ENDING THE EXCEPTIONALISM OF CONSERVATION EASEMENTS

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This Essay advances two arguments that are linked together. The first argument is that conservation easements enjoy legal exceptionalism from legislation, enforcement methods, and courts as seen in relevant case law. Furthermore, this exceptionalism of conservation easements can be damaging—namely, it hurts communities by creating wealth inequalities and may cause ecological problems. The second argument advances a bolder proposal that has not been explicitly advanced in the existing scholarship—that is, it is time to end this damaging exceptionalism of conservation easements by encouraging jurisdictions to statutorily limit the duration of conservation easements and to require conservation easements to be approved by local zoning boards. To further elucidate this proposal, this Essay will discuss Nebraska as a possible model for dealing with conservation easements and survey recent movement in other states and in the United States Congress to introduce legislation limiting the duration of conservation easements.

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INTRODUCTION

The term "exceptionalism" in American discourse frequently appears when talking about "American exceptionalism." "American exceptionalism" is the idea that America's institutions of government, history, and values are "exceptional." In other words, they are superior or considered unique, special, or distinct when compared to other nations and deserving of national and global admiration and influence.[1]

There is an analog to "American exceptionalism" in American property law—the exceptionalism, or more precisely, the legal exceptionalism, of the conservation easement. We can call this "the exceptionalism of conservation easements," which although not as catchy or flashy as "American exceptionalism," nevertheless expresses the similar notion that conservation easements are "exceptional" under American property law.[2] That is, conservation easements, in the context of property law, are considered unique, special, and distinct when compared to other servitudes, and thus, in the view of most scholars, also deserving of national (and indeed global) admiration, expansion, protection, and influence.[3]

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[1] Stephen M. Walt, *The Myth of American Exceptionalism*, FOREIGN POL'Y (Oct. 11, 2011), https://foreignpolicy.com/2011/10/11/the-myth-of-american-exceptionalism/.

[2] *See* Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 33 UTAH ENV'T L. REV. 69, 69 (2013) (stating that "[t]he conservation easement is exceptional").

[3] *See, e.g.*, Claire Wright, *Combatting Climate Change through Conservation Easements*, 23 MINN. J.L. SCI. & TECH. 175, 186 (2021) (arguing that conservation easements should be expanded into the international community to deal with climate change concerns); Gerald Korngold, *Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection*, 28 WIS. INT'L L.J. 585, 637–38 (2010) (arguing that American conservation easements can be exported as a legal model abroad to other countries for their own respective conservation protection efforts); Nancy A. McLaughlin, *Interpreting Conservation Easements*, 29 PROB. & PROP. 30, 30 (2015) (arguing that courts should seek to protect conservation easements and their enforcement by not interpreting conservation easements in favor of the free use of land); Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here*, 33 UTAH ENV'T L. REV. 1, 36 (2013) (describing conservation easements in positive terms, referring to their widespread use as a "grand and hopeful experiment"); Laurie A. Wayburn, *Conservation Easements as Tools to Achieve Regulatory Environmental Goals*, 74 LAW & CONTEMP. PROBS. 175, 197 (2011) (arguing that the uses of conservation easements in the United States should be expanded not just to merely preserve land from development, but also to "supplement regulatory responses to both listed-species protection and climate degradation"); Lawrence R. Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 DENV. U. L. REV. 1057 (2006) (arguing for the expanded use of conservation easements to protect culturally important resources in the United States); Joshua P. Welsh, Comment, *Firm Ground for Wetland Protection: Using the Treaty Power to Strengthen Conservation Easements*, 36 STETSON L. REV. 207, 213 (2006) (arguing that a federal conservation easement enabling statute should be

My argument in this Essay, which can be deduced from its title, is comprised of two linked components: first, conservation easements do enjoy legal exceptionalism not only under statutory law but also in enforcement and case law; and second, because such exceptionalism is damaging to communities and the environment, it is time to end that exceptionalism. In contrast to the weight of existing scholarly consensus which largely supports the legal *status quo* of conservation easements and which proposes only more moderate reforms,[4] I propose stronger reform. Jurisdictions should impose, by statute, clear time limits on the duration of conservation easements and also give local zoning boards the authority to review contemplated conservation easements. My proposal is not just abstract; there are more and more jurisdictions where legislation to explicitly limit the duration of conservation easements has been introduced.[5] In addition, the Nebraska approach to conservation easements can be considered a model approach for local zoning board authority on this matter.

This Essay proceeds as follows: Part I explains how conservation easements are exceptional, especially as compared to other servitudes. Part II then uses often neglected perspectives in scholarship to show how the exceptionalism of conservation easements leads to undesirable results which hurt communities and conservation efforts. Namely, the exceptionalism of conservation easements makes it difficult to modify these easements for changed conditions (a widely documented problem in the scholarly literature[6]), but also—far less discussed in scholarly literature—that such exceptionalism of conservation easements can lead to wealth inequality and environmental injustices in communities where conservation easements are present and may even cause ecological

drafted and passed by Congress and that the treaty power of the United States be employed to strengthen conservation easements for the protection of wetlands). For an overview of the academic debates over conservation easements generally, see Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENV'T L. REV. 119 (2010).

[4] *See, e.g.*, Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV'T L. REV. 421, 428 (2005) [hereinafter McLaughlin, *Rethinking the Perpetual Nature*] (proposing the application of the charitable trust law doctrine of *cy pres* to allow for modification of conservation easements); Gerald Korngold, Semida Munteanu & Lauren Elizabeth Smith, *An Empirical Study of Modification and Termination of Conservation Easements: What the Data Suggest about Appropriate Legal Rules*, 24 N.Y.U. ENV'T L.J. 1, 2 (2016) (proposing a doctrine that requires different procedures and rules for different categories of modifications of conservation easements – i.e., a type of sliding scale approach).

[5] *See* discussion *infra* Part III.

