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Environmental Preservation and the Fifth Amendment: The Use and Limits of Conservation Easements by Regulatory Taking and Eminent Domain

*Beckett G. Cantley**

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* Beckett G. Cantley (University of California, Berkley, B.A. 1989, Southwestern University School of Law, J.D. cum laude, 1995; and University of Florida, College of Law, LL.M. in Taxation, 1997) is an Associate Professor of Law at Atlanta's John Marshall Law School. Prof. Cantley would like to thank Matthew Abernethy for his assistance as a Research Assistant on this article.

Abstract

Successful preservation of environmentally and historically significant property requires the utilization of various innovative land conservation strategies. The government has three alternative land conservation strategies, including (1) using the police power to issue environmental and land use regulations; (2) the use of the eminent domain power over environmentally sensitive lands; and (3) the use of conservation easement programs. The government's use of its inherent police power to protect the health, safety, and welfare of its citizens extends to state and local governments the ability to use zoning and land-use regulations for environmental purposes. Typically, these regulations are used broadly as part of a comprehensive land use plan. The federal government has the power to make environmental laws based on its constitutional powers over commerce and treaty making. However, land use and environmental regulations are often politically difficult since such regulations interfere directly with a private landowners' use of his or her property. Land use and environmental regulations also have the potential to rise to the level of a Fifth Amendment regulatory taking, requiring the payment of just compensation for the loss of property rights by the government to the property owner. Federal, state, and/or local governments may use eminent domain to acquire fee simple title to lands it seeks to preserve. However, the government's use of the eminent domain power may be expensive relative to other alternatives, since just compensation for the land may be high and the eminent domain process may result in long and expensive litigation. Inadequate public funding for acquisitions and political unpopularity also may limit the use of eminent domain.

Conservation easements often represent a more politically palatable alternative for land preservation. Despite the inherent incentive problems associated with conservation easement donations, the use of easements as a land conservation method is increasing at an incredible rate - mostly due to the Federal and state tax benefits associated with the donation of conservation easements. Landowners are typically motivated to donate conservation easements by the landowners' desire to forever preserve the character of the land and to receive tax breaks in the forms of state tax credits and/or federal deductions for "qualified conservation contributions". While most currently created conservation easements are donated, many land trusts and governmental entities are also in the business of purchasing them. Conservation easements may also be created by the use of eminent domain, or by way of exaction. "Exacted" conservation easements generally arise where the government requires that a landowner donate a conservation easement in exchange for the government approving a permit or zoning variance application. While donations and sales of conservation easements are likely to avoid the requirement that the government pay the property holder just compensation, such compensation may need to be paid

where the landowner brings an action for inverse condemnation following the creation of an exacted conservation easement.

The use of conservation easements can raise constitutional issues where the government seeks to create the easement by way of regulation or exaction. In this article, the author: (1) provides an overview of the different systems of land control; (2) analyzes the ability of a landowner to argue that a regulatory taking has occurred where government land use and/or environmental regulations have greatly diminished the property's value; (3) specifically discusses the landowner's ability to grant or sell a conservation easement as a potential source of value to the landowner that could negate the finding of a sufficient diminution in value necessary to be considered a compensable Fifth Amendment taking; (4) addresses the government's ability to garner a conservation easement through the exercise of its powers of eminent domain; (5) discusses regulatory takings issues specific to conservation easements acquired by exaction and failed government attempts to acquire such conservation easements; and (6) discusses the question of whether the government may exercise its powers of eminent domain to condemn a preexisting conservation easement held by another government entity.

I. Introduction

Successful preservation of environmentally and historically significant property requires the utilization of various innovative land conservation strategies.¹ The government has three alternative land conservation strategies. First, the government may use its inherent police power to regulate the land to protect the health, safety, and welfare of its citizens. State and local governments may carry out conservation goals through zoning and land-use regulations.² Zoning and land use regulations are typically used on a broad scale, often as a part of comprehensive land planning. Federal environmental laws can also place restrictions on activities.³ The federal government has the power to make environmental

1. Steven M. Hoffman, *Open Space Procurement Under Colorado's Scenic Easement Law*, 60 U. COLO. L. REV. 383, 383 (1989).

2. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The United States Supreme Court has upheld the constitutional validity of zoning and land-use planning. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

3. The distinction here is a tricky (but perhaps meaningless) one. Land-use regulation is a realm of state power, but the federal government can pass environmental regulations. The line between land-use regulation and environmental regulation is a hazy one that would be difficult to draw. The debate is not important for the purposes of this Article. The point is merely that multiple levels of government can create valid laws that restrict activities of landowners. If the courts

laws based on its constitutional powers over commerce and treaty making. Land use and environmental regulations are often politically untenable since such regulations prevent a landowner from making certain uses on their property, which many Americans view as a violation of a fundamental property right. Therefore, there has been somewhat of a reluctance to pass comprehensive environmental and land use regulations. Furthermore, land use and environmental regulations could rise to the level of a Fifth Amendment regulatory taking, requiring the payment of just compensation for the loss of property rights by the government to the property owner.⁴

Second, the government (federal, state, and/or local) may use the power of eminent domain to acquire fee simple title to lands it seeks to preserve. Of course, the government must pay the property owner just compensation for the property acquired when the government exercises its power of eminent domain.⁵ The government's use of the eminent domain power may be expensive relative to other alternatives, since just compensation for the land may be high and the eminent domain process may result in long and expensive litigation. Inadequate public funding has also made fee acquisition of open lands increasingly problematic.⁶ Furthermore, the use of eminent domain often creates feelings of resentment in the community against the authorizing elected officials. Therefore, governments may find that the use of its eminent domain power is not a very efficient and politically tenable way to foster conservation goals.

Third, the government may use conservation easement⁷ programs as a land conservation tool. Conservation easements often represent a more

decide that the federal government's regulations have moved from a federal to state realm, they may invalidate environmental statutes. If that were to happen, the enforceability of the conservation easements negotiated under those laws may be called into question.

4. See generally *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

5. Furthermore, the land must be acquired for a valid public purpose.

6. Hoffman, *supra* note 1, at 383.

7. A conservation easement is a nonpossessory interest in land restricting a landowner's ability to use land in an otherwise permissible way with the goal of yielding a conservation benefit. A conservation easement is a legal contract that entails the transfer of certain "sticks" in the "bundle of rights" to either the government entity or a charitable entity with the means and will to conserve the property and is therefore a "partial interest" in land. See Cheever, *infra* note 14. The property owner, or grantor of the easement, retains the possessory interest in the land while transferring to the grantee the right to prevent the grantor or anyone else from engaging in certain activities that would be detrimental to the grantee's conservation goals, in perpetuity. See *id.*; James Boyd, Kathryn Caballero & R. David

politically palatable alternative to land use and environmental regulations (at least where such regulations would rise to the level of a compensable Fifth Amendment taking) or the exercise of the government's power of eminent domain to acquire property in fee simple.⁸ Despite the inherent incentive problems associated with conservation easement donations,⁹ the use of easements as a land conservation method is increasing at an incredible rate¹⁰—mostly due to the Federal and state tax benefits associated with the donation of conservation easements.¹¹ Conservation

Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 215 (2000).

8. Donated and sold conservation easements are more politically viable because such methods of acquisition are completely voluntary. "Exacted" conservation easements may be more politically tenable where the donating party receives sufficient consideration in exchange for the exaction, thereby not making the donor-constituent feel coerced or extorted into donating a conservation easement. Lastly, conservation easements acquired by eminent domain are more politically tenable than would be acquiring the entire property in fee simple by eminent domain.

