*POINT-COUNTERPOINT**

JULIA D. MAHONEY**

Land Preservation and Institutional Design

In the past three decades, conservation servitudes—also known as conservation easements—have emerged as an important means of preserving lands of ecological, scenic, cultural, and historic value.[1] Although exact figures are

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* The following discussion represents the *Journal of Environmental Law and Litigation*'s inaugural Point-Counterpoint. This discussion puts forth two differing views on the issue of whether conservation easements should be drafted to be perpetual. In facilitating this debate, *JELL* sought out the opinions of property law experts Julia D. Mahoney and James L. Olmsted, both who have published extensively on the topic of conservation easements. This Point-Counterpoint is the result of their collaboration. The entire staff of *JELL* would like to thank Professor Mahoney and Mr. Olmsted for lending their expertise and opposing viewpoints to this important debate.

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1 *See* 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, 1048 (2007) ("[C]onservation easements are becoming the conservation tool of choice."); Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 516 (2004) (reporting that a survey of land trusts reveals

impossible to come by, it is estimated that more than nine million acres in the United States are subject to conservation servitudes held by land trusts and other organizations.[2] The explosive success of this novel approach to land preservation has led to an increasing stream of questions and concerns. Once lavished with near unqualified praise, conservation servitudes are now acknowledged—even by fervent supporters—to have the potential to cause serious problems.[3] The hard question we now face is whether these instruments are fundamentally sound, suffering from nothing more serious than the inevitable growing pains of any legal innovation, or whether their flaws are of such character and magnitude that an overhaul of conservation law and practice is in order.

In this Point-Counterpoint exchange, I stake out the position that there is cause for grave skepticism about the net social benefits of conservation servitudes. Key to the appeal of these instruments is the conviction that current landowners, in conjunction with land trusts and other organizations, have the ability to identify lands worthy of eternal protection from development and the moral right (indeed, perhaps even the obligation) to entrench the judgments and preferences of today's decision makers by severely constricting the choices of later generations.[4] This belief is misguided. Even worse, its embrace

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that "conservation easements are becoming more prevalent relative to outright ownership" of conserved properties).

2 Korngold, *supra* note 1, at 1046–48; *see also* Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL. L. 47, 50–51 (2005).

3 *See, e.g.*, JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS 2–3 (2005) (arguing that the laws and social practices that govern conservation servitudes require reform to ensure that their creation and enforcement serve the public interest); *see also* Korngold, *supra* note 1, at 1057 (noting that conservation easements "come with costs that must be addressed"); McLaughlin, *supra* note 2, at 47 (acknowledging that with the "increased popularity" of conservation easements "have come increased reports of abuse"); Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273 (2007) (discussing the possibility that the use of conservation easements to preserve land will undermine public support for traditional environmental regulation).

4 *Compare* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002) (arguing that conservation servitudes "create ecological, legal, and institutional problems" that may outweigh any benefits "for later generations"), *with* James L. Olmsted, Counterpoint, *Representing Nonconcurrent Generations: The Problem of Now*, 23 J. ENVTL. L. & LITIG. 449,

threatens to create a legacy of sclerotic land use restrictions. Instead of striving to memorialize early twenty-first-century views of how humans should interact with nature, I suggest we should devote our energies to crafting policies and institutions that can readily adapt to changes in the physical world, advances in scientific knowledge, and shifts in cultural values.

I
CONSERVATION SERVITUDES: TRADITION AND EXPERIMENT

Conservation servitudes are partial interests in land. By transferring a particular type of nonpossessory interest (a servitude) to a land trust, other nonprofit organization, or, less frequently, a government entity, real property owners bind themselves and their successors to refrain from specified land uses.[5] Some conservation servitudes also contain affirmative promises that landowners will further preservation objectives.[6] The provisions of conservation servitudes vary widely, for the simple reason that these instruments are employed to further a variety of goals dear to present day conservationists, including the promotion of farming and ranching, the preservation of old-growth forest, and providing habitats for endangered species.[7] What conservation servitudes all have in common is that they aim to protect lands of ecological, scenic, cultural, and historic distinction by banning selected, but far from uniform, forms of

489 (2008) ("[F]uture generations will thank us . . . for using perpetual conservation easements to protect the last unique and irreplaceable traces of nature's grandeur . . . instead [of] replacing the remaining enclaves of undisturbed nature with our fungible structures of concrete, steel, and glass.").

