COMMENTS

FIRM GROUND FOR WETLAND PROTECTION: USING THE TREATY POWER TO STRENGTHEN CONSERVATION EASEMENTS

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I. INTRODUCTION

Wetland conservation is a national and international legal imperative. Wetlands provide a variety of "functions" in the natural environment and a number of "values" for human beings.[1] Beyond their intrinsic value,[2] wetlands serve as habitat for fish and wildlife,[3] help to recharge groundwater and enhance water qual-

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1. James F. Berry, *Ecological Principles of Wetland Ecosystems*, in *Wetlands: Guide to Science, Law, and Technology* 54–55 (Mark S. Dennison & James F. Berry eds., Noyes Publications 1993). The distinction between "functions" and "values" is common in discussions of wetlands. *See e.g.* Paul D. Cylinder et al., *Wetlands, Streams, and Other Waters: Regulation Conservation Mitigation Planning* 13, 16 (Solano Press Bks. 2004). For further discussion of wetland functions and values, see National Research Council, Committee on Mitigating Wetland Losses, *Compensating for Wetland Losses under the Clean Water Act* 27–34 (Natl. Acad. Press 2001); U.S. Office of Technology Assessment (OTA), *Wetlands: Their Use and Regulation* 37–65 (OTA 1984) (identifying functions as "ecological services or resource values"); and Clare Shine & Cyrille de Klemm, *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* 7–11 (IUCN—The World Conservation Union 1999) (distinguishing between wetland "products, functions, and attributes").

2. Berry, *supra* n. 1, at 54.

3. *Id.* at 55. Wetlands are thought to provide sixty to ninety percent of the commercial fish catch in the United States, in excess of $10 billion per year. *Id.*; *see also* OTA, *supra* n. 1, at 52 (discussing the importance of wetlands to fish and wildlife).

ity,[4] and aid in the control of flooding and erosion.[5] Wetlands also provide educational and recreational opportunities for human beings, including hunting, fishing, and boating.[6] The prairie potholes of North Dakota, one of the prime examples of isolated, intrastate wetlands, provide between fifty[7] and seventy-five[8] percent of the waterfowl in America, thus contributing substantially to the hunting industry. The destruction of such wetlands has led to a corresponding decline in migrant duck populations.[9]

Historically, wetlands have been undervalued,[10] leading to estimated losses over the last 200 years of approximately fifty-three percent of the wetland areas across the United States.[11] While the rate of loss slowed somewhat in recent years, the United States continued to lose wetland areas at a rate of 58,500 acres per year between 1986 and 1997.[12] This "areal" calculation does not include any reduction in "function and ecosystem integrity."[13] In response to these losses, various levels of government have implemented wetland protection programs and policies, in-

4. Berry, *supra* n. 1, at 61; OTA, *supra* n. 1, at 47–48.

5. Berry, *supra* n. 1, at 63; OTA, *supra* n. 1, at 43–47.

6. OTA, *supra* n. 1, at 41–42.

7. Ronald Keith Gaddie & James L. Regens, *Regulating Wetlands Protection: Environmental Federalism and the States* 19 (St. U. N.Y. Press 2000). In listing the attributes of various wetlands, the authors note that "[p]otholes produce approximately 50 percent of the annual duck hatch and provide homes to about 7 million breeding ducks." *Id*.

8. James A. Kushlan, *Freshwater Wetlands*, in *Wetlands: Guide to Science, Law, and Technology*, *supra* n. 1, at 118. In addition to crediting the pothole region with "as much as 75% of the waterfowl produced in North America," Kushlan also notes that the number of waterfowl produced bears a direct relationship to the proportion of potholes containing water at the outset of the breeding season. *Id*.

9. Gaddie & Regens, *supra* n. 7, at 23.

10. *See* Cylinder, *supra* n. 1, at 17 (noting that for "most of the past two centuries, wetlands were viewed as impediments to agricultural and urban expansion").

11. *Id*. For further discussion of wetland losses, see Berry, *supra* n. 1, at 67–70. Berry cites a net loss of 260,300 acres in Florida alone "[b]etween the mid-1970s and mid-1980s." *Id*. at 68. This is a reduction in the rate of loss from the previous three decades, when Florida lost wetlands at nearly 72,000 acres annually. *Id*. For commentary on the impact of wetland losses on the recent flooding of New Orleans due to Hurricane Katrina, see Mark Fischetti, *A Disaster Foretold New Orleans*, Intl. Herald Trib. Op. 3 (Sept. 3, 2005) (available at 2005 WLNR 13936809) (arguing that the Army Corps of Engineers' manipulation of the Mississippi River for the sake of development contributed to the degradation of delta wetlands, "a lush, hardy buffer that could absorb sea surges and weaken high winds").

12. Cylinder, *supra* n. 1, at 17 (citing Thomas E. Dahl, *Status and Trends of Wetlands in the Coterminous United States 1986 to 1997* (U.S. Dept. of Int., Fish & Wildlife Serv. 2000)).

13. Cylinder, *supra* n. 1, at 18.

cluding Section 404 of the Clean Water Act (CWA)[14] and state wetland protection laws.[15] Governments have also taken action to protect individual wetlands through outright purchase from landowners and have engaged in extensive public education programs.[16] Various international efforts also aim to protect wetlands and reduce the rate of wetland losses worldwide,[17] most notably the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar).[18]

Ramsar was adopted by the original contracting parties on February 2, 1971,[19] entered into force on December 21, 1975,[20] and became binding on the United States on April 18, 1987.[21] The Convention calls for each signatory nation to designate at least one wetland for a "List of Wetlands of International Importance,"[22] and to "formulate and implement [its] planning so as to promote the conservation of wetlands included in the List, and as far as possible the wise use of wetlands in [its] territory."[23] The Convention thus imposes upon its signatories two main obligations: a general obligation of wise use ("non-site-specific measures") and a specific obligation to conserve listed wetlands ("site-specific measures").[24] Contrary to the common stereotype of envi-

14. 33 U.S.C. § 1344 (2000).

15. Berry, *supra* n. 1, at 71–73. Florida, for example, has enacted extensive wetlands protection statutes. *See* Fla. Stat. §§ 373.4135–373.41495 (2004) (setting out the parameters for the operation of mitigation banks, to offset the adverse effects of wetland development); *id.* at § 373.4592 (setting out the state's plan for "Everglades improvement and management").

16. Berry, *supra* n. 1, at 71–73.

17. *See* Royal C. Gardner, *Rehabilitating Nature: A Comparative Review of Legal Mechanisms That Encourage Wetland Restoration Efforts*, 52 Cath. U. L. Rev. 573, 578–587 (2003) (reviewing the Ramsar Convention, the Convention on Biological Diversity, the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), the North American Waterfowl Management Plan, and the United Nations Framework Convention on Climate Change).

18. *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* (Feb. 2, 1971), http://www.ramsar.org/key_conv_e.htm [hereinafter *Ramsar*]; Gardner, *supra* n. 17, at 578–581 (discussing generally the goals and provisions of Ramsar).

19. Shine & de Klemm, *supra* n. 1, at 27.

20. *Id*. at 28.

21. Ramsar Conv. Bureau, *The Annotated Ramsar List: United States of America*, http://www.ramsar.org/profiles_usa.htm (updated Jan. 31, 2005).

22. *Ramsar*, *supra* n. 18, at art. 2, §§ 1, 4.

23. *Id*. at art. 3, § 1.

24. Shine & de Klemm, *supra* n. 1, at 29, 81–84. Non-site-specific measures include regulations generally applicable to wetlands, such as dredge-and-fill permitting or pollution control measures. *Id*. Site-specific measures, such as designation on a list of protected

ronmental policies as "anti-human,"[25] Ramsar's concept of wise use is bound up with the concept of "sustainable development," defined as "human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations."[26]

The United States partially satisfies its obligation of general wise use through its continued adherence to federal environmental regulations, including Section 404 of the CWA, which originated in the Federal Water Pollution Control Act of 1948.[27] Section 404, like many wetland protection regimes, is non-site-specific in its general applicability, but becomes site-specific in its implementation, as it relates to permitting at a given location by the United States Army Corps of Engineers.[28] Commentators disagree about the extent to which the CWA and associated regulatory frameworks truly promote "wise use" as envisioned by Ramsar.[29] Whatever its effectiveness, however, the dredge-and-fill permitting provision of the CWA has in recent years been repeatedly

areas, are intended to protect individual wetlands. *Id.*

25. *See e.g. Schools vs. Shrimp: Endangered Species Act Needs Revising*, San Diego Union-Trib. G2 (Aug. 7, 2005) (available at 2005 WLNR 12575148) (discussing delays and increased costs to a school building project due to the presence of an endangered shrimp species in vernal pools on the construction site, and asserting that the Endangered Species Act of 1973, as funded by Congress and enforced by the United States Fish and Wildlife Service, shows a "clear bias against human activity in favor of puddles for shrimp").

26. Shine & de Klemm, *supra* n. 1, at 47 (quoting from the 1987 Conference of the Parties).

27. Pub. L. No. 80-845, ch. 750, 62 Stat. 1155; Parthenia B. Evans, *Preface to the First Edition*, in *The Clean Water Act Handbook* xxvi (Mark A. Ryan ed., ABA 2003).

28. Shine & de Klemm, *supra* n. 1, at 82.

29. For an argument that "current [United States] wetlands management practices substantially satisfy the 'wise use' requirement of the Ramsar Convention," see Michael J. Podolsky, Student Author, *U.S. Wetlands Policy, Legislation, and Case Law As Applied to the Wise Use Concept of the Ramsar Convention*, 52 Case. W. Res. L. Rev. 627, 628, 644 (2001). Podolsky sees United States compliance with Ramsar in the CWA permitting process and the National Environmental Policy Act requirements for preparation of Environmental Impact Statements prior to issuance of permits. *Id.* at 644. For an argument that "[t]he United States is not in compliance with the Ramsar Convention since the current legislation fails to meet the wise use obligation of this international treaty," see Beth L. Kruchek, Student Author, *Extending Wetlands Protection under the Ramsar Treaty's Wise Use Obligation*, 20 Ariz. J. Intl. & Comp. L. 409, 441 (2003). Kruchek specifically advocates for enhanced environmental impact assessment requirements and the enhanced protection of "buffer habitats," vegetated areas between protected land in its natural state and adjacent land subject to human activity. *Id.* at 431–438.

undermined by the United States Supreme Court,[30] which has curtailed the jurisdiction of the Corps of Engineers and questioned the CWA's Commerce Clause basis.[31] Furthermore, the denial of a permit to a given landowner will often instigate litigation, and if a court finds that the landowner has been substantially deprived of the economically beneficial use of his land, the government may be required to compensate the landowner for a regulatory taking.[32] Therefore, while regulation remains an important and generally effective means of promoting wise use,[33] a comprehensive scheme of wetland protection will necessarily include private alternatives.[34] One particularly promising tool for promoting general wise use as well as site-specific conservation is the conservation easement, by which a private, charitable, or governmental entity acquires the right to enforce a restriction on the use of land, while the land remains in the possession of the original owner.[35]

Conservation easements, like regulatory schemes, are not without their problems. Because they implicate property law, conservation easements are regulated by the states rather than the federal government.[36] Many state statutes do not specifically

30. *E.g. Rapanos v. U.S.*, 126 S. Ct. 2208 (2006); *Solid Waste Agency of N. Cook Co.* (*SWANCC*) *v. U.S. Army Corps of Engrs.*, 531 U.S. 159 (2001). For a more thorough discussion of *Rapanos* and *SWANCC*, see *infra* notes 60–83 and accompanying text.