9. Individuals who are most likely to voluntarily surrender development rights are those who think they will be burdened the least by the restrictions. The burden, here, represents primarily the degree to which the individuals would have to change their land use plans under the terms of the conservation easement. Therefore, conservation easements are most effective in protecting undeveloped land that is owned by an individual or firm that does not plan on developing their land. See John Echeverria, *Skeptic's Perspective on Voluntary Conservation Easements*, ECOSYSTEM MARKETPLACE (Aug. 31, 2005), http://ecosystemmarketplace.com/pages/article.opinion.php?component_id=3822&component_version_id=5435&language_id=12.

10. Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 275 (2007). In 1950, there were only 53 land trusts in existence. By 2000, that number exceeded 1,200, and in the five years between 2000 and 2005, another 400 land trusts were established, bringing the total to 1,667. In 2000, there were 2,514,545 acres under easement by local and state land trusts. By 2005, that number increased by 148% to 6,245,969 acres. See 2005 NATIONAL LAND TRUST CENSUS REPORT, LAND TRUST ALLIANCE, at 3, 8 (2005), available at <http://www.northolympiclandtrust.org/Documents/2005LandTrustCensusReport.pdf> [hereinafter 2005 LAND TRUST CENSUS].

11. See 2005 LAND TRUST CENSUS, *supra* note 10. The Land Trust Alliance has put forth a substantial effort towards expanding the tax benefits of donating conservation easements and was awarded in 2006 with a congressional bill that provided expanded relief. See also 2006 ANNUAL REPORT, LAND TRUST ALLIANCE, at 4 (2006), available at http://www.landtrustalliance.org/about/who-we-are/annual-report/2006AnnualReport.pdf/at_download/file.

easements may be donated, sold, exacted, or taken under the government's power of eminent domain (taking merely use and development rights, rather than an entire fee simple interest in the land).

Landowners are typically motivated to donate conservation easements by the landowner's desire to forever preserve the character of the land and to receive tax breaks in the forms of state tax credits and/or federal deductions for "qualified conservation contributions."¹² Sellers of conservation easement interests are typically motivated by: (1) the money made directly from the sale of the conservation easement interest; (2) the landowner's desire to forever preserve the character of the land; and/or (3) property tax benefits from lowering the landowner's fair market value by limiting future use and development (and sometimes federal income tax benefits associated with a deeply discounted partial sale of a conservation easement property interest).¹³ While most currently created conservation easements are donated, many land trusts and governmental entities are also in the business of purchasing them (at least at a deeply discounted fair market value in the context of a "partial sale/partial donation").¹⁴ Most conservation easements are donated¹⁵—rather than sold, "taken," or "exacted"—because government entities and land trusts generally have

Many states have incorporated deductions into the law as well, which also serve as considerable motivation for the donation of conservation easements. *See, e.g.,* Illana Poley, *Conservation Easements Protect Colorado Open Space at Year-End*, CHERRY CREEK NEWS (Jan. 7, 2008), <http://www.thecherrycreeknews.com/news-mainmenu-2/1-latest/2243-conservation-easements-protect-colorado-open-space-at-year-end.html> (describing the "flurry of year-end activity to finalize conservation easements" in Colorado that resulted from a change in the law, going into effect Jan. 1, 2008, that would raise the tax standards).

12. *See* 26 U.S.C. § 170(b)(E) (2012).

13. *See* PAUL ELCONIN & VALERIE A. LUZADIS, *EVALUATING LANDOWNER SATISFACTION WITH CONSERVATION RESTRICTIONS* 9-11 (1997).

14. *See* Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transaction*, 38 IDAHO L. REV. 431, 432 (2002); *All About Conservation Easements*, THE NATURE CONSERVANCY (Nov. 17, 2008), <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/allabout.html>; *Conservation Options for Landowners*, LAND TRUST ALLIANCE (Oct. 12, 2007), <http://199.238.135.238/conservationoptions.htm>.

15. Conservation easements do not represent a "free market solution" to environmental problems. Most conservation easements are voluntarily donated because of the tax benefits that such donations provide for the donor, and as a result, "[t]he lion's share of the funding for easements . . . comes out of the pocket of the taxpayer." *See* Echeverria, *supra* note 9.

limited funds to put towards the outright purchase of conservation easements or the paying of just compensation.

Conservation easements (or a property owner's use and/or development potentially subject to the placing upon of a conservation easement) are likely considered to be compensable property interests, able to be taken by the government through the exercise of its power of eminent domain. If a conservation easement were found to be a compensable property interest and such interest was taken by the government under its eminent domain power, the government would clearly owe just compensation to the holder of the property's use and/or development rights to the extent such rights are affected by the conservation easement. However, there may exist some issues of sovereignty when *preexisting* conservation easements held by government entities are purportedly taken by another government entity through its power of eminent domain. An example might be where the federal government decides that it is necessary to build clean energy windmills upon preexisting conservation easement land that prevents the development of structures like windmills.

"Exacted" conservation easements generally arise where the government requires that a landowner donate a conservation easement in exchange for the government approving a permit or zoning variance application.¹⁶ "Exacted" conservation easements are typically much cheaper to the federal government than having to pay just compensation for a conservation easement taken under the government's power of eminent domain.¹⁷ Unlike donated and sold conservation easements, exacted conservation easements are not generally "voluntary" in the fullest sense of the word, and this motivational difference generally raises concerns regarding the enforceability of these conservation easements.¹⁸ While

16. Exacted conservation easements are often mandated mitigation measures under environmental and land use regulations. Property owners seeking to change their land must often obtain federal, state, and local permits. Increasingly, permit issuers require mitigation measures to compensate for environmental degradation or harms created by proposed projects. At times, these mitigation measures take the form of conservation easements. Exacted conservation easements are mitigation requirements for landowners seeking to fulfill goals other than land protection. See JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK* xi (1988).

17. So long as the conservation easement "exaction" can avoid the requirement that the government pay just compensation for the property interests received.

18. While the grantor of an exacted conservation easement must consent to its formation, the creation of an exacted conservation easement is not the grantor's idea and is generally conceded to by the grantor in order to obtain some larger and more immediate land use goal. Exacted conservation easements are mitigation requirements for landowners seeking to fulfill goals other than land protection.

donations and sales of conservation easements are likely to avoid the requirement that the government pay the property holder just compensation,¹⁹ just compensation may need to be paid where the landowner brings an action for inverse condemnation following the creation of an exacted conservation easement.²⁰

This Article will address limits on the government's eminent domain power and relevant Fifth Amendment takings issues related to the various above-described land conservation methods. Section II will analyze the ability of a landowner to argue that a regulatory taking has occurred where government land use and/or environmental regulations have greatly diminished the property's value. Section II also specifically discussed the landowner's ability to grant or sell a conservation easement as a potential source of value to the landowner that could negate the finding of a sufficient diminution in value necessary to be considered a compensable Fifth Amendment taking. Section III addresses the government's ability to garner a conservation easement through the exercise of its powers of eminent domain. Section IV discusses regulatory takings issues specific to conservation easements acquired by exaction and failed government attempts to acquire such conservation easements. Section V turns to the question of whether the government may exercise its powers of eminent domain to condemn a *preexisting* conservation easement²¹ held by another government entity.