5 *See generally* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

6 *See* Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE, *supra* note 5.

7 *See* James Boyd et al., *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209 (2000); *see also* PIDOT, *supra* note 3, at 8–9 ("It is often stated that each conservation easement should be unique and negotiated to address the parties' particular specifications. . . . By all accounts, conservation easements have become increasingly dense and intricate instruments."); Julia D. Mahoney, *Forest Conservation Easements: Some Questions and Concerns*, THE CONSULTANT, 2005, at 26.

development.[8] As compensation for surrendering some of their property rights, holders of burdened properties receive federal, state, or local tax benefits or, less often, outright payments from governmental or nonprofit entities.[9] Conveyors of conservation servitudes remain in possession of their lands and typically retain all other rights and obligations of ownership, including powers to transfer, lease, and mortgage their properties.[10]

Most conservation servitudes are unlimited in term. This merits emphasis, for a crucial component of the emotional pull of these instruments is the claim that the development restrictions imposed by the present generation will determine land uses not just for now but for all time. Land trusts and other conservation organizations work hard to foment the expectation that, absent highly unusual circumstances, conservation easements will remain in effect in perpetuity.[11] The strong inclination of landowners to impose restrictions with no time limits is reinforced by practical considerations: only property holders who transfer perpetual interests are eligible for most of the available tax breaks and other financial benefits that flow from the transfer of conservation easements.[12]

Conservation servitudes are of fairly recent vintage and represent a significant innovation in the law of real property.[13]

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8 *See* Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573 (2004); *see also* UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 174 (1981).

9 *See* Mahoney, *supra* note 4, at 742.

10 *Id.*

11 *See, e.g.*, Finger Lakes Land Trust, Donation of a Conservation Easement, http://www.fllt.org/protect_your_land/easement.php (last visited Jan. 3, 2009) ("Donation of a conservation easement protects your land permanently while keeping it in private ownership. . . . Conservation easements are designed to conserve forever the important resource values of each property."); Mont. Ass'n of Land Trusts, About Conservation Easements, http://www.montanalandtrusts.org/conservationeasements (last visited Jan. 3, 2009) ("[E]asements follow the land forever."); *see also* Mahoney, *supra* note 8, at 597–98 ("[M]ost organizations that hold conservation easements have taken the position that these instruments should be amended sparingly, if at all, and then only to further conservation goals.").

12 *See* Federico Cheever & Nancy McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Conservation Transactions*, 34 ENVTL. L. REP. 10,223, 10,225–26 (2004).

13 *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, 435–36 (1984).

Traditionally, Anglo-American law has been sparing in its willingness to enforce promises regarding property use that purport to bind the successors in interest of an original contracting party. As the Supreme Court of Virginia observed in a recent decision:

> At common law, an owner of land was not permitted at his pleasure to create easements of every novel character and annex them to the land so that the land would be burdened with the easement when the land was conveyed to subsequent grantees. Rather, the landowner was limited to the creation of easements permitted by the common law or by statute.[14]

In particular, courts construed common law rules as imposing severe limitations on negative easements, which, unlike ordinary easements conveying rights to enter onto or use land owned by another, grant their holders rights to prevent land uses that contravene the terms of the easement.[15] Only a handful of negative easements were given effect: those created to ensure adequate light and air, to protect the flow of artificial streams, and to provide lateral and subjacent support.[16] Courts were also reluctant to recognize servitudes "in gross." That is, servitudes not appurtenant to specific estates in land but instead inuring to the benefit of individuals qua individuals.[17] This practice was often justified by the claim that such servitudes interfered with "the free use of land."[18] Because conservation easements have characteristics of negative easements and are (except in rare cases) held in gross, for many years there were serious doubts about whether courts would enforce them.[19]

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14 United States v. Blackman, 613 S.E.2d 442, 446 (Va. 2005) (citation omitted); *see also* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 12–17 (1989).

