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KELO, CONSERVATION EASEMENTS, AND FOREVER: WHY EMINENT DOMAIN IS NOT A SUFFICIENT CHECK ON CONSERVATION EASEMENTS' PERPETUAL DURATION

DERRICK P. FELLOWS*

INTRODUCTION

A. *The Problem of Perpetuity*

Kelo v. City of New London affirmed that promoting economic development is a permissible public purpose sufficient to justify taking private property by eminent domain and that a legislative body is to receive broad deference in making this determination.¹ Soon thereafter, many state courts and legislatures reacted to *Kelo* by restricting local and state governments' power to condemn private property for purposes of economic development.² Most commentators have harshly criticized *Kelo*, both in academic journals and in the popular press.³

Professor Gerald Korngold argues that *Kelo* was decided correctly and that eminent domain is essential in the context of conservation easements.⁴ As Professor Korngold notes, conservation easements are usually of unlimited duration⁵ and are designed to preserve the current state of

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¹ *Kelo v. City of New London*, 545 U.S. 469, 481 (2005).

² Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1082–83 [hereinafter Korngold, *Contentious Issues*]; see also 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79F.03[3][b][iv] (Michael Allan Wolf ed., 2009) (detailing states' anti-*Kelo* legislation and constitutional amendments).

³ Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1579 (2007) [hereinafter Korngold, *Intergenerational Conflicts*]; see also 13 POWELL ON REAL PROPERTY, *supra* note 2, § 79F.03[3][b][iv] (noting that the public reaction against *Kelo* was “swift, intense, and unprecedented”).

⁴ Korngold, *Contentious Issues*, *supra* note 2, at 1082–83.

⁵ *Id.* at 1051; Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, [2004] 34 Env'tl. L. Rep. (Env'tl. Law Inst.) 10,223, 10,226 (Mar. 2004) (noting that the “vast majority” of conservation easements are perpetual in duration).

land in perpetuity.⁶ These easements will likely conflict with future land-use needs as societal goals, patterns of living, and scientific knowledge change over time.⁷ Conservation easements' perpetual and inflexible nature will thus potentially cause major problems for future generations, and conservation easements on specific parcels of land might eventually conflict with the public interest.⁸ Eminent domain is necessary to rectify the rare situations when private arrangements such as conservation easements frustrate an essential public need.⁹ A flexible power of eminent domain is a necessary tool for future generations to "remedy the missteps of the past and develop community-based, land use plans that will meet the currently unknowable, ultimately pressing needs of the future."¹⁰

One of Professor Korngold's "currently unknowable, ultimately pressing needs of the future"¹¹ might have already become a need of the present: the development of renewable energy resources. Poorly located conservation easements can prevent the development of renewable energy resources. Conservation easements with the purpose of preserving open

⁶ Korngold, *Intergenerational Conflicts*, *supra* note 3, at 1575.

⁷ See Korngold, *Contentious Issues*, *supra* note 2, at 1063 ("[H]istory shows us that the constant shifts in the human condition, technology, and economic arrangements have meant differing uses of land over the generations."). Concepts of what creates an ideal society change over time. See Korngold, *Intergenerational Conflicts*, *supra* note 3, at 1554. So does the cultural understanding of what constitutes a proper conservation goal. See Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 760 (2002). Moreover, scientific knowledge regarding ecosystems is not yet fully developed and may one day suggest a need to alter current land uses. See *id.* at 757–58. For example, poorly placed conservation easements might impede "smart growth" and exacerbate urban sprawl. See *id.* at 762–63; see also Dana Joel Gattuso, *Conservation Easements: The Good, the Bad, and the Ugly*, NAT'L POL'Y ANALYSIS (May 2008), <http://www.nationalcenter.org/NPA569.html> (listing examples of how conservation easements might become antiquated, useless, and even harmful as cultural norms and scientific knowledge evolve).

⁸ Korngold, *Intergenerational Conflicts*, *supra* note 3, at 1576. Current plans to protect the environment will almost certainly need to be revised in the future as current scientific knowledge becomes outdated. Mahoney, *supra* note 7, at 783. Where future generations have the unambiguous ability to alter outdated policies, this poses little problem. *Id.* "When long-range plans are deliberately designed to thwart future modification, however, implicit assumptions that today's ecological science is correct can no longer be dismissed as the inevitable hubris of each generation, but instead should be recognized as a potential source of harm." *Id.* at 783–84.

⁹ Korngold, *Contentious Issues*, *supra* note 2, at 1083.

¹⁰ Korngold, *Intergenerational Conflicts*, *supra* note 3, at 1578; accord Korngold, *Contentious Issues*, *supra* note 2, at 1083 (arguing that *Kelo* "provid[es] government with the tool necessary to meet changing needs and correct the errors of the past").

¹¹ Korngold, *Intergenerational Conflicts*, *supra* note 3, at 1578.

space, for example, might not be amenable to wind turbines any more than to shopping centers.¹² Given the level of NIMBYism (derived from “not-in-my-back-yard” sentiment) raised in opposition to wind turbines in particular,¹³ one suspects that some conservation easements may even include provisions expressly forbidding the placement of wind turbines on the burdened property. If the terms of conservation easements can be read to exclude the development of wind farms, transmission lines, and so forth, then this means that as the amount of acreage burdened by conservation easements increases, the amount of acreage available for renewable power generation likewise decreases. Therefore, the competing policy goals of preserving open space and developing renewable energy resources might clash, particularly as governments increasingly mandate renewable energy standards (also known as renewable portfolio standards, “RPS”).¹⁴ Eminent domain can thus be used to aid the development of renewable energy sources when poorly placed conservation easements might otherwise impede such development.

B. *Responding to Professor Korngold*

Although Professor Korngold appears to be correct in arguing that eminent domain provides a way for allowing necessary development to proceed in the face of poorly placed conservation easements,¹⁵ his argument ignores the fact that many conservation easements are held not by private parties but by governments and government agencies, over which a state

¹² See, e.g., Matthew J. Richardson, Note, *Conservation Easements as Charitable Trusts in Kansas: Striking the Appropriate Balance Among the Grantor’s Intent, the Public’s Interest, and the Need for Flexibility*, 49 WASHBURN L.J. 175, 175–76 (2009) (posing a hypothetical scenario in which local residents object to a wind farm being built on ranch land encumbered by a conservation easement and suggesting that the wind farm goes against the easement grantor’s intent to prevent “any development” on the ranch land).

¹³ See Eric R.A.N. Smith & Holly Klick, *Explaining NIMBY Opposition to Wind Power*, ALLACADEMIC, 2–4 (Aug. 28, 2008), http://www.allacademic.com/meta/p279566_index.html (follow the “Click here to view the document” hyperlink) (noting the resistance that wind farms often face). Cf. Leora Broydo Vestel, *On the Radar, and That’s the Problem*, N.Y. TIMES, Aug. 27, 2010, at B1 (noting that the U.S. Department of Defense has objected to several wind turbine installations because of potential interference to radar systems).

¹⁴ See *States with Renewable Portfolio Standards*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP’T OF ENERGY, http://apps1.eere.energy.gov/states/maps/renewable_portfolio_states.cfm (last updated June 16, 2009) (noting that twenty-four states and the District of Columbia have enacted binding RPS and that five other states have established nonbinding renewable energy goals).

¹⁵ See, e.g., Korngold, *Contentious Issues*, *supra* note 2, at 1083.

or local government will have little, if any, power of eminent domain.¹⁶ Governments at all levels are “increasingly rely[ing] on conservation easements to accomplish land protection goals,”¹⁷ although precise documentation of the extent of governments’ conservation easement holdings is not available.¹⁸ The U.S. Department of Agriculture (“USDA”), for example, holds a large number of agricultural conservation easements and allocated over \$790 million to acquire permanent conservation easements in 2004 alone.¹⁹ The Natural Resources Conservation Service (“NRCS”), a branch of the USDA, held more than 11,000 conservation easements covering a total of over two million acres in 2005.²⁰ Conservation easements are also “an important instrument [sic] in the construction and design of the habitat conservation plans that landowners and the U.S. Fish and Wildlife Service enter into under the Endangered Species Act.”²¹ In California, in 2003, the top four conservation easement holders, in terms of the number of conservation easements held, were all state and federal governments or agencies.²² There were an estimated 50,000 government-held conservation easements in the early 2000s in New Jersey alone; local and regional private land trusts, by contrast, held about 18,000 conservation

¹⁶ See *infra* Part I.

¹⁷ Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031, 1033 (2006) [hereinafter McLaughlin, *Amending Perpetual Conservation Easements*]; see also Mahoney, *supra* note 7, at 752 (noting that government agencies widely use conservation easements). The same is true for the nonprofit sector. McLaughlin, *Amending Perpetual Conservation Easements, supra*, at 1033. See also Bruce I. Knight, Chief, Natural Res. Conservation Serv., Remarks at the National Land Conservation Conference: Strengthening Conservation Easements (Oct. 17, 2005), <http://www.nrcs.usda.gov/news/speeches05/coneasments.html> (“Over the past 20 years, we’ve also worked with land trusts on conservation easements. And our easement portfolio has grown exponentially.”).

¹⁸ Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold’s Critique of Conservation Easements*, 2008 UTAH L. REV. 1561, 1563 n.5.

¹⁹ Amy Wilson Morris, *Easing Conservation? Conservation Easements, Public Accountability and Neoliberalism*, 39 GEOFORUM 1215, 1219 (2008). Agricultural landowners own the majority of the private land in the United States, and consequently many conservation easements are sited on farms, ranches, and working forests. *Id.* at 1217.

²⁰ Knight, *supra* note 17.

²¹ Mahoney, *supra* note 7, at 752.

