Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates

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ABSTRACT

In drafting the Uniform Conservation Easement Act, the National Conference of Commissioners on Uniform State Laws (NCCUSL) focused on conservation easements as part of a private ordering system. Doing so did not accurately reflect the public nature of conservation easement use at the time, and in the 20 years since the NCCUSL's debates, the need for greater public accountability for conservation easements has become more apparent. As Congress ponders restricting the deductibility of donated easements for federal income tax purposes, the land trust community is reforming its practices to regain public confidence in itself and its conservation easements. The NCCUSL debates provide a trove of insights into mechanisms that could be of significant utility to establishing greater public accountability for land trusts and conservation easements.

I. INTRODUCTION: PUBLIC ACCOUNTABILITY, CONSERVATION EASEMENTS, AND THE UNIFORM CONSERVATION EASEMENT ACT DEBATES

In the early 1980s, when the land trust movement was small and unfamiliar and conservation easements (CEs) were relatively new and unproven,¹ the National Conference of Commissioners on Uniform State
Laws (NCCUSL) developed the Uniform Conservation Easement Act (UCEA). It was a proposal for state legislation intended to strengthen the reliability of CEs as a conservation tool. The UCEA achieved the commissioners' most pressing priority: both the UCEA debate and its adoption in 22 states were critical elements in putting CEs beyond the reach of problematic common law defenses against enforcement.

However, in "sweeping away" common law concepts that constrained CEs, the NCCUSL drafting committee also swept away common law tools of accountability personified by the watchful (or appurtenant) neighbor. Historically, the neighbor had provided an informal but useful system of easement recordation, monitoring, and enforcement. The commissioners limited CE holding to government entities or charitable organizations and believed that those limitations would ensure an equivalent degree of accountability. We argue that critical elements of CE accountability have not been effectively replaced. Moreover, the commissioners left other common law principles in place (e.g., eminent domain, marketable title) or their application in limbo (e.g., charitable trust principles). Removing the watchful neighbor while leaving CEs enmeshed in other elements of the common law has left CEs in an unpredictable morass of public oversight tools that is not effective, nor does it provide consistent assurances of adequate public consultation in land trust programs.

the Land Trust Alliance (LTA), the coordinating mechanism/lobbying arm of the land trust movement.

2. See infra Part II.C.

3. The preface to the proposed legislation makes the claim explicitly. See Uniform Conservation Easement Act (drafted by the NCCUSL, 1981) [hereinafter UCEA], Commissioners' Prefatory Note 7.

4. McLaughlin advocates a charitable trust interpretation of CEs as a route to accountability concerning their modification and termination. See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 Harv. Envtl. L. Rev. 421 (2005) [hereinafter McLaughlin, *Rethinking*]. Although we share her accountability concerns, we are less interested in drawing modification and termination issues into the courts than we are with drawing public participation into the decision to create an easement and draft its terms. As easements have become larger, frequently encompassing whole regions such as the "Northern Forest," dealing with them as a form of local or regional land use planning is unavoidable. The watchful neighbor is not a proxy for this kind of community involvement, but by eliminating the requirement of appurtenance and substituting attorney general and perhaps Internal Revenue Service enforcement of trust principles, the UCEA also removed the neighbors. See generally FAIRFAX ET AL., BUYING NATURE, supra note 1 (especially chs. 8, 9). For our more enthusiastic treatment of charitable trust principles, see generally JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS (1996) and SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS (2001). We turn directly to the trust issues that McLaughlin raises in *Rethinking, supra*, in Part III.C.2, infra.
In discussing oversight and accountability, the commissioners viewed CEs as a private ordering system, justifying their decision as following logically from a view of CEs as a permutation of traditional servitudes. But many commissioners questioned the private ordering view: some disagreed with the general premise; some agreed with the premise and advocated for greater control on its use; still others suggested that the public purpose, infusion of public funds, and duration of CEs warranted greater public oversight. Many practitioners, scholars, and interested members of the public have since pondered the appropriate relationship between public planning and private transactions and have seen a need for more public involvement in CE programs. We argue that CEs are much more public than either the UCEA or land trusts often frame them and that the public nature of CEs warrants more explicit attention to public accountability than the private ordering system prescribed by the UCEA provides.

