

# Entrenching Environmentalism: Private Conservation Easements over Public Land

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*This Article examines how local governments can use private law mechanisms to entrench policy in ways that circumvent typical legal limitations. The Article explores in detail a specific example of a town donating conservation easements over property it owns to a third-party not-for-profit conservation organization to ensure that the property would not be developed in the future. This is nearly the functional equivalent of passing an unrepealable zoning ordinance to restrict development, something existing anti-entrenchment rules would never permit. The Article discusses the costs and benefits of using such a device. It theorizes generally about the nature of entrenchment outside public law, and identifies anti-entrenchment protections designed to prevent the worst effects. It ultimately argues that eminent domain serves an important role in allowing subsequent governments to escape the precommitments of prior governments and proposes a modest modification in compensation rules to limit the extent to which conservation easements can entrench conservation.*

## INTRODUCTION

Local governments are competitors in a nationwide race over taxes, resources, residents, and, ultimately, property values. It is, however, a peculiar race; more like a sack race than a marathon, because the contestants are hobbled by legal and structural constraints limiting their freedom of movement. A local government wishing to attract some new, high-valued use has relatively limited tools at its disposal. Traditionally, a local government can offer to assemble land, provide tax or financial incentives, or build supportive infrastructure. It can also promise favorable regulatory treatment. For many potential entrants, this last one is the most important. Promises of permissive zoning, to forebear in the future, to forego exactions, or even to maintain restrictions in other parts of town can dramatically affect the expected value of new development. Such promises are not only important to developers. In selecting where to live or build, individual homeowners are placing bets about a community's medium- to long-term prospects.

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The content of land use regulations can be a critical part of this bet, and people may well want some measure of certainty about the future.<sup>1</sup>

Anti-entrenchment rules, however, forbid a legislature from binding the hands of future legislatures. They generally prevent local governments from making zoning decisions unrepealable or from otherwise locking in any particular regulatory treatment of property.<sup>2</sup> While this is subject to some limited modifications—development agreements and zoning estoppel are the principal examples—governments by and large are left making promises that the promisee knows cannot be enforced. As a result, variances and rezonings that are initially promised are sometimes later denied or revoked because the government changes its mind, capitulates to neighbor pressure, or because of public referenda.<sup>3</sup> Antidevelopment regulations can change, too, and be replaced by pro-growth measures that fundamentally alter the character of a community.

To circumvent these restrictions and respond to property owners' demands for greater certainty, local governments have found creative uses of private law to entrench land use decisions. My contribution to this Symposium, then, looks in some detail at one such new tool: donating conservation easements over publicly owned land to a not-for-profit conservation organization. This approach is more effective at ensuring the perpetual conservation of land than almost anything else a local government could do. It also reveals a broader category of private law entrenchment—that is, public precommitments that are enforceable because they rely on preexisting private law doctrines. Entrenchment in this form is not inherently problematic and can indeed create significant benefits. But it also threatens to create substantial costs, primarily in the form of reduced flexibility in the future. The conveyance of conservation easements comes with important cautionary lessons because of inadequate safeguards against political malfunctions and loss of flexibility in the future. I therefore make a modest proposal. Depending on the political conditions when the conservation easements were created, governments should be able to condemn the easements back through eminent domain and then by paying the fair market value of the development rights at the time the

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<sup>1</sup> For a thoroughgoing treatment of this claim, see generally Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 Colum L Rev 883 (2007) (proposing that local governments should have greater ability to precommit to land use regulations).

<sup>2</sup> See Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am Bar Found Rsrch J 379, 384–93 (1987).

<sup>3</sup> See Serkin, 107 Colum L Rev at 902 (cited in note 1) (describing risks of regulatory change).

property was conserved, plus interest. This marks an appropriate compromise between the desire for precommitments and the need for future flexibility.

Part I describes how one municipality has used conservation easements to entrench its constituents' environmental goals, looks at the pros and cons of such a strong precommitment, and suggests characteristics of the conservation easement model that make it both particularly effective and potentially troubling. Part II then provides a more general account of private law entrenchment mechanisms, surveys limits on their use, and proposes a change to governments' use of conservation easements to mitigate its greatest risks.

## I. ENTRENCHING CONSERVATION

### A. An Example

The town of Marlboro, Vermont had a problem.<sup>4</sup> A well-to-do out-of-stater (a “flatlander” in local parlance) had bought a defunct ski area, Hogback Mountain, and was making noises about developing the property or selling it to someone who would. Rising insurance costs, and the lack of dependable snowfall, had driven Hogback Mountain out of business almost two decades earlier. During the intervening years, the mountain had been acquired by successive owners with various development plans, all of which had either been thwarted or delayed by economic conditions or by Vermont's restrictive land use statute, Act 250.<sup>5</sup> By 2005, however, Hogback's owner had a plan to develop the property that appeared to be gaining traction.

Marlboro is a small town in Southern Vermont.<sup>6</sup> To the south and east of most of the good skiing in the region, Marlboro has been largely spared the transformation into a resort town that has consumed some of its proximate neighbors. Home to the Marlboro Music Festival in the summer, and Marlboro College in the winter, it has one of the best public elementary schools in the area and a close-knit, year-round community.

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<sup>4</sup> Disclosure: I am originally from Marlboro, Vermont and remain a part-time resident. Much of the information in this Part is drawn from firsthand knowledge and informal conversations with friends and neighbors.

<sup>5</sup> 10 Vt Stat Ann § 6001 et seq (1970).

<sup>6</sup> According to the 2000 census, the town's population was 978. See US Census Bureau, *Profile of General Demographic Characteristics: 2000*, online at <http://censtats.census.gov/data/VT/0605002543375.pdf> (visited Nov 5, 2009). For background information on the town, see *About Marlboro*, online at <http://www.marlboro.vt.us/about/marlboro> (visited Nov 5, 2009).

The Hogback Mountain property encompasses nearly six hundred acres of pristine woodland at the edge of town. Many locals learned to ski there, and its expansive views of Southern Vermont are exceptional (and advertised visibly on the state highway running through the town). People in Marlboro therefore believed it was important to preserve the property. Moreover, the threat of a large-scale residential development on this far western edge of town promised to be a net loser for Marlboro financially. Increased costs in road maintenance and fire protection, to say nothing of the potential for an increased burden on the public school, could be expensive for the town to absorb. And, perhaps even more importantly to the town of roughly nine hundred residents, it could mean an influx of newcomers that might threaten the sense of community that holds the town together.

To protect the property from development, a group of concerned citizens formed a committee to raise money to buy the property in order to convey it to the town for conservation. They succeeded in 2008, and the property is presently owned in fee simple by a consortium of so-called “conservation buyers.” The next step calls for the town to purchase the property from the conservation buyers at face value, raising some of the money through taxes, but the bulk through public and private grants. The conservation buyers will get their money back, and the town will take fee simple title to the property.<sup>7</sup> But here is where the story takes an interesting turn. Instead of simply buying and holding the property, Marlboro’s plan when it purchases the property is to donate (or arrange for the conservation buyers to donate) conservation easements over the property to the Vermont Land Trust, a nonprofit group that receives and maintains conservation easements throughout the state. The underlying property will still be owned by the town in fee simple.