²² See Morris, *supra* note 19, at 1220 tbl.1 (listing data). The California Department of Fish & Game held 264 conservation easements, the Natural Resources Conservation Service (a branch of the USDA) held 246, the U.S. Fish and Wildlife Service held 199, and the California Department of Parks & Recreation held 144. *Id.* By contrast, the Land Trust of Napa County, which was the fifth largest easement holder and the largest private easement holder, held only 89 conservation easements. *Id.*

easements nationwide in 2003.²³ Government entities acquire most of the conservation easements conveyed in Maryland and Virginia.²⁴ In October 2007, for example, the Virginia Outdoors Foundation held 2217 open-space easements totaling 409,383 acres—more than 1.5% of the total land in the state.²⁵

Also suggestive of governments' role in holding conservation easements is private land trusts' increasing use of a type of transaction known as a preacquisition or a "prearranged flip."²⁶ In these transactions, the land trust acquires a conservation easement and then sells it to a government agency soon thereafter.²⁷ This practice appears to be prevalent, although only limited data exist as to the precise quantity of land under easement transferred to federal and state government agencies in this manner.²⁸

Taking into account the increasing role of governments in acquiring conservation easements, this note will explore the difficulties that arise when a state or local government determines that a conservation easement should be modified or terminated to accommodate development that is determined to be necessary for the public good.²⁹ Although the condemnation process will be fairly straightforward when the easement is held by a private land trust or other private party, sovereign immunity and related issues interfere when the easement is held by another government body.³⁰ The difficulties in modifying and terminating government-held conservation easements become a particularly important issue when the conservation easement is held by the federal government,³¹ which, like a private

²³ Morris, *supra* note 19, at 1220.

²⁴ McLaughlin & Machlis, *supra* note 18, at 1563–64.

²⁵ Nancy A. McLaughlin, *Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (Or Not)*, 26 VA. ENVTL. L.J. 399, 404 [hereinafter McLaughlin, *Condemning Open Space*]. The Virginia Outdoors Foundation is a state entity that acquires and manages the majority of the conservation easements conveyed in Virginia under the Open-Space Land Act, enacted in 1966. *Id.* at 402–03.

²⁶ See Gattuso, *supra* note 7 (noting that land trusts increasingly use preacquisitions).

²⁷ *Id.*

²⁸ *Id.*

²⁹ This note does not advocate terminating conservation easements—or condemning property interests of any sort—indiscriminately. Nevertheless, it seems highly likely that some conservation easements will need to be modified or terminated at some point in the future to legitimately further the public good. The scope of this note is limited to those rare situations.

³⁰ See *infra* Part I.

³¹ See, e.g., Joe Lanane, *PGA Championship Visitors in Wisconsin to Rough It with Just One Ramp*, DAILY REP. (Milwaukee, WI), Aug. 10, 2010, available at 2010 WLNR 16426554 (federal conservation easement blocking Wisconsin Department of Transportation's construction of an interstate highway interchange).

land trust, might be geographically distant from the community in which the easement is situated and might usurp the community's role in democratically shaping local public policy.³² Alternative methods of obtaining development rights over lands encumbered by government-held conservation easements or of regulating the placement of these easements *ex ante* will then be necessary.³³

Part I of this note analyzes the constitutional and statutory restrictions on exercising the power of eminent domain over government-held conservation easements. Government bodies often have only a limited power of eminent domain over one another, and thus condemning government-held conservation easements is an inadequate remedy to counteract the otherwise perpetual nature of many conservation easements. Part II analyzes alternative methods of obtaining development rights, such as invoking the doctrine of changed conditions and initiating *cy pres* proceedings, and discusses the difficulties that will arise with these methods if courts begin applying charitable trust principles to conservation easements. Part III proposes legislative reforms that might minimize the adverse impact of conservation easements' perpetual duration. Such reforms include (1) legislation authorizing public bodies to modify and terminate conservation easements outside of condemnation proceedings, even if charitable trust principles are held to apply to conservation easements, and (2) legislation requiring all future conservation easements to comply with each locality's comprehensive plan by requiring grantors of conservation easements to obtain permission from a locality's zoning board before granting the easement. Part IV proposes a Medicaid-like system of providing states with funding to acquire and administer conservation easements and concludes that by divesting the federal government of its conservation easements and delegating the handling of these easements to the states, more flexible and effective land conservation easements could be put into place.

³² See Korngold, *Intergenerational Conflicts* *supra* note 3, at 1576–77 (noting that, when a conservation easement is held by a private, perhaps geographically distant organization rather than the local government, the “key matter of local land use” of whether the public interest in economic development of a parcel of land outweighs the public interest in conservation “will not be the subject of public policy debate based on the democratic process but rather left to a private group with a predetermined agenda.”); *see also* Mahoney, *supra* note 7, at 775–76 (“Nonprofit organizations and governmental entities will pursue their own agendas, which will be in large part a function of the interests and preferences of their respective constituencies, and may or may not coincide with broader societal interests.”).

³³ *See infra* Parts II–IV.

- I. RESTRICTIONS ON CONDEMNING GOVERNMENT-HELD CONSERVATION EASEMENTS
 - A. *Principles of Eminent Domain Affecting Conservation Easements Held by Public Bodies at the Same Level of Government*
 1. The Prior Public Use Doctrine

Although only the state itself has the inherent power of eminent domain at the state level,³⁴ a state may delegate this power to its subdivisions and agencies.³⁵ A state may delegate its power of eminent domain to public officials, special commissions, municipalities, counties, towns, other public corporations, public service corporations, private corporations, and, under certain circumstances, individuals.³⁶ Although state legislatures can authorize others to exercise the power of eminent domain, they cannot divest themselves of their power of eminent domain entirely.³⁷

The prior public use doctrine proscribes the condemnation of land set aside for a public use to devote it to an inconsistent public use, absent express or implied legislative authorization to do so.³⁸ In doing so, this doctrine limits the power of eminent domain that public bodies at the same level of government may exercise over property interests held by one another.³⁹ The prior public use doctrine is necessary to regulate the situation when several government entities simultaneously have only a general

³⁴ See 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.01[1] (rev. 3d ed. 2010) (noting that states have an inherent power of eminent domain as sovereign powers); *id.* at § 3.03[3][a] (noting that local governments are not sovereign and therefore may not exercise the power of eminent domain without authorization from the state constitution or legislature or under home rule authority); A.S. Klein, Annotation, *Power of Eminent Domain as Between State and Subdivision or Agency Thereof, or as Between Different Subdivisions or Agencies Themselves*, 35 A.L.R.3D 1293, 1326 at § 8 (1971) (noting that a governmental or political subdivision of a state has no inherent power to condemn the property of the state itself).

³⁵ Klein, *supra* note 34, at 1326 § 8.

³⁶ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03[3][a], [3][b][i]–[iii] (rev. 3d ed. 2010).

³⁷ *Id.* at § 3.03[1] (noting that state legislatures cannot “delegate[] away” their power of eminent domain).

³⁸ See *id.* at § 2.17.

³⁹ See *id.* (noting that the prior public use doctrine applies to condemning authorities with “equally delegated powers of eminent domain.”); Klein, *supra* note 34, at 1334 § 11 (noting that the rule applies to “condemnation by a governmental subdivision of a state, or its agency, of the property of another such subdivision or agency”).

delegation of eminent domain authority from the legislature.⁴⁰ This doctrine is designed to prevent a “free for all of battling entities all equipped with eminent domain power, passing title back and forth.”⁴¹

A condemner with a delegated power of eminent domain (such as a municipal corporation) generally may not condemn property already devoted to a public use where “the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction,” unless the legislature has authorized it to do so expressly or by necessary implication.⁴² A general delegation of eminent domain power from the legislature does not provide authorization for this type of condemnation without legislative intent to do so, that is, where “it can be clearly inferred from the nature and situation of the proposed work, and from the impracticability of constructing it without encroaching on land already used by the public.”⁴³ Such an implication does not arise unless the denial of eminent domain authority would frustrate the exercise of a power that the legislature has expressly granted to the condemner.⁴⁴ If the public purpose can be accomplished without taking public-use land, there is no such implication.⁴⁵

The prior public use doctrine exempts land from condemnation when the owner of the land is legally obligated to maintain the public use to which the land is devoted.⁴⁶ Thus, this doctrine does not exempt land from condemnation when: the owner merely voluntarily devotes the land to a public use; the land is vacant or used for purposes not pertaining to the corporation’s franchise, even when the corporation (such as a school) is legally obligated to serve the public; or the land was originally acquired

⁴⁰ *United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land*, 753 F. Supp. 50, 54 (D.P.R. 1990).

⁴¹ *Id.*

⁴² 1A JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 2.17 (rev. 3d ed. 2010). The minority rule requires only that the proposed use “materially impair or interfere with the existing public use of the subject property rather than requiring an interference so severe as to amount to a destruction.” *Id.* Tennessee and Florida appear to follow the minority rule. *See id.* at n.4 (citing cases).

⁴³ *Id.* at § 2.17.

⁴⁴ *Id.* at § 2.17[1]. Jurisdictions are divided as to the degree of necessity required to allow condemnation of public-use land: some jurisdictions require a degree of necessity such that the grant of eminent domain power would be otherwise defeated and further require that this necessity arise out of physical conditions over which the condemner has no control; other jurisdictions take into account factors of practicability and economy and require only a reasonable necessity, even where alternative procedures are possible. *Id.* at § 2.17[2].

⁴⁵ *Id.* at § 2.17[1].

⁴⁶ *Id.* at § 2.17[5].

for a public use but was later abandoned or put to a private use.⁴⁷ However, the method by which the condemnee originally acquired the property (for example, by purchase or by eminent domain) is irrelevant in this context.⁴⁸

Under the consistent use exception, property devoted to a public use may still be condemned when that public use will not be “materially impaired or destroyed” by the proposed use, even if some inconvenience might be caused to the original user.⁴⁹ Regardless, the property may not be condemned to devote it to the same use but in the hands of a different owner, unless the condemnation proceedings will transfer title from a public service corporation (such as a public utility) to a municipality or a purely public corporation.⁵⁰ Most economic development, however, would seem to be inconsistent with conservation, and so this exception would be ineffective in allowing public bodies with a general grant of eminent domain to condemn government-held conservation easements to further such development.

2. The Paramount Public Use Doctrine

The paramount public use doctrine, where adopted, provides greater flexibility for courts to allow condemnation of land devoted to a public use.⁵¹ An exception to the prior public use doctrine,⁵² the paramount public use doctrine is employed by some courts to allow condemnation of property devoted to public use even when the existing use would be practically destroyed if the condemnor can show that the proposed use is of paramount public importance and that its purpose cannot be accomplished in any other way.⁵³ In other words, the paramount public use doctrine requires

⁴⁷ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17[5] (rev. 3d ed. 2010).