15 *See Blackman*, 613 S.E.2d at 445–46.

16 *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 977 (2007).

17 *See* 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, 1081 (1996).

18 *Blackman*, 613 S.E.2d at 446.

19 *See* Korngold, *supra* note 1, at 1048; *see also* Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future,* 27 CARDOZO L. REV. 2523, 2524 n.2 (2006) ("Although widespread concerns about the potential invalidity of conservation easements led to legislation authorizing them, there are so few cases involving conservation servitudes that it is difficult to say with confidence that

As time wore on, however, there was a marked trend toward relaxing the strict, often inflexible, common law limitations on servitudes and permitting owners to exercise a greater degree of control over the future uses of their holdings.[20] A movement to enact laws explicitly authorizing conservation servitudes began in the late 1950s and accelerated in the wake of the Uniform Commission on State Laws' 1981 approval of the Uniform Conservation Easement Act.[21] Today, "easement enabling" statutes are in force in all fifty states, as well as in the District of Columbia.[22] At around the time of the passage of a number of these statutes, Congress substantially expanded the federal tax benefits available to donors of conservation servitudes.[23] These federal tax benefits have been supplemented by state and local tax benefits, as well as other financial incentives.[24] The effect of these modifications of property and tax law has been nothing short of seismic; between 1980 and 2005, the number of acres in the United States subject to conservation servitudes held by land trusts alone increased nearly fifty fold.[25]

II
TROUBLE IN PARADISE?

At first, conservation servitudes inspired little but accolades. Hailed as "unique, dynamic tools"[26] and even described as

courts would not have recognized their validity when increasing environmental concerns made their utility apparent.").

20 *See* Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 888 (2008) ("[T]he trend has been toward recognition of a wider variety of servitudes and abandonment of some of the more convoluted common law doctrinal requirements.").

21 *See* Mahoney, *supra* note 4, at 749–50.

22 Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1900 (2008).

23 *See* Dana Joel Gattuso, *Conservation Easements: The Good, the Bad and the Ugly*, NAT'L POL'Y ANALYSIS (Nat'l Ctr. for Pub. Pol'y Res., Wash., D.C.), May 2008, http://www.nationalcenter.org/NPA569.html.

24 ROB ALDRICH & JAMES WYERMAN, 2005 NATIONAL LAND TRUST CENSUS REPORT 8 (Chris Soto & Anne W. Garnett eds., 2006), *available at* http://www.landtrustalliance.org/about-us/land-trust-census/2005-report.pdf.

25 *Id.*

26 Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. LAW. 441, 451 (2000).

"magic,"[27] the new instruments were deemed both innovative and unproblematic.[28] But, in the past five years or so, enthusiasm has been tempered by a mounting realization that conservation servitudes have real drawbacks.[29] Concerns have been voiced that lack of coordination among the nonprofit and governmental organizations that hold conservation servitudes will result in a hodgepodge of restrictions. In the words of property law scholar Gerald Korngold:

> Private groups have virtually unlimited discretion in purchasing or accepting donations of easements and do not have to follow standards or a plan in making such determinations. . . .
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> Moreover, private organizations do not accumulate conservation easements pursuant to a public land use plan. This can easily result in a patchwork of easements that do not add up to an effective community-wide preservation plan.[30]

Worries about the possible antisocial effects of privately made conservation decisions are compounded by the growing recognition that the agendas of land trusts, other conservation organizations, and individual landowners are often in conflict with the needs of the public.[31] The clash between the interests of conservation groups and their generally well-heeled constituencies on the one hand and the general welfare on the other is especially glaring with respect to the issue of affordable housing. Because conservation easements can function as

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27 Cheever, *supra* note 17, at 1078.

28 *See* Mahoney, *supra* note 4, at 761; *see also* Gattuso, *supra* note 23.