The use of conservation easements by a town is at least unusual. The principal financial benefit of conservation easements to private owners comes from the value of the charitable contribution for federal income tax purposes, and from a reduction in property taxes.<sup>8</sup> Those tax benefits obviously do not apply where the fee owner is the town itself. Nor is the Vermont Land Trust paying the town anything to acquire the conservation easements. To the contrary, the town is paying the land

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<sup>7</sup> The conservation donors’ principal contribution was providing money up front to take the property off the market immediately, and then absorbing the carrying costs of the property until the town can buy it from them.

<sup>8</sup> See Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *Ecology L Q* 1, 3–4 (2004).

trust a substantial amount of money to establish an endowment for the ongoing monitoring and management of the property in perpetuity.<sup>9</sup>

Marlboro does receive some financial benefit from the conservation. A number of grant-making organizations require that land be subject to explicit conservation easements to be eligible for funding. In other words, the conservation easements may be a prerequisite for certain grants.

Nevertheless, there can be no doubt that one of Marlboro's motivations is to entrench its current conservation goals. In this regard, the town's behavior is perfectly consistent with current residents' interests. They favor taking title to the property at some expense precisely because of the promise that it will be perpetually conserved. That is to say, a significant portion of the property's value to the town's residents today is the knowledge that it will be preserved into the future. Presumably, without some kind of guarantee that the property will be protected from the vagaries of political winds, voters in town might not have been willing to try to take title to the property in the first place.

The use of conservation easements by a local government like Marlboro is at least potentially problematic because of the extent to which it entrenches a particular policy agenda. By enlisting a third party and the property device of conservation easements, Marlboro is able to achieve indirectly what it could not through explicit legislation. An ordinance declaring Hogback undevelopable could always be modified or repealed.<sup>10</sup> That is to say, entrenchment through ordinary legislation is always subject to subsequent political change. Conservation easements are not (save for eminent domain, of which more later). They therefore present more risks, but also benefits, both of which need to be considered in detail before deciding if and when such privately enforceable public precommitments should, in fact, be permissible and binding.

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<sup>9</sup> See Jaime Cone, *Money Match for Hogback Group*, Brattleboro Reformer (Sept 2, 2009) (detailing the town's efforts to raise the \$1.73 million necessary for the conservation project).

<sup>10</sup> See, for example, *Reichfelderfer v Quinn*, 287 US 315, 317 (1932) (refusing to enforce apparent perpetual dedication of land for a park), cited in Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L J 1665, 1667–68 (2002). Some states have taken the dramatic step of entrenching conservation in their constitutions, setting aside certain property as in the public trust. See Barton H. Thompson, Jr, *The Trouble with Time: Influencing Conservation Choices of Future Generations*, 44 Nat Resources J 601, 603–04 (2004).

## B. Conservation Easements as Entrenchment

Public conservation easements implicate two different and contested literatures: one on legislative entrenchment, and one on private conservation easements. Both, fundamentally, are concerned with trading off reliance today with flexibility in the future.

Entrenchment is one of those topics that excites periodic flurries of scholarly attention. A series of articles, starting in the 1980s, brought the topic to the fore, highlighting its seeming intractability.<sup>11</sup> More recently, Eric Posner and Adrian Vermeule took up the topic and energized a sharp back-and-forth with John Roberts and Erwin Chemerinsky about the normative desirability of entrenchment.<sup>12</sup> These recent debates over entrenchment have focused on the power of Congress to entrench, say, the death penalty, or abortion funding. The underlying concern is the ability of voters to set policy for themselves, and it therefore implicates quite a fundamental issue in democratic theory. On the one hand, allowing one legislature to entrench legislation enhances the self-determination of the earlier legislature—it can both decide on the law and on the law’s temporal scope. On the other hand, it removes the ability of future legislatures to decide issues for themselves. Entrenchment of local land use decisions presents the same set of issues, although the nature and politics of local land use controls may generate a different set of prescriptions.<sup>13</sup>

Of course, the entrenchment literature may have nothing to say about Marlboro’s use of conservation easements unless they are, in

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<sup>11</sup> See Eule, 1987 *Am Bar Found Rsrch J* at 383 (cited in note 2) (relating the policy against entrenchment to the prohibition against retroactive enforcement of the law); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *Georgetown L J* 491, 496 (1996) (identifying entrenchment issues in constitutional law and advancing an anti-entrenchment theory of judicial review); David Dana and Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 *U Pa L Rev* 473, 473–74 (1999) (discussing the possibility of government fundraising through the sale of entrenched legislation). See also Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 *Hastings Const L Q* 185, 188–90 (1985) (addressing entrenchment concerns in the Balanced Budget and Emergency Deficit Control Act of 1985’s attempt to impose restrictions on future legislation).

<sup>12</sup> See Posner and Vermeule, 111 *Yale L J* at 1666 (cited in note 10) (arguing that the rule against entrenchment should be discarded because it has no justification in the Constitution, in political norms, or in economics); John C. Roberts and Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner & Vermeule*, 91 *Cal L Rev* 1773, 1795–1806 (2003) (arguing that entrenchment is contrary to the democratic principle of majority self-rule). See also generally Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 *Geo Wash L Rev* 231 (2003) (responding to Posner and Vermeule).

<sup>13</sup> These differences are considered explicitly in the text accompanying notes 33–34. Roberts and Chemerinsky appear to assume that entrenchment rules would apply equally in different political contexts. See Roberts and Chemerinsky, 91 *Cal L Rev* at 1776 (cited in note 12).

fact, properly seen as a form of entrenchment. Conservation easements certainly do not fall within the common formal definition of entrenchment, which focuses only on legislation made unalterable by future legislatures. Quite simply, easements are not legislation; they are a property right that can be bought, sold, leased, or otherwise treated as property without any legislation at all.<sup>14</sup> And this is precisely their power. By relying on private law and enforcement by private parties, the government can achieve through contracts and property what it cannot through legislation or regulation.

Conservation easements may also look different from formal entrenchment if they are used to obtain grants or funds from third parties. In these situations, it may appear that the private third party is actually responsible for setting the condition and for establishing the conservation easement. The government is simply capitulating to market demands. So long as the government's motivation is not primarily to tie the hands of future governments, perhaps there is no reason for concern. This, however, proves far too much. If a government could attract desirable development by entrenching the regulatory treatment of property, say by making a zoning ordinance unrepealable, it also would not be motivated primarily by the desire to entrench a particular regulation or policy but instead by the demands of the real estate market. In fact, such a situation would look very similar to Marlboro donating conservation easements to become eligible for certain grants.

Some might alternatively object that conservation easements have nothing to do with entrenchment because they are not distinct from routine government decisions that nevertheless affect future choices. A municipality can sell property to anyone it chooses. This, too, limits the choices of future governments and is therefore also entrenching under the capacious definition suggested here. That is true. The important functional issue in the entrenchment literature is the extent to which the actions by one government limit and shape the range of options available to subsequently constituted governments. Entrenchment, then, must be viewed on a continuum. Government actions can be more or less entrenching. While this is not the formal definition of entrenchment found in some of the most sophisticated scholarly discussions, the difficulty of line-drawing in this area is a strong reason to look beyond legal categories and to the actual effect of local

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<sup>14</sup> Admittedly, conservation easements themselves are generally creatures of state law. See Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility in the Future and Engaging the Public Land Use Process*, 2007 Utah L Rev 1039, 1044–48 (chronicling the history of conservation easements).

precommitments.<sup>15</sup> Donating conservation easements is actually one of the strongest precommitments local governments can make.