[6] *See, e.g.*, McLaughlin, *Rethinking the Perpetual Nature*, *supra* note 4, at 424–25 (discussing the problems and mistakes which result from not modifying conservation easements to account for changed conditions as well as the "confusion and uncertainty" regarding the modification of conservation easements).

damage. Part III then concludes with my proposal to end the exceptionalism of conservation easements by limiting their duration and requiring local zoning boards to approve conservation easements.

I. THE LEGAL EXCEPTIONALISM OF CONSERVATION EASEMENTS

A. Brief Overview of Conservation Easements and their "Exceptional" Qualities

Conservation easements are a restriction on land use that permit the holder of the easement to prevent the landowner of the servient land—the land burdened by the easement[7]—from using or developing his land in ways that would hurt its preservation.[8] Because of the power conferred on the holder to restrict the servient landowner from using his servient land, conservation easements are considered "negative easements."[9] Further, conservation easements are considered a type of easement in gross, because the conservation easement can be given to any entity or person other than the owner of another piece of land.[10] In other words, there is no dominant estate benefitted by the conservation easement, and therefore conservation easements are not appurtenant to any estate in land.[11]

Under traditional common law principles, negative easements and easements in gross were and continue to be subject to a host of limitations and restrictions. Negative easements, given their restrictive nature on land development and land use, were looked on with suspicion and antipathy by courts. Indeed, traditional English common law recognized only a limited assortment of negative easements, such as those which prevented interference or obstruction of building support,

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[7] The land burdened by an easement is the servient estate, whereas the land benefited by the easement is the dominant estate. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1(1) (AM. L. INST. 2000).

[8] John H. Pearson, *Conservation Easements*, *in* 7 THOMPSON ON REAL PROPERTY § 60.02(e)(5) (David A. Thomas ed., 2023); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 682 (5th ed. 2021); 4 POWELL ON REAL PROPERTY § 34A.01 (Michael Allan Wolf ed., 2023).

[9] Negative easements give an easement holder the right to prohibit or block certain uses of their land. *See* DALE A. WHITMAN ET AL., THE LAW OF PROPERTY 353 (4th ed. 2019).

[10] 4 POWELL ON REAL PROPERTY, *supra* note 8, § 34A.01. An easement in gross attaches a particular right to an individual rather than to the property itself. *See id.*

[11] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, *supra* note 7, § 1.5(1) states that "'[a]ppurtenant' means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land." *See also* 4 POWELL ON REAL PROPERTY, *supra* note 8, § 34A.01.

or of flow of air, light, and artificial streams.[12] American courts have not been willing to recognize new kinds of negative easements, save for certain negative easements preventing interference with views or access to solar energy via solar panels, which in some states have been expressly permitted by statute.[13] Easements in gross were also disfavored in the common law, in part because they were generally not transferable and would not run with the land.[14] Thus, based on such common law principles, which continue to apply to the universe of negative easements and easements in gross generally, one might expect conservation easements to be unenforceable and invalid because they do not fall within the aforementioned few categories of recognized negative easements, are unassignable, and do not burden successors.

However, one would be mistaken to assume that these easements are invalid, as conservation easements enjoy legal exceptionalism and are not treated as ordinary negative easements or easements in gross. The exceptionalism comes from statutes—states have enacted laws that essentially save conservation easements from invalidity under the common law.[15] Every state now has legislation which explicitly recognizes conservation easements, and twenty-one states (and the District of Columbia and the U.S. Virgin Islands) have adopted the Uniform Conservation Easement Act ("UCEA") which was originally developed by the Uniform Law Commission in 1981 to serve as model legislation for states enacting statutes to recognize and protect conservation easements.[16] Although variations exist among states, conservation easement statutes also make clear that such easements are not subject to common law limitations imposed on easements in gross—rather, conservation easements are assignable and the burdens imposed run with the servient land to bind the servient landowner's successors and/or assigns.[17] The exceptionalism of conservation easements is explicitly recognized by the UCEA; Section 4 of the UCEA deals with all possible validity challenges from the common law and peremptorily declares that "[a] conservation easement is valid even though: (1) it is

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[12] WHITMAN ET AL., *supra* note 9, at 353. For example, California's Civil Code permits solar easements. *See* CAL. CIV. CODE §§ 801, 801.5. For a more detailed discussion of California statutory and case law on solar easements, see SCOTT ANDERS ET AL., ENERGY POL'Y INITIATIVES CTR., CALIFORNIA'S SOLAR RIGHTS ACT: A REVIEW OF THE STATUTES AND RELEVANT CASES 20–23 (2014), https://www.sandiego.edu/law/documents/centers/epic/Solar%20Rights%20Act-A%20Review%20of%20Statutes%20and%20Relevant%20Cases.pdf.

[13] *Id.*

[14] 4 POWELL ON REAL PROPERTY, *supra* note 8, § 34A.01.

[15] WHITMAN ET AL., *supra* note 9, at 353–54.

[16] CHRISTINE A. KLEIN, PROPERTY: CASES, PROBLEMS, AND SKILLS 536 (2016); UNIF. CONSERVATION EASEMENT ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2007).