⁴⁸ *Id.* at § 2.17.

⁴⁹ *Id.* at § 2.17[8]; accord Klein, *supra* note 34, at 1337 § 12; see also United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land, 753 F. Supp. 50, 54 (D.P.R. 1990) (noting that the prior public use doctrine requires specific legislative authorization to condemn public-use land for a “different (and inconsistent) public use”).

⁵⁰ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17[9] (rev. 3d ed. 2010). The rationale behind this rule is that there is an increased public benefit inuring from governmental operation. *Id.*

⁵¹ See Joris Naiman, Comment, *Judicial Balancing of Uses for Public Property: The Paramount Public Use Doctrine*, 17 B.C. ENVTL. AFF. L. REV. 893, 893, 895 (1990).

⁵² *Id.* at 898.

⁵³ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17 (rev. 3d ed. 2010). See also *id.* at n.6 (listing cases in Texas); Klein, *supra* note 34, at 1340 § 13 (listing cases in Arizona and Texas). See generally Linda A. Sharp, Annotation, *Construction and Application of Rule Requiring Public Use for Which Property Is Condemned to Be “More Necessary” or*

the court to balance the uses proposed for a specific parcel of land and determine which use would produce the greater benefit to the public.⁵⁴ As with the prior public use doctrine, this judicial balancing occurs only when there is no clear legislative intent.⁵⁵ This doctrine allows courts to allocate public property in a more deliberative manner than by “relying solely upon the arbitrary procedural posture of the parties” as being either the condemnor or the condemnee.⁵⁶ This is a minority rule, however, and many courts have been disinclined to balance the relative benefits of the proposed and existing uses.⁵⁷ In jurisdictions applying the paramount public use doctrine, conservation easements could thus be terminated to make way for necessary economic development. As a corollary, they might not be terminated if the court finds that the conservation value of the easement provides a greater public benefit than the proposed economic development. Proceedings under the paramount public use doctrine would be similar to *cy pres* proceedings in that the court would engage in a balancing test.⁵⁸ A court invoking the paramount public use doctrine, however, would retain the ability to extinguish any trust associated with the conservation easement.⁵⁹ The additional flexibility provided by the paramount public use doctrine would therefore alleviate some of the problems created by government-held conservation easements, at least when the condemnor and the condemnee both hold a general power of eminent domain as delegated from the legislature.

“Higher Use” than Public Use to Which Property Is Already Appropriated—State Takings, 49 A.L.R.5TH 769 (1997) (listing cases). California statutorily permits takings for a more necessary public use under certain circumstances. See Naiman, *supra* note 51, at 908 (noting that the California statute codifies judicial balancing of uses of public land by setting forth a list of rebuttable presumptions); Klein, *supra* note 34, at 1340–41 (listing cases interpreting the California statute).

⁵⁴ Naiman, *supra* note 51, at 898.

⁵⁵ *Id.* at 920.

⁵⁶ *Id.* at 917. “Common sense suggests . . . that the best public use of a site does not depend upon whether the user happens to be a condemnor or a condemnee.” *Id.*

⁵⁷ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17[3] (rev. 3d ed. 2010); see also Naiman, *supra* note 51, at 900 (noting that a court’s “reluctance to intrude upon the legislative policy-making function” may inhibit it from balancing competing public uses).

⁵⁸ See *infra* Part II.B.

⁵⁹ See *United States v. Carmack*, 329 U.S. 230, 236, 239–40 (1946) (holding that the federal government could obtain title to land free of restrictions even though the land had been held in trust by a municipal government); *United States v. 11.037 Acres of Land*, 685 F. Supp. 214, 217 (N.D. Cal. 1988) (holding that a federal condemnation action extinguished a state-held public trust easement); 26 AM. JUR. 2D *Eminent Domain* § 93 (2004) (noting that state and federal governments have been able to take lands held in trust). See *infra* Part II.B for discussion of the applicability of trust principles to conservation easements.

B. Principles of Eminent Domain Affecting Conservation Easements Held by Public Bodies at Different Levels of Government

1. State Governments Vis-à-Vis Local Governments

As a sovereign power, a state has a power of eminent domain restricted only by the U.S. Constitution and the respective state constitution.⁶⁰ The power to take property for public use without the property owner's consent is an "essential attribute of sovereignty,"⁶¹ and a state has this power even if it is not expressly granted to it in the state constitution.⁶² The prior public use doctrine does not preclude states from condemning property owned by local governments or state agencies.⁶³ A state has a superior right of eminent domain to that of a municipality and to a utility.⁶⁴ A governmental or political subdivision of a state, by contrast, has no inherent power to condemn property of the state itself and must instead be granted this power by the state legislature either expressly or by necessary implication.⁶⁵ Accordingly, a state will be able to condemn a conservation easement held by a municipality or utility, but a municipality or utility will be unable to condemn a conservation easement held by the state.

In some cases, statutes might preclude states from condemning conservation easements. For example, some states provide for the purchase of conservation easements over agricultural lands by statute and require that certain conditions be met before the easements can be condemned.⁶⁶ In Virginia, open-space easements created under the Virginia

⁶⁰ 29A C.J.S. *Eminent Domain* § 23 (2007).

⁶¹ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.01[1] (rev. 3d ed. 2010); *accord* *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879).

⁶² 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.01[1] (rev. 3d ed. 2010); *United States v. City of Tiffin*, 190 F. 279, 280 (C.C.N.D. Ohio 1911) (noting that the states' powers of eminent domain are inherent in their sovereignty and do not derive from their constitutions).

⁶³ *See Tiffin*, 190 F. at 281 (noting that the general rule that a condemnor may condemn public-use property only with the express authorization of the legislature serves to protect the sovereign from unauthorized uses of its power by municipal or private public service corporations and that this rule does not apply to the sovereign itself); Klein, *supra* note 34, at 1308 § 3 (noting that a state has the sovereign power to condemn property within its boundaries for public purposes "despite the fact that the property is already devoted to a public use by a subdivision or agency of that state").

⁶⁴ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17[4] (rev. 3d ed. 2010).

⁶⁵ Klein, *supra* note 34, at 1326 § 8.

⁶⁶ Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1930 (2008) [hereinafter McLaughlin, *Condemning Conservation Easements*].

Open-Space Land Act are immune to condemnation and may not be released except when certain statutory criteria are met.⁶⁷ In these situations, the conservation easements themselves do not constrain the state's power of eminent domain; rather, competing public policies do so.⁶⁸

2. The Federal Government Vis-à-Vis State and Local Governments

The U.S. government receives its power of eminent domain from the U.S. Constitution.⁶⁹ No single clause in the Constitution grants the U.S. government its power of eminent domain; rather, this power is derived from the various enumerated powers granted to it, such as its powers over commerce and post offices.⁷⁰ The U.S. Constitution and acts of Congress have supremacy over state legislation.⁷¹ The federal government, therefore, has the authority to condemn state-owned lands.⁷² The federal government may condemn municipal property to the same extent that it may condemn state-owned property because a municipality is “a creature of the state.”⁷³ Likewise, the federal government may condemn the property of a public service corporation for proper purposes.⁷⁴ Moreover, the federal government is not constrained by the prior public use doctrine when condemning state

⁶⁷ George C. Freeman, Jr., *An Update on Virginia Law Applicable to the Possible Destruction of “Perpetual” Easements on Historic Properties and Open Space by Condemnation: It All Depends upon Who Is the Grantee*, 26 VA. ENVTL. L.J. 429, 429–30 (2008); see also McLaughlin, *supra* note 25, at 411 (noting that “the mechanism for extinguishing open-space easements to accommodate development and growth was built into the Open-Space Land Act rather than the eminent domain laws of the state”).

⁶⁸ McLaughlin, *Condemning Conservation Easements*, *supra* note 66, at 1930.

⁶⁹ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.02[1] (rev. 3d ed. 2010).

⁷⁰ *Id.* at § 3.02[2][a].

⁷¹ *Id.* at § 2.18; see also, e.g., *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) (quoting *Florida v. Mellon*, 273 U.S. 12, 17 (1927)) (noting that the constitutional powers of federal government trump those of the state when the two conflict).

⁷² E.g., *Guy F. Atkinson Co.*, 313 U.S. at 534 (citing *Wayne Cnty. v. United States*, 53 Ct. Cl. 417 (1918), *aff'd* 252 U.S. 574 (1920)) (“The fact that land is owned by a state is no barrier to its condemnation by the United States.”). Other than the usual constitutional constraints on the exercise of eminent domain, the federal power to condemn state-owned lands devoted to a public use is apparently also constrained to the extent that the United States may not “arbitrarily imperil the very functions of the State itself,” *United States v. 4450.72 Acres of Land*, 27 F. Supp. 167, 175 (D. Minn. 1939), but this would not appear to be an issue in the context of conservation easements.

⁷³ 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.19 (rev. 3d ed. 2010).

⁷⁴ *Id.* at § 2.21.

lands,⁷⁵ nor would application of the paramount public use doctrine protect the state from federal condemnation of its lands.⁷⁶

Although the federal government is not constitutionally proscribed from condemning state-owned lands beyond the usual constitutional restrictions on eminent domain, it may be statutorily limited. For example, the Energy Policy Act of 2005⁷⁷ grants the Federal Energy Regulatory Commission authority to issue permits to public utilities to build or modify electric transmission facilities within an approved national electric transmission corridor.⁷⁸ Although these permits enable public utilities to exercise the federal power of eminent domain to obtain the necessary rights-of-way, they do not grant public utilities the power to condemn state-owned or federally owned land.⁷⁹

By contrast, state and local government bodies have no right of eminent domain over federal property, absent express consent.⁸⁰ This

⁷⁵ *United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land*, 753 F. Supp. 50, 54 (D.P.R. 1990); *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 685 (1896) (“[T]he power of Congress to take land devoted to one public use for another and a different public use upon making just compensation cannot be disputed.”); *United States v. Jotham Bixby Co.*, 55 F.2d 317, 319–20 (S.D. Cal. 1932) (“[T]he limitation which prohibits a municipality from using for another and inconsistent purpose land already dedicated to a public use, as, for example, a public park, does not apply against the government of the United States.”), *aff’d*, *C. M. Patten & Co. v. United States*, 61 F.2d 970 (9th Cir. 1932), *rev’d and vacated as moot*, 289 U.S. 705 (1933) (reversed and vacated on other grounds).