By fragmenting ownership, and making one of the owners a conservation group, the government is locking in its conservation agenda more effectively than just about any other mechanism would allow. It is even more effective than selling or donating the property in fee.<sup>16</sup> Where the government sells property outright, the government loses all control over it. The possibility then at least exists that the acquirer could decide eventually to resell the property, perhaps to raise money for some broader conservation efforts somewhere else.<sup>17</sup> It has the unilateral power to convey the property to someone who can put it to economically beneficial use. With conservation easements, no one party has that power. Even if the Vermont Land Trust sold the Hogback easements, the buyer would not be able to develop the property without the fee owner's consent. The use of conservation easements is simply more effective at preserving the property because it unbundles rights that would need to be reassembled in order to develop the property.<sup>18</sup>

The public dedication of conservation easements is entrenching because it serves to limit or even eliminate the ability of subsequent governments to alter the prior government's policy judgment that the burdened property should not be developed. In short, donating conservation easements over municipally owned land looks like the functional equivalent of passing an unrepealable ordinance not to develop the property. That is not to say, however, that a municipality's use of

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<sup>15</sup> Dana and Koniak adopt a similarly broad definition, 148 U Pa L Rev at 529 (cited in note 11) (defining legislative entrenchment as "a legal hierarchy in which the will of a past legislature trumps the will of a present legislature").

<sup>16</sup> The form of the property interest may be less important than the entity to which it is conveyed. The entrenching character of the government's action comes from the conveyance of a property interest to a group with very little flexibility over its own use of the property. See Korngold, 2007 Utah L Rev at 1063–64 (cited in note 14) (describing limits of conservation groups' power to put conserved property to alternate use).

<sup>17</sup> The power of a conservation group to act in this way is not entirely clear and may be seen to violate the group's fiduciary duties to its donors. But that is at least up for grabs. See *id.* at 1044 (noting that state law is unclear with regard to the fiduciary duties of holders of conservation easements).

<sup>18</sup> See Michael Heller, *The Boundaries of Private Property*, 108 Yale L J 1163, 1165–67 (1999) (addressing the difficulty of recombining fragmented property due to transaction costs, strategic behavior, and cognitive biases). State statutes may also limit the alienability of conservation easements. See Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va L Rev 739, 773–74 (2002), citing Cal Civ Code § 815.3 (2002). Still, even conservation easements are not indestructible. See Thompson, 44 Nat Resources J at 609 (cited in note 10) (noting that easements in most states may be defeated if the land trust conveys them to the owner of the underlying fee interest).

conservation easements is necessarily inappropriate. What, then, are the costs and benefits of entrenching conservation in this way?

### C. The Costs and Benefits of Entrenching Conservation

#### 1. Property values and the benefit of precommitments.

The ability of a local government to precommit to conservation has obvious advantages.<sup>19</sup> First, enforceable precommitments can induce third-party reliance on property regimes in ways that enhance property values.<sup>20</sup> Just as neighbors of a state park will pay more because of the relative certainty that adjacent property will not be developed, neighbors of conserved land benefit from the immediate positive externalities of the promise of perpetual conservation. To put it more directly, the value of conservation in the future is capitalized into local property values.

There can be a more systemic effect, too, that goes beyond the benefit to directly affected neighbors. Commitments to pro-growth, conservation, or historic preservation agendas, for example, can allow for greater sorting among communities, à la the Tiebout hypothesis, as residents buy into municipalities that share their land use preferences.<sup>21</sup> Satisfying those preferences unlocks property values.<sup>22</sup>

Of course, this kind of Tiebout-style sorting does not generally require government policies or precommitments to be binding. Preferences for any particular mix of services and taxation—the typical dimensions of Tieboutian sorting—are not usually set in stone. A town's one-time commitment to its schools can change as demographics shift, as can local property taxes, or the level of any public service. In an ideal world, people might want to be able to select not only based on first-order combinations of local services and taxation, but also on second-order conditions about how binding those combinations are over time. But as the range of choices becomes both more

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<sup>19</sup> For previous work endorsing greater local precommitments specifically around land use regulations, see generally Serkin, 107 Colum L Rev 883 (cited in note 1).

<sup>20</sup> Consider Kevin E. Davis, *The Demand for Immutable Contracts: Another Look at the Law and Economics of Contract Modifications*, 81 NYU L Rev 487, 500–01 (2006) (discussing reliance benefits of precommitments in bilateral contracts).

<sup>21</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Polit Econ 416, 417–20 (1956) (conceiving of potential residents as “consumer-voters” who shop for locations based on their appetites for public goods such as schools, parks, and beaches). See also Marc A. Weiss, *The Rise of the Community Builders* 91 (Columbia 1987) (describing industry's objection to retroactive application of early California land use controls for making permitted uses unpredictable).

<sup>22</sup> Serkin, 107 Colum L Rev at 886 (cited in note 1).

abstract and less apparent, the real-world opportunity for sorting, and the chances that it will unlock real value, decreases.<sup>23</sup> While the quality of local schools is undoubtedly capitalized into property values, it is harder to imagine that variation in the strength of precommitments to education funding in the future would be capitalized into property values to the same extent, or at all.

Land use decisions, and especially those affecting conservation or preservation, may be importantly different. While a local government can change course on education funding—a cycle with low funding and poor schools can be followed by a new commitment of resources—many land policies operate more like a one-way ratchet. A temporary pro-growth agenda can stimulate an irreversible wave of development. Once property is developed, it cannot easily be reclaimed.<sup>24</sup> Once historic or environmental resources are destroyed, they cannot be brought back. The added importance of land use precommitments, then, comes principally from the stickiness of land use decisions. Development can place a heavy burden on the future, and entrenching conservation functions like something of a counterweight.<sup>25</sup>

There is a political economy story to tell here, as well. In the absence of entrenchment, a majority of voters today may well fear interest group capture in the future. Marlboro's actions can be seen through precisely this lens. Local voters may have good reason to worry about a developer coming along and exerting sufficient political and economic power to force some development through the local land use processes, despite the interests of the local majority.<sup>26</sup> The conservation easements make this much harder, if not impossible. Entrenchment in this way can function like a developer repellent, making even attempts to exert untoward influence less likely. It is almost like a poison pill or shark repellent in corporate law, making the town a less hospitable place for developers to try to influence the local political process.<sup>27</sup>

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<sup>23</sup> *Id.* at 909.

<sup>24</sup> This is particularly true because of the law's special solicitude for existing uses of property. See Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 NYU L Rev 1222, 1275–80 (2009) (problematizing the assumption that existing uses need to be protected).

<sup>25</sup> See Korngold, 2007 Utah L Rev at 1055 (cited in note 14) (noting the permanence of development activities and the corresponding need for strong preservation). But see Mahoney, 88 Va L Rev at 764 (cited in note 18) (problematizing the notion that development is hard to reverse).

<sup>26</sup> This concern has been used to justify states constitutionalizing conservation. See Thompson, 44 Nat Resources J at 615 (cited in note 10).