Although the grantor engages in the transactions willingly, exacted conservation easements should not be viewed in the same light as donated and sold conservation easements because the incentives and benefits of donated and sold conservation easements are very different from those associated with exacted conservation easements. *See* Diehl, *supra* note 16.

19. *See* JOHN J. COSTONIS ET AL., REGULATION V. COMPENSATION IN LAND-USE CONTROL: A RECOMMENDED ACCOMMODATION, A CRITIQUE, AND AN INTERPRETATION (1977); DAVID D. GREGORY, THE EASEMENT AS A CONSERVATION TECHNIQUE (1972). Denials of use applications stemming from failed exaction negotiations are also likely to avoid the requirement of paying just compensation for the loss of the land use (discussed in greater detail in Section V, below, *infra*).

20. *See* Smith v. Town of Mendon, 822 N.E.2d 1214, 1226 (N.Y. 2004) (Read, J. dissenting); St. Johns River Water Mgmt. District v. Koontz, 861 So. 2d 1267,1268 (Fla. Dist. Ct. App. 2003). And just compensation would very likely have to be paid where the government exercises its power of eminent domain to condemn a conservation easement interest on private property (as noted above).

21. Created in any manner—by donation, sale, exercise of eminent domain, or exaction.

II. Regulatory Takings Analysis in the Context of Comprehensive Land Use and Environmental Regulations

This section will analyze the ability of a landowner to argue that a regulatory taking has occurred where government land use and/or environmental regulations have greatly diminished the property's value. A brief overview of the general law relating to regulatory takings will be followed by an analysis of whether comprehensive environmental and/or land use regulations may be considered a regulatory taking. Subsection C specifically involves the issue of whether the ability to garner a financial benefit through the voluntary sale or donation of a conservation easement may factor in to such a regulatory takings analysis.

A. General Regulatory Takings Law

In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court of the United States recognized that government action may constitute a taking under the Fifth Amendment of the U.S. Constitution, even where there is no direct governmental invasion or appropriation of property.²² In *Penn Central Transportation Company v. City of New York*, the Supreme Court of the United States identified several factors significant to the inquiry of whether government action constitutes a regulatory taking, including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the government has interfered with distinct investment backed expectations; and (3) the character of the governmental action (for example, whether the government action is a physical invasion).²³ The *Penn Central* factor test is the general regulatory takings test; however, three exceptions exist to the *Penn Central* factor test—each of which trigger heightened review. The three exceptions that extend the *Penn Central* factor test involve: (1) actual indirect physical appropriations of property (“per se” regulatory takings); (2) regulations that deny landowners of all economically beneficial use of property; and (3) exactions.

Specifically, in *Lucas v. South Carolina Coastal Council*, the Supreme Court held that regulations that completely deprive a property owner of all economically beneficial use of the property constitute a regulatory taking.²⁴ In *Lingle v. Chevron USA, Inc.*, the Supreme Court addressed the issue of

22. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court held that any physical invasion by the government onto private property is a per se taking, requiring the payment of just compensation. See 458 U.S. 419, 426 (1982).

23. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

24. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031-32 (1992).

whether government action could be found to constitute a regulatory taking, holding that where an action does not *substantially advance legitimate interests*, the issue is relevant to a due process argument, rather than an eminent domain issue.²⁵

B. Application of Regulatory Takings Law to Comprehensive Land Use and Environmental Regulations

Comprehensive land use and environmental regulations could conceivably rise to the level that such regulations completely deprive scenic open space property of all economically beneficial use in violation of a property owner's reasonable and distinct investment backed expectations,²⁶ and thus violates due process.²⁷ For example, an individual that purchased mining land 20 years ago (whose highest and best use, at the time, was known to be mining), could have a valid regulatory takings claim and/or due process claim if the recent environmental and land use regulations have deprived the land of all economically beneficial use.

C. Whether a Landowner's Ability to Voluntarily Sell or Donate a Conservation Easement Constitutes an Economic Use Sufficient to Defeat a Regulatory Takings Claim

Some commentators have argued that a landowner's ability to donate or sell a conservation easement represents a potential economic use for regulated land that could help to avoid a regulatory taking by lessening the economic impact of environmental and land use regulations. However, a donor whose land use is already strictly regulated at the time of donation is unlikely to receive the federal income tax benefits associated with the donation of a "qualified conservation contribution."²⁸ Because a takings

25. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542-43 (2005).

26. See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

27. Hoffman, *supra* note 1, at 383.

28. The amount of a "qualified conservation contribution" is determined by comparing the value of the property, considering the highest and best *permitted* uses both pre- and post-donation. See Treas. Reg. § 1.170A-14(h)(3) (2009); *Whitehouse Hotel LP v. Commissioner*, 131 TC 112 (2008). Where land use is already strictly limited, the granting of a conservation easement would be unlikely to prohibit additional uses and thus have little effect on the difference in value pre- and post-donation. Valuation of a property before contribution of a conservation easement should take into account environmental, zoning, conservation, or historic preservation laws that would restrict development of the property. See S. Rep. No. 96-1007, at 15 (1980), 1980 WL 12915.

claimant would not be able to realize these tax benefits, the source of a conservation easement's economic value in the takings analysis must reside in the ability to sell it.²⁹ Thus, the crucial question becomes whether demand and a market for selling conservation easements truly exist. If a market for selling conservation easements is found to exist, the ability to sell a conservation easement could conceivably be considered an economic use that could support the defeat of a takings claim.

In order for the sale of conservation easements to represent an economic use, the government must show that there is a "demand for such use in the reasonably near future."³⁰ In order to determine whether demand exists for a particular use, an examination must be made as to whether a significant number of individuals would be willing to purchase the property in spite of the land use restrictions.³¹ Because land use trusts have limited resources to purchase interests in private land, only certain parcels of noteworthy conservation value are likely to be sought for outright purchase. Therefore, it must first be determined whether the regulated property is "conservation-worthy" (i.e., whether the property has ecological or historical qualities deserving of conservation). Where the regulated parcel has been developed, polluted, or otherwise harmed (or where a significant investment would be required to rehabilitate the ecological integrity of the parcel), the development rights on that parcel of land are unlikely to elicit any demand on the conservation easement "market." However, it must also be determined whether there is a reasonable probability that potential buyers would have sufficient funds to purchase the development rights.

If it is determined that the "market" for conservation easements is speculative in nature, then the sale of an easement will not be considered a viable economic use that would support the defeat of a takings claim.³² Conservation easements are currently bought and sold on an open market. However, more often than not, the purchaser of conservation easements is a local land trust that operates as the lone purchaser of conservation easements in the community.³³ Therefore, it is arguable whether conservation easements are currently bought and sold on a *competitive*

29. See, e.g., The Nature Conservancy, *supra* note 14; Margaret Jackson, *Ranchers Rush to Secure Conservation Easements*, DENVER POST (Nov. 4, 2007), at 1C (reporting the rush to secure conservation easements before the temporary increase in federal income tax benefits expired).

30. See *Walcek v. United States*, 49 Fed. Cl. 248, 262 (2001) (quoting *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 158 (1990)).

31. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999).

32. See *United States v. 341.45 Acres*, 633 F.2d 108, 112 (8th Cir. 1980).

33. See *Vinson*, *supra* note 10.

market. Most importantly, there is the issue of whether a land trust, when faced with the decision to expend some of its limited funds to secure an easement, would choose to spend those funds on a regulated parcel or on a non-regulated parcel. Most likely, a land trust would choose to expend its limited funds on a nonregulated parcel since the goal of most land trusts is to get as much conservation bang for its buck as possible.³⁴ Land trusts may treat the passing of a restrictive environmental regulation as a victory, and as a result, place no further efforts towards securing the ecological qualities of the properties affected by the regulation. As a result, there is a significant possibility that whatever “market” existing for conservation easements on non-regulated parcels of land may disappear once development on that property is restricted by governmental regulation.