29 Among the few early detractors was property rights activist James Burling, who argued that conservation servitudes were in conflict with long-standing principles and practices discouraging property owners from exercising "dead hand" control. *See* James Burling, The Folly of Conservation Easements (1998) (unpublished manuscript, on file with the Journal of Environmental Law and Litigation).

30 Korngold, *supra* note 1, at 1059 (footnote omitted); *see also* PIDOT, *supra* note 3, at 15 ("Most conservation easements are driven by ad hoc forces and opportunities. . . . [and are] not integrated into public planning processes . . . ."); 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) (concluding that the absence of concerted action by land trusts may have detrimental consequences).

31 *See* Christopher M. Anderson & Jonathan R. King, *Equilibrium Behavior in the Conservation Easement Game*, 80 LAND ECON. 355, 355 (2004) ("[S]ince the conservation decision is private rather than public, there is no guarantee that the most socially valuable land will be conserved . . . .").

growth controls, their imposition threatens to drive up the price of housing. Consequently, conservation servitudes may have the unfortunate side effect of creating redoubts for the affluent.[32]

Potential harms to the populace extend beyond making it harder to find a place to live. A flurry of press reports, most notably a series of articles published in the *Washington Post*, have raised the specter that donations of conservation servitudes may serve as a highly effective vehicle for tax abuse or even outright fraud.[33] Although the danger that donors might reap illegitimate benefits by overstating the value of their surrendered property interests was both foreseeable and foreseen,[34] the news that conservation servitudes are being used for dubious purposes has tarnished their once sterling public image.[35]

Conservation easements have also begun to stir unease among advocates of strong government power to regulate owners' uses of their lands. The spread of the "voluntary approach," it is feared, threatens to "undermine the viability of the regulatory approach" to preventing land development.[36] Last but not least, a few proponents of conservation servitudes have begun to admit that the perpetual terms of these instruments might lead

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32 *See* PIDOT, *supra* note 3, at 34; *see also* Korngold, *supra* note 1, at 1060–61.

33 *See* Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003, at A1; *see also* Margaret Jackson, *Subpoenas Issued Over Easements*, DENV. POST, Nov. 21, 2007, at C1 (detailing investigations by Colorado officials of inflated appraisals of servitudes donated pursuant to the state's conservation program); Jerd Smith & Burt Hubbard, *Abuses Taint Land Deals: Conservation Easements Approved for Pricey Subdivisions, Fairways, Small Parcels*, ROCKY MOUNTAIN NEWS (Colo.), Feb. 9, 2008, at 19 ("An innovative state law designed to preserve Colorado's scenic open spaces and working ranches has, in dozens of cases, been used to protect everything from multimillion-dollar home sites in gated communities to tiny pieces of land slated for oil and gas development."); Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss: Buyers Gain Tax Breaks with Few Curbs on Land Use*, WASH. POST, May 6, 2003, at A1.

34 *See Miscellaneous Tax Bills: Hearing on H.R. 3874, H.R. 4103, H.R. 4503, H.R. 4611, H.R. 4634, H.R. 4968, and H.R. 5391 Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 96th Cong. 12 (1979) (statement of Daniel I. Halperin, Deputy Assistant Sec'y, Treasury Dep't).

35 *See* McLaughlin, *supra* note 2, at 52–54.

36 John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1, 2 (2005); *see also* Vinson, *supra* note 3, at 299.

to trouble and that amendment or even termination will be warranted in a number of instances.[37]

Interestingly, this cascade of difficulties has yet to spur supporters to question the basic idea of conservation servitudes. Rather, the typical response is to confess that things are not working out as originally envisioned and insist that the problems that have arisen are soluble.[38] This "mend it, don't end it" attitude has fueled a steady supply of detailed prescriptions for reform. Increased government involvement and transparency are offered as antidotes to the self-interested conduct of land trusts and private property owners.[39] Inflated valuations of donated easements are to be checked by beefing up enforcement mechanisms[40] and adjusting the available tax incentives.[41] And the problem of perpetuity is said to be not much of a problem after all, based on the theory that old, established common law doctrines such as cy pres are bound to evolve in a way that will ensure that bad conservation easements are modified or extinguished.[42]

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37 *See, e.g.*, PIDOT, *supra* note 3; Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 425–26 (2005).