<sup>27</sup> Importantly, however, dead-hand poison pills have been largely rejected by the Delaware courts as imposing too great a restraint on change in control. See, for example, *Quickturn Design Systems, Inc v Shapiro*, 721 A2d 1281, 1292 (Del 1998) (holding invalid a provision that

## 2. Decreased flexibility and the costs of precommitment.

There are costs to greater certainty. Restricting the ability to develop property in the future (or to promote private development of the property in the future) naturally, and unavoidably, decreases flexibility to respond to changed circumstances. That, quite frankly, is the point of donating conservation easements. But as local conditions and knowledge change, once-sensible conservation policies can be rendered obsolete. Precommitments are, in some sense, a gamble that the present value of the precommitment exceeds the costs that the commitment imposes in the future. Even in an entirely transparent system, free of agency costs, this seems like a questionable gamble that local governments will occasionally get wrong. People may have a natural tendency to discount the value of flexibility in the future.<sup>28</sup>

All precommitments, in private as well as in public contexts, present this risk, however. Governments have no monopoly on bad judgments about the future. There is no more reason to let governments out of their bad bets than private parties if they are just the result of guessing wrong about values in the future. But government precommitments can be importantly different, given the possibility of political malfunction. In fact, conveying conservation easements can be problematic for three distinct reasons. As noted above, it can reflect a bad judgment about the future if the conservation easements turn out to be much more valuable than the original voters anticipated. Had they known the “true” value of the easements, voters would not have approved conserving the land. But it can also be the product of political malfunction, meaning either that the use of the conservation easements did not represent the will of the majority even at the time they were created, or that the government was able to externalize the costs of entrenchment on others (geographically or temporally). Alternatively, it can be the product of changes in policy preferences, meaning that a subsequently constituted town simply values the conservation easements differently. With full knowledge, and 20/20 hindsight, the original voters would still have voted to conserve the property, but the new electorate just plain disagrees.

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prevented appellant corporation’s new board of directors from negotiating the sale of the corporation). Thanks to Jennifer Arlen for pointing this out.

<sup>28</sup> Cell phone contracts are arguably an example of this same dynamic. See Oren Bar-Gill and Rebecca Stone, *Pricing Misperception: Explaining Pricing Structure in the Cellular Service Market*, 23 Harv J L & Tech \*1–3 (June 24, 2009), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1425046](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1425046) (visited Nov 4, 2009) (arguing that the pricing structure in cell phone contracts allows carriers to take advantage of consumers who underestimate their future usage).

Consider these latter concerns in order. Most straightforwardly, there is a significant risk of a momentarily ascendant interest group briefly capturing the legislative process and entrenching its particular land use agenda. It may well be that Marlboro, Vermont is temporarily dominated by a mobilized group of environmentalists and anti-growth community preservationists who, working together, assembled a political coalition in favor of entrenching an antidevelopment regime in town. The temporary success of a powerful but minority conservation lobby, say, can then bind the municipality forever, even against the less crystallized desires of a majority of voters.<sup>29</sup>

More profoundly, too, the costs of precommitments may not be entirely borne by the current government. On first glance, the costs appear easy to calculate. The conservation easements have a specific market value to the government, equivalent to the development rights on the property, so the cost of conservation can be priced objectively. By approving the plan, current voters have implicitly determined that the development rights are less valuable than keeping the property undeveloped. To put numbers to it, imagine that the development rights for Hogback Mountain have a market value of \$800,000. It might seem that voters in Marlboro are effectively spending \$800,000 to perpetually preserve the burdened property. In fact, though, the form of this “payment” makes its price far more complicated to calculate.

The opportunity costs of conservation are hard to value in part because conservation can actually increase local property values. The effect of conservation is to limit supply of developable property, which in turn can increase the value of existing housing. Development rights in these situations are less a valuable commodity, grudgingly given away, than they are like spent nuclear fuel rods that unfortunately cannot be destroyed but at least can be contained. This is a very traditional account of exclusionary zoning and regulatory growth controls.<sup>30</sup> The costs of restricted supply will be borne by future entrants to the town who will have to pay more for housing, or potentially by existing renters or other residents who are priced out of the market.<sup>31</sup> In the typical land use process, these groups are represented partially by local developers whose interests are at least loosely aligned with the

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<sup>29</sup> This is the familiar insight of public choice theory. See Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 NYU L Rev 1624, 1637–44 (2006) (discussing public choice theory and citing leading sources).

<sup>30</sup> See, for example, Lawrence Katz and Kenneth T. Rosen, *The Interjurisdictional Effects of Growth Controls on Housing Prices*, 30 J L & Econ 149, 158–59 (1987).

<sup>31</sup> See Robert C. Ellickson, *Suburban Growth Controls*, 86 Yale L J 385, 402 (1977).

ultimate consumers of their housing. In the case of a town donating conservation easements over its own property, however, there is no owner seeking to develop the specific property, so future residents do not even have a proxy in the political process. In short, a temporarily dominant political group can externalize the costs of conservation on unrepresented outsiders.

There is an additional concern to contend with, too. Government officials reap the short-term rewards of their actions but will not suffer the long-term consequences of their precommitments. In other words, they are likely to discount the future costs of the precommitment, perhaps dramatically so, because they will not be in office any more when the costs of precommitments are actually felt.<sup>32</sup>

True, the benefits of conservation are also externalized on future generations—indeed, altruism towards the future is one motivation for conservation. But if, as is likely, the promise of perpetual conservation generates immediate benefits while the costs in the form of decreased flexibility are not truly felt unless and until local conditions change, conservation easements present something of an intergenerational externality.

The externality problem also implicates the final risk of entrenchment: that the political majority may be differently constituted in the future. That is to say, even if a government made every effort to consider the full costs and benefits of its actions on the future, it may ultimately select a different set of policies than the government of the future. This is not because conditions developed differently than anticipated, or because the original government discounted relevant costs (or constituents), but because policy preferences change over time. If it were possible to hold an intertemporal vote, with full information available at both times, the outcomes would simply diverge. The effect of entrenchment is to allow current preferences to trump divergent future preferences, leading to a more subtle intergenerational conflict.

Voters considering entrenching a conservation agenda must weigh the benefits of certainty against the costs of reduced flexibility. In the abstract, flexibility is important for two distinct reasons: to anticipate the possibility of changed preferences in existing voters, and also to accommodate changes in political coalitions (or in the identity of the constituents in the majority coalition). Voters today may well value flexibility for the first reason, but actually eschew it for the

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<sup>32</sup> See, for example, Sterk, 71 *Geo Wash L Rev* at 244–45 (cited in note 12) (describing intertemporal agency costs).

second. In other words, preserving flexibility is valuable to the entrenching majority to protect against changes in their own preferences in the future, but is actually costly to them to the extent it accommodates electoral changes that do not reflect their steady and unchanging preferences. Preventing growth shores up the political power of the group presently in control by limiting the influx of newcomers who might have divergent political preferences. There is reason, then, to worry that current voters will not fully internalize the future costs of entrenched conservation.

These externality concerns may well be fatal at the state or federal level. But the story is at least more complicated at the local level. Local precommitments around conservation are less likely to be subject to this particular political malfunction because local property values reflect, at least to some extent, both good and bad land use precommitments—the former increasing property values today, the latter decreasing them.<sup>33</sup> In short, local land use regulations are capitalized into property values, and this has important political consequences.

The political process in many small local governments is driven in large part by homeowners united in the common goal of preserving property values.<sup>34</sup> William Fischel identifies these as jurisdictions primarily responsive to “homevoters.”<sup>35</sup> Property values in these jurisdictions become quite a sensitive barometer for local decisionmaking. Anything that affects property values today will also generate political pressure today, even if it is the result of future costs and risks being capitalized into present values. Local officials will, in fact, internalize at least some of the political costs of entrenching conservation, and cannot impose those costs only on future officials, distinguishing the political economy of local government entrenchment (at least in homevoter jurisdictions) from that in larger governments. While this is no bromide, it does suggest that some of the particular political risk from entrenchment is lessened in small, local governments where property values respond to land use precommitments.