Nevertheless, at the time of the UCEA’s drafting, the NCCUSL view of CEs as tools of private conservation did not raise concern. As one of the drafters remarked, the “private ordering system...would supplement and assist in carrying forward public programs of great importance without conflicting with them.” Indeed, the private nature of CEs has been a major part of their charm; they have been embraced as a private, voluntary, or win-win alternative to regulation that protects resources while compensating affected landowners. Although the commissioners do not appear to have anticipated the rapid growth in land trusts and the use of CEs, the land trust movement’s early phenomenal success appears to have deflected potential challenges to CEs. The NCCUSL effort to facilitate CE use succeeded and CEs became


8. Indeed, the commissioners never used the term “land trust.” See infra note 50. We have also encountered a persistent belief among a small number of old timers in the land trust movement that The Nature Conservancy (TNC) manipulated the UCEA process to the disadvantage of smaller groups. We have found no data to support the darker interpretation. To the contrary, TNC appears to have played a relatively small, informal role and does not, by any account, appear to have distorted the debate or the outcome in any particular direction, self-serving or otherwise.
a common fixture in land acquisition for conservation. The land trust
movement has deployed CEs and enjoyed a long period of extraor-
dinary proliferation and uncritical acclaim.

At the time of the drafting of the UCEA, and even more so in the
20 years following the UCEA debates, the commissioners’ emphasis on
private ordering has been confounded by other elements. The federal
government played an active and interested role in the NCCUSL process
and in early CE drafting and enforcement. More recently, beginning with
the early 1990’s dot.com fizzle, the bloom came off the private-ordering
peach. As the Washington Post and Congress began asking questions
about business practices and the Internal Revenue Service (IRS) began
looking more closely at charities, at charitable deductions in general, and
at CEs in particular, the debate became a serious threat to standard land
trust activities. The Land Trust Alliance has joined Congress in seeking
ways to assure that CEs and other conservation tools are not used simply
to enhance the wealth of developers or protect the view shed of large
landowners at public expense. The Washington Post articles and

9. CEs account for more than half of land trust acquisitions (in acreage). Land Trust
tables.htm. The other half are divided among private preserves, acquisitions that the land
trusts maintain and manage, and preacquisitions, or flip transactions, in which the land
trust purchases land for subsequent purchase by a government agency. See FAIRFAX ET AL.,
BUYING NATURE, supra note 1, at 206–14.

10. Although states and localities continue to pass bond issues supporting CEs and
land trusts. “In 2004, state and local voters approved 75 percent of the 217 conservation
measures on ballots nationwide, generating $4 billion in new conservation funding and
continuing a rate of success that has been consistent since 1996. Leading the way were
county measures, which enjoyed an almost 80 percent passage rate and accounted for
nearly three quarters of total new conservation funding.” See Land Trust Alliance, A
Divided Electorate Finds Common Ground When It Comes to Conservation, http://lta. 

11. Senate Finance Committee Chairman Charles E. Grassley (R-Iowa) likened self-
dealing and other abuses in the nonprofit world to scandals such as Worldcomm and
ENRON. This juxtaposition is not friendly to land trusts and conservation easements. See
//www.nonprofitpanel.org/coverage/coverage_interim_html#post3-2 (last visited June
30, 2006).

12. Its evolution is described in FAIRFAX ET AL., BUYING NATURE, supra note 1, ch. 8,
and information is available at Land Trust Alliance, http://www.lta.org/.