⁷⁶ See *Acquisition of 0.3114 Cuerdas of Condemnation Land*, 753 F. Supp. at 54–55 (“We may not . . . weigh the relative benefits of the two proposed public uses and make a judicial finding that one is ‘superior’ to the other (meaning more important or more beneficial to the public). The federal use is deemed to be superior *precisely because it is the federal use.*”) (emphasis in original); 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17[4] (rev. 3d ed. 2010) (noting that states cannot assert balancing of benefits of the proposed and existing uses against the federal government).

⁷⁷ Energy Policy Act of 2005, Pub. L. 109–58, 119 Stat. 594. (2005) (codified at 42 U.S.C. §§ 15801–16524).

⁷⁸ McLaughlin, *Condemning Open Space*, *supra* note 25, at 399.

⁷⁹ *Id.* at 400.

⁸⁰ *Utah Power & Light Co. v. United States*, 230 F. 328, 338 (8th Cir. 1915) (“The title of the United States can be divested by no other power, by no other means, in no other mode, than that which Congress shall sanction and prescribe. It cannot be done by the action of the people or Legislature of a territory or state.”) (quoting *Van Brocklin v. State of Tennessee*, 117 U.S. 151 (1886)), *modified on other grounds*, 242 F. 924 (8th Cir. 1917); *City of Sacramento v. Sec’y of Housing & Urban Dev.*, 363 F. Supp. 736, 737 (E.D. Cal. 1972) (noting that property belonging to the United States cannot be condemned without the consent of Congress and explaining that “this rule is simply an application of the broader principle of sovereign immunity”); 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.22 (rev. 3d ed. 2010) (“The power of a state to condemn federal lands within its territorial limits is denied no matter what the existing federal use may be unless the federal government consents to the condemnation.”).

presents a problem because local and state government bodies have a greater interest in advancing local development than does the federal government, and given these government bodies' lack of eminent domain power over federally held property, federally held conservation easements might prevent these governments from developing their localities as local needs dictate. Despite Professor Korngold's reasoning in his approval of the holding in *Kelo*,⁸¹ eminent domain in this situation is powerless to counteract the "frozen land utilization pattern"⁸² that inflexibly placed conservation easements can create.

II. ALTERNATIVE METHODS OF OBTAINING DEVELOPMENT RIGHTS

A. *Doctrine of Changed Conditions*

The doctrine of changed conditions is an equitable doctrine that, at common law, allowed a court to terminate an equitable servitude or a real covenant "when changed conditions in or around the burdened land frustrated the purpose of the restriction or created an undue hardship on the owner of the burdened land."⁸³ The doctrine of changed conditions calls for an examination of several factors, including the parties' intent, the foreseeability of the changed conditions, the location of these changes, the burdens and benefits to the parties, and the duration of the challenged restriction.⁸⁴ This doctrine has traditionally been applied only to real covenants and equitable servitudes, or, more broadly, to promises regarding the land rather than to interests in the land; easements, as interests in the land, have traditionally been immune to the doctrine of changed conditions.⁸⁵

Applying the doctrine of changed conditions to conservation easements raises difficult policy questions. The doctrine of changed conditions does not easily apply to conservation easements created for general conservation purposes because, when the property around such easements becomes developed and congested, these easements may be seen as serving

⁸¹ See *supra* Introduction, subpart A.

⁸² Korngold, *Contentious Issues*, *supra* note 2, at 1083.

⁸³ Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1188 (1989).

⁸⁴ *Id.* at 1209.

⁸⁵ *Id.* at 1194; see also Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 123 (2002) (noting that the doctrine of changed conditions traditionally does not apply to easements but that some commentators argue for extending it to conservation easements and other servitudes).

their purpose of preserving open space better than before the development, and the surrounding development can even increase the value of the restrictions on the property.⁸⁶ This doctrine is designed to terminate obsolete covenants but fails to provide a way to “balanc[e] a strong public interest in a new use for the land (perhaps for necessary industrial development, affordable housing, or health care facilities) against the conservation value exemplified by the easement held by a private organization.”⁸⁷

Applying the doctrine of changed conditions is particularly problematic if one considers conservation to constitute an efficient use of the land:

Open space, under this view, is not unproductive land. Rather, it is both useful and necessary to preserve our environment and the natural beauty of open space. When open space is not viewed as wasted land, but as a productive and efficient use of land, application of the changed conditions doctrine to terminate a natural state easement subverts the policy.⁸⁸

This view is particularly relevant in Virginia, where even the state constitution codifies a strong policy preference for conservation.⁸⁹ The doctrine of changed conditions likely could not be successfully applied to terminate conservation easements in Virginia or states with similar policy objectives.

B. Difficulties of Using Cy Pres Proceedings to Modify and Terminate Conservation Easements

Many commentators argue that charitable trust principles should be applied to conservation easements.⁹⁰ In this line of reasoning, donated

⁸⁶ Blackie, *supra* note 83, at 1218–19; *see also* Korngold, *Contentious Issues*, *supra* note 2, at 1077 (“Proponents of the easement will argue that any open space is valuable and especially necessary when surrounding conditions have worsened.”); Mahoney, *supra* note 7, at 778 (noting that many conservation easements arguably are designed to continue in perpetuity in the face of changed circumstances).

⁸⁷ Korngold, *Contentious Issues*, *supra* note 2, at 1077–78.

⁸⁸ Blackie, *supra* note 83, at 1220 (internal footnote removed).

⁸⁹ *See* VA. CONST. art. XI, § 1 (declaring the policy of the Commonwealth to “conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings”).

⁹⁰ *See, e.g.*, Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005) [hereinafter McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*] (discussing at length why conservation easements should be modified or terminated according to charitable trust principles).

conservation easements should be treated as charitable trusts because they are usually donated to a government entity or land trust for a specific charitable purpose, namely the conservation of the burdened land.⁹¹ Trusts may be created even if the parties do not label it a trust or understand exactly what a trust is.⁹² Conservation easements thus can be deemed to be held in trust if the parties had the intent to enter into a trust-like relationship.⁹³ Trusts where the public is the beneficiary are charitable trusts.⁹⁴

Cy pres is a common-law doctrine that “permits a court of equity to administer a charitable trust to conform as closely as possible to the purpose for which the trust was created or, if that purpose cannot be achieved, for some other charitable purpose.”⁹⁵ It is unique to the context of charitable trusts and provides for the reformation of a charitable trust to approximate the settlor’s charitable intent when the trust, as originally conceived, “has become impossible, unlawful or impracticable.”⁹⁶

In the context of conservation easements, courts would adapt the easement to serve another conservation purpose consistent with the overall conservation goal of the easement.⁹⁷ This doctrine is designed to make the minimal changes necessary to reform the charitable trust and might not be suitable for modifying or terminating conservation easements when the public interest requires that the land be put to a different use.⁹⁸ This inflexibility might be somewhat reduced by statutes authorizing courts to terminate one conservation easement while placing a similar parcel of land under a substitute conservation easement.⁹⁹

⁹¹ McLaughlin & Machlis, *supra* note 18, at 1573.

⁹² Arpad, *supra* note 85, at 128.

⁹³ *Id.* at 130; *see also* C. Timothy Lindstrom, Hicks v. Dowd: *The End of Perpetuity?*, 8 WYO. L. REV. 25, 73 (2008) (noting that, to find that a conservation easement is held as a charitable trust, a court must “find a clear intention on the part of the grantor of a conservation easement . . . to create a trust”).

⁹⁴ *See* Arpad, *supra* note 85, at 130.

⁹⁵ Tauber v. Commonwealth *ex rel.* Kilgore, 562 S.E.2d 118, 128 (Va. 2002).

⁹⁶ Arpad, *supra* note 85, at 124 (quoting *In re* Petition of Downer Home, 226 N.W. 2d 444, 450 (Wis. 1975)).

⁹⁷ Korngold, *Contentious Issues*, *supra* note 2, at 1078.

⁹⁸ *See id.*

⁹⁹ *See, e.g.*, CONN. GEN. STAT. § 7-131i (2009) (requiring municipalities to pay the state the value of the open-space land upon selling it or converting it to a different use if “comparable” land is not placed under easement to replace it; this applies only to open-space land obtained with state grant money); MD. CODE ANN., NAT. RES. § 5-906(e) (7) (2010) (requiring municipalities to replace open-space land with land “of at least equivalent area and of equal recreation or open space value” before any change in use; this change in use must be approved by the state); MONT. CODE ANN. § 76-6-107 (2009)

Applying the doctrine of cy pres will not effectively counter the problem of poorly placed conservation easements and will make the modification or termination of these easements even more difficult. Applying the doctrine of cy pres to conservation easements necessarily means that the easement holder will no longer have the right to modify or terminate a conservation easement without court approval.¹⁰⁰ At least one commentator has argued that a suit to terminate a government-held conservation easement in a cy pres proceeding should not be barred on grounds of sovereign immunity.¹⁰¹ Even if a cy pres proceeding against the federal government is allowed to proceed, it seems unlikely that a court will agree to terminate a conservation easement when the federal government seeks to maintain the easement in its current form.¹⁰² The cy pres doctrine thus does not adequately address the problem of poorly placed federal conservation easements.

III. PROPOSED LEGISLATIVE REFORMS AT THE STATEWIDE LEVEL

A. *Legislation Allowing Government Bodies to Terminate Conservation Easements Regardless of the Charitable Trust Doctrine*

1. Policy Rationale

If government-held conservation easements are deemed to constitute charitable trusts for the benefit of the public, the relevant policy question becomes how one defines what it means to be “for the benefit of the

(requiring municipalities to replace converted open-space land with land “of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as open-space land” within three years of the change in use); VA. CODE ANN. § 10.1-1704(A) (2009) (requiring the public body to replace converted open-space land with land “(a) of at least equal fair market value, (b) of greater value as permanent open-space land than the land converted or diverted and (c) of as nearly as feasible equivalent usefulness and location for use as permanent open-space land . . .”).