[17] 4 POWELL ON REAL PROPERTY, *supra* note 8, § 34A.01.

not appurtenant to an interest in real property . . . (3) it is not of a character that has been recognized traditionally at common law . . . [and] (4) it imposes a negative burden . . . ."[18]

In the real world, conservation easements are also typically perpetual in duration,[19] which is another reflection of their exceptionalism. Despite general common law principles in property law that are anathematic toward perpetuity clauses and dead-hand control of property—such as the principles reflected in the rule against perpetuities which can invalidate perpetual restrictions in various kinds of property interests[20]—perpetual conservation easements are not only tolerated but also statutorily protected by federal tax law. Section 170(h) of the U.S. Internal Revenue Code allows the servient land owner (i.e., sellers of conservation easements) to enjoy a charitable deduction on their income taxes, but only if the servient landowner granted the conservation easement "in perpetuity"—i.e., forever.[21] The costs to the United States of these deductions are substantial; it is estimated that from 2001 to 2003, for example, that federal and state treasuries forewent approximately $5.2 billion to $18.2 billion dollars.[22] Furthermore, there have been numerous documented abuses of this tax provision, including overvaluation of conservation easements and fraudulent deductions.[23] Some states go further than the federal tax law and actually statutorily require that conservation easements be perpetual (such as California) while others require a minimum period of at least ten to fifteen years.[24]

The last exceptional quality of conservation easements to be discussed in this section is that conservation easements frequently are held and enforced by the government (as opposed to other servitudes in

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[18] UNIF. CONSERVATION EASEMENT ACT § 4 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2007).

[19] 4 POWELL ON REAL PROPERTY, *supra* note 8, § 34A.01.

[20] J. Brady Hagan, Note, *Facing the Growing Tension between Conservation Easements and the Common Law*, 108 KY. L.J. 335, 354 (2019).

[21] *See* 26 U.S.C. § 170(h)(5). The focus of this Essay is not on tax issues associated with conservation easements. For a fuller discussion of the relevant tax law provisions on conservation easements, see 4 POWELL ON REAL PROPERTY, *supra* note 8, § 34A.04 and Molly Teague, Note, *Conservation Options: Conservation Easements, Flexibility, and the "In Perpetuity" Requirement of IRC Sec. 170(h)*, 75 VAND. L. REV. 1573 (2022). It should be noted that Congress in 2022 has capped certain conservation easement deductions; for a discussion of this, see Dominic Parker, *Congress Limits Conservation Easement Write-Offs — That's Good for Conservation and Taxpayers*, THE HILL (Jan. 11, 2023), https://thehill.com/opinion/energy-environment/3806213-congress-limits-conservation-easement-write-offs-thats-good-for-conservation-and-taxpayers/.

[22] Bray, *supra* note 3, at 146.

[23] *Id.* at 147–48. For a discussion of abuses of the conservation easement deduction, see Mark A. Luscombe, *Land Conservation Easements: Use and Abuse*, 98 TAXES 3 (2020).

[24] 4 POWELL ON REAL PROPERTY, *supra* note 8, § 34A.03.

the property law world, which are primarily between, among, and enforced by private parties). Thus, conservation easements are often enforced literally at gunpoint by executive authority. To better understand this exceptionalism of conservation easements, it is necessary to discuss how conservation easements are often created in the real world and who tends to hold conservation easements. Imagine you are a landowner and you have a large piece of land you would like to preserve in an undeveloped state. You also want to make some money. You then sell or donate your right to develop the property to a non-profit organization (often called a land trust) or a government agency or unit. The non-profit organization will thus hold the conservation easement and ensure its enforcement, and you become the servient landowner. You receive money and other financial benefits, such as an income tax charitable deduction or reduction of property tax, and you can generally continue living on the land or sell your land, provided your successors also promise never to develop the land (remember the conservation easement, unlike other easements in gross, runs with the land).[25]

The key point here is, conservation easements are often held by government agencies who are also charged with its enforcement.[26] Data as of September 2012 from the National Conservation Easement Database shows approximately 64,640 conservation easements were owned by government units or agencies (federal, state, and local levels), protecting a total of approximately 11,410,653 acres,[27] or roughly twenty-five percent of all land protected in the United States under conservation easements (whether owned privately or by government agencies/units).[28] While government agencies do enforce conservation easements in court, conservation easements held by federal government entities, like the U.S. Fish and Wildlife Service ("USFWS"), have also been enforced by armed federal agents visiting servient landowners on the servient land. For example, in September 2017, various farmers and representatives complained in a town hall meeting held with the USFWS in Cramer, North Dakota that they had been intimidated by

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[25] KLEIN, *supra* note 16, at 529–30.

[26] *Id.* at 529.

[27] Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467, 475 (2013). For information about the National Conservation Easement Database, see *About Us*, NAT'L CONSERVATION EASEMENT DATABASE, https://www.conservationeasement.us/about/ (last visited Aug. 25, 2023).

[28] It is estimated that approximately forty million acres total in the United States—roughly the size of the state of Florida or the state of Washington—are protected by conservation easements. *See* KLEIN, *supra* note 16, at 530; SPRANKLING & COLETTA, *supra* note 8, at 683.

armed federal agents who, in full body armor and armed with firearms, would attend routine meetings with servient landowners about the USFWS's conservation easements over their land.[29] In response to the complaints, Gregory J. Sheehan, then serving as Principal Deputy Director of USFWS, tried to placate servient landowners by saying that "[u]nless concerns for employee safety or implications that a violation [of the conservation easements] has taken place are present, [USFWS] law enforcement officers are not expected to make first contact with land owners."[30] The caveat in the first part of Sheehan's attempted placation is important because he makes clear that the USFWS will still send its law enforcement officers to enforce conservation easements if "implications that a violation . . . has taken place are present."[31] Simply put, another way conservation easements are exceptional is that, contrary to other servitudes, they have been enforced by armed federal agents who have intimidated servient owners.

In short, Part I of this Essay has posited that conservation easements enjoy legal exceptionalism because they are unique and distinct from other servitudes. Their exceptional qualities as detailed in this section derive largely from statutory backing (both state and federal) which saves them from invalidity under common law principles, as well as executive enforcement by authorities. Given that approximately forty million acres in the United States—roughly the size of the state of Florida or the state of Washington—are protected under conservation easements,[32] the exceptionalism of conservation easements is a national phenomenon.

B. The Exceptionalism of Conservation Easements in Case Law

Conservation easements do not only enjoy exceptionalism from statutes and executive enforcement, but also from courts as seen in case law. Different state courts have employed different methods to afford conservation easements special treatment.