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<sup>33</sup> For discussion of services capitalized into property values, see William Fischel, *The Homevoter Hypothesis* 39–57 (Harvard 2001). See also Serkin, 107 *Colum L Rev* at 886 (cited in note 1).

<sup>34</sup> This account is articulated and defended in Fischel, *The Homevoter Hypothesis* at 72–92 (cited in note 33). See also Serkin, 81 *NYU L Rev* at 1648 (cited in note 29) (noting that homeowners have a strong incentive to be politically active, since for most people the home represents their most valuable investment).

<sup>35</sup> Fischel, *The Homevoter Hypothesis* at 20 (cited in note 33).

## II. CALIBRATING ENTRENCHMENT

In principle, there are three broad-brush responses to a municipality's use of conservation easements. It can be wholly rejected, wholly embraced, or limited by certain protections to minimize its greatest risks. The last option is the best. The potential political malfunctions identified in Part I make the risks of embracing unfettered entrenchment too high.<sup>36</sup> But nor should the use of conservation easements be wholly rejected, both because of the real benefits identified above, and because it would be extremely difficult to prohibit. The Marlboro example is instructive. There, the town is planning to convey the conservation easements to a conservation group at the time it closes on the property. But if Marlboro were prohibited from conveying conservation easements itself, there is nothing to prevent the current private owners from conveying the easements themselves before transferring the property to the town. Indeed, many of the conservation easements over municipally owned land were conveyed by private owners before the government took title to the property. Short of prohibiting the government from owning such property, this would be a hard practice to police. The better approach, then, is to permit the use of conservation easements, but subject to certain safeguards. This Part examines what those safeguards should be.

### A. Private Entrenchment Mechanisms

The use of conservation easements to entrench a particular legislative agenda is part of a broader phenomenon of public entrenchment through private law. Governments, and local governments in particular, have a number of ways of entering into enforceable precommitments by relying on private law doctrines sounding in both property and contract. Viewing conservation easements against this broader backdrop makes them appear less exceptional, but also suggests some protections or limitations that help to guard against their abuse.

Contract law provides the most obvious examples of private entrenchment. Governments can, of course, enter into binding contracts with third parties, say for the acquisition of goods or services. Government contracts can be entrenching, as the term is used here, when they limit the range of options for differently constituted governments

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<sup>36</sup> But see Posner and Vermeule, 111 *Yale L J* at 1666 (cited in note 10) (arguing for allowing greater entrenchment, going so far as to permit unrepealable legislation).

in the future.<sup>37</sup> If a legislature enters into a long-term contract with a private group to collect parking meter fees, or the like, this may limit a future government's ability to contract with someone else (or adopt a different approach to parking).<sup>38</sup> Indeed, the scholarly literature often points to the entrenching character of contract law as an example of permissible public precommitments.<sup>39</sup> Less obviously, too, a government can incur indebtedness, which can constrain its options in the future even more than any bilateral contract.<sup>40</sup> Furthermore, local governments in some states can enter into development agreements, which are contracts with developers promising particular regulatory treatment in the future.<sup>41</sup>

Property law provides its own forms of entrenchment, too. A local government can sell or give away property, limiting municipal control over previously public property. Indeed, that is occasionally the purpose of the government action. A particularly interesting example is *Salazar v Buono*, in which the Supreme Court recently granted certiorari.<sup>42</sup> The case arose after an earlier Establishment Clause claim against the federal government for permitting the display of a cross, but no other religious symbols, in a war memorial in a federal park.<sup>43</sup> In response to the original suit, Congress directed the Department of the Interior to transfer the single acre of land on which the cross was situated to a private group, but with covenants requiring the group to maintain the property as a war memorial.<sup>44</sup> Simultaneously, Congress

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<sup>37</sup> See *id.* at 1700–01 (noting that avoiding performance of a government contract requires a future legislature to pay damages for breaching the contract and analogizing these costs with the political costs of obtaining a supermajority vote to avoid an entrenchment statute). See also Dana and Koniak, 148 U Pa L Rev at 499 (cited in note 11) (“Regulatory contracts may provide legislators, regulators, and regulated firms with a means to entrench their shared regulatory vision against the possibility of such political change.”).

<sup>38</sup> Chicago has made just such a deal. For a summary, see Andrew Stern, *Chicago Leases Parking Meters for \$1.16 Billion*, Reuters (Dec 2, 2008), online at <http://www.reuters.com/article/bondsNews/idUSN0227950220081202> (visited Nov 5, 2009).

<sup>39</sup> See, for example, Posner and Vermeule, 111 Yale L J at 1700 (cited in note 10).

<sup>40</sup> See, for example, Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L J 907, 918 (2003) (“A central justification of constitutional limits on debt is to offset the temptations that can cause elected officials to burden future generations with unnecessary debt.”).

<sup>41</sup> See Serkin, 107 Colum L Rev at 903–04 (cited in note 1) (describing the features of development agreements and maintaining that they are an unsatisfactory form of precommitment due to their inflexibility and susceptibility to special interest group pressure).

<sup>42</sup> See *Buono v Kempthorne*, 502 F3d 1069 (9th Cir 2007) (holding that the government can still be in violation of the Establishment Clause even after the transfer of public land into private hands), cert granted as *Salazar v Buono*, 129 S Ct 1313 (2009).

<sup>43</sup> See *Buono*, 502 F3d at 1071.

<sup>44</sup> The group was the Veterans Home of California-Barstow. See *id.* at 1073–75.

identified the site as a national monument, ensuring that the property would remain in the control of the Department of the Interior, even while transferring the property into private hands.<sup>45</sup> Here, Congress was trying to insulate the property from a court-ordered policy shift, instead of a political change of heart by a subsequent legislature. Nevertheless, it is an apt and timely illustration of a government's use of private law to place property outside the easy reach of future governments, while still setting policy for the property into the future.

Many private law mechanisms can entrench government policies. Contracts, debt, and property conveyances all represent government precommitments that are enforceable through private law, just like conservation easements, but that do not run afoul of the constitutional prohibition against entrenchment. Importantly, however, each of these comes with protections and limits that curb their most serious potential for abuse. All of these doctrines thus reflect at least some implicit recognition that private law's power to bind governments can tie too tightly.

Protections against precommitments take one of two principal forms. They either limit or prohibit the government's ability to enter into the precommitment in the first place, or they provide some opportunity to opt out in the future. The former can be divided into substantive restrictions on the one hand, and procedural requirements on the other.<sup>46</sup> Ex post opt-outs can operate either through a property or a liability rule.

Private law entrenchment mechanisms subject to substantive ex ante limits include, for example, the inalienable (or reserved) powers doctrine and the public trust doctrine, both of which constrain the kinds of contracts governments can enter into, and the kinds of property they are allowed to sell.<sup>47</sup> Similarly, state debt limits often operate by capping the amount of debt a local government can incur, usually

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<sup>45</sup> See *id.* at 1074. For an interesting discussion of the case, see Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 Nw U L Rev Colloquy 70, 71–77 (2009) (discussing charges of “ventriloquism” in what appeared to be an effort on the part of Congress to do an end run around the Establishment Clause).

<sup>46</sup> A similar division can be found in Dana and Koniak, 148 U Pa L Rev at 485–95 (cited in note 11) (distinguishing between procedural and substantive approaches to the enforceability of regulatory contracts).