¹⁰⁰ See Lindstrom, *supra* note 93, at 62.

¹⁰¹ See Nancy A. McLaughlin, *Could Coalbed Methane Be the Death of Conservation Easements?*, WYO. LAWYER, Oct. 2006, at 18, 22 (noting that “[t]he purpose of governmental immunity is to protect the public fisc” and suggesting that cy pres proceedings to terminate conservation easements and redistribute the monetary proceeds to other conservation easements should not be barred by governmental immunity because they serve to protect the public fisc).

¹⁰² See *supra* note 76 and accompanying text (noting that, in the condemnation context, the federal use of land is deemed to be superior to a proposed state use).

public[.]” A government body, after all, has a duty to use even land donated in fee simple without any accompanying contractual restrictions for the benefit of the public.¹⁰³ A government body that seeks to terminate or modify a conservation easement to be able to build a highway, low-income housing, or even a shopping mall has presumably already made the legislative determination that the proposed use yields a greater benefit to the public than the original conservation purpose. Particularly in the context of a lower-level government body obtaining development rights from a federal or state government body, policy considerations thus suggest that government bodies should not be constrained by the charitable trust doctrine when modifying and terminating conservation easements.

In the event that the charitable trust doctrine is applied to conservation easements generally, the idea that government bodies are presumptively acting in the interest of the public when modifying or terminating conservation easements should be recognized by creating statutorily defined powers that apply to trustees holding conservation easements. This is particularly important given the lack of evidence that the improper modification or termination of conservation easements is a prevalent problem in the United States.¹⁰⁴

2. The Proposed Statute

Using that policy framework as its point of departure, this note proposes a statute that would give government bodies the power to modify or terminate conservation easements without being forced to initiate cy pres proceedings. This power should be construed to apply to all government bodies whether or not the terms of the conservation easement make reference to the statute. The statute that this note proposes would apply only to government bodies and would expressly not apply to private land trusts.

The proposed statute would read as follows:

Any public body that is the grantee of a conservation easement shall have the power to modify the terms of or terminate any charitable trust deemed to have been created by the granting of such conservation easement, without judicial intervention, if the following conditions have first

¹⁰³ See Arpad, *supra* note 85, at 126 (noting that both charitable organizations and government agencies “owe some degree of duty to use even absolute gifts for the benefit of the public”).

¹⁰⁴ Lindstrom, *supra* note 93, at 62.

been satisfied: (a) the conservation easement must have been held in trust for no fewer than twenty-one (21) years, whether solely by the public body seeking to modify or terminate the conservation easement or by more than one public and/or charitable body; and (b) the public body seeking to modify or terminate the conservation easement must have sought and received legislative approval of the proposed modification or termination of the conservation easement. The powers granted by this Section shall not be construed to apply to private land trusts or to any other nongovernmental charitable organization.

The requirement that the easement be held for at least twenty-one years uses what is admittedly an arbitrary number. This minimum period of time is designed to ensure that the easement will still serve to slow the rate of development of an area, in accordance with the intent of the donor, yet not entirely impede the necessary growth of a community, as determined by the competent government authorities.¹⁰⁵ Legislatures would be free to adopt a longer minimum period of time, but in the opinion of the author, a minimum period shorter than twenty-one years would unduly impinge upon donors' reasonable expectations when giving conservation easements to government bodies.¹⁰⁶

¹⁰⁵ It should be noted that the twenty-one-year minimum period is similar to the planning horizons used by many land planners. Although planning horizons used in comprehensive plans are typically between twenty and fifty years, the most common horizon is twenty years. PRINCE EDWARD CNTY. (VA.), PRINCE EDWARD COUNTY 2005 COMPREHENSIVE PLAN 3 (2005), available at http://www.co.prince-edward.va.us/pdf/PZ_PE%20Co%20Comp%20Plan_Final.pdf. Thus, for localities where new conservation easements are required to conform to the local comprehensive plan, see *infra* Part III.B, the majority of the proposed twenty-one-year period would overlap with the planning horizon of the comprehensive plan. Consequently, the locality's necessary growth would likely be only minimally impaired during the first twenty-one years of the easement's existence. This assumes, of course, that the comprehensive plan is regularly reviewed and amended. See, e.g., PRINCE EDWARD CNTY., *supra*, at 3 (noting that the comprehensive plan must be reviewed at least once every five years to determine whether amendments are necessary).

¹⁰⁶ See Nancy A. McLaughlin & W. William Weeks, Hicks v. Dowd, *Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73, 91–92 (2010) (discussing conservation easement donors' expectations generally and noting the chilling effect that governments' unmitigated termination of conservation easements might have on donations). Although donors are typically told that conservation easements will protect their land in perpetuity, Mahoney, *supra* note 7, at 750–51, these easements are still subject to the exercise of eminent domain at any time, see *supra* notes 9–10 and

3. Limitations on the Usefulness of the Proposed Statute

Such a statute is important to enable government bodies to promote local development and planning without becoming ensnared by the fiduciary relationship inuring from a charitable trust when these government bodies determine that the public, for whose benefit the conservation easement was originally created, would be better served by dedicating the land to a different use. It is important to note that, although this proposed statute removes one legal impediment to the modification or termination of government-held conservation easements, government bodies are still subject to other influences that might preclude such modification or termination,¹⁰⁷ and, as such, exempting them from the charitable trust doctrine would not grant them the unfettered ability to terminate conservation easements at will.

Such a statute, moreover, would apply only when the government body holding the easement and the government body seeking to develop the servient land are the same or, alternatively, when the federal government voluntarily relinquishes an easement to a state or local government body to be modified or terminated. The proposed statute is also not useful in the context of eminent domain because the government already has the authority to condemn charitable trusts.¹⁰⁸ The proposed statute therefore does little to solve the problem created by federally held conservation easements interfering with local development. Some other form of legislation is necessary to deal with this problem.

accompanying text (discussing the use of eminent domain to terminate conservation easements); *infra* text accompanying note 108 (discussing the condemnation of charitable trusts). Donors' expectations that conservation easements will protect land forever are therefore not necessarily reasonable.

¹⁰⁷ See McLaughlin & Machlis, *supra* note 18, at 1580 (noting, for example, that failing to honor easement donors' intentions by cavalierly modifying or terminating conservation easements might "chill future conservation easement donations" because "failing to honor the intent of charitable donors is likely to result in fewer charitable donations"). McLaughlin and Machlis also warn of "the political, financial, and other pressures that may be brought to bear on both governmental and nonprofit holders to release or terminate conservation easements," *id.*, yet fail to note that political pressures can also exist to discourage modifying or terminating these easements. See *id.*

¹⁰⁸ See Phillip E. Hassman, Annotation, *Eminent Domain: Right to Condemn Property Owned or Used by Private Educational, Charitable, or Religious Organization*, 80 A.L.R.3D 833, 837 § 2[a] (1977) (noting that property owned by charitable organizations is not barred from being taken by eminent domain); *supra* note 59 and accompanying text (discussing the condemnation of trusts).

B. State Legislation Requiring that New Conservation Easements Conform to the Local Comprehensive Plan

An important way of addressing the problem of poorly placed conservation easements is to prevent these easements from being created in the first place. One way of doing this is by requiring new conservation easements to conform to a locality's comprehensive plan. Such a statute already exists in Virginia: "No conservation easement shall be valid and enforceable unless the limitations or obligations created thereby conform in all respects to the comprehensive plan at the time the easement is granted for the area in which the real property is located."¹⁰⁹ Several states have similar statutes requiring proposed conservation easements to conform to such local land-use plans or to be approved by a public official.¹¹⁰

Such a statute mitigates the problem of poorly placed conservation easements by requiring new conservation easements to be located in places deemed proper by the locality's current vision of its future growth and its current development goals. Such a statute would in effect enable local zoning boards to prohibit conservation easements from being granted within specific zones, even if the land to be placed under easement had some unique value.¹¹¹ Nevertheless, a locality's best efforts at planning its growth will never entirely prevent conservation easements from being placed in locations that will later need to be developed to further the public good. At least some of these poorly placed easements are likely to be held by the federal government.¹¹²

¹⁰⁹ VA. CODE ANN. § 10.1-1010(E) (2009).

¹¹⁰ Nancy A. McLaughlin, *A Constructive Reformist's Perspective on Voluntary Conservation Easements*, ECOSYSTEM MARKETPLACE (Aug. 31, 2005), http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=3821§ion=home [hereinafter McLaughlin, *A Constructive Reformist's Perspective*].

¹¹¹ *See id.* (arguing that requiring all conservation easements to meet local approval might inhibit the creation of easements that protect sites of national conservation value, "as local governments can be expected to give greater weight to local economic interests than to national conservation interests"). McLaughlin fails to mention, however, that the federal government could still protect these sites of national conservation value by acquiring them in fee simple. Land was acquired for conservation purposes "almost invariably" in fee simple until well into the twentieth century. Mahoney, *supra* note 7, at 748; *see also* Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. RES. L. REV. 401, 403 (1993) ("The government can readily control land uses, and avoid the complex issues arising when federal programs affect states' rights or private property rights, by purchasing full fee title to environmentally significant lands.").

¹¹² *See supra* notes 17–28 and accompanying text (discussing the increasing prevalence of federally held conservation easements).

Moreover, a statute requiring conservation easements to conform to the local comprehensive plan is preventive in nature and does nothing to allow states and localities to deal with federally held conservation easements once they are already in place. Therefore, although such a statute might alleviate the problem of poorly placed federally held conservation easements by preventing them *ex ante*,¹¹³ it does not entirely solve the problem. Some other remedial solution is needed.