Courts have shielded conservation easements from basic contract principles which would otherwise apply to other land restriction agreements. At least one court, for example, has refused to apply basic

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[29] Rob Port, *U.S. Fish & Wildlife Changes Policy on Use of Armed Personnel After Complaints at Cramer Town Hall*, SAY ANYTHING (Aug. 7, 2018), https://www.sayanything blog.com/entry/u-s-fish-wildlife-changes-policy-on-use-of-armed-personnel-after-complaints-at-cramer-town-hall/.

[30] *Id.* (quoting a policy guidance issued by Sheehan).

[31] *Id.*

[32] KLEIN, *supra* note 16, at 530; SPRANKLING & COLETTA, *supra* note 8, at 683.

contract principles, such as mutual mistake, intentional misrepresentation, negligent misrepresentation, and frustration of contract, to interpreting conservative easements (as opposed to other servitudes), saying that "defenses [to enforcement of the written servitude agreement] that exist at common law have no application in the context of a conservation easement."[33]

At least one court has also rescued conservation easements that were signed, executed, and conveyed prior to the state's adoption of a conservation easement-enabling statute—in other words, at least one court, through illogical reasoning, has in effect *retroactively* applied the state's conservation easement-enabling statute.[34] In *United States v. Blackman*, the conservation easement at issue was executed and conveyed in March 1973 by the Atkins family to a non-profit conservation group called Historic Green Springs, Inc.[35] The March 1973 conservation easement agreement made it clear that the Atkinses were conveying a perpetual, assignable easement in gross which restricted them from improving their land and that any addition, structural changes, improvements, or alterations to the house on the land would require prior written approval from Historic Green Springs, Inc.[36] Five years later, Historic Green Springs, Inc. conveyed the Atkins easements to the U.S. National Park Service ("NPS").[37] In 2002, Blackman purchased the Atkins property and informed NPS (the new owner of the conservation easement) of his intention to make alterations on the house, such as removing the front porch, but NPS rejected his request.[38] In 2004, Blackman's lawyer sent a letter to NPS that his client would start the alterations with or without approval, which prompted NPS to file a complaint in a Virginia court.[39] The trial court issued a temporary restraining order against Blackman pending written approval from NPS; Blackman appealed, arguing that the March 1973 conservation easement agreement was invalid because at that time, Virginia did not recognize negative easements in gross.[40] Neither party could rely on the Virginia Conservation Easement Act which explicitly

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[33] Argyle Farm & Props., LLC v. Watershed Agric. Council, 24 N.Y.S.3d 436, 439 (N. Y. App. Div. 2016).

[34] *See* United States v. Blackman, 613 S.E.2d 442 (Va. 2005).

[35] *Id.* at 444.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 445.

recognized conservation easements, since the Act, passed in 1988, was not yet in effect.[41]

The issue before the court therefore was whether, in 1973, Virginia recognized negative easements in gross.[42] The court examined pre-1973 statutory and constitutional provisions, first looking to a 1962 statute which provided that "[a]ny interest in or claim to real estate, *including easements in gross*, may be disposed of by deed or will."[43] The court thus reasoned that this language clearly did not only apply to easements appurtenant, but also to negative easements in gross, and used the 1962 statute as evidence that easements in gross were "recognized interests in real property."[44] The court then looked at the 1966 Open-Space Land Act, which encouraged the acquisition of certain public bodies in fee simple title or "easements in gross or such other interests in real estate" designed to maintain the preservation of open-space land.[45] The court used the 1966 statute as further evidence that Virginia recognized easements in gross for preservation purposes and wrote that it "evince[s] a strong public policy in favor of land conservation and preservation of historic sites and buildings."[46] The court also examined the Virginia Constitution, which it interpreted as having a long-standing commitment to land conservation, quoting the relevant part of the Virginia Constitution:

> " . . . it shall be the policy of the Commonwealth to conserve, develop and utilize its natural resources, its public lands, and its historical sites and buildings. Furthermore, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution . . . for the benefit . . . and general welfare of the people of the Commonwealth."[47]

Next, the court looked to the 1988 Virginia Conservation Easement Act itself, writing that a key purpose of the Act was to consolidate and legislate the previous statutes, such as the 1962 and 1966 statutes.[48] Thus, the court in the end decided that Virginia did in fact recognize negative easements in gross when the March 1973 conservation easement was executed, and issued a ruling in favor of the NPS.[49]

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41 *See* VA. CODE §§ 10.1-1009–1016.
42 *Blackman*, 613 S.E.2d at 445.
43 *Id.* at 447.
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.* at 447–48.
49 *Id.* at 449.

The court's logic is problematic for a number of reasons. Foremost, despite the court's attempts to directly link the pre-1973 statutes and Virginia constitutional provision to negative easements in gross, none of these statutory or constitutional provisions *explicitly* or *specifically* recognize or authorize negative easements in gross or conservation easements. The 1962 statute, for example, is not concerned with recognition or authorization, but with transferability. Though the Virginia Constitution's commitment to historical preservation also can be read as a general policy statement in favor of preservation and conservation, it too fails to explicitly mention negative easements in gross.

Yet despite these logic weaknesses and leaps, *United States v. Blackman* nevertheless shows that courts like the Virginia Supreme Court are willing to treat conservation easements exceptionally and to confer retroactive protections on them, notwithstanding the general rule of law principle that laws should not apply retroactively.