<sup>47</sup> For discussion of the former, see *id.* See also Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 Colum L Rev 647, 696–98 (1988) (describing a series of cases in which courts declined to enforce legislative agreements where there was an attempt to contract away inalienable rights or where a new legislature had a different idea of what was needed for the public good). For the latter, see David Callies, *Custom and Public Trust: Background Principles of State Property Law?*, SE18 ALI-ABA 699, 732–37 (1999) (discussing cases addressing the public trust doctrine).

as a percentage of local property values.<sup>48</sup> The purpose is explicitly to prevent local governments from shifting costs to future generations.<sup>49</sup> Similarly, many state constitutions prevent state and local governments from making outright gifts to private parties.<sup>50</sup>

Even when a government is permitted to make a binding precommitment, it must often follow procedures that limit the risk of political malfunction. The ability to incur debt is subject to this kind of ex ante procedural protection. Bond election requirements, for example, are designed to ensure some degree of political accountability before a government can float a municipal bond.<sup>51</sup> In the contract arena again, promissory estoppel does not traditionally run against the government. This means that individual government actors cannot inadvertently, or informally, bind the government to contractual obligations. Instead, contracts are channeled more-or-less exclusively into explicit contractual arrangements involving mutual consideration.<sup>52</sup>

Ex post property rule protection allows a government simply to void an earlier precommitment under certain circumstances. The classic example in this regard is *Charles River Bridge v Warren Bridge*.<sup>53</sup> There, Massachusetts had granted what appeared to be an exclusive charter to a company to construct the Charles River Bridge, and to collect tolls for forty years.<sup>54</sup> Within that period, however, Massachusetts granted a charter to a second company to build a competing bridge.<sup>55</sup> When the original company sued, alleging breach of contract, the Supreme Court found the contract unenforceable.<sup>56</sup> Or, to take

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<sup>48</sup> Clayton P. Gillette, *Direct Democracy and Debt*, 13 J Contemp L Issues 365, 374 (2004) (providing examples of state debt limits in South Dakota, Georgia, and Alabama).

<sup>49</sup> Stewart E. Sterk and Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis L Rev 1301, 1329.

<sup>50</sup> Ralph L. Finlayson, *State Constitutional Prohibitions against Use of Financial Resources in Aid of Private Enterprises*, 1 Emerging Issues State Const L 177, 182 (1988).

<sup>51</sup> Gillette, 13 J Contemp L Issues at 372 (cited in note 48).

<sup>52</sup> This undoubtedly oversimplifies and overstates a complex area of law involving the Supreme Court's plurality opinion in *United States v Winstar Corp*, 518 US 839, 843 (1996) (holding that the government was obligated to honor agreements allowing firms to use certain accounting methods, despite subsequent changes in the law, and despite the governments invocation of the unmistakability doctrine), among others. See Dana and Koniak, 148 U Pa L Rev at 499 (cited in note 11) (discussing the limits on government contracting).

<sup>53</sup> 36 US 420 (1837). For a discussion, see Dana and Koniak, 148 U Pa L Rev at 487–88 (cited in note 11).

<sup>54</sup> *Id.* at 420.

<sup>55</sup> *Id.*

<sup>56</sup> The Court reasoned that the contract did not give an exclusive right to the first company, a point in tension with the facts. Compare *Charles River Bridge*, 36 US at 548–49 (finding that the grant of an exclusive franchise would infringe upon the rights of the community, which can insist that the government not abandon its duty to provide public accommodations) with *id.* at

another example, municipalities in the nineteenth century sometimes simply disclaimed their existing debts.<sup>57</sup> When this was not possible, some went so far as to unincorporate and then reincorporate with their obligations wiped clean.<sup>58</sup> This is subtly but importantly different from an ex ante prohibition that prevents the government action in the first place. If a government tries to sell property subject to the public trust doctrine, the sale is void ab initio. Here, ex post property rule protection allows the government to get out of a precommitment, but only with a subsequent legislative action.

Similarly, ex post liability rule protection allows a government, in essence, to buy its way out of the precommitment, and often at some reduced price. For example, government procurement contracts generally permit termination for convenience, entitling the counterparty to recover only actual reliance damages instead of expectation damages.<sup>59</sup> Specific performance is usually unavailable against the government.<sup>60</sup>

Conservation easements are subject to their own important ex ante liability rule opt-out: eminent domain.<sup>61</sup> Condemnation turns the Gordian knot of perpetual conservation into a slipknot that can be loosened with the payment of money. If Marlboro later changes its mind about the appropriate use of Hogback Mountain, it can always condemn back the conservation easements, reuniting full, unencumbered title to the property (subject, of course, to satisfying the Fifth Amendment's public use requirement, and any state constitutional or statutory require-

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614–17 (Story dissenting) (arguing that, as a matter of common sense, the charter must have granted an exclusive franchise because the bridge could not generate profit if this were not the case, and therefore the proprietors would have had no reason to contract with the government for the bridge).

<sup>57</sup> Michael W. McConnell and Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U Chi L Rev 425, 430–33 (1993) (describing the history of municipal debt).

<sup>58</sup> Alberta M. Sbragia, *Debt Wish: Entrepreneurial Cities, U.S. Federalism, and Economic Development* 60 (Pittsburgh 1996) (describing the repudiation of municipal bonds and other debt in the nineteenth century).

<sup>59</sup> Daniel R. Fischel and Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1999 Am L & Econ Rev 313, 354–57 (1999).

<sup>60</sup> Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims against the Federal Government for Specific Performance*, 43 Vill L Rev 155, 156 (1998).

<sup>61</sup> See Korngold, 2007 Utah L Rev at 1081–82 (cited in note 14); Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 UC Davis L Rev 1897, 1897–1907 (2008). Conceiving of condemnation as creating liability rule protection is hardly new. See James E. Krier and Christopher Serkin, *Public Ruses*, 2004 Mich St L Rev 859, 873–74.

ments).<sup>62</sup> However, the government will have to pay just compensation, and valuing conservation easements is remarkably complex.<sup>63</sup>

There is no ready market for conservation easements.<sup>64</sup> Even if such a market were to exist, it is not at all obvious that the right valuation approach in eminent domain would be keyed to the amount that one conservation group would pay another for the right to block development. The only sustained academic treatment of the problem advocates the before-and-after (subtraction) method of valuation: if the underlying property was worth \$1.2 million before the easements were conveyed, but is worth only \$400,000 now, then the conservation easements must be worth \$800,000.<sup>65</sup> This amounts to valuing conservation easements by the foregone development that they block. On the other hand, a conservation easement only confers a power to veto development, not the right to develop property. If the development rights are worth \$800,000, the right to block development is presumably worth something less (assuming the easement holder cannot expect to capture all the gains from trade in what amounts to a bilateral monopoly). Finding the right answer to the valuation problem from a doctrinal perspective is beyond the scope of this Article. But the range of options suggests some approaches to the entrenchment problem.

Valuing conservation easements at something substantially less than the value of the development rights creates a host of problems. Imagine, for example, that a market for conservation easements did exist, and that they were valued, say, at 10 percent of the value of the development rights. Conserved land, held in private hands, would then become a likely target for government condemnation. The value of the underlying property is significantly diminished by the existence of the conservation easements. If the easements themselves do not make up that lost value, then the combined value of the property plus the easements would be worth less than the value of other comparable

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<sup>62</sup> See McLaughlin, 41 UC Davis L Rev at 1944 (cited in note 61). Legal reforms following *Kelo v City of New London*, 545 US 469 (2005), may actually prove to be a substantial hurdle to the use of eminent domain. The principal risk of conservation easements is that developing the property will turn out to be far more valuable in the future than conserving it. But it is precisely this kind of private development that post-*Kelo* reforms are designed to prevent. Where eminent domain is not available, conservation easements are an even stronger precommitment device.