IV. LEARNING FROM MEDICAID: DECENTRALIZED ACQUISITION AND ADMINISTRATION OF CONSERVATION EASEMENTS

A. *Introduction*

Although the solutions proposed earlier in this note can mitigate the potentially adverse effects of federally held conservation easements on state and local development, none is able to solve the problem entirely. The problem inherent in each of these proposed solutions is that they do not directly address how to deal with federal conservation easements that already exist in the event that some body other than the federal government seeks to have these easements modified or terminated. The federal

¹¹³There is some uncertainty as to whether a state statute merely governing the permissible placement of conservation easements would be enforceable against the federal government. See *North Dakota v. United States*, 460 U.S. 300, 316-20 (1983) (refusing to apply North Dakota statutes purporting to place limitations on federal acquisitions of wetlands easements that North Dakota had previously authorized unconditionally); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595-97 (1973) (holding that state laws that are "aberrant or hostile" to the interests of the federal government will not be applied in federal court; a Louisiana statute retroactively altering federal mineral rights was such a hostile law); *United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974) (enforcing the terms of a wetlands preservation easement even though such easements were not recognized as valid property interests under North Dakota law). *But see* *United States v. California*, 655 F.2d 914, 917 (9th Cir. 1980) (citing *Little Lake* for the proposition that state law may not be applied where "state law would *actually frustrate* rather than *only hinder* a federal program" (emphasis added) and invoking *Georgia Power Co. v. 54.20 Acres of Land*, 563 F.2d 1178, 1189 (5th Cir. 1977) (*overruled on other grounds*, *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980)); *Batton v. United States*, 2006 U.S. Dist. LEXIS 15430, *14-15 (W.D. La. Mar. 8, 2006) (suggesting that, when determining whether a state law is aberrant or hostile under *Little Lake*, relevant factors include whether the state law existed at the time of the federal acquisition, whether similar laws are prevalent among the several states, and whether the state law serves "clearly legitimate and important state interests"). See generally *Jordan*, *supra* note 111 (arguing that Congress has the constitutional authority to enact a statute granting federally held conservation easements preemptive authority over state law).

government would always be able to trump the proposed local use because of the supremacy of federal law.¹¹⁴ Any reforms would thus have to occur at the federal level.

Accordingly, this section proposes the solution of moving the policy discussion regarding the funding of conservation easements from the state-wide level to the nationwide level. In so doing, the federal government should not seek to enact some sort of nationwide comprehensive plan, or even a plan setting forth quotas for conservation; this would be needless micromanaging of the states' conservation programs. Rather, the federal government should divest itself of its role in directly managing conservation easements. By providing the states the funding to manage conservation easements in a federal-state partnership similar to the Medicaid program, greater flexibility in managing conservation easements could be achieved.

B. Taking the Federal Government Out of the Business of Managing Conservation Easements

The division of authority between the federal and state governments regarding land conservation implicates issues of federalism and subsidiarity. As a matter of federal policy, one must ask whether the federal government should be involved in monitoring and enforcing conservation easements. Land conservation is a worthy policy objective, but this objective could likely be carried out by the states just as well.¹¹⁵

Providing states, rather than the federal government, with the primary authority over conservation easements better satisfies federalism and subsidiarity concerns. Subsidiarity is a concept that holds that "nothing should be done by a larger and more complex organization which can be done as well by a smaller and simpler organization."¹¹⁶ Adhering to this principle leads to a decentralization of government activities.¹¹⁷ The

¹¹⁴ See U.S. CONST. art. VI, cl. 2 (Supremacy Clause); see also *supra* note 76 and accompanying text (noting that the paramount public use doctrine would not enable states to be able to condemn federal land).

¹¹⁵ See Jessica O. Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1055-56 (2006).

¹¹⁶ David A. Bosnich, *The Principle of Subsidiarity*, RELIGION & LIBERTY (Acton Inst. for the Study of Religion & Liberty, Grand Rapids, Mich.), Jul.-Aug. 1996, at 9, available at http://www.acton.org/sites/v4.acton.org/files/pdf/r1_v06n4.pdf.

¹¹⁷ See *id.* at 9 (noting that subsidiarity holds that "any activity which can be performed by a more decentralized entity should be"). By this logic, states arguably might find it better to delegate the acquisition and administration of conservation easements to localities. This note does not examine this topic, although it should be noted that urban growth typically extends across multiple localities within a given state. See VA. CHAPTER, AMERICAN

principle of subsidiarity is violated when the federal government takes over the rights and responsibilities of state and local governments.¹¹⁸ This principle is incorporated into federalism,¹¹⁹ the essence of which may be described as being that “‘states as states’ have legitimate interests which the national government must respect even though federal laws, if constitutionally proper, are supreme.”¹²⁰ The constitutional division of authority between the federal and state governments is not intended to protect states as political entities, but rather is intended to protect individuals.¹²¹ Given that conservation easements are typically described as being for the benefit of the public,¹²² which is composed of individuals, subsidiarity is thus a relevant concern.

Determining the precise details of conservation planning might be more effectively handled at the state level rather than both the federal and state levels. If conservation planning is consolidated in the states, the state legislatures would be able to set forth a unified vision of conservation planning within each respective state, rather than being faced with a patchwork of state and federal conservation easements. Development occurs primarily at the local level, and so states would naturally be better able to tailor policy governing development to local needs than would the federal government.¹²³ This approach thus addresses planning concerns better than the current “business as usual” way of acquiring conservation easements, which is not sustainable over the long term.¹²⁴

Furthermore, states would be in a better position to monitor conservation easements, detect violations, and enforce the terms of the

PLANNING ASS'N, PATTERNS OF SUBURBAN GROWTH: A GRAPHIC PRESENTATION OF SUBURBAN DEVELOPMENT IN VIRGINIA: PAST PATTERNS AND FUTURE OPTIONS 3 (2000), *available at* http://apavirginia.org/documents/other-publications/Patterns_of_Suburban_Growth.pdf (noting that “growth is seldom balanced within a political jurisdiction”). The coordinating functions of the state would thus seem to be necessary in administering the acquisition of conservation easements.

¹¹⁸ See Bosnich, *supra* note 116, at 9.

¹¹⁹ See *id.* at 10 (arguing that the Founders intended the federal government to do “only those things which the individual states could not effectively do for themselves”).

¹²⁰ Jordan, *supra* note 111, at 442.

¹²¹ *New York v. United States*, 505 U.S. 144, 181 (1992).

¹²² See McLaughlin, *Condemning Conservation Easements*, *supra* note 66, at 1937 (noting that conservation easements “are conveyed to and acquired by government entities and charitable organizations to be held and enforced for the benefit of the public”).

¹²³ See *supra* note 32 and accompanying text (noting that, by holding conservation easements, the federal government might usurp a local community’s ability to shape policy democratically).

¹²⁴ See *supra* Introduction (discussing the problems that might ensue from states’ inability to condemn federal conservation easements).

easements.¹²⁵ Except perhaps for easements located in Maryland and Northern Virginia, state agencies would be located geographically closer to the conservation easements that they would administer than would the corresponding federal agencies, presumably located in or around Washington, D.C.¹²⁶ The geographic proximity of branch offices of federal agencies would lessen this distinction, but even these branch offices might have to coordinate their monitoring and enforcement of conservation easements with a central Washington, D.C. office thousands of miles away.¹²⁷

Allowing states to control government acquisition of conservation easements also addresses the aforementioned policy clash between conserving open space and providing for ways of developing renewable energy sources.¹²⁸ To date, no legislation has been passed mandating nationwide RPS, and all current RPS programs are administered at the state level.¹²⁹ Even if legislation mandating a federal RPS were to pass, this legislation would most likely set minimum national standards that states would be free to exceed.¹³⁰ As such, much RPS policy will remain in the domain of state legislatures. If the federal government continues to acquire and administer conservation easements in large numbers—the “business as usual” method—the federal government could potentially interfere with states’ needs to use land to develop renewable energy resources.

If both conservation easement policy and RPS policy are made at the state level, a greater potential exists to harmonize the two competing policy interests. A nationwide RPS policy would be ineffective in doing this because states have access to different renewable resources and have different conservation needs;¹³¹ these policy determinations would necessarily

¹²⁵ See *supra* note 32 and accompanying text (local governments will by definition be closer to local easements than the federal government).

¹²⁶ The distance between Washington, D.C. and San Francisco, for example, is approximately 2840 miles. See *Interactive Distances Between Major U.S. Cities*, TRAVEL NOTES, <http://www.travelnotes.org/NorthAmerica/distances.htm> (last visited Jan. 24, 2011) (providing a mileage calculator).

¹²⁷ See *supra* note 126.

¹²⁸ See *supra* notes 11–14 and accompanying text.

¹²⁹ See *The American Clean Energy and Security Act (Waxman-Markey Bill)*, PEW CENTER ON GLOBAL CLIMATE CHANGE, <http://www.pewclimate.org/acesa> (last visited Jan. 24, 2011) (discussing the legislative history of the Waxman-Markey Bill, which would impose nationwide RPS goals); see also *States with Renewable Portfolio Standards*, *supra* note 14 (discussing RPS as a state policy).

¹³⁰ See STAFF OF H. COMM. ON ENERGY AND COMMERCE, 111TH CONG., AMERICAN CLEAN ENERGY AND SECURITY ACT (H.R. 2454), at 1–2 (June 23, 2009) (discussing the proposed federal RPS).

¹³¹ See, e.g., AM. WIND ENERGY ASS’N, WIND POWER TODAY (2007) (noting that forty-six states have sites with winds adequate to support commercial power production); *Geothermal*

be made on a state-by-state basis. For example, states with a high level of onshore wind might place a greater emphasis on “developing” open space than states relying more on renewable energy sources that require a smaller geographic footprint, such as geothermal resources.¹³² Similarly, states with a large number of preexisting hydroelectric facilities might decide that maintaining open space free from aesthetically displeasing wind turbines is a more important policy objective than developing those wind resources. It is precisely these sorts of individualized local and state policy determinations that the federal government should avoid attempting to make.¹³³

Land conservation, moreover, is largely a local issue. Preserving open space has little impact on citizens of other states while they remain in the other states.¹³⁴ This is unlike wind pollution, for example, which can easily cross state boundaries and cause harmful effects in other states.¹³⁵ The migratory nature of wind pollution makes it a logical object of federal regulation.¹³⁶ Conservation easements, however, do not move from state to state. Conservation easements affect only the citizens of the respective states in which the easements are located and travelers entering those states, except insofar as vegetation in open-space land might reduce greenhouse gases in the atmosphere and the related habitat preservation might benefit migratory animals.¹³⁷ These are concerns that would otherwise

Explained: Where Geothermal Energy Is Found, U.S. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY (Feb. 19, 2010), http://tonto.eia.doe.gov/energyexplained/index.cfm?page=geothermal_where (noting that most accessible geothermal energy in the United States is located in the western states and Hawaii).