Moreover, courts seem to go out of the way to protect conservation easements from any possible modification or amendment, even if the language of the conservation easement itself does not explicitly prohibit the contemplated modification or amendment. In *Bjork v. Draper*, for instance, the servient landowners were the Grays, who had granted a conservation easement to the Lake Forest Open Lands Association.[50] The Grays owned two lots of land: Lot 1 contained a historic house called Kerrigan House, while Lot 2 was adjacent to and part of the landscaped grounds of Kerrigan House.[51] The conservation easement regulated this Lot 2, indicating that the purpose of the easement was to "assure that the Property [Lot 2] will be retained forever predominantly in its scenic and open space condition . . . [,]"[52] and also prohibited "[t]he placement or construction of any buildings whatsoever, or other structures or improvements of any kind except that the existing driveways serving said Lot 1 and the existing encroachment of the Kerrigan House onto the Property [Lot 2] may continue."[53] The conservation easement also provided that Lot 2 could be altered or varied only by agreement of both parties or their successors (Section 23(d) of the conservation easement provided that: "No alteration or variation of this instrument shall be valid or binding unless contained in a written amendment first executed by Grantors and Grantee, or their

[50] Bjork v. Draper, 886 N.E.2d 563, 565–66 (Ill. App. Ct. 2008).
[51] *Id.* at 566.
[52] *Id.*
[53] *Id.* at 567.

successors, and recorded in the official records of Lake County, Illinois.").[54]

The Grays later sold Lot 1 and Lot 2 to the defendants, the Drapers, who decided to add a brick driveway turnaround to Lot 1 that would partially encroach onto Lot 2.[55] The Drapers and the holder of the conservation easement, the Lake Forest Open Lands Association, entered into a written agreement to amend the conservation easement to allow this change.[56] Specifically, the original agreement provided for no change in the size of land protected by the conservation easement—the total amount of land subject to the easement would not decrease and conservation values would not be impaired. Under the amendment, a small portion of Lot 2 (809 square feet, or 3.2 percent of its total size) would be removed from the easement in order to make way for the driveway turnaround encroachment, but it would immediately be replaced with an *equal amount of land* from Lot 1 to be protected under the easement.[57]

Neighbors sued, arguing that this amendment was not permitted under the conservation easement.[58] The Illinois appellate court agreed and ruled that the amendment was invalid, seemingly discarding its faithfulness to "plain language,"[59] and opining that although Section 23(d) of the conservation easement permitted amendments, that "section must be interpreted in harmony with the other provisions of the easement. That is accomplished by interpreting [S]ection 23(d) to mean that, although the easement allows amendments, no amendment is permissible if it conflicts with other parts of the easement . . . [,]"[60] such as the section which prohibited "improvements of any kind to the easement property."[61]

There are a number of issues with the court's reasoning. First, the amendment provision in the conservation easement, Section 23(d), contained no explicit or express limitation. To get around this fact, the court then seemed to latch on to the provision which disallowed "improvements of any kind"[62] but failed to explain how adding a driveway turnaround and replacing the affected land with an equal amount of land from the other lot qualified as a prohibited

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[54] *Id.* at 567–68.
[55] *Id.* at 568.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 568–69.
[59] *Id.* at 573–74.
[60] *Id.* at 574.
[61] *Id.* at 567.
[62] *Id.*

"improvement." Furthermore, the court seemed to ignore the key carveout to the prohibition on improvements, which permitted that "existing driveways serving said Lot 1 and the existing encroachment of the Kerrigan House onto the Property [Lot 2] may continue."[63] There is a perfectly reasonable argument to be made that the contemplated brick driveway turnaround was not a completely new driveway but part of the existing driveway of Lot 1, and thus its encroachment on Lot 2 would be permissible. Third, the court ignored the fact that the holder of the conservation easement and the servient landowners came to an agreement that the brick driveway turnaround was acceptable.

The above cases show that courts have utilized a wide range of methods to protect the exceptionalism of conservation easements, such as exempting conservation easements from ordinary principles of contract law, retroactively applying conservation easement-enabling statutes, and arbitrarily shielding conservation easements from amendments.

II. EXCEPTIONALISM OF CONSERVATION EASEMENTS LEADS TO UNDESIRABLE RESULTS

Having established that conservation easements do enjoy legal exceptionalism, this Essay now proceeds to detailing how this exceptionalism leads to undesirable results in society and specifically in jurisdictions where conservation easements operate. Existing scholarship has already touched upon some of these undesirable results—namely, that the perpetual duration of most conservation easements can actually backfire and hurt conservation efforts, as it makes it difficult for conservation easements to change and adapt to local and global environmental changes over time, including changes to the nature of the land itself, surrounding communities, demographics of the area, and/or conservation norms.[64]

I do not wish to rehash these points which have been well-developed in the existing scholarship. Instead, I want to illuminate two less-discussed undesirable results of the exceptionalism of conservation easements that legal scholars, particularly scholars who laud conservation easements and environmental protection, have ignored: first, that the exceptional perpetuity and protections afforded to

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[63] *Id.*

[64] *See, e.g.*, Michael Allan Wolf, *Conservation Easements and the Term Creep Problem*, 33 UTAH L. REV. 787 (2013); Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENV'T L.J. 121 (2011).

conservation easements under the law can lead to wealth inequality in jurisdictions where conservation easements are created and operate; and second, that serious ecological concerns or problems can result from conservation easements.

A. Conservation Easements Can Lead to Wealth Inequality & Environmental Injustices

Sociologist Justin Farrell has coined a term called "compensation conservation," which describes how conservation and conservation easements can be a financially lucrative activity for those with great wealth, allowing them to "accrue disproportionate economic benefits *under the banner of environmental protection*."[65] Conservation easements, as Farrell argues, are often lucrative for wealthy people because they can preserve wealth through generous charitable deductions by donating conservation easements or getting cash payments by selling conservation easements over the land, and then continue to increase their wealth by constraining housing supply and pushing up property values since large stretches of land which they own in the community are constrained by conservation easements.[66] While Farrell concedes that conservation easements are not necessarily intrinsically inequitable things, he argues that we all need to think more critically about the societal impact of conservation easements particularly in wealthy areas.[67] As he bluntly notes, "[t]here's this popular assumption that environmental conservation is an altruistic public good—[conservation easements] are a really useful mechanism and critical—but the easements are also a vehicle for protecting wealth."[68]

Farrell's on-the-ground research in Wyoming also reveals a substantial financial industry and business operation, run by land trusts such as the Jackson Hole Land Trust, which tries to attract the rich and wealthy to enter into conservation easements through advertisements and recruitment materials by emphasizing the financial benefits they can

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[65] JUSTIN FARRELL, BILLIONAIRE WILDERNESS: THE ULTRA-WEALTHY AND THE REMAKING OF THE AMERICAN WEST 83 (2020). *See also* Chuck Collins, *Six Questions for Justin Farrell, 'Billionaire Wilderness' Author*, INST. FOR POL'Y STUD. (Jan. 25, 2021), https://ips-dc.org/six-questions-for-justin-farrell-billionaire-wilderness-author/.