13. The LTA spent 14 months drafting a new set of Land Trust Standards and
Practices. See Land Trust Alliance, New Resources Available for Land Trust Standards and
has also been at work developing new approaches for auditing conservation easement
claims for tax deductions, which is probably the most persistent and pervasive problem.
Land trusts participate marginally in the process, signing a document in which the
landowner states the value of the easement but technically not certifying that the value is
reasonable. Nancy A. McLaughlin, Increasing the Tax Incentives for Conservation Easement
congressional inquiries indicate how, in the early twenty-first century, a long overdue, perhaps post-adolescence, period of public criticism and scrutiny had engulfed land trusts and CEs.\textsuperscript{14}

We argue that many of the problems arise from placing CEs within a private, rather than public, ordering system. Doing so was not reasonable even as the commissioners debated; it did not reflect the way CEs were being used at the time, and it did not account for the interest and participation of federal agencies in the UCEA drafting.\textsuperscript{15} Moreover, it is inappropriate given the way the land trust community operates in the early twenty-first century. The \textit{Washington Post} may have directed the IRS and congressional attention toward questionable business practices of The Nature Conservancy (TNC), but the ensuing debate on the tax deductible status of donated CEs has turned on the blending of public and private and has ripened into a demand for public accountability across the entire land trust community.

We argue that the NCCUSL's sweeping of the common law and its conception of CEs as private instruments have contributed to the land trust movement's current quandary. CEs were in 1980, and remain today, a combination of public and private leadership, management, and funding. Although conserved lands are now frequently held in blurred mosaics of public and private land ownership and management priorities,\textsuperscript{16} they are not well integrated into established forms of public review, oversight, or land use planning.

Although we are critical of parts of the UCEA, this article uses the NCCUSL debates as a source of insight for addressing accountability

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\textit{Donations}—A Responsible Approach, 31 \textit{ECOLOGY} L.Q. 1, 68–91 [hereinafter McLaughlin, Increasing]. The IRS is presently investigating more than 48 easement donors and easement holders, including The Nature Conservancy, suspecting that they have profited “unduly” from easement transactions. \textit{See also} Joe Stephens, Alliance Starts Plan to Improve Land Trusts: Association Moves to Train and Accredit Conservation Organizations, \textit{WASH. POST}, Apr. 20, 2005, at A8.


15. \textit{See} discussion \textit{infra} Part II.D.

\end{flushleft}
issues that threaten both CEs and the land trust movement. We base our understanding of accountability on Judge Richard Posner's discussions of the topic and focus on three general elements. First, accountability includes appropriate tracking of public funds expenditure. Second, it includes the oversight necessary to ensure that the goals set forth in statutes and policies are achieved in the most efficient manner possible. Third, accountability includes assurances that broad outcomes are being achieved in the most effective and equitable manner. To these elements we add the necessity of mechanisms that allow citizens affected by or interested in a decision to know in advance of the issue and participate in resolving it.

Using these four elements to define accountability, we can look to the NCCUSL debates as a source of direction. Although they abjured burdening CEs with mechanisms of bureaucratic oversight, the commissioners lucidly discussed alternatives for accountability in CE transactions. The UCEA drafting process is a fruitful source of insight, particularly with respect to the dissenters' arguments about why CEs should not be part of a private ordering system, why additional measures for public accountability were justified and warranted and how they might be achieved. We thus analyze the UCEA's role as both part of the problem and a thoughtful source of solutions to the lack of public accountability in CE transactions.

Our effort to apply the UCEA's debates to current issues proceeds in five parts. Section II provides background on the UCEA and the chronology of events that led to its development by the NCCUSL. Section III discusses what the NCCUSL accomplished, with emphasis on accountability problems arising from CEs' partial, but continuing, relationship to the common law. Even though the NCCUSL effort was not uniformly adopted in all states, it succeeded in removing some of the common law impediments to CE use. But what was not swept, the remaining straws of the common law, are also important. The resulting ineffective interplay between public and private is a serious flaw in the UCEA proposal.

Section IV briefly summarizes events following the NCCUSL debates that heightened attention to issues of public accountability; it

17. In early May 2005, the LTA proclaimed on its website, “Congressional Recommendations Threaten Every Land Trust.”

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chronicles the startling rise of the land trust movement and the current threats to its continued success. Section V addresses public oversight and accountability matters left in disarray following the UCEA process. The NCCUSL debates provide alternatives, carefully thought-out ideas, and pros and cons regarding CEs and can assist us, with a quarter of a century's additional experience, in addressing fundamental and potentially explosive issues of accountability with appropriate dispatch and a clear intellectual base. Section VI offers our own gloss on those possibilities.