Since there may be no demand or competitive market for the sale of a conservation easement on property that is already strictly regulated, the ability of a property owner to sell a conservation easement is very likely not an economic use sufficient to support the defeat of a takings claim.³⁵ A finding that the ability to sell a conservation easement is not an “economic use” of property would prevent the government from successfully claiming that a landowner’s ability to garner some money from the sale of a conservation easement preregulated property is sufficient to defeat a regulatory takings claim, thereby requiring the payment of just compensation rather than a diminished sales price. Since increases in land use and environmental regulations are already considered politically untenable at times to some, the extra cost of having to pay just compensation could easily cause the government to prefer public acquisition of private conservation easement property to such regulations (particularly considering the due process limitations³⁶ of the police power, which constrains the effectiveness of restrictive zoning³⁷).³⁸

34. However, a land trust may nonetheless decide to purchase a conservation easement on regulated land since: (1) the land trust may desire to conserve the property in perpetuity (as opposed to the temporary nature of environmental and land use regulations which may change as the political winds shift); (2) the land trust may want access to monitor and steward the conservation goals.

35. However, if there were demand and a competitive market for conservations on regulated property, courts may hold that a takings claim would not lie unless there exists at least a 75% diminution in value. If the sale of a conservation easement on preregulated property can bring over 25% of the land’s preregulation fair market value, a regulatory takings would not lie. While 25% may still be a considerable amount of money, it is likely much less than what the government would have to pay as “just compensation” if a takings were found to exist.

36. Unlike the enforcement of strict environmental and land use regulations, voluntary conservation easements (i.e., donated and sold conservation easements) do not raise constitutional due process issues. However, as noted in Section IV,

The bottom line is that effective environmental and land use regulations can slow unwelcome development. However, where environmental and land use regulations go too far in preventing unwelcome development without compensating the landowner, the government has the incentive to avoid the payment of just compensation by instead acquiring a conservation easement through donation or deeply discounted partial sale/partial donation.³⁹ As noted in sections III and IV, below, *infra*, conservation easements acquired and held in arguably involuntary manners either through government “exactions” or the governments’ exercise of its eminent domain powers, may constitute a compensable regulatory taking, requiring the payment of just compensation.⁴⁰

III. The Government’s Ability to Garner a Conservation Easement Through the Exercise of Eminent Domain

Numerous federal and state laws allow government entities to condemn or “take” conservation easements (or use and development rights of land potentially subject to a conservation easement) under the power of eminent domain.⁴¹ However, the law in a waning⁴² minority of jurisdictions

below, *infra*, conservation easements acquired through exaction may entail due process concerns, like those found in *Lingle*.

37. Hoffman, *supra* note 1, at 383.

38. In sum, regulation is preferable to conservation easements in the following situations: (1) where the expenditure of a large amount of public funding is involved; (2) where a sweeping, regional response to a conservation concern is required; (3) to avoid free riders; (4) to raise awareness of conservation issues; and (5) to respond to a community’s interest in conservation. On the other hand, conservation easements are preferable to regulation in the following situations: (1) where there is weak political support for conservation; (2) where landowners distrust the government or favor deregulation; (3) for conservation in perpetuity; (4) for flexibility of contract; (5) to conserve large properties as a whole; (6) for unique or unusual properties; (7) to bar all development; (8) to provide public access; and (9) for affirmative conservation.

39. Hoffman, *supra* note 1, at 409-10.

40. Conservation easements acquired and held by the government—whether through “exaction,” sale, donation, or the government’s exercise of its eminent domain—are a type of regulation, and thus subject to constitutional limitations (i.e., due process, regulatory takings/eminent domain, and sovereignty issues).

41. See, e.g., JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 12:2 (2004).

42. The minority rule denying compensation to the holder of negative restrictions on development and use upon the taking of the burdened land is an outdated holdover from an earlier time and inconsistent with the modern view of property. For example, California and Texas have abandoned the minority rule in

remains that conservation easements are not compensable property interests for eminent domain purposes, unlike traditional easements which are uniformly respected as compensable property interests whether they are held appurtenant or in gross.⁴³ These minority jurisdictions have historically argued that conservation easements are more properly characterized as real or restrictive covenants in gross (a creation of contract⁴⁴ not considered a compensable property interest for condemnation purposes at common law) than as traditional easements.⁴⁵ However, a majority of commentators and jurisdictions have held that conservation easements (whether characterized as traditional easements or restrictive covenants in gross) fit neatly within the United States Supreme Court's expansive modern definition of "compensable property interest" for eminent domain purposes.⁴⁶

favor of the majority rule. See *S. Cal. Edison Co. v. Bourgerie*, 507 P.2d 964, 968 (Cal. 1973)(overruling earlier decision and adopting majority rule); *City of Houston v. McCarthy*, 464 S.W.2d 381, 387 (Tex. Civ. App. 1971) (holding that damages, as opposed to injunctive relief, could be recovered upon taking of restrictive covenants, thereby distinguishing earlier case that purported to adopt minority rule).

43. In *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 630-31 (1961), the Supreme Court held that the holder of a perpetual in gross flowage easement was entitled to just compensation upon the taking of the easement, reasoning that it is indisputable that an easement is property that cannot be appropriated for public use without just compensation. See also William B. Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 IOWA L. REV. 293, 301 (1970) ("[E]xtinction of, or permanent interference with, an easement, appurtenant or in gross, amounts to a compensable taking.").

44. See, e.g., *Moses v. Hazen*, 69 F.2d 842, 844 (D.C. Cir. 1934) (holding that residential-use covenants were "not truly property rights, but contractual rights, which the government in the exercise of its sovereign power may take without payment of compensation").

45. See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 1.6 cmt. a (2000) (noting that conservation easements, referred to in Restatement as "conservation servitudes," could be either restrictive covenants or negative easements. Since a conservation easement is a negative restriction, rather than an affirmative right, a conservation easement could be viewed as a real covenant more than a traditional easement).

46. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 381-84 (1945). Under the expansive modern view, a variety of intangible rights or interests in real property have been treated as compensable property for eminent domain purposes, including: (1) *appurtenant and in gross easements*; (2) restrictive covenants; (3) leasehold interests; (4) interests of mortgagees; (5) life estates; (6) remainders; and (7) reversions. See 2 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN §§ 5.02, 5.03, 5.07[2][b] - [4][a], 12D.01 (3d ed. 2007) (stating that negative restrictions on development and use of land are treated as compensable property in majority of jurisdictions that have addressed issue).

A majority of state and federal courts that have addressed the issue have interpreted the expansive modern definition of “compensable property interest” to include negative restrictions on the development and use of one parcel that is held *appurtenant* to a different parcel.⁴⁷ In a minority of jurisdictions that still deny just compensation for the taking of a negative restrictive covenants, characterization of a conservation easement as a negative restrictive use covenant *appurtenant* could conceivably prevent a property owner from obtaining just compensation upon a government taking.⁴⁸ However, with public policy⁴⁹ clearly supporting the trend towards the majority position,⁵⁰ such a holding is growingly unlikely.⁵¹

The case of *Hartford National Bank & Trust Co. v. Redevelopment Agency* provides strong support for the conclusion that in gross restrictions constitute compensable property.⁵² *Hartford* stands for the proposition that in gross restrictions on the development and use of land have value, and

47. See generally *Adaman Mutual Water Co. v. United States*, 278 F.2d 842, 846 (9th Cir. 1960); *United States v. Certain Lands in Augusta*, 220 F. Supp. 696 (D. Me. S.D. 1963); *Leigh v. Village of Los Lunas*, 108 P.3d 525 (N.M. Ct. App. 2004).