[66] Collins, *supra* note 65.

[67] *Id.*

[68] Karen Heller, *The Fabulously Wealthy are Fueling a Booming Luxury Ranch Market Out West*, WASH. POST (Aug. 16, 2022), https://www.washingtonpost.com/lifestyle/2022/08/16/ranch-land-west-billionaires/.

bring.[69] As one longtime land trust expert has revealed, "wealthy people out here [in Wyoming] tend to do land conservation easements as a financial tactic, rather than out of necessity or because of their genuine commitment to conservation values."[70]

Furthermore, wealthy individuals often enter the area, buy up large pieces of land, sell or donate conservation easements to units like the Jackson Hole Land Trust, and enjoy the financial benefits (as well as keeping their land untouched for their successors), but this all "creat[es] intense housing demand and land scarcity that has dramatically reshaped who lives in the community" and which has made it much more difficult for middle- and lower-income people to survive due to reduced affordable housing, since land has been snatched up and development forbidden by the conservation easements.[71] Thus, one undesirable outcome of conservation easements is their effect on wealth inequality. Conservation easements may bring conservation benefits, but at what cost to middle-to-lower class individuals in the community? The commercialization of conservation easements by land trusts also raises awkward but important ethical questions: Does it matter if the primary motivation of the land trust and servient landowner is not conservation but rather financial benefit?[72]

The links between wealth inequality and conservation easements also bring attention to difficult questions regarding environmental justice (or perhaps, more aptly put, environmental injustice). Environmental justice is defined by the U.S. Environmental Protection Agency ("EPA") as:

> "the *fair treatment* and *meaningful involvement* of all peoples regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys: the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which to live, learn, and work."[73]

Can it be said that lower-income individuals who bear the costs of conservation easements (through possibly being priced out of the market for homes) have "equal access" to the conservation easement

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[69] FARRELL, *supra* note 65, at 86.

[70] *Id.* at 85.

[71] *Id.* at 96–97.

[72] *See generally* Jesse J. Richardson, Jr., *Conservation Easements and Ethics*, 17 SAN JOAQUIN AGRIC. L. REV. 31 (2007) (detailing the ethical problems related to conservation easements).

[73] U.S. EPA, *Environmental Justice*, https://www.epa.gov/environmentaljustice (last updated July 24, 2023) (emphasis added).

decision-making process? Can it be said that they have "meaningful involvement" in the "development, implementation, and enforcement" of conservation easements, which are after all enforced by the courts and in some cases, by armed federal officers, as discussed earlier in this Essay? Environmental injustice is often thought of in terms of pollution unjustly affecting disadvantaged individuals, but conservation easements—and the costs they impose on more disadvantaged populations—raise the uncomfortable possibility that environmental injustice can result from conservation itself. Furthermore, again referring to the EPA's definition of environmental justice, can we expect disadvantaged people to have a "healthy environment in which to live" when they might not be able to purchase a home—an environment—in the first place due to the burdens of conservation easements? Is this just, when the economic benefits of conservation easements fall disproportionately to the wealthy?[74]

Indeed, some scholars have pointed out the inequitable racial impact of conservation easements, arguing that conservation easements in the United States coastal south "were an elite white class project from the start"[75] and that, at least in their case study of the South Carolina coast, communities abutting private conservation easements are more likely to be economically disadvantaged and have a higher percentage African American population than communities adjacent to public lands.[76] Additionally, these economic and racial disparities are also present in access to greenspace because the vast majority of private conservation easements, like those on the South Carolina coast, do not permit public access and have the effect of blocking off lower income and minority populations.[77]

B. Conservation Easements May Hurt Conservation Efforts Because They May be Based on Faulty Assumptions

Most legal scholarship on conservation easements also ignores valuable input from scientists, particularly ecologists, biologists, and geographers. A majority of legal scholarship on conservation easements, including property law casebooks and treatises, seems to accept as a

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[74] *See* Levi Van Sant et al., *Conserving What? Conservation Easements and Environmental Justice in the Coastal US South*, 14 HUM. GEOGRAPHY 31, 34 (2021) (studying the racial and economic inequalities resulting from conservation easements and concluding that they disproportionately benefit high-income landowners).

[75] *Id.* at 31.

[76] *Id.* at 40.

[77] *Id.* at 41–42.

given that conservation easements are effective at *conservation*.[78] However, some ecologists, biologists, and geographers have argued that the assumptions on which conservation easements are based may be faulty and thus eventually lead to ecological and environmental problems. In other words, conservation easements themselves are not conserving, but actually harming, the environment they were meant to protect. Or, at the very least, conservation easements are not really doing much "conserving."