¹³² See Fathali Ghahremani, *The Possibility of Large-Scale Geothermal Power Plants*, PERSPECTIVES ON GLOBAL ISSUES, Fall 2009, at 33, 35 (2009), available at <http://www.perspectivesonglobalissues.com/0401/fullissue0401.pdf> (noting that a geothermal plant and an equivalent fossil-fuel plant would have a similar physical footprint); *id.* at 33 (noting that hydroelectric, tidal, and wind power require large physical footprints).

¹³³ See *supra* note 32 and accompanying text.

¹³⁴ See Lippman, *supra* note 115, at 1072.

¹³⁵ See News Release, U.S. Evtl. Prot. Agency, Duke Energy to Spend \$93 Million to Resolve Clean Air Act Violations (Dec. 22, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/2520f12f7372fe1d85257694005ab7a7> (“Air pollution from power plants can travel significant distances downwind, crossing state lines and creating region-wide health problems.”).

¹³⁶ See *Air Quality Notices Media Kit: Controls*, WIS. DEP'T OF NATURAL RES. (last revised Jan. 27, 2011), http://www.dnr.state.wi.us/news/mediakits/mk_air_quality.asp (follow the “Controls” hyperlink) (“Federal rules deal with the problem of [airborne] pollutants that cross state boundaries . . .”).

¹³⁷ See McLaughlin, *A Constructive Reformist's Perspective*, *supra* note 110 (noting that “significant public benefits in the form of ‘ecosystem services’ can flow from the protection of

properly be the subject of federal legislation and regulation. Unlike the example of wind pollution prior to the enactment of the Clean Air Act,¹³⁸ however, states will probably continue acquiring conservation easements in the absence of direct federal intervention.¹³⁹ This is not an area that will go untouched if the federal government does not intervene. Although these interstate effects suffice to give the federal government the power to acquire and administer conservation easements,¹⁴⁰ conservation easements provide no immediately apparent policy justification for direct federal regulation or, in this case, acquisition and administration.

Maintaining the status quo whereby the federal government is acquiring conservation easements at a rapid rate is not a viable model. An increasing proliferation of federal conservation easements could lead to the “frozen land utilization pattern,” which Professor Korngold warns against.¹⁴¹ Although there is an important national interest in conservation, some other way must be selected to advance this federal policy objective while also allowing states to advance their own conservation and development policies.

C. *Medicaid’s Structure and Funding: A Model Federal-State Cooperative Relationship*

Any federal-state program designed to prevent Korngold’s “frozen land utilization pattern”¹⁴² must be cooperative in nature. One preexisting program that incorporates a federal-state cooperative relationship is Medicaid.¹⁴³ Medicaid is a “federal / state partnership program” providing healthcare benefits to specified groups of low-income Americans.¹⁴⁴ A

such lands”); *Grazing Lands Conservation Initiative (GLCI)*, NATURAL RES. CONSERVATION SERV., U.S. DEP’T OF AGRIC. (Oct. 26, 2010), <http://www.nrcs.usda.gov/programs/glci> (discussing the societal benefits of preserving grazing lands).

¹³⁸ Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401–7671q (2006)).

¹³⁹ See *supra* notes 15–28 and accompanying text (discussing the increasing role of governments in acquiring conservation easements).

¹⁴⁰ See Jordan, *supra* note 111, at 424–27 (discussing Congress’s power to regulate environmental matters under the Commerce Clause); *id.* at 441–42 (discussing the ability of the federal government to acquire conservation easements through its property power and spending power).

¹⁴¹ See Korngold, *Contentious Issues*, *supra* note 2, at 1083.

¹⁴² *Id.*

¹⁴³ *\$15 Billion in Medicaid Relief Headed to States*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/recovery/programs/medicaidfmap.html> (last visited Jan. 24, 2011).

¹⁴⁴ *Id.*

state's "participation in Medicaid is optional, but every state has opted to participate."¹⁴⁵ The roles of the federal and state governments in this partnership can be described as follows:

Because Medicaid is a partnership, states and the federal government each have a role in designing and paying for each state's program. While states have some flexibility in determining what benefits they provide, who will be eligible and how much they will pay health care providers, they must work within federal guidelines. In turn, the federal government pays a portion of each state's Medicaid costs.¹⁴⁶

The federal government provides broad guidelines within which the states must administer the Medicaid program.¹⁴⁷ The states otherwise have "wide flexibility in the design and implementation of their Medicaid programs."¹⁴⁸ Because of this broad discretion, "Medicaid spending varies considerably from state to state on both a per capita and per beneficiary basis."¹⁴⁹ Despite this, the state Medicaid program must be approved by the Centers for Medicare and Medicaid Services.¹⁵⁰

The percentage of Medicaid costs paid for by federal funding varies according to each state's relative wealth; federal funding pays for a greater percentage of a state's Medicaid costs in states with lower per-capita incomes.¹⁵¹ This federal funding rate is adjusted on a yearly basis in response to "economic changes in the states"¹⁵² according to a statutory formula.¹⁵³ The federal funding rate for costs incurred in administering Medicaid,

¹⁴⁵ ANDY SCHNEIDER ET AL., HENRY J. KAISER FAMILY FOUND., *THE MEDICAID RESOURCE BOOK* 82 (2002), available at <http://www.kff.org/medicaid/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14261>.

¹⁴⁶ *\$15 Billion in Medicaid Relief Headed to States*, *supra* note 143.

¹⁴⁷ KAISER COMM'N ON MEDICAID FACTS, HENRY J. KAISER FAMILY FOUND., *THE MEDICAID PROGRAM AT A GLANCE* (2008), available at http://www.kff.org/medicaid/upload/7235_03-2.pdf.

¹⁴⁸ *About Medicaid*, FAMILIES USA, <http://www.familiesusa.org/issues/medicaid/about-medicaid.html> (last visited Jan. 24, 2011); accord SCHNEIDER, *supra* note 145, at 83 ("States choosing to participate in Medicaid enjoy substantial flexibility with respect to defining a benefits package, establishing eligibility criteria, and setting provider reimbursement rates.").

¹⁴⁹ SCHNEIDER, *supra* note 145, at 83.

¹⁵⁰ *Id.* at 96.

¹⁵¹ *\$15 Billion in Medicaid Relief Headed to States*, *supra* note 143.

¹⁵² *Id.*

¹⁵³ SCHNEIDER, *supra* note 145, at 93.

rather than in paying for covered services, is fixed and does not vary from state to state.¹⁵⁴ States obtain Medicaid funding as a partial reimbursement of eligible medical expenses that they have already incurred.¹⁵⁵ There is no cap on the total federal matching funds that may be provided to any individual state in a given year.¹⁵⁶

D. The Proposed Program: Matching States' Spending on Conservation Easements with Federal Funds

1. *Forestalling the Future Acquisition of Federal Conservation Easements by Delegating This Role to the States*

This note proposes setting up a Medicaid-like system for acquiring conservation easements. Instead of funneling money to the USDA and other federal agencies, the federal government would provide funding to the states to acquire and administer conservation easements. Thus, although federal funding would be used for the conservation easements, title to the conservation easements would be held in the name of the state or state agency. Congress would enunciate broad policy objectives and allow the states to work out the policy details to be implemented in each state.¹⁵⁷

Such a system would have many advantages and would address many of the concerns raised in prior sections of this note. First, if states hold the title to the conservation easements instead of the federal government, then the concerns over states' inability to condemn federally held conservation easements disappear.¹⁵⁸ Federal conservation easements would no longer be an impediment to localities' growth.¹⁵⁹ The easements

¹⁵⁴ See *id.* at 95 (noting that the default rate for matching Medicaid administrative expenses is 50%).

¹⁵⁵ See CTR. FOR MEDICAID AND STATE OPERATIONS, U.S. DEP'T OF HEALTH & HUMAN SERVS., AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, FREQUENTLY ASKED QUESTIONS FROM STATES 19 (2009), available at http://www.cms.hhs.gov/Recovery/Downloads/ARRA_FAQs.pdf (noting that within the context of recently increased federal Medicaid funding, a state "may not draw funds for expenditures it has not incurred"); *id.* at 2 (noting that the recently increased federal Medicaid funding will be implemented on a cash basis and generally describing how to determine the eligibility of prior expenditures for that increased funding).

¹⁵⁶ See SCHNEIDER, *supra* note 145, at 83 ("The federal government matches state spending on an open-ended basis.").

¹⁵⁷ See *id.* at 91 (discussing variations in state Medicaid policies).

¹⁵⁸ See *supra* Part I.B.2 (discussing the inability of states to condemn federal property).

¹⁵⁹ See *supra* text accompanying notes 80–82 (discussing states' inability to condemn federally held conservation easements that obstruct growth).

would instead be held at the state and local levels, or by nonprofit land trusts, and citizens would be able to have more direct access to their representatives to shape land-use policy.¹⁶⁰

Providing states with federal funds to acquire and manage conservation easements would insulate states' conservation budgets from sudden changes in economic realities and political attitudes in each state. At least one commentator has suggested that, despite the public benefits provided by conservation, it could prove difficult to obtain public support for funding of conservation easements on otherwise private land to which the public has no access.¹⁶¹ Because the federal government receives taxes from citizens in all the states, areas of the country that consider conservation to be a higher priority would in effect be able to subsidize conservation efforts in parts of the country that do not have the same high regard for conservation. This nationwide funding would thus enable the important federal policy objective of conservation¹⁶² to be carried out despite local opposition or apathy regarding the use of local funds.

Similarly, the broad geographic reach of federal tax revenues would largely immunize conservation funds from economic downturns occurring only in localized areas of the country. Just as with Medicaid spending, states affected by an economic downturn might choose to reduce conservation spending and divert those funds to other uses, especially in states that have enacted balanced-budget requirements.¹⁶³ Federal funding could provide a baseline amount on which state conservation programs could rely to maintain their current conservation easements in that situation. The proposed funding structure would be similar to Medicaid in that the level of funding would not be reduced because of a localized economic downturn.¹⁶⁴

The extent of federal funding itself might vary according to the national political mood. State legislatures, as with Medicaid funding, would be free to provide additional state funding to offset any decreases in the federal matching rate and thus receive equivalent or greater aggregate

¹⁶⁰ See *supra* note 32 and accompanying text (discussing the federal government's potential to obstruct the shaping of local land use policy).