31. *Rapanos*, 126 S. Ct. at 2224; *SWANCC*, 531 U.S. at 173. Though the Court has "questioned" whether the CWA, interpreted expansively, "presses the envelope of constitutional validity," it has never invalidated the CWA itself, preferring instead to invalidate overly expansive administrative regulations promulgated under the authority of the CWA. *Rapanos*, 126 S. Ct. at 2224.

32. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). In *Lucas*, the landowner had purchased two beachfront lots for development, when the South Carolina Coastal Council drew a regulatory line in the sand, past which the landowner could not build. *Id*. at 1008. The Supreme Court held that when a state enacts a regulation "that deprives land of all economically beneficial use," it must compensate the landowner, unless the planned activity would have constituted a nuisance. *Id*. at 1027, 1029. For a survey of regulatory takings jurisprudence in the context of wetland regulation, see Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings,* 81 Iowa L. Rev. 527, 542–548 (1996).

33. Shine & de Klemm, *supra* n. 1, at 82–83.

34. *See* Gardner, *supra* n. 17, at 605–608 (discussing the granting of exclusive rights to individual wetland tracts to fishermen and hunters, in return for their obligation to conserve the given tract); *id*. at 615–619 (discussing mitigation banking).

35. *See* Shine & de Klemm, *supra* n. 1, at 156–158 (discussing conservation easements as a "site-specific" measure for wetland conservation and "wise use").

36. An important exception is the perpetual duration requirement for land use restriction easements (LUREs) imposed by the federal government pursuant to federal agricul-

cover wetland conservation, and those that do are inconsistent in their allowed duration, recording requirements, methods of valuation for purposes of taxation, and methods of termination.[37] These inconsistencies have given rise to their own strand of litigation, one notable example being the battle over waterfowl management easements held by the federal government in North Dakota.[38] Coincidentally, the prairie potholes at issue in North Dakota are the very kind of isolated intrastate wetlands whose protection under the CWA has been jeopardized by recent decisions of the Supreme Court.[39]

To enhance wetland protection nationwide, at least one commentator has suggested using the treaty power as an alternative basis for environmental regulation, enacting further regulations pursuant to Ramsar in order to overcome the Commerce Clause issues surrounding the CWA.[40] Another commentator has proposed using the Article IV property power or the treaty power as an alternative basis for the Endangered Species Act, which may be subject to the same kind of Commerce Clause challenge that

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tural legislation. *See generally* Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal through Preemptive Federal Easement Programs*, 43 Case W. Res. L. Rev. 401, 404–405 (1992–1993) (discussing the durational requirements of easements held pursuant to the Forestry and Conservation Titles of the 1990 Farm Bill).

37. *See infra* pt. IV(B) (summarizing the variations in state statutes); *see also* Richard R. Powell, *Powell on Real Property* vol. 4, § 34A.03[1] (Michael Allan Wolf ed., LexisNexis 2005) (providing a brief history of state conservation easement statutes, and noting the wide variation among statutes).

38. Brian Ohm et al., *Conservation Easements in the Seventh and Eighth Federal Circuits*, in *Protecting the Land: Conservation Easements Past, Present, and Future* 292, 313–314 (Julie Ann Gustanski & Roderick H. Squires eds., Island Press 2000).

39. *See generally Rapanos*, 126 S. Ct. 2208 (requiring a "relatively permanent flow," or adjacency to such a flow, to support Corps jurisdiction over wetlands); *SWANCC*, 531 U.S. 159 (invalidating Corps jurisdiction over certain isolated, intrastate waters). In both *Rapanos* and *SWANCC*, the Court purported not to address the issue of CWA Commerce Clause jurisdiction, but suggested that expansive wetland regulation would fall outside Congress' Commerce Clause authority. *Rapanos*, 126 S. Ct. at 2224; *SWANCC*, 531 U.S. at 173.

40. Podolsky, *supra* n. 29, at 650–652. This approach, as recognized by Villareal, *infra* note 41, is not without challenges. Curtis A. Bradley, in *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 409–422 (1998), argues that the Founders and a strong line of nineteenth century court opinions recognized certain limitations on the treaty power. Bradley would favor either a subject matter restriction or subjecting the treaty power to the same federalism restrictions that apply to Congress' legislative powers. *Id.* at 451–461. He concedes, though, that the general trend in foreign affairs law is to accept the abandonment of subject matter limitations on the treaty power. *Id.* at 432–433.

has been leveled against the CWA.[41] Yet a third commentator has addressed a private-property alternative to command-and-control environmental regulation, proposing use of the property power or the spending power to preempt state conservation easement law that conflicts with federal requirements of perpetual duration.[42]

This Comment, adapting and expanding on the logic of its predecessors, proposes using the treaty power, specifically pursuant to United States obligations under Ramsar, to create a strong federal conservation easement enabling statute that can be applied uniformly from state to state for the promotion of wise use generally, and the conservation of individual wetlands, which can in turn be listed as Ramsar sites.[43] While environmental regulation, regardless of its basis in the Constitution, can sometimes prompt takings litigation, conservation easements are immune to claims of regulatory takings because they arise out of a voluntary conveyance by a private landowner.

Part II of this Comment will briefly discuss the Commerce Clause and takings issues surrounding traditional wetland regulation under the CWA, along with issues of Corps jurisdiction over certain wetlands in the wake of certain Supreme Court decisions.[44] Part III will briefly discuss the functions and the benefits of conservation easements as a private alternative to government regulation.[45] Part IV will lay out in detail the many problems surrounding conservation easements and the inconsistencies in con-

41. Gavin R. Villareal, Student Author, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act after* United States v. Lopez, 76 Tex. L. Rev. 1125, 1147–1162 (1998).

42. *See generally* Jordan, *supra* n. 36, at 441–470 (suggesting that Congress may constitutionally preempt state property law under the spending power by placing conditions on federal funding for the acquisition of easements, or under the property power, by regulating property (presumably including easement interests in property) belonging to the federal government).

43. While most United States Ramsar sites are either Wildlife Management Areas or National Wildlife Refuges, according to the Ramsar Convention Bureau, *supra* n. 21, there is no reason why a privately owned wetland, protected by a strong perpetual conservation easement, could not be designated as a Ramsar site. David Farrier and Linda Tucker, writing from an Australian perspective, have noted that Ramsar "does not exclude the incorporation of private land in listed areas." *Beyond a Walk in the Park: The Impact of International Nature Conservation Law on Private Land in Australia*, 22 Melb. U. L. Rev. 564, 571 (1998).

44. *Infra* nn. 48–96 and accompanying text.

45. *Infra* nn. 97–145 and accompanying text.

servation easement statutes among the states.[46] Finally, Part V will present a specific legislative solution, enacted pursuant to Ramsar and building on the Uniform Conservation Easement Act, but with important differences.[47] Ultimately, the goal is to ensure that private landowners and charitable organizations, working together with governmental agencies, can use the property owner's "bundle of rights" to assure long-term, durable protection of the nation's wetlands.

II. PROBLEMS WITH TRADITIONAL REGULATORY SCHEMES: COMMERCE CLAUSE AND TAKINGS CHALLENGES

For over thirty years, the CWA has been the "cornerstone" of wetland protection laws and regulations.[48] Under Section 404 of the CWA, the Army Corps of Engineers is charged with overseeing the permitting of dredge-and-fill operations in the nation's wetlands.[49] The regulatory scope of the Corps was originally limited to "navigable waters," which generally excluded much of what we would today consider wetlands.[50] The National Environmental Policy Act of 1969 mandated federal agencies, including the Corps, to consider environmental impacts in their planning of activities and projects.[51] With the passage of the Federal Water Pollution Control Act Amendments of 1972,[52] the Corps was given the power to control dredge-and-fill operations in the

46. *Infra* nn. 146–233 and accompanying text.

47. *Infra* nn. 234–268 and accompanying text.

48. Mark S. Dennison & James F. Berry, *Preface*, in *Wetlands: Guide to Science, Law, and Technology*, *supra* n. 1, at vii; *see also* Cylinder, *supra* n. 1, at 40–49 (tracing the development of federal wetland regulations, from early attempts to diminish wetlands, to the Army's civil engineering program and its enhanced authority under the Rivers and Harbors Act of 1899, to the enactment of the CWA in 1972, and providing a broad overview of Section 404); Gaddie & Regens, *supra* n. 7, at 26 (discussing early legislation authorizing draining and filling of swamps); Sylvia Quast & Steven T. Miano, *Wetlands: Section 404* in *The Clean Water Act Handbook*, *supra* n. 27, at 98–104 (providing a comprehensive discussion of Section 404 of the CWA, including court decisions that have affected Corps jurisdiction over wetlands).

49. 33 U.S.C. § 1344; Mark S. Dennison & James F. Berry, *The Regulatory Framework*, in *Wetlands: Guide to Science, Law, and Technology*, *supra* n. 1, at 213–214.

50. Dennison & Berry, *supra* n. 49, at 214.

51. *Id*.

52. 33 U.S.C. §§ 1251–1263, 1265, 1281–1292, 1311–1326, 1328, 1341–1345, 1361–1376.

"waters of the United States," which the Corps ultimately defined to include the drainage of wetlands generally.[53] The Corps also expanded the definition of "waters" to include "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," as well as "all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce."[54]

In 1985, the Supreme Court unanimously upheld the Corps' authority to regulate "wetlands adjacent to the 'waters of the United States.'"[55] Aside from the hydrologic interconnectedness of certain wetlands and "adjacent lakes, rivers, and streams,"[56] the Court found that Congress had the opportunity to reconsider and curtail the Corps' expansive definition of wetlands, and chose not to.[57] The Court also briefly considered the respondent's takings claim, but dismissed it on the grounds that a permitting regulation doesn't really "take" property.[58] "Permitting" implies by its very definition that permission is possible, and even if the permit is denied, the landowner can still use his property for other purposes, or sue separately for compensation.[59]

In 2001, five Justices on the Court found that the Corps had gone too far in attempting to extend its jurisdiction to intrastate waters that "are or would be" used as habitat for migratory birds or other endangered species (a Corps regulation that had been dubbed the "Migratory Bird Rule").[60] The Court found that Congress' acquiescence to the expansion of the Corps' authority, which had been cited in *United States v. Riverside Bayview Homes* in 1985,[61] could not be read so broadly as to cover the Mi-

53. Dennison & Berry, *supra* n. 49, at 215 (quoting 33 C.F.R. § 328.3(a)(1) (1993)).

54. *Id*. (quoting 33 C.F.R. § 328.3(a)(1) and 33 C.F.R. § 328.3(a)(3)).

55. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

56. *Id*. at 134–135.

57. *Id*. at 135–138.

58. *Id*. at 127–129.

59. *Id*. The Court modified its takings jurisprudence somewhat in *Lucas*, 505 U.S. 1003, as is discussed *infra* note 87.

60. *SWANCC*, 531 U.S. at 164, 174 (citing 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986)).

61. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135–137 (1985).

gratory Bird Rule, which was enacted years later.[62] While the Court in *Riverside* had declared the term "navigable waters" to be of limited effect, the Court in *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers* (*SWANCC*)[63] reaffirmed that the term "navigable" did indeed serve to limit jurisdiction to "waters that were or had been navigable in fact or which could reasonably be so made."[64] The Court invalidated the Corps regulation in part to avoid reaching the question of whether Congress could exercise authority over isolated intrastate wetlands consistent with the Commerce Clause.[65] However, the Court did make more than a passing reference to *United States v. Morrison*[66] and *United States v. Lopez*[67] in support of the proposition that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited."[68]

The EPA and the Corps responded to *SWANCC* with a Joint Memorandum pointing out that the holding in *SWANCC* was limited to an invalidation of the regulatory definition of "waters of the United States"[69] only "as clarified and applied to the ponds at issue pursuant to the Migratory Bird Rule," and that *SWANCC* did not otherwise affect the scope of the regulatory definition itself.[70] The Memorandum further emphasized that the understanding of Corps jurisdiction as delineated in *Riverside* was still good law.[71]

SWANCC was followed by general confusion about how narrowly or broadly the ruling should be interpreted.[72] Lower courts

62. *SWANCC*, 531 U.S. at 170–171.