<sup>63</sup> For a discussion of compensation for regulatory takings claims, see generally Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW U L Rev 677 (2005) (arguing that the adequacy of compensation should be evaluated against the goals of the Takings Clause and that the “all or nothing” approach to compensation adopted by the courts should be replaced with a more nuanced evaluation).

<sup>64</sup> See McLaughlin, 41 UC Davis L Rev at 1937 n 171 (cited in note 61) (citing sources).

<sup>65</sup> See *id.* at 1933–60.

but unencumbered property.<sup>66</sup> This would create a perverse incentive for governments to target conserved land for condemnation. This valuation method would also fundamentally undermine a government's use of conservation easements to entrench conservation. It would render the use of such easements counterproductive, making condemnation and development more likely in the future.

Valuing conservation easements by the full value of the development rights of the property presents its own problems. As a mechanism to limit entrenchment, condemnation is appealing precisely when the development rights have become particularly valuable. Imagine that Marlboro's Hogback Mountain suddenly becomes uniquely situated for a new ski resort, or a wind farm, or some other unexpectedly valuable use. Instead of \$800,000, the development rights are suddenly worth ten times as much, a price at which the town no longer values conservation over development (and a price at which even the entrenching legislature might not have opted for conservation). Sure, Marlboro can condemn them back, but it will have to pay their fair market value at the time of the condemnation: now \$8,000,000. It is, in other words, an expensive opt-out that might undermine the government's incentive to put the property to an alternative use.

The effect of compensation on government incentives is admittedly more equivocal than the analysis so far suggests because it is not entirely clear who will end up footing the compensation bill. If the government is condemning the easements to facilitate development of the property, it will presumably sell the unencumbered property to a developer (or wind farm operator, or mining company, and so on). To the extent that the ultimate transferee pays fair market value, the government will be relatively indifferent whether the development rights are worth \$8,000, \$800,000, or \$8,000,000. The condemnation and resale will be revenue neutral.<sup>67</sup> The political costs are therefore more important than the financial ones.<sup>68</sup> But if, as is likely, the political salience of any particular condemnation is at least related to the value of

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<sup>66</sup> Consider Richard A. Epstein, *How to Undermine Tax Increment Financing: The Lessons of City of Chicago v ProLogis*, 77 U Chi L Rev 121, 132, 133 & n 37 (2010) (explaining that "the value of an asset is independent of the capital structure superimposed on it").

<sup>67</sup> And to the extent it is not—as when the government reconveys the property at a discount—any loss reflects an implicit concession or inducement to a private developer that is subject to its own, independent cost-benefit analysis.

<sup>68</sup> See Christopher Serkin and Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 Notre Dame L Rev 1, 37 (2009) (describing the political salience of eminent domain); Thomas Merrill, *The Economics of Public Use*, 72 Cornell L Rev 61, 77 (1986) (describing "due process costs" of eminent domain).

the underlying resource and the amount of money at stake, the increased value in the conservation easements may limit a government's appetite to condemn them back as they become more valuable in the future.

Of course, precommitments are supposed to be hard to escape. That is, after all, the point. Their benefits come from their ability to induce reliance, an ability that is crippled if they are too easily shaken off. But how binding is too binding?

## B. Calibrating Conservation Easements

Just as the entrenching character of precommitments exists on a spectrum, their enforceability is similarly diverse. The net entrenchment effect of any government action is a function of two variables: how easy it is to enter into, and how easy it is to get out of. The greater the procedural protections *ex ante*, the less the need to be able to unwind them *ex post*. That is, the *ex post* protection should be strongest when concerns about the original conservation decision are at their greatest.

### 1. *Ex ante* procedural and political protections.

The risks of political malfunction, and of changes in policy preferences over time, are both significant. But they also vary with the size and character of the local government. Where homeowners are the dominant political force in a local government, the political feedback from property values at least minimizes the risks of local politicians discounting the benefits of flexibility in the future.<sup>69</sup> Small local governments—rural towns, suburbs, and the like—therefore present fewer risks of political malfunction than large and mid-size cities.

Similarly, more stable communities are less likely to undervalue the importance of flexibility to a differently constituted majority of voters.<sup>70</sup> Where change is in the air, and where flexibility is likely to be undervalued by a current but changing majority, the use of conservation easements presents greater risks. Rapidly developing or transitioning communities, growing outer-ring suburbs, and gentrifying center cities, for example, are more likely to present the greatest risk of changing policy preferences. These are the contexts in which entrenchment is potentially most problematic.

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<sup>69</sup> See text accompanying notes 33–35.

<sup>70</sup> For a similar suggestion *vis-à-vis* government contracts, see Dana and Koniak, 148 U Pa L Rev at 517 (cited in note 11) (noting that the level of political instability at the time the contract was formed will affect the terms of the contract).

Finally, the greater the support for an entrenching decision, the less likely it is the result of preferences of an unstable majority. Marlboro, Vermont presents an unusually easy case for judging political support because of Vermont's somewhat anachronistic reliance on a town meeting system for local governance. There, the plan to donate conservation easements could, in fact, be presented to the voters en masse and the extent of support easily gauged. This, of course, is not always possible and political support can be difficult to assess.

When conservation easements are conveyed by a small, stable local government after some expression of strong public support, the risks of political malfunction are relatively low. The only substantial risk is that the easements turn out to be more valuable than the original government anticipated, but that risk is no different than the risk presented by any precommitment, public or private. In these cases, traditional condemnation rules are an adequate remedy to prevent entrenchment that turns out to be genuinely harmful to the public. However, where the conservation easements are conveyed by a large or rapidly changing government, with substantial risk of minoritarian capture, a subsequent government should be able to unwind them more easily in the future.

## 2. Ex post modification to fair market value.

Surprisingly, a modest adjustment in condemnation rules in those cases presenting the greatest risk of political malfunction might be all that is required (assuming that courts do, in fact, follow the before-and-after method of valuing conservation easements by the value of foregone development costs). Under current rules for eminent domain, just compensation is measured by the fair market value of the property on the date it is taken.<sup>71</sup> Instead, governments should have the choice of condemning conservation easements by paying their fair market value at the time of the condemnation or as of the date they were originally conveyed, plus interest.<sup>72</sup>

Under this compensation rule, governments would only be able to entrench conservation to the extent they actually internalized those costs at the time the conservation easements were created. This

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<sup>71</sup> Serkin, 99 *Nw U L Rev* at 678 (cited in note 63).

<sup>72</sup> The just compensation standard probably contains enough flexibility for courts to measure the value of conservation easements at the date conveyed, instead of at the date of the actual condemnation. See *id.* at 696–99. Even if not, conservation easements are themselves largely a creature of modern statute, and their value for these purposes could be similarly modified by statute. See McLaughlin, 41 *UC Davis L Rev* at 1900 & n 5 (cited in note 61).

creates no change at all in the current rules if the development rights remain as valuable as they were at the time they were conveyed. That is to say, in the absence of any real change in circumstances, the value of the easements in the future should come close to the value of the easements at the time they were created, plus interest.<sup>73</sup> But if the conservation easements have become much more valuable, this proposal in effect allows for de novo review of the original entrenchment decision. When there was a significant risk of political malfunction in the original decision, a subsequent government can, in effect, decide for itself whether conservation continues to be worth the price the original government “paid” by donating the easements.