II. BACKGROUND ON THE NCCUSL AND THE UCEA

A. Introduction

CEs were not new as the NCCUSL began to debate; they had long been used for conservation purposes. The City of Boston had begun using easements in the 1890s to protect an "emerald necklace" of parks around Boston. The federal government has been protecting viewsheds along the Blue Ridge and Natchez Trace Parkways and waterfowl breeding areas in the upper Missouri Basin with easements since the 1930s. Wisconsin's Great River Road was an early state program relying heavily on easements, and TNC held a growing portfolio of CEs. But common law principles hostile to CE enforcement were troubling to private, state, and federal entities using CEs.

Legislation authorizing the acquisition of less-than-fee interests for conservation and/or historic preservation had been enacted in at least 29 states before the NCCUSL convened its forum, and at least seven of those states included private organizations among eligible CE holders. Massachusetts, for example, assured CE reliability early on—it

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19. Dana and Dana have likened the liftoff period in the land trust movement to the start of the dot.com bubble. See Andrew C. Dana & Susan W. Dana, Rogue Land Trusts, Abused Conservation Easements and Regulation of the Private Land Trust Movement (2002) (unpublished manuscript, on file with author).


21. FAIRFAX ET AL., BUYING NATURE, supra note 1, at 181.

became the first to adopt state legislation in 1956. Amended many times since then, the initial Massachusetts statute, called the Conservation Restriction Statute,\(^2\) allowed only government entities to hold CEs.\(^2\) That stricture was lifted in 1969. However, Massachusetts law continues to require that state officials approve _every_ CE before it can be recorded with the deed. The Trustees of Reservations acquired its first easement in 1971, a decade before the NCCUSL started work.\(^2\) Thus, the NCCUSL’s slate was not blank. Enough other states had begun to pass legislation that the NCCUSL perceived a need for uniformity and for national debate and clarification of basic concepts.

### B. Initiating the NCCUSL Effort

The American Bar Association (ABA) proposed a uniform state CE act to the NCCUSL in 1975,\(^2\) but NCCUSL records reveal that similar suggestions had been made as early as 1966.\(^2\) The clarification of state law authorizing CEs seemed necessary because of a lack of uniformity across states and because, as we shall reiterate in more detail below, the common law is generally stacked against enforcement of privately negotiated CEs. For them to become broadly reliable, it was necessary to disconnect them from doctrines developed over centuries to prevent a long-departed former owner from controlling subsequent owners’ and communities’ choices. Because property law is generally a question of state law, each state had to enact legislation to reorient the common law of property in its own jurisdiction and to define what a CE is, who can hold one, and whether/how they can be modified, terminated, or

\(^{23}\) The nomenclature regarding conservation easements has always been complex.


\(^{25}\) Because perpetual easements were vulnerable prior to the passage of the 1969 Massachusetts statute to protect them from the common law, the few pre-1969 easements that The Trustees of Reservations did have were called “100 year easements” and the Trustees renewed them every 30 years. This dodge carved out room for donated easements, but the Trustees are not totally confident that the “100 year easement” concept applies to purchased easements. See FAIRFAX ET AL., _BUYING NATURE_, _supra_ note 1, at 157-58.

\(^{26}\) “It is my understanding that this project, from the standpoint of the Conference, was initiated primarily by authorities of the American Bar Association.” See 1979 _Proceedings_, _supra_ note 6, at 2 (remarks of Comm'r Rupert R. Bullivant). The proposal is found in Letter from Luther J. Avery, Chairman, Section of Real Property, Probate and Trust Law, ABA, to Committee on Scope and Program, NCCUSL (May 2, 1975) (on file with author).