63. 531 U.S. 159 (2001).

64. *Id*. at 172.

65. *Id*. at 162.

66. 529 U.S. 598 (2000).

67. 514 U.S. 549 (1995).

68. *SWANCC*, 531 U.S. at 173. For an interesting pre-*SWANCC* discussion of the impact *Lopez* would have on environmental regulation, see J. Blanding Holman, IV, Student Author, *After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?* 15 Va. Envtl. L.J. 139 (1995).

69. 33 C.F.R. § 328.3(a)(3).

70. Cylinder, *supra* n. 1, at 32 (discussing the Joint Memorandum, available as App. A at U.S. Dept. of Transp., Fed. Hwy. Admin., *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States"*, http://www.fhwa.dot.gov/environment/wetland/swancc.htm (last updated June 11, 2003)).

71. Cylinder, *supra* n. 1, at 32.

72. *See* Quast & Miano, *supra* n. 48, at 102–104 (providing various interpretations of *SWANCC*). According to Quast & Miano, "[u]nder a narrow reading, the Corps [would]

took inconsistent approaches to dealing with *SWANCC*,[73] and the volume of literature on post-*SWANCC* environmental regulation demonstrated that commentators remained concerned with its long-term implications.[74]

In the summer of 2006, a deeply divided Supreme Court issued a splintered opinion that further imperiled the regulatory jurisdiction of the Corps of Engineers and once again questioned the constitutional authority for an expansive reading of the CWA.[75] The Court[76] reversed a finding of Corps jurisdiction based on "hydrological connections" between the wetlands at issue and adjacent "navigable waters,"[77] and a plurality would have limited the Corps' jurisdiction to "relatively permanent, standing or continuously flowing bodies of water," or to those adjacent wetlands that have a "continuous surface connection to bodies that are 'waters of the United States' in their own right."[78] Justice Kennedy, concurring in the judgment, advocated a much broader test, based on the "significant nexus" language in *SWANCC*.[79] The dissent[80] voted to affirm the lower court judgment, in deference to the Corps and the broader congressional purpose behind the CWA.[81] Ultimately, the Court yet again avoided the Commerce Clause issue, and the precedential effect of the fractured opinion is ques-

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only lose jurisdiction when the wetland [was] completely isolated, non-navigable, intrastate, and the sole basis of jurisdiction [was] the presence of migratory birds," the last element, of course, being the only element drawn into question by *SWANCC*. *Id*. at 103. A broader reading would have given the Corps jurisdiction only over waters "that [were] either navigable in fact, or [had] a 'substantial nexus' to navigable waters, such as those directly adjacent to navigable waters." *Id.*

73. *Id*. *United States v. Interstate General Co.*, 152 F. Supp. 2d 843 (D. Md. 2001), for example, took the narrow approach, while *United States v. Newdunn Associates*, 195 F. Supp. 2d 751 (E.D. Va. 2002), took the broader approach.

74. *See e.g.* Quast & Miano, *supra* n. 48, at 103–104 (speculating that *SWANCC* would likely make the Corps more "cautious in asserting jurisdiction over nonnavigable isolated waters," limit permitting over isolated intrastate waters to state-level agencies, and leave states with the task of filling in the "gaps" left by receding federal regulation).

75. *Rapanos*, 126 S. Ct. 2208.

76. The plurality opinion was authored by Justice Scalia, and joined by Chief Justice Roberts, Justice Thomas, and Justice Alito.

77. *Id*. at 2219.

78. *Id*. at 2225–2226.

79. *Id*. at 2236.

80. The dissenting opinion was authored by Justice Stevens, and joined by Justice Souter, Justice Ginsburg, and Justice Breyer.

81. *Id*. at 2252.

tionable.[82] However, *Rapanos v. United States*[83] clearly indicates the Court's continuing willingness to curtail the jurisdiction of the Corps of Engineers, and its continued suspicion of Congress' power to regulate wetlands pursuant to the Commerce Clause.

In addition to Commerce Clause and Corps jurisdictional challenges, wetlands regulations are also subject to challenges based on regulatory takings.[84] The Fifth Amendment to the United States Constitution provides that private property cannot "be taken for public use, without just compensation."[85] While this applies predominantly to "possessory takings,"[86] courts have also recognized that "governmental regulation of land use may sometimes be so restrictive that, by eliminating the economic use of the property, the action constitutes a taking."[87] This includes

82. Though Justice Kennedy joined with the plurality for the sake of remanding the case, the legal substance of his opinion arguably aligns more with the dissent than the plurality. As recognized by the dissent, this ironically leaves lower courts to apply the test of *either* the plurality *or* Justice Kennedy, since the dissent would uphold the jurisdiction of the Corps when either test is met. *Id*. at 2265. Subsequent decisions have followed Justice Kennedy's opinion, arguably leaving the "significant nexus" test intact. *See e.g. N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (finding Justice Kennedy's opinion to be "the controlling rule of law"); *see also U.S. v. Evans*, ___ F. Supp. 2d ____, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006) (agreeing with the dissent that Corps jurisdiction may be upheld when either test is met); *but see U.S. v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006) (finding Justice Kennedy's test "ambiguous" and relying on the plurality opinion as more consistent with Fifth Circuit precedent).

83. 126 S. Ct. 2208 (2006).

84. Although commentators have suggested using the treaty power as an alternative basis for environmental regulations, *supra* notes 40–41 and accompanying text, such regulations would still be limited by takings jurisprudence. While the treaty power can be used expansively, treaties must not "contravene any prohibitory words to be found in the Constitution." *Mo. v. Holland*, 252 U.S. 416, 433 (1920). Presumably, ancillary legislation enacted pursuant to a treaty is subject to the same "prohibitory words," including the words of the Fifth Amendment. *See infra* nn. 247–251 and accompanying text (discussing a possible takings challenge to environmental regulation enacted under the treaty power).

85. U.S. Const. amend. V.

86. Possessory takings include the somewhat less controversial, garden-variety acquisition of private land for roads, bridges, etc., as well as the more controversial kind of acquisition discussed *infra* note 87.

87. Cylinder, *supra* n. 1, at 96. The Supreme Court, in *Lucas*, 505 U.S. at 1015, laid out "at least two discrete categories of regulatory action as compensable." The first is when regulations "compel the property owner to suffer a physical 'invasion' of his property," as in *United States v. Causby*, 328 U.S. 256 (1946), where low-flying planes rendered the owner's property virtually uninhabitable. *Lucas*, 505 U.S. at 1015. The second is when regulation "denies all economically beneficial or productive use of land," as in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where a local government required an easement over an owner's land as a condition for granting a building permit, and that condition did not further a public purpose related to the permit requirement. *Lucas*, 505

regulation under the CWA, challenges to which under the takings clause may be heard in the United States Court of Federal Claims as well as the district courts.[88] Of the various factors considered by the courts in determining a taking in a wetland case, the economic impact on the owner is often the most significant.[89]

In *Lucas v. South Carolina Coastal Council*,[90] the Supreme Court found that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[91] In three federal court decisions interpreting takings in the context of wetlands regulation, the courts have found a permit denial under Section 404 of the CWA to constitute a taking.[92] Decisions such as these have brought about an increased interest in private-property alternatives, including mitigation banking[93] and conservation easements.[94] Private-property alternatives, while still subject to and indeed usually arising out of government regulation,[95] can help to assuage the

U.S. at 1015. This Comment is mostly concerned with the second category, which is the more common basis for wetlands takings challenges.

88. Cylinder, *supra* n. 1, at 96–97. Cylinder notes that the assertion of a taking under the CWA "has not been demonstrated to be a valid defense to violations of Section 404 of the CWA or to permit conditions imposed by [the Corps]." *Id.*

89. Gardner, *supra* n. 32, at 543. Other factors include "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Penn C. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

90. 505 U.S. 1003 (1992).

91. *Id.* at 1019 (emphasis in original). For the facts of *Lucas*, see *supra* note 32.

92. *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171 (Fed. Cir. 1994); *Formanek v. U.S.*, 26 Cl. Ct. 332 (1992); *Bowles v. U.S.*, 31 Fed. Cl. 37 (1994). Gardner examines *Loveladies Harbor*, *Formanek*, and *Bowles* and finds that "these takings cases endanger wetland regulatory programs, because adverse decisions may discourage agencies from strictly enforcing wetland laws and regulations." Gardner, *supra* n. 32, at 547. *See also* Michael K. Braswell & Stephen L. Poe, *Private Property vs. Federal Wetlands Regulation: Should Private Landowners Bear the Cost of Wetlands Protection?* 33 Am. Bus. L.J. 179, 190–206 (1995) (providing the history of takings jurisprudence); *id.* at 206–233 (discussing wetlands takings cases).

93. *See* Gardner, *supra* n. 32, at 550 (asserting that mitigation banking, as a viable private-property alternative, "reduces the burden on private landowners, yet not at the undue expense of environmental values").

94. *See* Jordan, *supra* n. 36, at 429 (noting that "[c]ontrol of the land through voluntary incentives," such as conservation easements, is more consistent with the concept of private land ownership).

95. Both mitigation banking and conservation easements rely on statutory and administrative regulations for their existence. *See Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*, 60 Fed. Reg. 58605-2 (Nov. 28, 1995) (setting forth guidelines for satisfying the mitigation requirements of Section 404 of the CWA as well as

tension between the concept of private ownership of land and the interest of society in protecting the environment.[96]

III. THE FUNCTIONS AND BENEFITS OF CONSERVATION EASEMENTS AS A PRIVATE ALTERNATIVE TO GOVERNMENT REGULATION

The conservation easement, a creature of statute, was unknown at common law[97] but is generally an "outgrowth of three distinct common law devices that enable their owner or beneficiary to control the use of property owned by another: easements, real covenants, and equitable servitudes."[98]

Easements are classified as either affirmative or negative: affirmative easements entitle the owner (dominant tenant) to make use of another's real property (servient estate), while a negative easement entitles the dominant tenant to prevent the owner of the servient estate from using it in a certain way.[99] At English common law, negative easements were limited to four uses, including "the right to stop your neighbor from (1) blocking your windows, (2) interfering with air flowing to your land in a defined channel, (3) removing the support of your building . . . , and (4) interfering with the flow of water in an artificial stream."[100] American courts, though free to reject the traditional limitations on negative easements, have generally followed the English courts, with the occasional exception.[101]

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the "Swampbuster" provisions of the Food Security Act); Gardner, *supra* n. 17, at 615–619 (describing wetland mitigation banking within the federal regulatory framework); *infra* pt. IV(B) & App. (discussing state conservation easement enabling statutes).

96. Jordan, *supra* n. 36, at 427–428. Jordan cites the tension between "traditional aspects of private ownership and societal rights in private land" as one of the main issues facing federal regulation of privately held land, especially as it relates to agricultural regulation. *Id.* at 428.

97. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 Nat. Resources J. 373, 380 (2001).

98. John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 Envtl. L. 319, 325–326 (1997).

99. Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 2:10 (West Group 2001); Hollingshead, *supra* n. 98, at 326.

100. Jesse Dukeminier & James E. Krier, *Property* 855 (5th ed., Aspen Publishers 2002).

101. *Id*. at 856–858. American innovations include the easement of view, which protects one's view from the clutter of television aerials and other unsightly interference, and the solar easement, which protects one's solar collector from obstruction of the sun's rays by one's neighbor. *Id*. at 858.