48. See, e.g., *Moses v. Hazen*, 69 F.2d 842, 844 (D.C. Cir. 1934); *United States v. Certain Lands in Jamestown*, 112 F. 622, 627-28 (Cir. Ct. R.I. 1899); *Burma Hills Dev. Co. v. Marr*, 229 So. 2d 776 (Ala. 1969).

49. Considerations of public policy weigh heavily in favor of treating conservation easements as compensable property for eminent domain purposes. If conservation easements are not treated as compensable property and the government were permitted to acquire conservation easement-encumbered property for a restricted value, conservation easement-encumbered property would become an attractive target for condemnation because it would be less expensive to condemn than similar unencumbered land. Such a holding would undermine the conservation goals of conservation easement donors.

50. The trend in more recent cases has been to adopt the majority rule and the majority rule was even adopted by the Restatement (First) of Property and the Restatement (Third) of Property: Servitudes. See RESTATEMENT (FIRST) OF PROP. § 566 (1944); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.8 reporter’s note; *Dible v. City of Lafayette*, 713 N.E.2d 269, 273 (Ind. 1999); *Wash. Suburban Sanitary Comm’n v. Frankel*, 470 A.2d 813, 817 (Md. Ct. Spec. App. 1984) (noting “rather formidable array of authority” in support of majority rule); *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1297 (Miss. 1994).

51. See Paul B. Edelberg & Charles C. Goetsch, *Hartford National Bank and Trust Company v. Redevelopment Agency of the City of Bristol*, 164 Conn. 337, 321 A.2d 469 (1973); *Establishing the Compensability and Value of Restrictive Covenants and Easements in Gross*, 7 CONN. L. REV. 403 (1975).

52. See *Hartford Nat’l Bank & Trust Co. v. Redevelopment Agency*, 321 A.2d 469 (Conn. 1973).

that such value can be measured by the extent to which extinguishment of the restrictions increases the value of the burdened land.⁵³ Moreover, although the issue of whether the in gross restrictions constituted compensable property for eminent domain purposes was not before the court, the court satisfied itself that such restrictions were a species of property.⁵⁴ Accordingly, the court implicitly recognized in gross restrictions as a compensable form of property for eminent domain purposes.⁵⁵ The in gross status of conservation easements should not prevent them from being treated as compensable property interests for eminent domain purposes. As the courts in both *Hartford* and *Morley* recognized, the right to control the use of land can be a valid, enforceable, and therefore valuable right independent of its connection to a benefited parcel.

As noted above, conservation easements generally do not restrict the government's ability to exercise eminent domain powers. Easement-enabling statutes in half of the states expressly provide that conservation easements (and a property owner's use and/or development rights that could be subjected to a conservation easement) are subject to the power of eminent domain.⁵⁶ In addition, even in states without explicit easement-enabling statutes, the eminent domain power is generally exercisable in a majority of jurisdictions.⁵⁷ Accordingly, absent a waning minority of jurisdictions, government is generally free to exercise its eminent domain power to condemn a privately held conservation easement property interest upon property, although the government would be required to pay just

53. See *id.* at 473.

54. See *id.*

55. See *id.*; *Morley*, 632 So. 2d at 1297, *aff'd* 874 So. 2d 973 (Miss. 2004) (holding that where landholders or their successors in interest wished to use the property for a purpose prohibited by a negative covenant in gross, the landholders would have to purchase that right from the holder of the negative covenant in gross).

56. See, e.g., ARIZ. REV. STAT. ANN. § 33-272.A (1985) (noting that the Arizona easement-enabling statute "neither limits nor enlarges the power or purposes of eminent domain"); VA. CODE ANN. § 10.1-1010(F) (2006) (noting that Virginia easement-enabling statute "does not . . . in any way limit the power of eminent domain as possessed by any public body"). However, a few states have specifically prohibited states and municipalities from using their eminent domain power to acquire conservation easements. See, e.g., ALASKA STAT. § 34.17.010(e) (2004); OR. REV. STAT. § 271.725(1) (2003); UTAH CODE ANN. § 57-18-7(1) (West 2005); ALA. CODE § 35-18-2(a) (2004).

57. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.8 cmt. A (2000) ("Servitude benefits like other interests in property may be condemned under the power of eminent domain."); Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. Envtl. L.J. 592, 598 (2001) ("Privately held conservation easements . . . offer surprisingly little protection from condemnation.").

compensation to the holder of the conservation easement (or the holder to use and development rights of land potentially subject to a conservation easement). Both federal and state governments have acknowledged that acquisition of conservation easements via eminent domain may be a necessary component of land conservation programs.⁵⁸ Next, this Article will address regulatory takings issues relating to conservation easements created through government “exaction” immediately below, *infra*.

IV. Regulatory Takings Issues Involving Conservation Easement “Exactions”

A. Regulatory Takings Law Relating to Exactions in General

As noted above, *Penn Central* identified several factors significant to the inquiry of whether government action constitutes a regulatory taking, including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the government has interfered with distinct investment backed expectations; and (3) the character of the governmental action.⁵⁹ The *Penn Central* factor test is the general regulatory takings test; however, an exception to the *Penn Central* factors exists for exactions, under the holdings of *Nollan* and *Dolan*.⁶⁰

In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court discussed land use exactions in the context of a regulatory takings analysis.⁶¹ If a regulation is found to be an exaction, the regulation must meet two requirements in order to avoid being considered an impermissible taking.⁶² First, there must be an essential nexus between the legitimate government conservation interest and the regulation.⁶³ Second, the regulation must also be roughly proportionate in nature and extent to the impact of the proposed development.⁶⁴ If a regulation found to be an exaction does not meet these two requirements, the exaction would be considered an impermissible taking and would require that the government pay just compensation for the property interests acquired by exaction.⁶⁵ In

58. See, e.g., *Racine v. United States*, 858 F.2d 506, 507 (9th Cir. 1988).

59. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

60. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); See *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1228 (N.Y. 2004) (Read, J. dissenting).

61. See *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

62. See *id.*

63. See *Nollan*, 483 U.S. at 837.

64. See *Dolan*, 512 U.S. at 391.

65. See *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

Lingle, the Supreme Court held that where an action does not *substantially advance legitimate interests*, a due process argument may also be present.⁶⁶

B. Regulatory Takings Law Relating to “Exactions” of Conservation Easements Specifically

Conservation easements are increasingly created through regulatory “exaction,” as part of large development projects with complex permitting programs and environmental mitigation requirements. As noted above, “exacted” conservation easements generally arise where the government requires, as part of a zoning variance or permit application,⁶⁷ that a developer donate a conservation easement⁶⁸ for the purpose of mitigating the development’s environmental effect.⁶⁹ The “exacted” terminology is a bit confusing because there is a lack of clarity in the courts on what constitutes

66. The *Lingle* court discussed two related Fifth Amendment arguments—a due process argument and a takings argument. Where the imposition of the conservation easement is a violation of the government’s police powers because it is not substantially advance a legitimate interest, a due process argument could completely invalidate the conservation easement. An exercise of the government’s police power in a manner that is arbitrary and capricious would be unlikely to substantially advance a legitimate interest, thereby invalidating the condemnation. The imposition of a conservation easement, although related to a legitimate purpose, could also go so far as to constitute a taking, triggering the award of just compensation for the property interests taken. Unfortunately, courts have not always clearly distinguished between those two different protections of property rights. See generally *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542-43 (2005); *Dept. of Environmental Protection v. Burgess*, 667 So. 2d 267, 270 (Fla. Dist. Ct. App. 1995); *Grogan v. Zoning Board of Appeals of Town of East Hampton*, 221 A.D.2d 441 (N.Y.App.Div. 1995). After *Grogan*, an analysis of the constitutionality of a conservation easement “exaction” must address both the due process and takings issues.