38 *See, e.g.*, Korngold, *supra* note 1, at 1043 (arguing that the threats posed by conservation easements "can be mitigated . . . and the value of private conservation enhanced, if legislators and courts follow" certain principles "to implement needed reforms"); *see also* McLaughlin, *supra* note 2, at 55 ("Despite the problems that have arisen . . . if reforms can be successfully implemented, conservation easements can not only emerge from their troubled adolescence to take their appropriate adult role in the panoply of land conservation techniques, but also may act as a significant transformative force.").

39 *See, e.g.*, PIDOT, *supra* note 3.

40 *See* Stephen J. Small, *Proper—and Improper—Deductions for Conservation Easement Donations, Including Developer Donations*, 105 TAX NOTES 217, 223–24 (2004).

41 *See* McLaughlin, *supra* note 2, at 54–55.

42 *See* McLaughlin, *supra* note 37, at 520 ("Applying the doctrine of *cy pres* to conservation easements . . . [could vindicate] society's interest in ensuring that assets perpetually devoted to charitable purposes continue to provide benefits to the public."); *see also* French, *supra* note 19, at 2535 ("Existing doctrines can be used and extended to solve many problems that are likely to arise [from conservation servitudes], but more will be needed.").

III
THE CONCEPTUAL FLAW OF CONSERVATION SERVITUDES

For all their erudition and ingenuity, none of the remedies prescribed for the maladies of conservation servitudes address the conceptual flaw that lies at the heart of these instruments: their explicit aim of severely constraining the choices of later generations is impossible to justify. The attraction of conservation servitudes stems in large measure from the conviction that not only do some tracts of land deserve to remain forever in (roughly) their current state but that the present generation has the skills to identify them.[43] Moreover, the generations to come are assumed to be so incapable of ordering their own affairs that today's conservationists are right to take aggressive measures to ensure that what is cherished now will be "preserved" forever.[44] In sum, conservation servitudes are intended to accomplish nothing less ambitious than permanent land use planning.

Seeking to freeze the lawful uses of large quantities of land might make some sense if nature, scientific knowledge, and societal values were static. But that is not the world we live in. Far from being equilibrial, the natural world changes constantly.[45] And not only is nature dynamic but, as an ever-increasing body of scientific research tells us, throughout the world's history massive transformations have occurred both gradually and abruptly.[46] Species expand, contract, and migrate. Rivers vary their paths and dry up. Earthquakes and volcanic eruptions reconfigure topography and even create new land. Many of these changes are the product of human activity, which has increased in magnitude and impact since the Industrial Revolution.[47]

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43 *See supra* notes 11–12 and accompanying text.

44 *See* Mahoney, *supra* note 4, at 740.

45 *See id.* at 753–57.

46 *See generally* EUGENE LINDEN, THE WINDS OF CHANGE: CLIMATE, WEATHER, AND THE DESTRUCTION OF CIVILIZATIONS (2006); Jonathan Overpeck, *Climate Surprises*, *in* FORCES OF CHANGE: A NEW VIEW OF NATURE 33 (2000).

47 *See* PAUL R. EHRLICH & ANNE H. EHRLICH, ONE WITH NINEVEH: POLITICS, CONSUMPTION AND THE HUMAN FUTURE 21 (2004) ("*Homo Sapiens* has now become a truly global geographical force. . . . [I]t has changed the amount and patterns of light reflected back into space from Earth's surface, altered vast

This continual change means that "preserved" lands may fail to continue to exhibit the features and generate the environmental and other benefits that spurred preservation in the first place. Yet, the information furnished by land trusts and other easement advocates is oddly silent on the subject of the dynamism of the natural world. Indeed, to judge from descriptions of the virtues of conservation servitudes, putting in place institutional bars on development is sufficient to ensure that protected lands will remain forever "whole and intact" in their present condition.[48] In articulating this vision of what conservation servitudes can accomplish, land trusts and others unwittingly endorse the venerable but outmoded ecological paradigm that holds that so long as humans do not meddle with nature, she will remain in "balance."[49] This error fuels the widely held but misguided conviction that by roping off vast quantities of undeveloped acreage we can ensure future generations will have an adequate supply of ecologically valuable lands.