Easements are further classified as "appurtenant" or "in gross": an appurtenant easement benefits primarily an adjoining parcel of land and consequently the owner of that estate, while an easement in gross benefits primarily the holder, personally and without reference to his ownership of land.[102] Easements in gross were not transferable at common law and were thus extinguished upon the owner's death.[103] Both the common law restrictions on negative easements as well as the non-transferability of easements in gross presented impediments to the development of the conservation easement, which is held in gross by a charitable organization or governmental entity and transferred like any other estate in land.[104]

Real covenants and equitable servitudes sprang up as a way around the traditional limitations on negative easements.[105] Real covenants arose from the law of contracts, and had to "run with the land" and benefit one property to the burden of another.[106] Furthermore, they had to "touch and concern" the land, the original parties "must have intended that their successors be bound by the covenant," and there had to be "privity of estate."[107] Traditionally, real covenants were enforceable only at law, in the form of damages, and the benefit and burden both had to run with the land in order for the burden to be enforceable.[108] The arcane technical requirements of burden and benefit, as well as the unavailability of injunctive relief, made real covenants an insufficient protective measure for the conservation of land.[109]

Equitable servitudes, the last of the three precursors to modern conservation easements, were developed to provide a way around the technical requirements of real covenants.[110] Although there are still complicated rules for the "running" of the benefit and the burden, equitable servitudes are simpler than real cove-

102. Hollingshead, *supra* n. 98, at 326–327; *see also* Bruce & Ely, *supra* n. 99, at § 2.1–2.3 (defining appurtenant easements and easements in gross, and explaining the distinction between them).

103. Hollingshead, *supra* n. 98, at 327.

104. *Id.* at 328.

105. Dukeminier & Krier, *supra* n. 100, at 858.

106. Hollingshead, *supra* n. 98, at 330.

107. *Id.*

108. Powell, *supra* n. 37, at vol. 9, § 60.07; Hollingshead, *supra* n. 98, at 331.

109. Hollingshead, *supra* n. 98, at 331.

110. *Id.*

nants in that they do not require an inquiry into "privity," but only the intent of the parties to be bound and the notice provided by recording statutes to successors in interest.[111] Equitable servitudes arose as a way of protecting the interests of a seller who contracted with a buyer to restrict the buyer's use of the land; if the buyer were then able to turn around and sell to another without the restriction, presumably for a higher price, the interest of the original seller would be worthless.[112] Equitable servitudes provided the durability and certainty that are now guaranteed by conservation easements.

In order to establish an interest in land that was not subject to the limitations of the traditional servitudes, states enacted conservation easement enabling statutes.[113] While these statutes vary widely in their scope and application,[114] their primary characteristics can be seen in the Uniform Conservation Easement Act (UCEA),[115] approved in 1981 by the National Conference of Commissioners on Uniform State Laws, and since enacted in part or in whole in at least twenty-two states.[116] The UCEA allows for the imposition of negative limitations or affirmative obligations on the part of the servient fee owner;[117] it is specifically geared to the protection of "natural, scenic, or open-space values of real property";[118] it allows governmental bodies and charitable organizations to hold easements in gross;[119] it provides for third-party rights of enforcement (not generally a feature of the common law of easements);[120] it is unlimited in duration unless the instrument creating it expressly provides otherwise;[121] it does not need to be appurtenant;[122] its benefit does not need to touch or concern real property;[123] it does not require any kind of privity;[124] and it is

111. *Id.* at 332.
112. *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Ct. Chancery 1848).
113. Hollingshead, *supra* n. 98, at 332–333.
114. *See infra* pt. IV(B) (discussing the variations in state statutes).
115. Unif. Conservation Easement Act, 12 U.L.A. 163 (1996) [hereinafter UCEA].
116. Roderick H. Squires, *Introduction to Legal Analysis*, in *Protecting the Land: Conservation Easements Past, Present, and Future*, *supra* n. 38, at 70–72.
117. UCEA § 1(1).
118. *Id.*
119. *Id.* at § 1(2).
120. *Id.* at § 1(3).
121. *Id.* at § 2(c).
122. *Id.* at § 4(1).
123. *Id.* at § 4(6).

freely assignable.[125] Accordingly, conservation easements go far beyond the scope of the traditional servitudes, and their characteristics make them ideal in many ways for the protection of wetlands.

While state conservation easement enabling statutes do not necessarily provide benefits to those who convey easements, other than the pleasure of knowing that the natural quality of their land will be protected in perpetuity through successive owners, federal tax law provides special benefits for those who donate conservation easements to charitable organizations.[126] State governments generally prefer conservation easements to outright governmental acquisition of land, because they are cheaper to acquire.[127] Also, because the land remains under the fee ownership of a private individual, it remains on the property tax rolls, although many states allow for the decrease in value due to conservation easements in calculating their ad valorem taxes.[128]

While conservation easements are freely chosen and freely conveyed by private individuals, they would not have come about without enabling statutes, and their value as a conservation tool lies in the very fact that they are enforceable in court by damages or injunctive relief. This nexus between public and private is what Professor Federico Cheever has called "public good and private magic."[129] The illusion of the "private deal" is in fact founded on

124. *Id*. at § 4(7).

125. *Id*. at § 4(2).

126. *See generally* Hollingshead, *supra* n. 98, at 337–360 (discussing the general history of income tax statutes and regulations relating to conservation easements and providing more detailed definitions of the terms used therein); C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 Wyo. L. Rev. 1 (2005) (examining in detail the requirements for federal tax benefits); Morrisette, *supra* n. 97, at 393–395 (reviewing generally the requirements a conservation easement must meet in order to merit income, estate, and property tax deductions).

127. Morrisette, *supra* n. 97, at 418–419. Morrisette cites the Marin Agricultural Land Trust (MALT) as an example: "MALT values most of its easements at 25 to 50 percent of the value of the property itself." *Id*. Furthermore, "when a land trust buys or receives a donated conservation easement, it does not become responsible for the day-to-day management of the property." *Id*. at 419. Thus, conservation easements strike a balance between the interests of the fee owner, who wishes to retain ownership and control over his property, and the charitable organization, which wishes to protect the property but may not have the resources to manage it single-handedly. *Id*.

128. Hollingshead, *supra* n. 98, at 359–360.

129. 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, 1077–1078 (1996).

government action at three levels: the enabling statute that makes the conveyance possible, the federal tax code that provides the conveyor with financial incentives for the bargain, and the market participation of governments, which sometimes even provide direct funding for the purchase of conservation easements.[130] The "private magic" is what makes conservation easements politically preferable to command-and-control regulation, making "advocates of private property rights . . . somewhat more receptive to conservation easements than they are to less voluntary methods of land preservation."[131]

Conservation easements can also arise when a land trust buys a tract of land, attaches a conservation easement, and then resells the land.[132] Land trusts are nonprofit, tax-exempt charities, which "conserve open space for the public benefit by undertaking or assisting direct land transactions," usually on a state or local level.[133] The Nature Conservancy (TNC), for example, purchased two large ranches, 61,000 acres in total, from a Wells Fargo Bank foreclosure sale.[134] Because it was not interested in the ranching business, TNC then sought to resell the ranches, but with conservation easements attached.[135] TNC has used the same strategy in the Asphepoo, Combahee, and Edisto (ACE) River Basin in South Carolina, where it purchased and resold, with conservation easements, a 1,200 acre plantation.[136]

The federal government has also adopted this strategy, in Executive Order 11990, by requiring that "when Federally-owned

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130. *Id*. at 1091–1092. Cheever's explanation of this phenomenon is both imaginative and instructive:

> All this government influence does not taint the private transaction with the negatives associated with government. It does not destroy the private magic. Why not? . . . While governments shape [the seller's] motivations and offer her tools with which to achieve her goals—with a few exceptions—they neither make decisions for her nor do they review the decision she makes.

Id. at 1092.

131. Jeffrey M. Tapick, Student Author, *Threats to the Continued Existence of Conservation Easements*, 27 Colum. J. Envtl. L. 257, 260 (2002).

132. Morrisette, *supra* n. 97, at 409.

133. Jean Hocker, *Land Trusts: Key Elements in the Struggle against Sprawl*, 15 Nat. Resources & Env. 244, 244 (2000). As of 2000, "[n]ational, regional, and local land trusts have helped conserve more than [seventeen] million acres of open space" and have more than one million members. *Id*.

134. Morrisette, *supra* n. 97, at 410.

135. *Id*.

136. *Id*. at 411, 413.

wetlands or portions of wetlands are proposed for . . . disposal to non-Federal public or private parties, the Federal agency shall . . . [attach] appropriate restrictions to the uses of properties by the grantee or purchaser and any successor."[137] In *Harris v. United States*,[138] the Farmers Home Administration (FmHA) had purchased Harris' farm during a foreclosure sale and then resold the land to Harris with a conservation easement attached, for the purpose of protecting wetlands on over half of the property.[139] Although Harris challenged the FmHA's authority to impose the conservation easement, the Fifth Circuit upheld it.[140] Likewise, in *National Wildlife Federation v. Espy*,[141] the Ninth Circuit found that an FmHA transfer of a ranch to a bank without a wetland conservation easement attached violated Title 7 U.S.C. Section 1985(g)(1), as well as Executive Order 11990.[142] It found that the FmHA was required to impose a conservation easement for wetland protection "even if it [had to] repay a prior lien to do so."[143]

While the federal government has in at least one instance required federally held easements to be perpetual, preempting state law regarding duration,[144] conservation easements on the whole continue to be governed by state law, with all the attendant problems and inconsistencies that state laws entail.[145]

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137. *Harris v. U.S.*, 19 F.3d 1090, 1093 (5th Cir. 1994) (citing Exec. Or. 11990, 42 Fed. Reg. 26961 (May 24, 1977)).

138. 19 F.3d 1090 (5th Cir. 1994).

139. *Id*. at 1092.

140. *Id*. at 1097–1099.

141. 45 F.3d 1337 (9th Cir. 1995).

142. *Id*. at 1342. Section 1985(g)(1) provides that "in the disposal of real property under this section, the Secretary [of Agriculture] shall establish perpetual wetland conservation easements to protect and restore wetlands or converted wetlands that exist on inventoried property."

143. *Id*. at 1342.

144. Jordan, *supra* n. 36, at 404. The Forestry Title of the 1990 Farm Bill contained such a requirement, although the Conservation Title of the same bill incorporated state law regarding maximum duration. *Id*. Jordan argues for a use of the property or spending power to preempt state property law with regard to federally held conservation easements. *Id*. at 406.

145. *Id*. at 404–405; *see also* Adam E. Draper, Student Author, *Conservation Easements: Now More Than Ever—Overcoming Obstacles to Protect Private Lands*, 34 Envtl. L. 247, 257 (2004) (noting some of the major "threats" to conservation easements, including eminent domain, abandonment, the doctrine of changed conditions, marketable title acts, and tax and environmental issues). Squires, *supra* note 116, at 72–73, lists forty-six states with conservation easement enabling statutes, and a simple search reveals that Oklahoma, Pennsylvania, and Wyoming have since joined the list. Several other states, includ-

IV. PROBLEMS WITH CONSERVATION EASEMENTS

A. Weaknesses in State Conservation Easement Enabling Statutes

The UCEA provides in Section 2 that a conservation easement may be "modified, terminated, or otherwise altered or affected in the same manner as other easements."[146] Section 3 further provides that the UCEA "does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."[147] While this language assures a measure of necessary judicial oversight and flexibility, it weakens the statute by allowing for a degree of procedural maneuvering, yielding a variety of results collectively termed "judicial termination."[148]

The most significant ground for judicial termination is the doctrine of changed conditions, under which a judge can terminate a servitude on land (usually a covenant) when "conditions have so changed since the making of the [servitude] as to make it impossible longer to secure in a substantial degree the benefits intended to be secured by the performance of the [servitude]."[149] In determining whether a restriction is enforceable, judges consider "the intent of the parties, the foreseeability of the change in conditions, the loss of potential profits, economic burden on the land owner, the location of the changes, the benefit to the servitude holder, and the duration of the restriction."[150] While the doctrine of changed conditions was traditionally applicable only to real covenants and equitable servitudes, because conservation

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ing North Dakota, have partial conservation easement statutes that are inapplicable to wetlands. For other states with partial conservation easement statutes, see *infra* Appendix.