67. When developers and individual landowners want to make changes to the land, there are often local, state, and federal permit requirements. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 194-96 (2004).

68. Developers may be required to place some type of conservation easement on their own land or to purchase a conservation easement on someone else’s land.

69. Exacted conservation easements are often mandated mitigation measures under environmental and land use regulations. Property owners seeking to change their land must often obtain federal, state, and local permits. Increasingly, permit issuers require mitigation measures to compensate for environmental degradation or harms created by proposed projects. At times, these mitigation measures take the form of conservation easements. Exacted conservation easements are mitigation requirements for landowners seeking to fulfill goals other than land protection. See Diehl, *supra* note 16.

a true “exaction” in the context of conservation easements.⁷⁰ The case of *Smith v. Town of Mendon* is a great example of the debate over whether the required donation of a conservation easement, as part of a land use permit application approval process, constitutes a true “exaction.”⁷¹

In *Smith*, a local land use authority conditioned approval of the permit to construct a dwelling on the property owner’s donation of a conservation easement on the property.⁷² In *Smith*, the property owner challenged the requirement as a Fifth Amendment taking, but the court refused to categorize the easement donation requirement as an “exaction.”⁷³ Because the majority in *Smith* failed to characterize the conservation easement donation requirement as an “exaction”, the majority in *Smith* did not analyze the requirement under the heightened scrutiny of *Nollan* and *Dolan*.⁷⁴ The majority in *Smith* reasoned that the conservation easement donation requirement was not an “exaction” because an “exaction” involves the dedication of land for public use and the conservation easement did not propose to allow public use of the land.⁷⁵ Under the more general takings test involving the *Penn Central* factors, the *Smith* majority determined that a takings claim did not lie because: (1) the consideration given for the “exaction” (the right to construct a dwelling) was itself a valuable and marketable asset; (2) the property was already encumbered by a legitimate town ordinance which inhibited development; and (3) the conservation substantially the advanced legitimate government purposes of protecting environmentally sensitive areas in perpetuity, placing future buyers on notice of the limitations, and helping ensure and enforce regulatory compliance.⁷⁶

However, commentators have sharply criticized the majority opinion in *Smith*, with the minority dissent of Justice Read receiving much wider support for its strong public policy arguments.⁷⁷ In the *Smith* dissent, Justice Read argued that the requirement to donate a conservation easement in order to garner a permit to build a dwelling constitutes an “exaction,” and is thus subject to heightened review under *Nollan* and *Dolan*.⁷⁸ Justice Read

70. See *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004).

71. See *id.* at 1214.

72. *Id.* at 1216.

73. *Id.*

74. *Id.*

75. *Id.* at 1219.

76. *Id.* at 1220-21.

77. See Lara Womack Daniel and James D. Timmons, *Conservation Easements and Eminent Domain at the Intersection; How Modern Legal Creations Meet Constitutional Principles*, 36 REAL EST. L.J. 433 (Spring 2008).

78. See *Town of Mendon*, 822 N.E.2d at 1228 (Read, J. dissenting).

stated, in the *Smith* dissent, that public use of the property is not required for a conditional approval to constitute an “exaction.”⁷⁹ Justice Read further stated that even if an “exaction” requires that the dedication be for public use, the donation of a conservation easement could be considered a public use.⁸⁰ Public use is not synonymous with direct public access in the context of takings analyses, and a conservation easement that confers a general benefit to the public at large would likely be considered to have been donated for a public use (i.e., preservation of scenic/open space or environmentally or historically significant property).⁸¹ Justice Read further argued that the “exaction” constituted a taking under *Nolan* since the interest served by the “exaction” was a legitimate town interest, but there was no essential nexus between the “exaction” and the harm created by the proposed building of a dwelling.⁸² Justice Read noted that the easement purportedly was validly acquired by “exaction” without the government having to pay the purchase price or offer tax benefits. However, Justice Read states that just compensation would be owed for an “exaction” having no essential nexus to the harm sought to be prevented.⁸³ Judge Read’s dissent provides the framework to challenge a government requirement (as a condition to land use permit approval) that the property owner donate a conservation easement as a true “exaction”—and thus an impermissible taking under the heightened standard applicable to exaction under *Nollan* and *Dolan*.⁸⁴

Unlike donated and sold conservation easements, “exacted” conservation easements are not fully voluntary because they do not arise out of personal conservation motivations.⁸⁵ Although donors willingly engage in conservation easement “exaction” transactions, “exacted”

79. *Id.*

80. *Id.* at 1227 (Read, J. dissenting).

81. *Id.*

82. *Id.*

83. *Id.* at 1226 (Read, J. dissenting).

84. *Id.*

85. While the grantor of an exacted conservation easement must consent to its formation, the creation of an exacted conservation easement is not the grantor’s idea and is generally conceded to by the grantor in order to obtain some larger and more immediate land use goal. Exacted conservation easements are mitigation requirements for landowners seeking to fulfill goals other than land protection. Although the grantor engages in the transactions willingly, exacted conservation easements should not be viewed in the same light as donated and sold conservation easements because the incentives and benefits of donated and sold conservation easements are very different from those associated with exacted conservation easements. *See* Diehl, *supra* note 16.

conservation easements should not be viewed in the same light as donated and sold conservation easements because the incentives and benefits are so different—particularly where landowners are coerced or extorted into creating “exacted” conservation easements.⁸⁶ However, “exacted” conservation easements are not created in a truly involuntary manner either, unlike conservation easements taken by eminent domain that clearly require the paying of just compensation. Where the government requires that a property owner donate a conservation easement as a condition to approving such property owner’s land use permit application, the semi-voluntary nature of the condition supports a finding that the condition should be analyzed as a true “exaction.”

A true “exaction” of a conservation easement would be more likely to constitute a compensable Fifth Amendment taking since, in addition to being subjected to the *Penn Central* factor test and *Lingle* due process challenges, true “exactions” must: (1) display an essential nexus between the legitimate government conservation interest and the regulation;⁸⁷ and (2) be roughly proportionate in nature and extent to the impact of the proposed development.⁸⁸ However, owners of the burdened parcel also receive some additional benefit from the “exaction” that may factor in to an analysis of whether the burdened property has faced a sufficient diminution in value to constitute a compensable taking.⁸⁹

Where the “exaction” requirement is considered coercive or extortionate in comparison to the benefits received by the property owner under the arrangement, the “exaction” is unlikely to be found roughly proportionate to the nature and extent of the proposed development. Since a coercive “exaction” requirement is not roughly proportionate to the benefit, a takings claim would lie and the existence of some minor corresponding benefit would be unlikely to defeat the requirement to pay just compensation. Furthermore, a due process claim may lie where such coercive actions are also considered arbitrary and capricious. A due process claim would completely invalidate the conservation easement, rather than

86. In *St. Johns River Water Management District v. Koontz*, a property owner brought an action for inverse condemnation against a water management district because the district conditioned approval of an application to dredge wetlands upon the grant of a conservation easement. In *Koontz*, the case was dismissed for lack of appellate jurisdiction; however, in dicta, the *Koontz* court stated that had the merits of the claim been the basis for the decision, the property owner would have prevailed, implying that the government’s extortionate actions constituted a true “exaction” of a conservation easement. See 861 So. 2d 1267 (Fla. Dist. Ct. App. 2003).

87. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

88. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

89. Although “exacted” conservation easements generally do not result in charitable tax deductions and credits.

requiring the payment of just compensation. As a result of the uncertainty surrounding “exaction” requirements that are considered coercive or extortionate,⁹⁰ land use planners should carefully consider the relative benefits and burdens of “exaction” arrangements to ensure that such arrangements are not too slanted in favor of the “exacting” government entity. Where government “exactions” of conservation easements can avoid the payment of just compensation, “exactions” may provide a useful land conservation tool. However, such uncertainty limits the value of conservation easement “exactions” as a government conservation tool because government entities are fearful of pushing the boundaries of extortion for fear of: (1) losing the easement altogether under a due process challenge; (2) having to pay just compensation under a takings challenge; or (3) encountering political ramifications from engaging in hardball negotiations with constituents. The next subsection will discuss whether a failed government attempt to garner an “exacted” conservation easement could constitute a compensable Fifth Amendment regulatory taking, requiring the payment of just compensation.

C. Regulatory Takings Law Relating to Failed Government Actions to Garner Conservation Easement “Exactions”

It is unlikely that a failed government action to “exact” a conservation easement will constitute a regulatory taking. Failed “exaction” claims are likely non-cognizable under the Supreme Court’s *Nollan* and *Dolan* tests, and the non-existent conditions that would form the basis of such claims cannot constitute property for takings purposes.⁹¹ In some circumstances, a property owner might have viable claims under the U.S. Constitution or other authorities to challenge the government’s regulatory acts.⁹²

The permit denial that follows from failed negotiations can serve as the basis of a takings claim under the default *Penn Central* test, albeit one with little chance of winning.⁹³ Especially unfair treatment by the regulatory agency could serve as the basis for a substantive due process claim under the U.S. Constitution—again, one that might exist more in theory than in practice.⁹⁴ However, political pressures and concerns may soften regulatory

90. Uncertainty exists in determining whether conservation easement “exactions” are compensable Fifth Amendment takings since the determination depends on an ad hoc balancing of the benefits and burdens of the arrangement.

91. See Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623, 638-641 (Spring 2012).

92. See *id.*

93. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542-43 (2005); Fenster, *supra* note 91.

94. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2614-15 (2010) (concurring opinion); *Lingle*, 544 U.S. at 542-43. (“[T]he Due

hard bargaining that could lead to conservation easement “exactions” failing, especially actions considered to be governmental overreach.⁹⁵ The next section will discuss the effect of a preexisting government-held conservation easement upon the government’s ability to condemn such property under eminent domain powers.

V. The Effect of a Preexisting Conservation Easement Upon the Government’s Ability to Exercise Its Powers of Eminent Domain

The conservation easement issues previously discussed in this Article all involved the creation of conservation easement. However, this section discusses whether a preexisting conservation easement affects the government’s power of eminent domain. State and federal statutes do not squarely address the issue. However, a flexible power of eminent domain is necessary to rectify the rare situation in which a preexisting conservation easement frustrates an essential public need,⁹⁶ thereby allowing future generations to “remedy the missteps of the past . . . [in order to] meet the currently unknowable, ultimately pressing needs of the future.”⁹⁷

For example, the federal government has recently provided widespread support for clean energy, including the building of large windmills in the West. Presumably, the federal government will face challenges to the proposed locations of windmills, with many homeowners likely to express “Not In My Back Yard” (“NIMBY”) sentiments that can be politically damaging to incumbent candidates. In response to these challenges, the federal government may look to house these windmills on open space land along the nation’s interstates since there are fewer homes along the interstate and homeowners who already live in close proximity to the interstate are less likely to express politically damaging NIMBY sentiments. It is highly likely that a significant portion of private open space and scenic interstate land in the West is already encumbered by conservation

Process Clause is intended, in part, to protect the individual against ‘the exercise of power without any reasonable justification in the service of a legitimate governmental objective.’”); Fenster, *supra* note 91; J. Peter Byrne, *Due Process Claims After Lingle*, 34 *ECOLOGY L.Q.* 471, 472 (2007) (characterizing the likelihood of a property owner’s victory with a federal substantive due process claim as “virtually never”).

95. See Fenster, *supra* note 91.

96. See Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, *UTAH L. REV.* 1039, 1083 (2007).

97. See 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, 1578 (2007).

easements that may restrict the building of giant windmill structures on the land. The government could conceivably need to exercise its power of eminent domain to condemn such easement-encumbered private land for the purpose of building a public windmill.

The government clearly has the power to condemn privately held conservation easement property (i.e., conservation easement property interests held by charities). However issues of competing sovereignty arise where one government entity attempts to condemn a conservation easement property interest held by another government entity. The remainder of this section discusses whether the existence of a preexisting, government-held conservation easement impedes another government entity's ability to exercise its eminent domain powers.

A. The Effect of the Various Levels of Government Involved

1. Government Entities at the Same Level

This subsection addresses the issue of one government entity's ability to condemn a conservation easement held by another government entity at the same level of government. The Prior Public Use Doctrine prohibits the condemnation of land previously set aside for a public use to devote it to an inconsistent public use, absent express or implied legislative authorization to do so.⁹⁸ Therefore, the Prior Public Use 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 (since there would often be no implied or express authorization among bodies at the same level that have only a general delegation of eminent domain authority).⁹⁹ The Paramount Public Use Doctrine is an exception to the Prior Public Use Doctrine that (where adopted)¹⁰⁰ provides greater flexibility for courts to allow condemnation of land devoted to a public use. This is the case even when the existing use would be practically destroyed should the condemning party show that the proposed use is of paramount public importance (relative to the preexisting public use), and that its purpose

98. See JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.01[1] (rev. 3d ed. 2010) (providing that states have an inherent power of eminent domain as sovereign powers, while local governments are not sovereign and therefore may not exercise the power of eminent domain without authorization from the state constitution or legislature).

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

100. The Paramount Public Use Doctrine exception remains a minority view, with many courts weary to balance the value of various public uses. See JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17 (rev. 3d ed. 2010).

cannot be accomplished in any other way.¹⁰¹ In jurisdictions applying the Paramount Public Use Doctrine, conservation easements could be terminated to make way for necessary economic development where legislative intent is not clearly expressed on the matter (i.e., where the relative entities involved are at the same level of government and hold a general delegation of the power of eminent domain).¹⁰² In jurisdictions where the Paramount Public Purpose Doctrine is not applied, preexisting government-held conservation easements would likely be exempt from the exercise of eminent domain by a same level government entity—unless the legislature has clearly expressed or implied a grant of eminent domain authority against such conservation easements.