To be sure, supporters of conservation easements are hardly alone in their attachment to the idea that nature as they know it can last forever. As biologist Daniel Botkin notes, even though the dynamic model has prevailed among ecologists, "the balance of nature idea is alive and well, and infiltrates proposals for conservation as well as management" practices.[50] Nevertheless, the ready acceptance by conservationists of an inaccurate conception of how the world works raises the troubling prospect

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biogeochemical cycles that circulate the elements upon which our lives depend, [and] freed many minerals from Earth's crust at rates comparable to or even exceeding those of natural processes such as wind and water erosion . . . ."); *see also* JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT 13–14 (2d ed. 2005) (detailing the "phenomenal" expansion of "human enterprise in the twentieth century" that led "traditional pollutants like soot, sulfur oxides, and sewage" to grow from "modest quantities to huge ones").

48 Mont. Ass'n of Land Trusts, *supra* note 11.

49 *See* Daniel B. Botkin, *The Nature of Change*, *in* FORCES OF CHANGE: A NEW VIEW OF NATURE, *supra* note 46, at 15 ("Throughout the history of western civilization, for several thousand years, people have generally believed that there existed a great balance of nature, that nature, left alone, would inevitably achieve a permanent form and a constant structure.").

50 *Id.* at 18.

that the well-being of future generations is being subordinated to the illusions of the present one.

The fact that only recently did we figure out that nature is not stable and predictable underscores the limits and mutability of our scientific understanding.[51] Even if land trusts and other conservation organizations assiduously strive to incorporate science into their preservation decisions, it may do them little good, for the reality is that right now we are struggling to acquire fundamental knowledge about many ecological processes.[52] For instance, while we grasp that forest-atmosphere interactions can "amplify or dampen climate change arising from anthropogenic greenhouse gas emission,"[53] our knowledge of how and to what extent forests influence climate is still too primitive to enable us to make comprehensive recommendations regarding land use.[54] In short, there is every reason to conclude that even the latest, most sophisticated research is not up to the task of determining how lands should be used for all eternity.

As with the complexity and disequilibrium of nature, the nascent state of ecological science goes unmentioned in materials promoting conservation servitudes. Instead, the impression conveyed is one of serene confidence that the right restrictions are being imposed on the right properties.[55] The eagerness of today's conservationists to control the use of land by later generations grows even more puzzling if we take into account the common belief, which seems close to incontrovertible, that ecological knowledge is more likely to be

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51 *See* LINDEN, *supra* note 46, at 4.

> Until very recently, climate has been viewed as static. It was only in the mid nineteenth century that scientists discovered the wrenching changes of the ice ages, but even after that, the prevailing attitude was that the present 10,000-year warm period that gave rise to civilization was monotonously stable.

Id.

52 *See* Mary Jane Angelo, *Embracing Uncertainty, Complexity, and Change: An Eco-Pragmatic Reinvention of a First-Generation Environmental Law*, 33 ECOLOGY L.Q. 105, 109 (2006) ("Science has only scratched the surface of understanding complex ecological systems.").

53 *See* Gordon B. Bonan, *Forests and Climate Change: Forcings, Feedback and the Climate Benefits of Forests*, 320 SCIENCE 1444, 1448 (2008).

54 *See id.* at 1449 ("As the climate benefits of forests become better understood, land-use policies can be crafted to mitigate climate change.").