146. UCEA § 2(a).

147. *Id*. at § 3(b).

148. *See infra* nn. 149–159 and accompanying text (discussing the various methods of judicial termination).

149. Powell, *supra* n. 37, at vol. 9, § 60.10[2] (quoting *Restatement of Property* § 564 (1944)); *see also* Jeffrey A. Blackie, Student Author, *Conservation Easements and the Doctrine of Changed Conditions*, 40 Hastings L.J. 1187, 1188 (1989) (explaining that a servitude may be terminated when "changed conditions in or around the burdened land [frustrate] the purpose of the restriction or [create] an undue hardship on the owner of the burdened land").

150. Blackie, *supra* n. 149, at 1209.

easements share many similarities with these servitudes, they may also be subject to the doctrine.[151]

The argument of changed conditions can be raised either as a defense, when an easement holder brings an enforcement action against a landowner who is using or plans to use his land in a manner inconsistent with the easement restrictions, or as an affirmative claim, when a landowner sues for a declaratory judgment that the restriction has ceased to be enforceable.[152] The equitable purpose of this doctrine can clearly be seen in a simple hypothetical. If a conservation easement is imposed on a piece of land, especially a particularly small piece of land, which is originally surrounded by acres of rolling countryside but is later hemmed in by the encroachments of urban sprawl to the point where it is entirely surrounded by towering condominiums and office buildings, the surrounding conditions have changed enough to render that piece of land almost worthless for conservation purposes. Likewise, in the case of a wetland conservation easement, if the wetland has dried up by natural causes, the landscape has changed entirely, and there is no reasonable foreseeability that the area will ever again exhibit the characteristics of a wetland, there is little reason to maintain the easement.

However, one can also foresee another situation in which the court might find that the factors above have been satisfied: the parties did not "foresee" the encroachment of urban sprawl, an extrinsic change for which the parties are in no way responsible, the land has increased exponentially in value, and the landowner stands to lose potential profits, perhaps even in the tens of millions of dollars, and is thus economically burdened. When terminating a servitude because of changed circumstances, the court will imply an intention by the parties to terminate the servitude for reasons that they could not originally have foreseen.[153] Likewise, the court will prefer "the most profitable or productive use of land," with a concern for marketability or alienability, and the most efficient use possible.[154] Theoretically, simple changes in value are not enough, though it is easy to imagine a situation in

151. *Id*. at 1213.
152. Powell, *supra* n. 37, at vol. 9, § 60.10[2]; Blackie, *supra* n. 149, at 1206.
153. Blackie, *supra* n. 149, at 1207.
154. *Id*. at 1207–1208.

which skyrocketing land values will tempt landowners to seek termination of the restrictions on their land by whatever means necessary.[155]

Commentators argue over whether the doctrine of changed circumstances is applicable to conservation easements, and the extent to which it might pose a problem.[156] After all, maintaining the natural state of a piece of land despite changes in the surrounding area is the very purpose of a conservation easement.[157] In addition, while a court may be tempted to balance the value of continued restraints against the value of unrestricted alienability, it should take into consideration the value of conservation itself—the fact that wetlands, open spaces, and other natural settings have both ecological value and implicit natural and aesthetic value.[158] While the language in Section 2 of the UCEA would seem to limit the actions of courts to terminate easements, as distinct from real covenants and equitable servitudes, the language in Section 3 providing for termination consistent with the principles of law and equity would seem to allow for the doctrine of changed circumstances.[159]

While the policy favoring marketability or alienability figures as a background consideration in the doctrine of changed circumstances, it is even more strongly felt in the general policy against

155. *Id.* at 1210, 1217–1218.

156. According to one view, "easements, viewed as distinct property rights and not merely promises concerning land, traditionally have been resistant to, if not immune from, the doctrine." *Id.* at 1194. State legislatures attempt to affirm this distinction by the use of the term "easement" rather than "servitude" to describe conservation easements. *Id.* at 1195. Courts have also held easements to be compensable property rights in eminent domain proceedings, unlike traditional servitudes. *Id.* at 1197. Even so, landowners and developers "could attempt to use the doctrine opportunistically to destroy perfectly viable conservation easements in order to develop burdened properties." Tapick, *supra* n. 131, at 279. Tapick notes an exception for easement "exchanges": "where an easement holder is given the opportunity to 'swap' a viable conservation easement for another easement or property interest of greater conservation value, then the easement holder should have the ability to make the swap even at the expense of terminating an easement." *Id.* at 277. It is difficult to imagine the exact situation that Tapick describes, but assuming such situations exist, allowing for "swaps" in a wetland context hardly fulfills the goal of "no net loss," which has become an integral part of United States environmental policy. *See e.g.* 33 U.S.C. § 2317 (acknowledging the "no net loss" goal of the United States Army Corps of Engineers water resources development program).

157. Blackie, *supra* n. 149, at 1218–1219.

158. *Id.* at 1220.

159. *See supra* nn. 146–148 and accompanying text (commenting on the relevant provisions of the UCEA).

perpetual duration, the second significant threat to conservation easements. Some states presume or even require conservation easements to be perpetual,[160] but others require that restrictions on property terminate automatically after a certain amount of time.[161] These requirements, often taking the form of "marketable title acts," require that notice of a non-possessory interest be re-recorded within a certain number of years in order to maintain the validity of the interest.[162] The general prejudice against "dead hand" control of land, as seen in the Rule against Perpetuities, might also be applied against conservation easements, which "lock up" the use of land, theoretically in perpetuity, and have the potential to frustrate the legitimate uses to which future generations would put the land.[163]

As possible bases for the policy against "dead hand" control, one scholar cites the "nineteenth century view of full economic development" and the traditional opposition to the "hampering of marketability" of land, though the modern view of conservation as inherently valuable, as well as the modern system of recording and the free market, have generally resolved these issues.[164] The general concern with "dead hand control" remains valid, however,

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160. *See e.g.* Cal. Civ. Code Ann. § 815.2(b) (West 2005) (declaring that "[a] conservation easement shall be perpetual in duration"); Haw. Rev. Stat. § 198-2(b) (2005) (same). States following the UCEA on this point presume perpetual duration, but allow the parties to specify a different duration. *See e.g.* Minn. Stat. § 84C.02(c) (2005) (declaring that "a conservation easement is unlimited in duration *unless* the instrument creating it otherwise provides" (emphasis added)).

161. Draper, *supra* n. 145, at 268. The Alabama statute allows the parties to specify duration, but otherwise defaults to thirty years, the death of the grantor, or the sale of the property. Ala. Code § 35-18-2(c) (West 2005). The Kansas statute limits duration to the lifetime of the grantor, unless specified otherwise. Kan. Stat. Ann. § 58-3811(d) (2005). For a further comparison of state statutes, including those imposing a minimum duration, see *infra* Appendix.

162. Jordan, *supra* n. 36, at 481. Jordan notes that Florida Statutes Section 712.05 (1988) and Vermont Statutes, Title 27, Section 605 (1989), are two examples of this sort of statute. *Id*. at n. 466.

163. Tapick, *supra* n. 131, at 281.

164. Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433, 455–456 (1984). "Full economic development" is a vital concern when land is seen only as an "article of commerce," but becomes less important once land is seen as having intrinsic value worthy of conservation. *Id*. Likewise, restraints on alienability were traditionally viewed with suspicion, because they burdened the land and caused uncertainty and delay in land transactions. *Id*. at 456. The modern system of public records, which are freely, quickly, and reliably searched, largely removes both the uncertainty and the delay. *Id*.

given the sociological concerns and the fundamental issues such control raises with regard to the personal autonomy of future generations.[165] One commentator argues that the perpetual duration of conservation easements reflects "two widely held but erroneous assumptions," the first being that today's landowners have the wisdom and foresight "to predict the needs and preferences of future generations," and the second being that "the present generation represents nature's last or near-to-last chance."[166] Because of the continuous development in scientific and ecological knowledge and the absolute inability to foresee the uses to which future generations would wish to put their land, this commentator argues that it is wrong to limit their autonomy and freedom of choice.[167]

As a general category of challenges to conservation easements, the various "statutory challenges" available to landowners in termination proceedings are the next major weakness in conservation easements.[168] Enabling statutes like the UCEA require that an easement meet various requirements, and if it fails to meet any one of these requirements, then it can cease to be enforceable.[169] First, the statutes usually require that the holder be either a governmental body or a "charitable corporation, charitable association, or charitable trust,"[170] as defined either by common law[171] or the federal tax code.[172] Because many otherwise

165. *Id*. at 459–460. Korngold perpetuates an early stereotype that "the class donating conservation servitudes is generally the 'gentry,'" and that "[c]haracteristically, the gentry have a strong bias for the 'natural' countryside," rather than the egalitarian recreational use of public parks. *Id*. at 460. Korngold, writing two decades ago, perhaps did not foresee that some of the strongest enemies of conservation easements would be people of comparative wealth, including developers and land speculators, not to mention those who would purchase the developed land. *See* Tapick, *supra* n. 131, at 277 (noting that two of the greatest opponents of conservation easements are "landowners who no longer wish to be burdened with an easement, and developers [who] wish to put burdened property to commercial use").

166. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739, 744–745 (2002).

167. *Id*. at 782–784.

168. Tapick, *supra* n. 131, at 282.

169. *Id.*

170. UCEA § 1.

171. UCEA cmt. to § 1. The official commentary to the UCEA suggests that the status of charities should be determined by the common law definition of a charitable organization, "regardless of their tax status as exempt organizations under any tax law." *Id*.

172. Cheever, *supra* n. 129, at 1093–1094. Cheever notes that Colorado is one of many states that explicitly define a "charitable" organization according to the federal tax code, contrary to the intent of the UCEA drafters. *Id*. at 1093; *see also supra* n. 171 (discussing

nonprofit organizations maintain relationships with for-profit organizations, and because conservation easements can increase the value of nearby land, whose owners in turn may be members of the nonprofit organization, the charitable nature of the easement holder may be called into question.[173] Successors in interest to the original donor of the conservation easement can also argue that the original motivation for granting the easement was not conservation, but merely the tax incentive that comes with it.[174]

Other statutory provisions, such as the statute of limitations and the absence of any attorney fee-shifting arrangement, can allow for tactical maneuvers that endanger the conservation easement.[175] For example, because most states impose a relatively short statute of limitations on property or contract claims (the most likely category of claims that would be brought to enforce an easement), a landowner who is interested in terminating an easement on his or her property may simply violate the terms of the easement and wait to see if an enforcement action is brought.[176] Because land trusts, the usual holders of conservation easements, are typically small and serve limited geographical areas,[177] they may be lacking in financial resources and staff,[178] and therefore may conduct only infrequent inspections of the properties on which they hold easements.[179] As a result, incremental encroachments on the terms of the easement, or encroachments that are not plainly visible upon casual inspection, may go unnoticed until the statute of limitations has expired, at which point

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the intent of the UCEA drafters with reference to the definition of "charitable"). This definition causes a problem for conservation easements:

> "The presence of a single [nonexempt] . . . purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] . . . purposes." By asserting that the land trust engages in significant non-charitable activities, [a challenger] can attack the land trust's charitable status and the capacity of the land trust to qualify as a holder of conservation easements under state law.

Cheever, *supra* n. 129, at 1094.

173. *Id.*

174. *Id.* at 1095.

175. *Id.* at 1097.