Important contributions in this regard have been made by ecologist George Wuerthner. While recognizing the important role conservation easements play in conservation generally, Wuerthner has attacked the assumption often laden in those conservation easements which require the servient owner to keep the land pristine and for agricultural use that such limitations are better for conservation than permitting development (such as for a rural subdivision or residential area).[79] Wuerthner also attacks the assumption that preservation of open space equals conservation; an example is given of a large, open wheat field that has lower diversity and wildlife value than even a golf course.[80]

Because many conservation easements in the real world permit or, in some cases, mandate ongoing land exploitation (like agricultural activities), Wuerthner argues that in many cases, the environmental impact of agriculture can be more harmful than a rural subdivision or even a suburban housing tract. These developments can contain more wildlife diversity because agricultural land like cornfields or wheatfields are "biological desert[s]" that contain only few species of plants that are removed yearly.[81] Conservation easements which protect agricultural, open land and which restrict the landowner only to farming the land can also cause great harm to natural ecosystems due to unending, constant resource exploitation by the farmer-landowner.[82] In fact, such monoculture and constant exploitation of the land can cause soil erosion, water pollution, and harm from insecticides and herbicides.[83] In contrast, a developed small residential subdivision abutted by natural habitat could be better for ecological diversity.

Ecologists like Wuerthner also challenge conservation easements which preserve land by limiting activities by the servient landowner to

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[78] *See supra* note 3.

[79] George Wuerthner, *The Problem of Conservation Easements*, WILDLIFE NEWS (Apr. 15, 2020), https://www.thewildlifenews.com/2020/04/15/the-problem-of-conservation-easements/.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

ranching.[84] Wuerthner points out that keeping land open for ranching and livestock might not be as good for the environment as a small developed area, since native wildlife is preempted by "exotic animals" (the livestock not natural to the region) when native meadows in ranches are replaced by exotic grasses.[85] Livestock also pollute water, and often on such easements, natural predators are killed (affecting the natural ecosystem balance) and soil bio-crusts are degraded, resulting in the overall ecological impact of open land preserved for ranching to "vastly exceed the cumulative damage done by subdivisions and sprawl."[86]

Important empirical case studies have also been done by ecologists, biologists, and geographers which further cast doubt on the efficacy of conservation easements on the eponymous task of "conservation." A group of scientists examined 1,223 conservation easements between 1970 and 2016 in the High Divide (a region in the Rocky Mountains with national conservation importance) and attempted to empirically understand the contribution of conservation easements with respect to landscape-scale conservation goals.[87] In particular, they looked at two conservation targets—representation (the extent to which protected area networks effectively conserve species, genetics, and community diversity)[88] and landscape connectivity (the ability for a landscape to support movement for many species between protected areas or resource patches)[89]. These scientists found that conservation easements protected potential landscape connectivity "only slightly more effectively than randomly allocated areas" and that conservation easements insufficiently represented forty-three out of eighty-seven (almost fifty percent) ecosystems in the area.[90]

Another study was conducted in the Appalachian region, a heterogeneous mountain region in the southeast United States with some of the most important priority conservation areas in the country with state parks, national forests, and conservation easement-protected land.[91] The study attempted to compare and contrast the efficacy of conservation easements to publicly-conserved lands with respect to

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Rose A. Graves et al., *Quantifying the Contribution of Conservation Easements to Large-Landscape Conservation*, 232 BIOLOGICAL CONSERVATION 83, 83–84 (2019).

[88] *Id.* at 84.

[89] *Id.*

[90] *Id.* at 83, 89–90.

[91] Nakisha Fouch et al., *Landscape-Level Naturalness of Conservation Easements in a Mixed-Use Matrix*, 34 LANDSCAPE ECOLOGY 1967, 1970 (2019).

naturalness—i.e., how effective the conservation measures were at limiting human modification and transformation of the land.[92] They found that lands under conservation easements did not differ in a significant way from non-conserved lands, and that publicly conserved lands had more naturalness.[93]

The voices of such scientists—who are still sympathetic to conservation easements but who have called for more studies especially with respect to assessing and measuring the efficacy of conservation easements—should be given attention by legal scholars. The exceptionalism of conservation easements only serves to exacerbate the ecological problems detailed by ecologists like Wuerthner. At the very least, scientific research and case studies have cast some doubt on the effectiveness of conservation easements at conservation, which may weaken the justification for treating conservation easements as exceptional under the law.

III. A RADICAL PROPOSAL: LIMIT THE DURATION OF CONSERVATION EASEMENTS AND PUT THE POWER OF APPROVAL IN THE HANDS OF LOCAL GOVERNMENTS

So, what should we do? Most scholars writing about conservation easements seem to have no problem with the exceptional treatment of conservation easements,[94] and some even call for expanding the power of conservation easements.[95] Alternatively, others call for small steps reform or unrealistic proposals like using the eminent domain power to curb the perpetual characteristics of conservation easements.[96] The only scholar who has bravely pushed for more stringent curbs on conservation easements is Professor Jessica Owley, who has argued that conservation easements should be made of limited duration by ending

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[92] *Id.* at 1969–70.

[93] *Id.* at 1967, 1975.

[94] *See, e.g.*, Adam E. Draper, *Conservation Easements: Now More Than Ever – Overcoming Obstacles to Protect Private Lands*, 34 ENV'T L. 247 (2004) (arguing there is no problem with the perpetual characteristic of conservation easements).

[95] *See* discussion *supra* notes 3–4.

[96] *See, e.g.*, 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 (2007) (arguing that eminent domain can serve as a check on problems related to the unlimited duration of conservation easements). This, however, is unrealistic as many conservation easements are held by government agencies, so states cannot take eminent domain action against them—this argument is made persuasively by Derrick P. Fellows, Kelo, *Conservation Easements, and Forever: Why Eminent Domain is Not a Sufficient Check on Conservation Easements' Perpetual Duration*, 35 WM. & MARY. ENV'T L. & POL'Y REV. 625, 625 (2011).

perpetual conservation easements and changing them to "renewable term conservation easements."[97]

My proposal is even more radical than Professor Owley's—it is time to end the exceptionalism of conservation easements by imposing clear limitations on their duration. The United States Congress and state legislatures should take action, and indeed, they are taking action.