55 *See generally* RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA (2003).

gained than lost. This means that future decision makers will have access to superior information. Unless there is cause to believe that later generations will have vastly inferior analytic skills—a claim that has not, so far as I know, been advanced in defense of conservation servitudes or, for that matter, in any other context—the probable increase in future ecological knowledge militates for entrusting future generations with more authority rather than less.

Also hard to predict are changes in social values.[56] Here, we can only speculate about how future eyes will view the landscapes that inspire early twenty-first-century conservation efforts. What we judge worth preserving inevitably reflects, in no small measure, contemporary attitudes about what is beautiful, useful, or of historic merit. If the past is any guide, tastes will shift and judgments will be revisited, rendering at least some of today's preservation efforts outdated or discomfiting.[57] One can imagine, for example, that future generations might be disinclined to idealize pastoral landscapes and ways of life and be baffled that late twentieth- and early twenty-first-century Americans were willing to devote substantial resources to shielding farms and ranches from the market forces that threatened to convert them into residential communities and commercial sites. Alternatively, innovations in zoning and other land use regulation may prove so successful that our successors will have greater confidence in the capacity of government decision makers to decide which lands should be preserved or developed and marvel at our determination to supplement government regulations with privately ordered prohibitions on subdivisions, shopping centers, and selected other forms of development.

Regrettably, advocates of conservation servitudes fail even to acknowledge the prospect that later preferences will diverge from ours. Instead, their working assumption appears to be that our descendants will share our vision of the good life. This belief enables conservationists to make preservation decisions on the basis of their own emotional reactions. But it also has a downside, even for conservationists themselves. In declining to put forth serious effort to imagine alternative reactions to the

56 *See* Mahoney, *supra* note 8, at 587–89.

57 *See* Mahoney, *supra* note 4, at 759–60.

natural world, they sidestep the challenging but rewarding task of discerning the probable range of the values and needs of future generations.[58]

IV
IN SEARCH OF A NEW CONSERVATION ETHIC

None of this is to argue that no conservation servitudes yield any present or future benefits. That the architecture of conservation easements embodies fundamental misapprehensions about how the natural world and human culture function does not mean that their imposition cannot provide ecological and other amenities. A crucial issue, of course, is whether it is plausible that through blind luck an ill-conceived institutional innovation will turn out to do more good than harm. Ultimately, this is an empirical question, but so far there are no signs that good fortune will counteract bad design.

Nor do I claim that ill-advised or obsolete conservation servitudes will necessarily last forever. No matter what land trusts and other conservation organizations tell their constituencies and the public, future generations will retain ultimate control over land use, for no institutional structure imposed by the present day actors is immune from overhaul by those who follow.[59] I do argue that the potential problems caused by the durability of conservation easements tend to be downplayed or ignored because defenders of conservation servitudes are too quick to assume that dismantling institutional barriers to development will be cheap and simple.[60] Such optimism, I maintain, is unwarranted. Terminating or amending conservation servitudes is not without cost and may well prove expensive and difficult.[61] I also suggest that there is a certain

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58 *Cf.* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 215–19 (1980) (arguing that among the benefits of a liberal arts education is the capacity to make informed guesses about what goods and services will contribute to future social welfare).

59 *See* Roger E. Meiners & Dominic P. Parker, *Legal and Economic Issues in Private Land Conservation*, 44 NAT. RESOURCES J. 353, 353 (2004); *see also* Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 603 (2004).

60 *See supra* notes 38–42 and accompanying text.

61 *See* Mahoney, *supra* note 8, at 595–99; *see generally* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS

irony in this blithe disregard for the risk of institutional gridlock. If it is true, as many philosophers, legal scholars, and policymakers argue, that the interests of future generations place moral constraints on our behavior,[62] then surely we should be alert to all the actions we might engage in that might impose costs on our successors and not only focus on ones involving environmental harms.