176. *Id.*

177. Hocker, *supra* n. 133, at 244. National and international land trusts are relatively few, while "the overwhelming majority of the nation's 1,200-plus land trusts serve a state, a region or, more typically, a single town or county, a valley or watershed, or a metropolitan area." *Id.*

178. Cheever, *supra* n. 129, at 1100.

179. *Id.* at 1097–1098.

any further legal action would be barred.[180] The same problem of limited resources may allow a challenger to bring a lawsuit with no legal or factual merit, only for the purpose of outspending the land trust in legal fees, provided the challenger can keep the suit alive long enough. A land trust with limited resources would face the choice of forsaking a particular easement or going bankrupt.[181]

Closely related to the statute of limitations is abandonment—the easement holder's failure, for whatever reason, to enforce the restrictions of the conservation easement.[182] Aside from the issue of legal expenses, land trusts can fail for other reasons, and if they neglect to transfer their conservation easements to another more solvent organization, the easement can terminate.[183] Thus, it is vital to choose the proper holder for a conservation easement, looking to the solvency of a private land trust, or even turning the easement over to a governmental agency, which is often less palatable but more secure.[184]

Eminent domain, by which the government exercises a property right superior to all others, including conservation easements, can also result in termination.[185] Many state conservation easement enabling laws explicitly allow for the use of eminent domain to terminate easements when the government seeks to take the underlying property.[186] The government may take the property for a legitimate governmental use, such as a highway, mass transit system, or public utility, which nevertheless conflicts

180. *Id*. Cheever suggests that encroachments might be concealed by inclement weather or darkness, or by the intentional fraudulent activity of the landowner. *Id*. Additionally, they might simply be overlooked accidentally by a hurried and overworked land trust representative. *Id*.

181. For insight into the special problems that arise when a mitigation bank, a close relative of the land trust, goes bankrupt, see Royal C. Gardner & Theresa Pulley-Radwan, *What Happens When a Wetland Mitigation Bank Goes Bankrupt?* 35 Envtl. L. Rep. 10590 (2005).

182. Bruce & Ely, *supra* n. 99, at § 10:18; Draper, *supra* n. 145, at 266.

183. Draper, *supra* n. 145, at 266; *see generally* Gardner & Pulley-Radwan, *supra* n. 181 (discussing the consequences of bankruptcy in the mitigation-banking context).

184. Erin McDaniel, Student Author, *Property Law: The Uniform Conservation Easements Act: An Attorney's Guide for the Oklahoma Landowner*, 55 Okla. L. Rev. 341, 357 (2002).

185. Bruce & Ely, *supra* n. 99, at § 10:42; Draper, *supra* n. 145, at 265.

186. Draper, *supra* n. 145, at 265. For state statutes with this provision, see *infra* Appendix.

with the values underlying the conservation easement.[187] Eminent domain becomes an even greater threat when the government exercises its powers purportedly for a public purpose, but actually in the furtherance of private development.[188] When the words "public purpose" are held to include redeveloping land to increase tax revenues, then conservation easements that stand in the way of development become easily susceptible to termination by eminent domain.[189] As the Supreme Court stated in the classic takings case of *Hadachek v. Sebastian*,[190] "[t]here must be progress, and if in its march private interests are in the way they must yield to the good of the community."[191] Whether "the good of the community" is better served by conservation or development is a question of fundamental importance.

Other comparatively rare circumstances may arise in which a conservation easement may be terminated. If an easement holder takes fee simple title to the land that is under the conservation easement, the merger doctrine would result in termination of the easement.[192] The most likely way for this to occur would be if a landowner who had already donated a conservation easement to a land trust were then to bequeath fee simple title to the land trust upon his or her death.[193] This would ordinarily not pose a problem, unless the land trust went bankrupt or transferred fee simple title to the land to another party without reserving a conser-

187. *Id.* Draper cites the case of *Johnston v. Sonoma County Agricultural Preservation & Open Space District*, 123 Cal. Rptr. 2d 226 (2002), in which the Court authorized a utility easement across a conservation easement, under the threat of condemnation. *Id.*

188. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004). The Connecticut Supreme Court upheld the taking of a non-blighted area near the Pfizer global research facility in New London, on the basis that "creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions." *Id.* at 520–521. A five-vote majority of the United States Supreme Court affirmed, giving deference to the city's "carefully formulated . . . economic development plan," and holding that takings for a purely economic public purpose are constitutional. *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

189. *Kelo* has taken this particular "danger" out of the realm of theory and into reality. 125 S. Ct. at 2655. If land that is owned in fee simple can be taken for purely economic purposes against the will of its owner, land subject to a conservation easement can also be taken against the will of the easement holder, perhaps even with the consent of the fee simple owner, depending on the compensation.

190. 239 U.S. 394 (1915).

191. *Id.* at 410.

192. Bruce & Ely, *supra* n. 99, at § 10:27; Tapick, *supra* n. 131, at 280.

193. Tapick, *supra* n. 131, at 280.

vation easement, but the possibility nevertheless remains.[194] Another unlikely but potential threat to conservation easements is release by the holder,[195] explicitly permitted by some state statutes.[196] Generally speaking, once a land trust or governmental entity has an easement, it is not likely to let it go.[197] But because statutory release provisions generally fail to provide even a minimal level of procedural safeguards,[198] private and public entities may be susceptible to financial or political pressure to release an easement that has become inconvenient.[199]

B. Inconsistent State Conservation Easement Enabling Statutes[200]

The inconsistencies among state conservation easement enabling statutes become plainly visible when the statutes are compared side by side. For example, given the importance of conservation easements to the protection of wetlands, it is surprising

194. Tapick cites *Parkinson v. Board of Assessors of Medfield*, 495 N.E.2d 294 (Mass. 1986), as a case in which the merger doctrine was used unsuccessfully to challenge a conservation easement. Tapick, *supra* n. 131, at 281 n. 86. In *Parkinson*, the landowner originally donated a conservation easement on her land to a charitable corporation. 495 N.E.2d at 295. Approximately one year later, she conveyed to the corporation "all of her right, title and interest in the premises, reserving to herself a life estate and stating that the conveyance was subject to the conservation [easement] . . . ." *Id*. at 295 n. 3. The local tax board argued that the conveyance extinguished the easement under the merger doctrine. *Id*. The Court expressed some doubt as to whether the merger doctrine even applied to a statutory conservation easement, and decided that even under the common law, the intervening life estate prevented "complete unity of ownership in the dominant and servient estates." *Id*.

195. Bruce & Ely, *supra* n. 99, at § 10:17.

196. Tapick, *supra* n. 131, at 284. The Florida statute, for example, provides that "[a] conservation easement may be released by the holder of the easement to the holder of the fee even though the holder of the fee may not be a governmental body or a charitable corporation or trust." Fla. Stat. § 704.06(4) (2004). For other state statutes with release provisions, see *infra* Appendix.

197. Tapick, *supra* n. 131, at 284–285.

198. *Id*. at 285. According to Tapick,

> Only two states mandate that a public hearing must be held prior to the easement's release. One of these states, New Jersey, also requires that the [C]ommissioner of Environmental Protection approve the release of a conservation easement if the easement holder is a government entity. Nebraska's statute is the only one that imposes a substantive requirement on the release provision: it allows for the release of an easement only if "the conservation easement's purpose is not substantial."

Id.

199. *Id*. at 285–286.

200. For a complete, comparative survey of state conservation easement enabling statutes as they pertain to wetland protection, see the table included in the Appendix to this Comment.

that only twenty state statutes explicitly refer to wetlands or water areas;[201] the rest use the relatively vague UCEA definition[202] or do not protect wetlands at all. While a few of the ways in which state statutes differ from the UCEA are positive, many others have a negative impact on the use of easements for wetland conservation. The inconsistencies can be summarized as follows:

- Three state statutes explicitly allow for termination for changed conditions or circumstances,[203] while others simply follow the UCEA's provision for judicial modification or termination "in accordance with the principles of law and equity."[204]
- Three statutes require a public interest balancing test,[205] though three also forbid any kind of "comparative economic test" in determining public interest in a termination or modification proceeding.[206]

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201. *See* Ariz. Rev. Stat. § 33-271(2)(b) (West 2005); Colo. Rev. Stat. § 38-30.5-102 (Lexis 2005); Del. Code Ann. tit. 7, § 6901 (Lexis 2005); Fla. Stat. § 704.06(1), (1)(f); 765 Ill. Comp. Stat. § 120/1(a)(9), (10) (2005); Iowa Code § 457A.1 (2005); 33 Me. Rev. Stat. Ann. § 476(3) (2005); Md. Real Prop. Code Ann. § 2-118(a), (b)(5), (6), (8) (2005); Mass. Gen. Laws ch. 184, § 31 (2005); Mo. Rev. Stat. § 67.900(3) (2005); Mont. Code Ann. § 76-6-203(6) (2005); Neb. Rev. Stat. § 76-2, 111(1) (2005); N.H. Rev. Stat. Ann. § 477:45(I) (West 2005); N.J. Stat. Ann. § 13:8B-2(a), (b)(5), (6), (7) (West 2005); N.Y. Envtl. Conserv. Law § 49-0301 (McKinney 2005); Ohio Rev. Code Ann. §5301.67(A) (West 2005); R.I. Gen. Laws § 34-39-2(a) (2005); S.C. Code Ann. § 27-8-20(3) (2005); Utah Code Ann. § 57-18-2(1) (Lexis 2005); Vt. Stat. Ann. tit. 10, § 821(a) (2005).

202. The UCEA enables conservation easements for "maintaining or enhancing air or water quality," but does not explicitly mention wetland protection. UCEA § 1(1). While water quality may be maintained or enhanced in any number of ways, for example through the protection of watershed areas, this kind of vagueness may allow too much room for negative judicial construction in the context of wetland conservation easements. For example, a court may determine that the language of a given conservation easement instrument does not come within the enabling statute, and it is thus unenforceable under the common law.

203. Ala. Code § 35-18-3(b); Iowa Code § 457A.2; 33 Me. Rev. Stat. Ann. § 477(3)(B).

204. UCEA § 3(b).

205. Ariz. Rev. Stat. § 33-273(B); Mass. Gen. Laws ch. 184, § 32; Neb. Rev. Stat. § 76-2, 114.

206. Iowa Code § 457A.2; 33 Me. Rev. Stat. Ann. § 478(3), Neb. Rev. Stat. § 76-2, 114. Forbidding a "comparative economic test" is presumably the legislature's way of ensuring that conservation easements will not be terminated simply because they stand in the way of development or the tax revenues that would come from the increased land values of non-burdened estates. While this may protect conservation easements from suits by private developers, it may not protect them from the repercussions of the *Kelo* decision, discussed *supra* at notes 188–189.

- One statute explicitly allows termination by merger,[207] while two explicitly provide that merger will not result in termination.[208] The latter provision protects conservation easements against the kind of "accidental termination" that has concerned some commentators.[209]
- One statute allows termination by the express agreement of the parties,[210] while four allow for release by the holder of the easement without any notice and few limitations,[211] and three require notice or approval by a governmental authority before they can be released.[212]
- Six statutes require notice or approval by a governmental authority, or conformity with land use plans, before they can be created.[213]
- Eleven statutes allow a property tax break for the owner of the burdened estate,[214] in addition to federal income tax breaks, while one explicitly disallows a tax break[215] and one even requires retroactive tax payments in the event of termination.[216]
- Nine statutes specifically provide for entry and inspection by the holder of the easement in order to assure compliance with the terms of the easement.[217]

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207. Colo. Rev. Stat. Ann. § 38-30.5-107.

208. Miss. Code Ann. § 89-19-5(5) (Lexis 2005); Pa. Consol. Stat. Ann. § 5056(8) (2005).

209. *See supra* nn. 192–194 and accompanying text (discussing the effect of merger on conservation easements, when the donation of a conservation easement is followed by a donation of the underlying land in fee simple).