For example, on the federal level, in April 2022, U.S. Senators Kevin Cramer (R-ND), Mike Rounds (R-SD), and John Hoeven (R-ND) introduced the Landowner Easement Rights Act, which would prohibit the gun-carrying USFWS from entering into any easement with a term of more than fifty years; servient owners of existing easements would also be given the option, at the servient owner's request, to renegotiate, renew, or buy out the easement.[98] Though the bill was introduced and referred to the Senate Energy and Natural Resources Committee, it did not make it further in the legislative process in the 2022 session.[99] Corresponding legislation was also introduced in the U.S. House of Representatives by Congresswomen Kelly Armstrong (R-ND) and Michelle Fishbach (R-MN).[100]

State legislatures have also not remained dormant. Senate Bill 357 in Montana, sponsored and introduced by state Senator Steven Hinebauch (R-Wilbaux, Montana) in the Montana legislature in early 2023, would impose a forty-year limit on conservation easements purchased using state funding by agencies like the Montana Department of Fish, Wildlife and Parks.[101] Representatives in the Wyoming legislature in 2022 also

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[97] Owley, *supra* note 64, at 123 (advocating for the use of conservation easement agreements with a revisitation date instead of a perpetuity requirement).

[98] Landowner Easement Rights Act, S. 3989, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/3989; Press Release, Kevin Cramer, U.S. Senator for North Dakota, Sens. Cramer, Rounds, Hoeven Introduce the Landowners Easement Rights Act (Apr. 4, 2022), https://www.cramer.senate.gov/news/press-releases/sens-cramer-rounds-hoeven-introduce-the-landowner-easement-rights-act.

[99] Landowner Easement Rights Act, S. 3989, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/3989.

[100] Landowner Easement Rights Act, H.R. 7021, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/7021; Press Release, Kelly Armstrong, U.S. Representative for North Dakota, Armstrong, Fishbach Introduce the Landowner Easement Rights Act (Mar. 12, 2022), https://armstrong.house.gov/media/press-releases/armstrong-fischbach-introduce-landowner-easement-rights-act.

[101] Amanda Eggert, *Forever No More? Bill Seeks to Restrict State's Access to Perpetual Conservation Easements*, MONT. FREE PRESS (Feb. 22, 2023), https://montanafreepress.org/2023/02/22/legislature-conservation-easement-change/. As of August 2023, a Montana legislative tracker lists this bill as "tabled" and "probably dead." *See* Eric Dietrich, *2023 Capitol Tracker*, MONT. FREE PRESS, https://apps.montanafreepress.org/capitol-tracker-2023/bills/sb-357/ (last updated Aug. 24, 2023).

introduced House Bill 0140, which, if passed, would have imposed a thirty-year limit on conservation easements.[102]

Limiting the duration of conservation easements—as opposed to allowing them to remain perpetual—would at least inject some flexibility in the housing market, reduce the potential environmental impact of conservation easements, and allow for greater discussion, land use planning, and consideration of alternative conservation methods if needed.

However, ending the exceptionalism of conservation easements by limiting their duration is not enough. The authority to approve conservation easements should be returned to local governments, democratically elected officials, and the local people—specifically, local zoning boards. This is the approach taken under Nebraska law,[103] which gives counties the authority to approve or deny special use permits for conservation easements that are not consistent with the county's zoning plans.[104] The Nebraska statute also includes the power to review all conservation easements sought by the federal government.[105]

Giving power to local zoning boards, and by extension, to the people living in the community, to approve conservation easements reduces the harms of exceptionalism because it is precisely the local communities that know their own local land and development needs best. For example, on December 15, 2021, the Custer County Board of Supervisors in Nebraska denied under the Conservation Easement Program a conservation easement called the Wetland Reserve Easement.[106] The easement required the servient landowner to receive written permission from the Natural Resource Conservation Service if they wanted to plant, hay, or allow cattle to graze the land.[107] In other words, this proposed easement would have severely restricted the use of the servient land, making it difficult to even engage in agricultural activities on the land. However, the county's local zoning comprehensive plan focused on protecting agricultural use of land to

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[102] Conservation Easements Amendments, H.B. 0140, 2022 Leg. (Wyo. 2022), https://wyoleg.gov/Legislation/2022/HB0140.

[103] Neb. Rev. Stat. § 76-2,112.

[104] *Id.*; *see also Two Conservation Easements Denied by Counties in Nebraska*, AM. STEWARDS OF LIBERTY (Dec. 23, 2021), https://americanstewards.us/two-conservation-easements-denied-in-nebraska/.

[105] *Id.*

[106] *Id.*; Berryman, *Supervisors Deny Conservation Easement, Award $3.76M+ Asphalt Bid*, SANDSHILL EXPRESS (Dec. 15, 2021), https://sandhillsexpress.com/local-news/supervisors-deny-conservation-easement-award-3-76masphalt-bid/.

[107] Berryman, *supra* note 106.

support the county's economy, which led the Custer County Board to reject the conservation easement application.[108]

While dealing with the exceptionalism enjoyed by conservation easements in courts is difficult, limiting the duration of conservation easements statutorily, coupled with giving the power of approving conservation easements to local communities, would help reduce the undesirable effects that stem from the exceptionalism of conservation easements.

CONCLUSION

Exceptionalism of conservation easements departs from the common law and important common law principles, creates and possibly perpetuates socioeconomic inequalities, and may have perverse impacts on ecology. It is time to end the exceptionalism of conservation easements. This Essay concludes with the same analogy by which it began—although American exceptionalism has many positive aspects, it can also be a "double-edged sword."[109] Even if we accept that conservation easements have provided many benefits in environmental protection and preservation, we should recognize that they too can be a "double-edged sword" and that policy change is needed to ameliorate their shortcomings.

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[108] *Id.* This example demonstrates that such local authority can help advance decisions in the local interest—whether an environmental, economic, or equity-based interest—instead of allowing conservation easements to exist to the detriment of public/local goals.

[109] *See, e.g.*, SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1997).