the results were designed to guide not only regulatory policies and public land acquisitions, but also private land-protection efforts as would occur if conservation easements were required to conform to a public plan. While participation in the planning process could potentially be time-consuming for land trusts and other conservation advocates, it would provide an opportunity to build public support for private land-conservation efforts and at the same time help build public involvement in and support for planning.

G. Instill Permanence Where Permanence Makes Sense

Because society cannot pretend to know future conditions or the needs of future generations, permanent conservation easements, even if they may be subject to later modification and termination in certain circumstances, should be reserved for extraordinary situations where protection of essentially indefinite duration makes sense for the imaginable future. Conservation easements should not be used to protect areas that, as a result of the planning process, the public has identified as appropriate for future development. Easements should be used with particular selectivity in areas undergoing urbanization; otherwise, easements may have the negative environmental effect of promoting inefficient, leap-frog development. Permanent conservation easements are simply inappropriate in areas that, due to climate or other environmental changes, we know are likely to lose their identifiable conservation values and where regulation is clearly the more appropriate tool.

In sum, permanent conservation easements, as the prime method by which the payment mechanism is utilized, should be used only in extraordinary situations where there is reason to believe that a selected property has enduring natural values of benefit to the public for the indefinite future.

H. Consider Eminent Domain

Where a property is identified as possessing natural values the permanent conservation of which is essential to the public welfare, we should not be reluctant to use the condemnation power when voluntary acquisition has failed and holdouts present an obstacle. Such instances include where assembly of parcels is essential to provide public outdoor recreational opportunities, acquire needed open space, or preserve vital functioning of an integrated ecosystem.

59. McLaughlin, *supra* note 41, at 431-58. In Maine, the 2007 reforms of that state's conservation easement-enabling law included a statutory requirement of judicial review of major easement changes. See ME. REV. STAT. ANN. tit. 33, §§477-A(2), 478(3) (2009).

Experience shows that lands protected for conservation, whether through outright public ownership, conservation easements, or regulatory policies, can also be attractive targets for eminent domain for infrastructure development, i.e., public utilities or transportation projects, precisely because such lands will have little or no costly development to condemn. While the relative public importance of land as conserved compared to its value as devoted to a condemning authority's use should be the ultimate determining factor, all other things being equal, lands conserved as a result of a public process should have a higher level of protection from such forced conversion than lands set aside through exclusively private action. Accordingly, public review and approval of conservation easements, including those donated in private transactions to land trusts, would strengthen the case for such lands being accorded greater protection from conversion to other uses through condemnation.

I. Generate More and Better Data

There is an enormous need for additional research and data that will further illuminate these important policy issues. As one example, federal and state tax officials should regularly collect and report the public costs of various types of tax-subsidized, private-land conservation, so that the public can know how its money is being spent and make better informed decisions in the future. Likewise, there is a crying

need for meaningful data assembly and disclosure concerning the results of land trust and other private efforts to conserve lands, especially since these efforts enjoy substantial public subsidies. More research is also needed on how legal restrictions on land use influence property values and on what factors determine these impacts.

V. Conclusion

We need to intelligently use all available approaches to land conservation, including both regulation and payment. However, because these two approaches have the capacity to undermine each other, their efficient and fair deployment requires a conscious effort to select the right tool for the right job. Much greater care is needed to identify and adhere to boundaries establishing the best uses of each of these approaches.

Political expediency, as the reason most often asserted for paying land conservation volunteers, is also the primary reason for concern. Over the long term, the major problem with unbridled payments to protect land is that they obscure the benefits of regulation and erode regulatory authority and the conservation benefits that only it can deliver. Greater consciousness and conscientiousness in maintaining a rational line between these approaches should produce fairer and more effective conservation outcomes.