210. Ind. Code § 32-23-5-6(b) (2005).

211. Fla. Stat. § 704.06(4); 765 Ill. Comp. Stat. § 120/1(b); Iowa Code § 457A.2; R.I. Gen. Laws § 34-39-5.

212. Mass. Gen. Laws ch. 184, § 32; Neb. Rev. Stat. § 76-2, 113; N.J. Stat. Ann. § 13:8B-5.

213. Mass. Gen. Laws ch. 184, § 32; Mont. Code Ann. § 76-6-206; Neb. Rev. Stat. § 76-2, 112(3); Or. Rev. Stat. Ann. § 271.735(1) (2005); S.C. Code Ann. § 27-8-30(E); Va. Code Ann. §10.1-1012 (Lexis 2005).

214. Colo. Rev. Stat. § 38-30.5-109; Ga. Code Ann. § 44-10-8 (2005); Ind. Code § 32-23-5-8; Mo. Rev. Stat. § 67.895; Mont. Code Ann. § 76-6-208(1); Neb. Rev. Stat. § 76-2, 116; N.J. Stat. Ann. § 13:8B-7; Or. Rev. Stat. Ann. § 271.785; S.C. Code Ann. § 27-8-70; Va. Code Ann. §10.1-1011(B); Wyo. Stat. Ann. § 34-1-207(b) (2005).

215. Idaho Code § 55-2109 (Lexis 2005).

216. Tex. Nat. Resources Code Ann. § 183.002(f) (2005).

217. Ark. Code Ann. § 15-20-409(c) (Lexis 2005); Fla. Stat. § 704.06(4); 33 Me. Rev. Stat. Ann. § 477(5); Mass. Gen. Laws ch. 184, § 32; Mont. Code Ann. § 76-6-210; N.J. Stat.

- Fifteen statutes explicitly allow for equitable relief in the event of violation,[218] eleven allow for damages,[219] and one even allows for punitive damages.[220] Only two provide for attorney fee-shifting.[221]
- Only two statutes require perpetual duration,[222] while three specify a minimum duration.[223] The rest, like the UCEA, allow a designated duration or a default of perpetuity.
- Five statutes provide for or require transfer to another charitable organization or a governmental agency in the event that the original charitable holder ceases to exist (for example, goes bankrupt or dissolves).[224]
- Thirteen statutes explicitly require that the charitable organization be tax-exempt under Section 501(c) of the United States tax code,[225] contrary to the commentary to the UCEA, which explicitly follows the common law definition of a charity.[226]

Ann. § 13:8B-3; N.Y. Envtl. Conserv. Law § 49-0305(6); Ohio Rev. Code Ann. §5301.691(E)(2); Utah Code Ann. § 57-18-6(3).

218. Ark. Code Ann. § 15-20-409(c); Cal. Civ. Code. Ann. § 815.7(b); Colo. Rev. Stat. § 38-30.5-108(2); Fla. Stat. § 704.06(4); Haw. Rev. Stat. § 198-5(b); 765 Ill. Comp. Stat. § 120/4; Mass. Gen. Laws ch. 184, § 32; Mont. Code Ann. § 76-6-210; Neb. Rev. Stat. § 76-2, 115; N.H. Rev. Stat. Ann. § 477:47; N.Y. Envtl. Conserv. Law § 49-0305(5); Ohio Rev. Code Ann. § 5301.70; R.I. Gen. Laws Ann. § 34-39-4; Utah Code Ann. § 57-18-6(1); Vt. Stat. Ann. tit. 10, § 823.

219. Cal. Civ. Code. Ann. § 815.7(c); Colo. Rev. Stat. § 38-30.5-108(3); Fla. Stat. § 704.06(4); Haw. Rev. Stat. § 198-5(c); 765 Ill. Comp. Stat. § 120/4; Neb. Rev. Stat. § 76-2, 115; N.H. Rev. Stat. Ann. § 477:47; N.Y. Envtl. Conserv. Law § 49-0305(5); Ohio Rev. Code Ann. §5301.70 ("any other civil action"); R.I. Gen. Laws § 34-39-4; Utah Code Ann. § 57-18-6(2).

220. 765 Ill. Comp. Stat. § 120/4(c).

221. Cal. Civ. Code. Ann. § 815.7(d); Haw. Rev. Stat. § 198-5(d).

222. Cal. Civ. Code. Ann. § 815.2(b); Haw. Rev. Stat. § 198-2(b).

223. Mont. Code Ann. § 76-6-202; 32 Pa. Consol. Stat. § 5054(d); W. Va. Code § 20-12-4(c) (2005).

224. Ariz. Rev. Stat. § 33-273(A)(5); Iowa Code Ann. § 457A.8; Md. Real Prop. Code Ann. § 2-118(e); 32 Pa. Consol. Stat. § 5054(d); Va. Code Ann. §10.1-1015.

225. Alaska Stat. § 34.17.060(2)(B) (Lexis 2005); Cal. Civ. Code. Ann. § 815.3(a); Colo. Rev. Stat. § 38-30.5-104(2); Haw. Rev. Stat. § 198-3; N.J. Stat. Ann. § 13:8B-2(a); N.Y. Envtl. Conserv. Law § 49-0303(2); Ohio Rev. Code Ann. §5301.69(B); 32 Pa. Consol. Stat. § 5053(2); Utah Code Ann. § 57-18-3; Vt. Stat. Ann. tit. 10, § 821(C)(2), (3); Va. Code Ann. §10.1-1009; Wash. Rev. Code § 64.04.130 (2005); W. Va. Code § 20-12-3(b)(2).

226. *See supra* n. 171 (discussing the common law definition of "charitable").

- Twenty statutes subject easements to recordation statutes or require recordation in order for the easement to be valid or enforceable.[227] Only one explicitly makes conservation easements exempt from the state's "marketable title" provision.[228]
- Five statutes provide that mineral rights shall not be affected, including coal mining operations.[229]
- Eleven statutes prevent or limit creation of easements by eminent domain,[230] and eighteen protect the state's power of eminent domain over easements,[231] often including clauses allowing the state to negotiate, purchase, or condemn portions of a conservation easement for utility purposes.[232]
- Two statutes provide tort immunity for the easement holder, the landowner, or both.[233]

Clearly, a survey of state conservation easement enabling statutes reveals the very weaknesses that so greatly concern commentators. Likewise, the many inconsistencies as delineated above make any nationwide efforts to acquire easements for wetland protection difficult, because the body seeking to acquire the easements must conform itself to the conservation easement stat-

227. Ariz. Rev. Stat. § 33-274(A); Cal. Civ. Code. Ann. § 815.5; Colo. Rev. Stat. § 38-30.5-106; Fla. Stat. § 704.06(5); Haw. Rev. Stat. § 198-4; 765 Ill. Comp. Stat. § 120/5; Iowa Code § 457A.3; Mich. Comp. Laws § 324.2141 (2005); Mont. Code Ann. § 76-6-207(1); Neb. Rev. Stat. § 76-2, 112(1); N.H. Rev. Stat. Ann. § 477:47; N.J. Stat. Ann. § 13:8B-4; N.M. Stat. Ann. § 47-12-3(B) (2005); N.Y. Envtl. Conserv. Law § 49-0305(4); Ohio Rev. Code Ann. §5301.68; S.C. Code Ann. § 27-8-30(A); Tex. Nat. Resources Code Ann. § 183.002(e); Utah Code Ann. § 57-18-4(2); W. Va. Code § 20-12-6(b); Wyo. Stat. Ann. § 34-1-202.

228. 765 Ill. Comp. Stat. § 120/1(b).

229. Ala. Code § 35-18-2(d); Ky. Rev. Stat. Ann. § 382.850(1), (2) (West 2005); N.M. Stat. Ann. § 47-12-6(D); 32 Pa. Consol. Stat. § 5059; Wyo. Stat. Ann. § 34-1-202(d)–(e).

230. Ala. Code § 35-18-2(a); Alaska Stat. § 34.17.010(e); Fla. Stat. § 704.06(2); Ga. Code Ann. § 44-10-3(a); Haw. Rev. Stat. § 198-3; Idaho Code § 55-2107; Mo. Rev. Stat. § 67.885; N.M. Stat. Ann. § 47-12-6(c); Or. Rev. Stat. Ann. § 271.725(3); Utah Code Ann. § 57-18-7(1); W. Va. Code Ann. § 20-12-5(c).

231. Ala. Code § 35-18-2(e); Ariz. Rev. Stat. § 33-272(A); Ark. Code Ann. § 15-20-403(d)(2); Fla. Stat. § 704.06(11); 765 Ill. Comp. Stat. Ann. § 120/6; Kan. Stat. Ann. § 58-3816; Ky. Rev. Stat. Ann. § 382.850(2); Neb. Rev. Stat. § 76-2, 117(2); N.J. Stat. Ann. § 13:8B-8; N.M. Stat. Ann. § 47-12-6(C); N.Y. Envtl. Conserv. Law § 49-0305(5); Okla. Stat. tit. 60, § 49.8(1) (2005); 32 Pa. Consol. Stat. § 5055(d); S.C. Code Ann. § 27-8-80; Utah Code Ann. § 57-18-7(2); Va. Code Ann. §10.1-1010(F); W. Va. Code § 20-12-5(c); Wyo. Stat. Ann. § 34-1-207(a).

232. *E.g.* Colo. Rev. Stat. § 38-30.5-110; Neb. Rev. Stat. § 76-2, 117(4); N.Y. Envtl. Conservation Law § 49-0305(8); W. Va. Code § 20-12-5(c).

233. Alaska Stat. § 34.17.055(a)-(b); Fla. Stat. § 704.06(10).

utes of fifty-one different jurisdictions, some of which do not recognize wetland protection as a legitimate purpose. While the federal government has a handful of provisions regarding the acquisition of easements by federal agencies, there is no comprehensive, uniform body of conservation easement law that can be applied to further the kind of general "wise use" envisioned by Ramsar.

V. A PROPOSED SOLUTION

The Ramsar Convention contains many self-executing provisions, in the sense that the provisions need no additional act of a legislative body to be carried out.[234] For example, it contains provisions that define key terms in the Convention, set out the standards for listing a wetland, and protect the sovereign rights of the parties.[235] The more important parts of the Convention, however, are non-self-executing and require action on the part of national governments in order to carry them into effect in signatory states.[236] Article 3, Section 1, for example, requires the United States to promote the conservation of listed wetlands, as well as the wise use of wetlands within its territory generally.[237] Formulating and implementing planning and promoting conservation are imperatives that require specific legislation by Congress.[238] Congress, in turn, has the authority to enact whatever laws are "necessary and proper" to fulfilling its obligations under the Constitution,[239] an authority that has been given wide latitude by the United States Supreme Court, beginning with *M'Culloch v. Maryland*.[240]

234. *See* Louis Henkin, *Foreign Affairs and the United States Constitution* 198–204 (2d ed., Clarendon Press 1996) (defining "self-executing" provisions).

235. *Ramsar*, *supra* n. 18, at art. 1, §§ 1–2 (defining "wetlands" and "waterfowl"), and art. 2, §§ 2–3 (setting the standards for selecting wetlands for listing, and providing that the listing of a particular wetland "does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated").

236. Henkin, *supra* n. 234, at 199–200. Oddly, in the regulation issued by the Department of the Interior to provide guidelines for nominating United States sites to the Ramsar List, the Department commented that Ramsar is "deemed to be self implementing." 55 Fed. Reg. 13856 (Apr. 12, 1990). Given that the regulation itself is an implementation of Ramsar, this statement is hard to comprehend.

237. *Ramsar*, *supra* n. 18, at art. 3, § 1.