In sum, my chief point is that conservation servitudes do not fit well with our need for institutions and practices that can adjust with ease to shifting climate and landscape, advances in knowledge, and evolving societal norms. Right now, the conservation movement would profit from looking ahead and grappling with how modern society and technologies can and should interact with ecological systems.[63] To undertake this project, environmentalism should embrace a nuanced, realistic understanding of the relationship between humans and nature, one that casts man not simply as a potential despoiler or (at best) a preserver of pristine landscapes but as a part of the natural

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INNOVATION, AND COSTS LIVES (2008) (detailing the barriers to reassembling fragmented property rights). It bears mention that concerns about the durability of preservation measures are by no means pertinent only to conservation servitudes. Both command and control regulation and the acquisition of fees simple by government and nonprofit entities—the two chief preservation vehicles other than conservation servitudes—entail reconfigurations of human created institutional arrangements. As with the imposition of conservation servitudes, these measures are not irreversible, but they may prove hard and costly to undo. *See* Mahoney, *supra* note 8, at 596. There are differences. Most important, in contrast to conservation easements, there exist tried and true mechanisms for reversing land preservation accomplished through regulation and fee simple acquisition. Government entities routinely repeal or revise regulations and conservation organizations can and do deaccession lands they own outright. Nevertheless, the key point should not be lost sight of: reconfigurations of human created institutional strictures are generally not free and often not simple.

62 *See* DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 154–55 (1999); *see also* JOEL FEINBERG, *The Rights of Animals and Unborn Generations*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 159 (1980).

63 *See* THOMAS P. HUGHES, HUMAN-BUILT WORLD: HOW TO THINK ABOUT TECHNOLOGY AND CULTURE 153–56 (2004) (arguing that "people in the industrialized nations, especially the United States, do not grasp the large range of possibilities for creative action that technology offers" and have consequently failed to take full advantage of opportunities to create and maintain "aesthetically pleasing and ecologically sustainable environments").

world with the capacity to help create ecological value.[64] Instead it squanders precious energies on the almost certainly futile objective of enshrining existing preferences and attitudes.

The results of this approach are disquieting to contemplate. Large swathes of land, including many acres near densely inhabited areas, are designated as permanent farms, ranches, and forests, even though history teaches that long-term land use planning has an extremely poor track record.[65] Land trusts and easement donors not only fail to express any misgivings about their plans to control the future but exult in their powers[66] and resort to exaggerated claims about the detrimental consequences and irreversibility of development to defend their aggressive conservation programs.[67] And the welfare of future generations, which features so heavily in the rhetoric employed to justify land conservation, is, in practice, subjugated to the whims of the current one.[68]

V
CONCLUSION

To call for a revised mindset that incorporates, rather than ignores, the phenomenon of continual change in both nature and human society is easy. What is hard is to construct organizations and institutions that take account of the limits of our capacity to foretell the future. It is understandable that, to date, land trusts and other promoters of conservation servitudes have shied away

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64 *See* TED NORDHAUS & MICHAEL SHELLENBERGER, BREAK THROUGH: FROM THE DEATH OF ENVIRONMENTALISM TO THE POLITICS OF POSSIBILITY 7–16 (2007) (suggesting that the paradigm that "defines ecological problems as the inevitable consequence of humans violating nature" is flawed and that the environmental movement should instead emphasize the ability of humans to harness new technologies and ecological knowledge to improve the environment).

65 *See* JESSE DUKEMINIER, ET AL., PROPERTY 840 (Aspen Publishers 6th ed. 2006) (tracing the failure of comprehensive plans by local governments that proceeded "on the assumption that an area could be mapped, once and for all, with few changes necessary thereafter").

66 *See, e.g.*, BREWER, *supra* note 55.

67 *See* Mahoney, *supra* note 4, at 763–67.

68 *Cf.* Douglas A. Kysar, *The Consultants' Republic*, 121 HARV. L. REV. 2041, 2083 (2008) ("Can the other remote beneficiaries of environmental law's protection . . . be made to appear within the liberal democratic framework as legal subjects in themselves, rather than merely as objects of valuation by presently living [actors]?").

from this difficult enterprise, preferring instead to assume that today's conservation decisions will turn out to be good ones. But a true commitment to the welfare of future generations demands a more realistic approach.