2. State Government Versus Local Government

This subsection addresses the issue of a state to condemn a conservation easement held by a municipality/local government, and vice versa. As a sovereign power, a state has a power of eminent domain restricted only by the U.S. Constitution and the respective state constitution.¹⁰³ The Prior Public Use Doctrine does not preclude states from condemning property owned by local governments, state agencies, municipalities, and state or local utilities.¹⁰⁴ On the other hand, governmental or political subdivisions of a state have no inherent power to condemn property of the state and may only be granted such a power by the state legislature (either expressly or by necessary implication).¹⁰⁵ Thus, a state would likely be able to condemn a conservation easement held by a local government, municipality, or utility entity. However, local, municipal, and utility entities would likely be unable to condemn a conservation easement held by the state.¹⁰⁶

101. See Joris Naiman, Comment, *Judicial Balancing of Uses for Public Property: The Paramount Public Use Doctrine*, 17 B.C. ENVTL. AFF. L. REV. 893, 895, 898 (1990); JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17 (rev. 3d ed. 2010).

102. As with the Prior Public Use Doctrine, the Paramount Public Use Doctrine exception would only apply in the absence of clear legislative intent.

103. See 29A C.J.S. EMINENT DOMAIN § 23 (2007); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879).

104. See *United States v. City of Tiffin*, 190 F. 279, 281 (N.D. Ohio 1911); 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17[4] (rev. 3d ed. 2010).

105. See 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).

106. Absent a state statute that prohibits or restricts the exercise of eminent domain over a conservation easement.

3. The Federal Government Versus State/Local Government

This subsection discusses the federal government's ability to condemn a conservation easement held by state/local/municipal government, and vice versa. The federal government derives its power of eminent domain from the various enumerated powers granted to it under the United States Constitution, including its powers over commerce and post offices.¹⁰⁷ Since the U.S. Constitution and Congressional statutes have supremacy over state authorities, the federal government has the authority to condemn state-owned lands.¹⁰⁸ Since local and municipal governments and utility entities are "creatures of the state," the federal government may condemn the property of local and municipal governments and utility entities.¹⁰⁹ Moreover, the federal government is not constrained¹¹⁰ by the Prior Public Use or Paramount Public Use Doctrines when condemning state lands.¹¹¹ By contrast, state and local government bodies have no right of eminent domain over federal property, absent express consent.¹¹² The fact that state

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

108. See *e.g.*, *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) (stating "The fact that land is owned by a state is no barrier to its condemnation by the United States."). However, the federal power to condemn state-owned lands is constrained to the extent that the United States may not "arbitrarily imperil the very functions of the State itself." See *United States v. 4450.72 Acres of Land*, 27 F. Supp. 167, 175 (D. Minn. 1939). However, the federal condemnation of state-owned conservation easements does not appear to rise to the level of arbitrarily imperiling the very functions of the State (as would the federal government condemning the State Capital, for instance).

109. See 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN §§ 2.19, 2.21 (rev. 3d ed. 2010).

110. Although the federal government is not constitutionally prohibited from condemning state-owned lands beyond the usual constitutional restrictions on eminent domain, the federal government may be statutorily limited. For example, the Energy Policy Act of 2005 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. 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. See *Energy Policy Act of 2005*, Pub. L. 109-58, 119 Stat. 594 (2005) (codified at 42 U.S.C. §§ 15801-16524).

111. See *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).

112. See *Utah Power & Light Co. v. United States*, 230 F. 328, 338 (8th Cir. 1915); *City of Sacramento v. Sec'y of Housing & Urban Dev.*, 363 F. Supp. 736, 737 (E.D. Cal. 1972).

and local governments may not exercise eminent domain over federal-held conservation easement may present a problem since many commentators believe that local and state government entities have a greater interest in advancing local development than does the federal government—thereby potentially denying land use dictated by local needs.

VI. Conclusion

The creative and timely acquisition of conservation easements can help realize the goals of environmental and land use regulation.¹¹³ When the use of regulations and conservation easements are well coordinated, the relative advantages and disadvantages of each system can be somewhat offset.¹¹⁴ Environmental and land use regulations may be effectively imposed up until the point in which such regulations either: (1) become politically unpalatable or (2) would likely constitute a widespread taking. At such point, the government would be wise to convert to a conservation easement approach. For instance, upon reaching the conversion point, the government could increase the tax benefits associated with donations and partial sales of conservation easements that are considered “qualified conservation contributions.” Alternatively, the government could increase funding to both government and charitable land conservation entities, in order to facilitate a market for selling conservation easements. Subsidizing the market for the sale of conservation easements could: (1) undermine a claim that regulations have diminished the value of land use and development rights to the point of such regulations constituting a compensable Fifth amendment taking; and (2) increase the number and size of conservation easements in general. Increasing the tax incentives and funding of conservation purchasing organizations would be the ideal manners in which to acquire the conservation easements since these methods would allow the government to avoid paying full just compensation in exchange for offering either: (1) federal tax deductions, the amount of which has already been reduced by the effect of the land use and environmental regulations¹¹⁵; or (2) a reduced purchase price since the value

113. Hoffman, *supra* note 1, at 414-15.

114. *Id.* at 415.

115. The fair market value of the property, before contribution of the easement, should also take into account an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would be developed. Where applicable, valuation of the property before contribution should take into account land use and environmental regulations that would already restrict development of the property. See S. Rep. No. 96-1007, *supra* note 28, at 15. See also *Whitehouse Hotel LP v. Commissioner*, 131 TC 112 (2008); IRS *Conservation Easement Audit Techniques Guide*, INTERNAL REVENUE SERVICE, (Jan. 3, 2012), available at

of the land has already been limited by land use and environmental regulations.

“Exacted” conservation easements may constitute a useful conservation tool for cash-strapped government entities where such “exactions” avoid the requirement of just compensation. Government “exactions” of conservation easements could conceivably avoid the payment of full just compensation. However, public policy seems to dictate that the arrangement should be considered a true exaction, and thus subject to the heightened *Nollan/Dolan* test for determining whether the arrangement constitutes a regulatory taking. A conservation easement “exaction” that is viewed as coercive or extortionate would likely require the payment of just compensation under *Nollan/Dolan*, and could even be completely invalidated if found to be an arbitrary and capricious violation of due process under *Lingle*. Due to the uncertainty surrounding conservation easement “exactions,” government entities should be careful to draft the terms of the arrangement so as to avoid the appearance of anything approaching coercion or extortion. Furthermore, conservation easements that are “exacted” in a coercive manner may face political pressures similar to those present in the regulatory arena and in the case of the government’s exercise of eminent domain to acquire full fee simple interests.

Whatever tools the government uses to acquire a conservation easement, the government should be careful to craft good comprehensive conservation policies that are flexible enough to prevent inefficient land planning to meet the needs of the future (which is not environmentally or economically beneficial). The conservation community must be careful to avoid too much federal or state involvement in conservation easements as the popularity of conservation easements continues to grow around the country—increasing in number and size. This is because conservation easements held by the state or federal government would be unable to be condemned by local or municipal entities under their power of eminent domain. Local and municipal level government entities (i.e., zoning boards) often play a much more significant part in effective land use planning than does the federal government since local and municipal entities are more adept and better located to factor in community specific concerns. Therefore, there is a need to balance the benefits of direct federal and state involvement in conservation easements with the land use limitations imposed on local zoning boards because of such state and federal direct involvement.

http://www.irs.gov/pub/irs-utl/conservation_easement.pdf (holding that a use must be legally permissible in order for such use to qualify as the highest and best use for the purpose of valuing an easement property interest pre-contribution).