238. *Id*.

239. U.S. Const. art. I, § 8, ¶ 18.

240. 17 U.S. 316 (1819).

In theory, Congress has the authority to pass whatever legislation it might deem "necessary and proper" to carrying out the provisions of the Ramsar Convention, which as a treaty made "under the Authority of the United States" is the "supreme Law of the Land."[241] As Justice Holmes pointed out in the seminal case of *Missouri v. Holland*,[242] "[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."[243] Private property law, including conservation easement law, is part and parcel of "the great body of private relations" usually regulated by the states.[244] Justice Holmes further noted that the use of the treaty power to override state legislation is particularly appropriate when it involves "a national interest of very nearly the first magnitude," which "can be protected only by national action in concert with that of another power."[245] Certainly, given the vital role played by wetlands in our national and global ecology,[246] wetland protection can legitimately be designated a national interest of great magnitude, and the Ramsar Convention is an example of just the kind of action in concert with other powers to which Justice Holmes was referring.

As noted above, it might be possible to use the treaty power to enact environmental regulation such as the CWA pursuant to Ramsar.[247] While this might solve the Commerce Clause issues raised in *SWANCC* and *Rapanos*,[248] it would not necessarily solve the takings issues raised in *Lucas*.[249] The Court in *Holland* upheld regulation pursuant to a migratory bird treaty with the understanding that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution."[250] If an environmental regulation such as the CWA were enacted under the

241. U.S. Const. art. VI, ¶ 2.

242. 252 U.S. 416 (1920).

243. *Id*. at 434.

244. *See e.g. Fid. Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (noting that "real property law is a matter of special concern to the States," but recognizing that in a conflict between federal and state law, "the federal law must prevail").

245. 252 U.S. at 435.

246. *Supra* nn. 1–9 and accompanying text.

247. *Supra* nn. 40–41 and accompanying text.

248. *See supra* nn. 60–83 and accompanying text (referencing the holdings and repercussions of *SWANCC* and *Rapanos*).

249. *See supra* nn. 87–94 and accompanying text (discussing *Lucas* and associated regulatory takings cases).

250. 252 U.S. at 433.

treaty power, and a particular permit denial were construed as a "taking" within the meaning of the Fifth Amendment, the denial and the underlying legislation might be deemed, at least in that instance, to "contravene . . . prohibitory words" of the Constitution.[251]

Given that the Ramsar concept of "wise use" attempts to balance the requirements of the environment with the requirements of humanity,[252] conservation easements would be an ideal means to achieve this end. Once they are authorized under a state statute like the UCEA, they become a private tool for land management, and parties are left to draft specific provisions involving varying degrees of surrender and retention of property rights. Obviously, a general increase in the number of wetlands protected under conservation easements will satisfy the non-site-specific requirement of wise use. But conservation easements may also be appropriate for nomination as Ramsar sites.

To list a site with Ramsar, a plot of land protected by a conservation easement would first have to meet at least one of the following eight criteria:

> (1) [I]t contains a representative, rare, or unique example of a natural or near-natural wetland type . . . .
>
> (2) [I]t supports vulnerable, endangered, or critically endangered species or threatened ecological communities.
>
> (3) [I]t supports populations of plant and/or animal species important for maintaining the biological diversity of a particular biogeographic region.
>
> (4) [I]t supports plant and/or animal species at a critical stage in their life cycles, or provides refuge during adverse conditions.
>
> (5) [I]t regularly supports 20,000 or more waterbirds.
>
> (6) [I]t regularly supports [one percent] of the individuals in a population of one species or subspecies of waterbird.

251. *Id*.

252. *See supra* n. 26 and accompanying text (discussing Ramsar's concept of "wise use").

> (7) [I]t supports a significant proportion of indigenous fish subspecies, species or families . . . .
>
> (8) [I]t is an important source of food for fishes, spawning ground, nursery and/or migration path on which fish stocks . . . depend.[253]

Many of these criteria apply quite broadly even to comparatively small wetlands, such as those found on private property, which would be particularly appropriate for the use of a conservation easement.

After ascertaining that a wetland fits the criteria for designation with Ramsar, the Fish and Wildlife Service will consider "only those sites where . . . [t]he ownership rights are free from encumbrances," and "the lands are in public or private management that is [conducive] to the conservation of wetlands."[254] Obviously the latter is satisfied by the management of a land trust or governmental agency; whether the former implies an exception for conservation easements is debatable.[255] Additionally, the Service requires "concurrence from the State, Commonwealth or territory where the [site is] located."[256] While this would not seem to be an issue, cases such as *North Dakota v. United States*[257] raise doubts as to whether state governments would be willing to consent to Ramsar designations.[258] Furthermore, the party holding

253. Ramsar Conv. Bureau, *The Criteria for Identifying Wetlands of International Importance*, http://www.ramsar.org/key_criteria.htm (posted Aug. 1, 1999).

254. 55 Fed. Reg. at 13856.

255. A conservation easement, by its very nature, is an "encumbrance" on land. A landowner would presumably designate the site, not the easement itself, for Ramsar listing. But if the land must be "unencumbered," then land that is specifically protected by a conservation easement would not be designable, contrary to logic and common sense.

256. 55 Fed. Reg. at 13856.

257. 460 U.S. 300 (1983).

258. *Id*. The Court upheld the Secretary of the Interior's acquisition of conservation easements "over small wetland areas suitable for migratory waterfowl breeding and nesting grounds," notwithstanding the opposition of the state of North Dakota, which had attempted by statute to restrict the easements acquired by the Fish and Wildlife Service. *Id.* at 301. North Dakota also argued that it could revoke consent that it had previously given to the acquisition of wetland conservation easements, an argument which the Court rejected. *Id*. at 313. The Court explained as follows: "'To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs.'" *Id*. at 318 (quoting *U.S. v. Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973)). Although the Court sided with the federal government, this case demonstrates that states are not always eager to give their consent to federal intrusion

title to the land area must nominate the site and must send a packet of information materials describing, among other things, the geographical location, the site description, and the criteria for inclusion.[259]

While these are generally reasonable provisions, the ability of state officials to withhold their consent to an action already consented to by a private party is troubling. Likewise, although the provisions regarding encumbrances and title-holder nomination are understandable, they are not readily applicable in the context of conservation easements. When a land trust or governmental agency seeks to acquire a conservation easement over a given wetland, it should be able to include in the easement instrument a provision granting it the authority to pursue Ramsar designation (provided the conveyor of the easement consents). The Fish and Wildlife Service should amend these specific provisions of the guidelines in order to facilitate the listing of private wetlands under conservation easements as a site-specific conservation measure.

Finally, and most importantly, Congress should pass a federal conservation easement enabling act under the treaty power, in order to shore up conservation easements against the threats delineated in Part IV(A) of this Comment, and eliminate the confusion and inconsistencies among state laws as outlined in Part IV(B). The act should generally conform to the UCEA, but with several important differences.

First, the definition of "conservation easement" should be revised and focused on wetlands. The UCEA purports to protect "natural . . . values of real property" and "natural resources," and maintain and enhance "air or water quality."[260] While this vagueness may be useful in a definition that is intended to apply broadly, it may also allow certain wetland conservation easements to fall between the cracks.[261] A federal statute enacted pursuant to Ramsar should focus directly on wetlands, borrowing Ramsar's expansive definition of "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary,

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into state property law.

259. 55 Fed. Reg. at 13856.

260. UCEA § 1(1).

261. *Supra* nn. 139–143 and accompanying text.

with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres."[262]

Additionally, the definition of "holder" as a "charitable corporation, charitable association, or charitable trust"[263] should incorporate explicitly the UCEA drafters' commentary that "charitable" is not simply to be defined by the tax code.[264] Specifically, the statute should be drafted in such a way as to prevent forfeiture in the event that a charitable organization develops ties with non-charitable organizations or is found to have among its members owners of surrounding land. The statute should be flexible enough to allow for natural development and change in the holder's organization and activities without automatically excluding it from the class of permitted holders.

Moreover, the language that allows for recordation, release, and termination "in the same manner as other easements"[265] should exempt conservation easements from the requirements of "marketable title" and tighten the circumstances under which release and termination would be allowed. It should also explicitly state that recordation is not necessary in order for the easement to be valid or enforceable. The language allowing courts to "modify or terminate a conservation easement in accordance with the principles of law and equity"[266] should specifically prohibit judicial modification except in accordance with the original intent to conserve the wetland,[267] or in the event that the land no longer serves and is not likely ever to serve a conservation purpose, for reasons other than actions by the fee owner.

Furthermore, conservation easements should be unlimited in duration, with exceptions for termination as above. Likewise, the act should include an extended statute of limitations, exempting federal conservation easements from state statutes of limitations, and providing that actions to enforce, modify, or terminate an

262. *Ramsar*, *supra* n. 18, at art. 1, § 1.
263. UCEA § 1(2)(ii).
264. *Id*. at cmt. to § 1.
265. *Id*. at § 2(a).
266. *Id*. at § 3(b).
267. In accordance with the *cy pres* doctrine, the court would be allowed to approximate by prescribed terms and conditions the original objective, even though circumstances might have changed and the intent of the parties as originally formulated could not be effectuated. *Id*. at cmt. to § 3.

easement may be brought in federal court. The statute of limitations should be long enough to allow under-staffed and underfunded land trusts a reasonable opportunity to discover, investigate, and litigate easement violations.

A federal conservation easement statute should exempt federal easements from state powers of eminent domain except by the permission of a designated federal agency, and narrow the eminent domain powers of the federal government, as well as the agency's ability to consent to state takings, to actual public uses, such as parks or roads. The easement should not be terminable by merger with the owner of the servient estate, but only by release under strictly enumerated circumstances, including the kind of substantive requirements or agency authorization required by some state statutes.[268] Likewise, there should be a provision within the statute for automatic transfer to a governmental agency or designated charity, or some other form of transfer, perhaps with judicial oversight, upon the bankruptcy or dissolution of the land trust that holds the easement. There should also be a one-way attorney fee-shifting provision that would allow land trusts or other charities to recover their costs in suits to enforce or defend the easements.

Finally, while a federal conservation easement statute would be useful as a non-site-specific, general conservation measure, it should include language authorizing the parties to the conveyance to submit the site to the Fish and Wildlife Service for listing as a Ramsar site. Such language should override regulations that generally require consent by the state government, and provided both parties agree, should allow either (not just the fee owner) to take on the burden of applying for designation.

VI. CONCLUSION

The Ramsar Convention requires that the United States promote the conservation of listed wetlands as well as the "wise

268. *See e.g.* Neb. Rev. Stat. § 76-2, 113 (requiring that release by the holder "shall be approved by the governing body which approved the easement," and only upon a finding that "the easement no longer substantially achieves the conservation or preservation purpose for which it was created"); N.J. Stat. Ann. § 13:8B-6 (providing that "no conservation restriction acquired pursuant to this act shall be released without the approval of the Commissioner of Environmental Protection," who must "take into consideration the public interest in preserving these lands in their natural state," among other considerations).

use" of wetlands generally. In contrast, recent developments in Commerce Clause and takings jurisprudence have called into question Congress' ability to protect wetlands through environmental regulations, and have severely curtailed the authority of the Corps of Engineers to implement Section 404 of the Clean Water Act. The treaty power presents an alternative basis for federal wetland protection, and conservation easements present an attractive, private-property alternative to "command and control" regulation. Although conservation easements are a product of state law, state conservation easement enabling statutes vary widely in the protections they afford, and provide little protection against potential termination on the traditional common-law grounds for challenging servitudes on land. Ultimately, a federal conservation easement enabling statute, enacted pursuant to United States obligations under Ramsar, would bring strength and consistency to a land management tool fraught with weaknesses and inconsistency, and place wetland conservation easements on firm ground.