¹⁶¹ McLaughlin, *A Constructive Reformist's Perspective*, *supra* note 110.

¹⁶² See Jordan, *supra* note 111, at 403 (noting that Congress has made "special efforts" in land conservation).

¹⁶³ See SCHNEIDER, *supra* note 145, at 87 (noting that states having reduced tax revenues because of an economic downturn might choose to reduce spending on Medicaid and that most states have balanced-budget requirements).

¹⁶⁴ See *id.* (noting that federal Medicaid matching funds are counter-cyclical in that they actually increase as states are affected by economic downturns because more individuals will become eligible for the Medicaid program during such downturns).

federal funding,¹⁶⁵ assuming that the state has not reached its statutory cap on conservation matching funds for the year. Even if the state had received the full amount of conservation funds for the year, for example, if the federal government had reduced the total funding allotted to each state in response to its own budgetary crisis, the state legislature would still be free to authorize increased state funds above and beyond what the federal government would be willing to match.

In certain limited circumstances, a particular conservation easement might uniquely meet some federal conservation objective, just as national parks or national historical sites do.¹⁶⁶ The federal government might wish to retain ownership of such conservation easements and would be justified in doing so. The acquisition of conservation easements by the federal government should be subject to the same stringent standards as for the acquisition and development of new national parks and should otherwise be treated similarly.¹⁶⁷ Given the limited nature of conservation easements in terms of public access and use,¹⁶⁸ however, few situations would justify the creation of a federally held conservation easement under the scheme proposed by this note that would not also justify, and almost require, the acquisition of a fee simple interest in the land.¹⁶⁹ The federal government's conservation efforts, where federal action is required, would thus not be unduly constrained.¹⁷⁰ Absent reasons for acquiring a conservation

¹⁶⁵ See *id.* (noting that a state facing an economic downturn "could also choose to maintain (or even increase) its level of Medicaid spending, thereby maintaining (or increasing) the amount of federal revenues flowing into its economy" because of the nature of the federal matching arrangement).

¹⁶⁶ See, e.g., *Acadia Nat'l Park, Land Resources*, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR (Sept. 11, 2009), http://www.nps.gov/acad/parkmgmt/rm_landresources.htm.

¹⁶⁷ See Brenda Smith, *Criteria for Parkland*, NAT'L PARK SERVICE, U.S. DEP'T OF THE INTERIOR, <http://www.nps.gov/legacy/criteria.html> (last updated Jan. 2003).

¹⁶⁸ See McLaughlin, *A Constructive Reformist's Perspective*, *supra* note 110 ("One can readily imagine the challenges that would be associated with raising funds to monitor and enforce easements encumbering privately-owned land to which the public has neither physical nor visual access.").

¹⁶⁹ See *supra* note 103 and accompanying text. One such situation might be the use of conservation easements to create buffer zones around military bases, where the conservation is undertaken to ensure the continued viability of military bases and to limit nuisance to adjacent landowners rather than for the sake of conservation itself. See, e.g., Jessica Metcalf, *Fort Huachaca Conservation Easements Reach 1,400 Acres*, ENVTL. UPDATE, Fall 2007, <http://aec.army.mil/usaec/newsroom/update/fall07/fall0710.html> (describing the Army Compatible Use Buffer ("ACUB") program).

¹⁷⁰ See *supra* note 111 (noting that the federal government would retain the ability to acquire sites of national significance in fee simple even if local planning boards, under the auspices of statutes requiring conservation easements to conform to localities' comprehensive plans

easement of similar magnitude to those for acquiring land for a national park, acquisition of conservation easements at the federal level should be sharply curtailed and should instead be delegated to the states.

2. Divesting the Federal Government of the Conservation Easements that It Currently Holds

As a part of this shift to state ownership of conservation easements, the states should be given the option of purchasing or otherwise receiving the conservation easements currently held by the federal government, effectively divesting the federal government of most of its conservation easements. As the federal government shifts its funding for conservation easements to the states, transferring the preexisting federal conservation easements would almost become necessary. Thus, this system would both prophylactically and retroactively solve the problem of federally held conservation easements.

A less drastic measure to transfer title in federal conservation easements to the states would be to enact a federal statute allowing states to condemn these federal easements. Under such a statute, states would be able to condemn or buy out federally held conservation easements on an as-needed basis. Regardless of the means chosen to do so, the federal government should divest itself of its conservation easements. This divestiture is necessary to allow states the flexibility to plan for their future development and conservation needs without being unduly hampered by federal conservation easements that either no longer serve their original purpose or otherwise frustrate local public policy.

E. Limitations on the Analogy to Medicaid for Funding Conservation Easements

Any analogy between Medicaid and a program for purchasing and maintaining conservation easements will necessarily be limited because the two would have manifestly different policy goals. Medicaid is intended to provide health and long-term care benefits to qualified low-income individuals.¹⁷¹ Tax deductions for conservation easements, however, primarily benefit higher-income individuals because most low-income individuals either do not itemize their tax returns or do not have sufficient tax liability to benefit from the full tax deduction allowable.¹⁷² Although Medicaid might

or otherwise to obtain local approval, forbade placing the site under a conservation easement so as to further local economic interests).

¹⁷¹ See SCHNEIDER, *supra* note 145, at 86–87 (detailing policy objectives).

¹⁷² See McLaughlin, *Condemning Open Space*, *supra* note 25, at 404 (noting that “land rich,

have incidental societal effects by helping to prevent the spread of disease, it is primarily intended to benefit individuals directly.¹⁷³ Conservation easements, on the other hand, are intended to bestow a wider societal benefit in preserving open space.¹⁷⁴

Medicaid and a program for funding conservation easements would also have a different way of operating. Medicaid is an entitlement program, giving individuals a legally enforceable right to eligible medical care and also giving states a legally enforceable right to obtain federal matching funds for providing funding for such medical care.¹⁷⁵ This note does not suggest granting individuals an entitlement to obtain payment for conservation easements or even to require states to accept an individual's donation of a conservation easement. States should examine each proposed conservation easement in light of proposed growth patterns in the area, proposed development, and other factors that the state may deem relevant. Requiring states to accept conservation easements would not entirely eliminate the benefits associated with placing these easements under state control, but such a requirement would hamper states in their ability to plan for the future or, alternatively, result in increased use of the power of eminent domain and thus increased spending.

Moreover, a program to fund conservation easements should not be an open-ended commitment from the federal government, as Medicaid is.¹⁷⁶ In this regard, the proposed program should be more like the State Children's Health Insurance Program ("SCHIP"). SCHIP, like Medicaid, entitles states to matching funds, but the SCHIP funds available to each state have an annual cap.¹⁷⁷ This note does not necessarily propose increasing federal spending for conservation easements; rather, it proposes merely rerouting federal spending to the states. Although preserving open space is an important policy concern underlying government funding for conservation easements,¹⁷⁸ unlimited funding might have the unintended side effect of encouraging states to acquire even poorly placed conservation

cash poor" landowners might not have sufficient tax liability to absorb the full benefit of tax credits offered for donating conservation easements).

¹⁷³ See SCHNEIDER, *supra* note 145, at 83 (noting that Medicaid benefits are limited to individuals who qualify).

¹⁷⁴ See McLaughlin, *Condemning Conservation Easements*, *supra* note 66, at 1937 (noting that conservation easements "are conveyed to and acquired by government entities and charitable organizations to be held and enforced for the benefit of the public").

¹⁷⁵ SCHNEIDER, *supra* note 145, at 83.

¹⁷⁶ See *supra* note 156 and accompanying text (noting that there is no annual cap on federal Medicaid funding provided to the states).

¹⁷⁷ SCHNEIDER, *supra* note 145, at 87.

¹⁷⁸ See *supra* note 137 (discussing societal benefits of conservation easements).

easements, impeding communities' natural growth.¹⁷⁹ This is particularly true because most conservation easements are donated, not sold,¹⁸⁰ and so most of the federal matching funds provided by the proposed program would be given to the states for the maintenance of conservation easements and not to conservation easement donors.

CONCLUSION

In conclusion, much of the threat of a "frozen land utilization problem"¹⁸¹ comes not from conservation easements held by private land trusts, but rather from easements held by the federal government, over which the states will have no power of eminent domain.¹⁸² States should seek to alleviate the effects of this federal-state conflict by declining to adopt the charitable trust doctrine in the context of government-held conservation easements¹⁸³ and by adopting statutes requiring new conservation easements to conform to the local comprehensive plan.¹⁸⁴ Ultimately, however, the only comprehensive solution to this conflict is to divest the federal government of its conservation easements and to delegate the responsibility of administering them to the states.¹⁸⁵ Doing so will not only eliminate potential conflicts between federal conservation goals and state and local development needs; it will also result in more effective conservation easement planning and management.¹⁸⁶

To the extent that state law prohibits the usage of eminent domain for economic development,¹⁸⁷ much of this discussion will be purely academic, as states will be unable to condemn conservation easements held by the federal government or by anyone else. Although his analysis is incomplete, Professor Korngold is otherwise correct in asserting that the power of eminent domain is an essential tool to correct for conservation easements that have outlived their purpose.¹⁸⁸

¹⁷⁹ See *supra* notes 4–14 and accompanying text (discussing the effects of poorly placed conservation easements).

¹⁸⁰ See McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 90, at 430–31 (noting that most conservation easements are donated).

¹⁸¹ Korngold, *Contentious Issues*, *supra* note 2, at 1083.

¹⁸² See *supra* Part I.B.2.

¹⁸³ See *supra* Part III.A.

¹⁸⁴ See *supra* Part III.B.

¹⁸⁵ See *supra* Part IV.

¹⁸⁶ See *supra* Part IV.

¹⁸⁷ See *supra* note 2 and accompanying text (discussing post-*Kelo* state legislation to restrict the use of eminent domain for economic development).

¹⁸⁸ See Korngold, *Contentious Issues*, *supra* note 2, at 1082.