Some might object that this proposal will result in nothing more than a wealth transfer from conservation groups to developers. If the government can reclaim the conservation easements for substantially less than their market value, this can result in a giveaway to the ultimate transferee at the expense of the original easement holder. In fact, though, there is no necessary relationship between what the government pays in condemnation and what it charges the transferee. A government that acquires property on the cheap can still charge as much as a buyer is willing to pay to acquire the property. And if the government pays a lot to acquire property, there is no requirement that it recoup those costs in the sale of the property.<sup>74</sup> Instead of a transfer from conservation groups to developers, then, the proposal here simply allows the subsequent government to allocate who benefits from any unexpected increase in the value of the conservation easements.

Importantly, though, the proposal provides governments with an option—not a requirement—to condemn for the original price of the easements. Presumably it will pick whichever is lower. This is to account for the very real possibility that the easements have decreased in value over time. A government’s conservation policies may well be put to the test either in a boom time when development is unexpect-

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<sup>73</sup> This is not quite right because the value of the easements at T1 includes the possibility of some increase in value, discounted by its likelihood. Where that eventuality does actually come to pass, it does not mean that the original value was necessarily wrong, or underestimated the actual value of the easements. Nevertheless, the easements at T2 are, in fact, more valuable if unlikely conditions come to pass. Interest can be measured by actual inflation and interest rates over the time period instead of by proxy. The point is to put the new government in as close to the financial shoes of the original government as possible.

<sup>74</sup> In *Poletown Neighborhood Council v City of Detroit*, 304 NW2d 455 (Mich 1981), overruled on other grounds by *County of Wayne v Hancock*, 684 NW2d 765 (Mich 2004), Detroit spent \$200 million to condemn property that it transferred to General Motors for only \$8 million. See Daniel B. Kelly, *The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L Rev 1, 37 (2006).

tedly valuable, or in a bust when the absence of development is crippling. If local property and development rights have decreased in value since property was originally conserved, valuing conservation easements in eminent domain by their original price will be even more entrenching than current fair market value rules. It would all but ensure that the government would not act; the government would have to pay more than the easements are actually worth.

There is an additional complexity to acknowledge. This valuation proposal is easy enough to implement when the government itself conveys the conservation easements. But what happens if, as is often the case, the government acquires property subject to conservation easements that had been created some time in the past? In that case, the easements for condemnation purposes should be valued as of the date the government acquired the property, not the date that the conservation easements were originally created. This will prevent a developer from buying up conserved property and using a conveyance to the government to erase the conservation easements on the cheap. If the value of the development rights has increased between the time the property was originally conserved, and the time the underlying property was conveyed to the government, the government will have to pay that increase if it wants to take the conservation easements by eminent domain.

Ultimately, this approach remains something of a compromise. It still allows for the use of conservation easements as a precommitment device. In fact, it would be hard to know how to forbid them. But, where the risks of political malfunction are greatest, it limits the strength of the precommitment to the value of the easements at the time they are conveyed (or the time the government acquires the underlying property). This is hardly an invitation to eminent domain, which will remain costly both financially and politically. Neighboring owners can still sleep easy in the knowledge that the conserved property will not be developed willy-nilly. But if it turns out that political malfunction led the original government to make a particularly bad bet, and that development rights over the property are much more valuable than anyone guessed, the original government's precommitment cannot deny a future government (or public) those increased benefits.

#### CONCLUSION

A town conveying away conservation easements to property it owns is, indeed, unusual. It is also, however, entirely intelligible as a private law mechanism for precommitting to an environmental or anti-growth agenda. While democracy usually does not permit a legisla-

ture to entrench its substantive policy judgments, there are good reasons to allow local governments, in particular, to precommit to at least some kinds of land use regulations in the future. Conservation easements are therefore a potentially valuable, if narrow, tool for inducing local investment and unlocking property values. But they come with risks. Predictable political malfunctions can result in significant financial harm; conservation easements can also amount to naked and permanent exclusionary growth controls, and governments using them may be systematically undervaluing the importance of retaining flexibility in the future.

The way forward towards striking the right balance between these costs and benefits is made easier by construing conservation easements as part of a broader phenomenon: the use of private law to entrench local government decisions. The concern, broadly, is deciding when and how the decisions of one government should be able to reach forward, as if out of the political—if not literal—grave, to constrain the choices available to future governments. At this level of generality, it becomes apparent that entrenchment exists on a spectrum. Decisions and actions by one government can be more or less entrenching. At one end are entirely routine service contracts. At the other are unrepealable regulations. The former are benign. The latter are fatally antidemocratic. The gray area in between—the area that includes long-term contracts, bond issuances, and conservation easements, among others—implicates difficult line-drawing where the benefits of entrenchment need to be weighed against its costs in particular contexts.

The goal for all precommitments should be to unlock their value while minimizing the risk of political malfunction. For conservation easements, that should mean implementing *ex post* protection that varies depending on the political conditions that existed at the time the easements were created. Where small, stable local governments conveyed conservation easements after some expression of supermajority preferences, there is little cause for concern, and courts should enforce those precommitments, subject only to traditional condemnation rules. Where, however, the risks of political malfunction were higher, the precommitment knot should be looser, and governments in the future should be able to condemn back the conservation easements for their value at the time they were originally conveyed. By focusing on the extent of entrenchment, and the structural protections against political malfunction, it is possible to endorse at least the limited use of conservation easements by local governments like Marlboro, Vermont, while suggesting limits to their long-term enforcement.

## ARTICLE

### **Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended**

*Frank O. Bowman, III*<sup>†</sup>

*This Article argues that the line of Supreme Court Sixth Amendment jury right cases that began with *McMillan v Pennsylvania* in 1986, crescendoed in *Blakely v Washington* and *United States v Booker* in 2004–2005, and continues in cases such as *Oregon v Ice*, is a colossal judicial failure. First, the Court has failed to provide a logically coherent, constitutionally based answer to the fundamental question of what limits the Constitution places on the roles played by the institutional actors in the criminal justice system. It has failed to recognize that defining, adjudicating, and punishing crimes implicates both the Sixth Amendment Jury Clause and the Fifth and Fourteenth Amendment Due Process Clauses, and it has twisted the Jury Clause into an insoluble logical knot. Second, the practical effect of the Court's constitutional malpractice has been to paralyze the generally beneficial structured sentencing movement, with the result that promising avenues toward improved substantive and procedural sentencing justice have been blocked. Even the most widely applauded consequence of these cases, the transformation of the federal sentencing guidelines into an advisory system, proves on close inspection to be a decidedly mixed blessing. The Court has made the Constitution not a guide, but an obstacle, to a desirable distribution of authority among the criminal justice system's institutional actors.*

*The Article provides a comprehensive analysis of all the opinions in the *McMillan-Apprendi-Blakely-Booker-Ice* line, considering both their constitutional reasoning and their practical impact on federal and state sentencing systems. It builds on a careful dissection of the defects in the Court's Sixth Amendment sentencing decisions to develop an alternative constitutional analysis that combines Sixth Amendment and due process principles to suggest a more intellectually coherent and practically desirable constitutional sentencing jurisprudence.*

## INTRODUCTION

The set of institutions we refer to as the criminal justice system performs three basic functions. It defines what a “crime” is. It adjudicates guilt of crimes. It imposes punishment for crimes. In the United States, the responsibility for performing these three functions is distri-

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