\(^{27}\) Letter from Frank F. Jestrab, Executive Committee, NCCUSL, to the NCCUSL Committee on Scope and Program (May 19, 1966) (on file with author).
transferred. The ABA proposed in 1975 that the NCCUSL draft a "Uniform Conservation and Historic Preservation Agreements Act." That proposal grew out of a study funded by the ABA and conducted by the Conservation Law Foundation of New England. Thus, when the NCCUSL appointed a preliminary drafting committee in 1976, they had plenty of material to consider.

The initial letter from the ABA to the NCCUSL described the need for the Act in a number of ways: by recognizing the growing use of "recorded agreements" in the previous 15 years, by citing the benefits associated with using less-than-fee arrangements rather than purchasing land in fee simple, by pointing to the success of the British National Trust in using covenants, by noting that enforceability was key to eligibility in securing federal matching grants for historic site protection and IRS tax deductions, and by identifying the growing number of diverse state statutes on the subject. The ABA and the NCCUSL concluded that uniformity was needed.

28. See Ellen Edge Katz, Conserving the Nation's Heritage Using the Uniform Conservation Easement Act, 43 WASH. & LEE L. REV. 369 (1986). Because this was done state-by-state in very different ecological and political circumstances, the state law of easements varies considerably. Id. For information on which laws were passed and differences among them, see PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Rodrick H. Squires eds., 2000).

29. Letter from Luther J. Avery to Committee, supra note 26.

30. The ABA had organized its own Committee on Historic Preservation and Easements to address the topic.

31. Netherton, supra note 22. See also Report from Albert B. Wolfe, ABA Advisor to the NCCUSL Committee, to the ABA Real Property, Probate and Trust Section Officers (Oct. 12, 1979) (on file with author).

32. The drafting committee consists of state commissioners and is appointed by the NCCUSL Committee on Scope and Program.


34. See Lauren Gwin & Sally K. Fairfax, England’s National Trust: What Can It Teach U.S. Land Trusts? 29-31 (prepared for the Land Trust Alliance Rally, Providence, Rhode Island (Oct. 2004)).

35. The goals of the NCCUSL concerned both predictability and uniformity concerning CE use. Memorandum from John M. McCabe to Drafting Committee on Uniform Conservation and Historic Preservation Easements Act, Review Committee, Reporters 6
The ABA also lamented lawyers' and legislators' lack of understanding about conservation easements and noted support for the project from a host of federal organizations, including the Council on Environmental Quality, the National Park Service, and the Department of Transportation, and from "national charitable organizations" like TNC and the National Trust for Historic Preservation. The letter concluded that "few areas of law have more need of...barnacle removal."36

The ABA, numerous lawyers, and legislators were summoned to discuss38 a familiar, yet new and newly circumscribed, concept. After six years of debate, the proposed UCEA legislation was approved by the NCCUSL in 1981 by a vote of 45 to 3.39

C. The NCCUSL

The NCCUSL was an appropriate venue for the task. It was created by the ABA and maintains a close relationship with it. At the 1889 ABA conference, an address on the benefits of uniform state law prompted the formation of an ABA committee to investigate the possibilities further. The NCCUSL grew out of that committee and became independent of the ABA. It was established as a separate entity in 189240 as a source of proposed law, a "private legislature" to "promote
the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable." The NCCUSL is concerned with both uniform legislation—it has drafted over 250 uniform or model acts for state consideration—and uniformity of interpretation. The NCCUSL considers itself a state organization and is funded primarily by state appropriations. Commissioners are members of the bar—attorneys, judges, legislators, legislative staff, and professors—and are appointed from each state by the governor. The NCCUSL's template acts are "enacted" or proposed by the Conference after approval by a majority of states (and no less than 20). Their proposals do not, however, become law until state legislatures adopt them, either in whole or in part.

The NCCUSL's earliest work focused on such issues as marriage and divorce, wills probated in other states, and Sunday as a day of grace for paying bills, but it is perhaps best known for major, widely adopted acts like the Uniform Commercial Code. The NCCUSL regularly addresses issues pertaining to trusts, contracts, and real property, so the topics of the UCEA were neither unfamiliar to the commissioners nor a major departure from the wide range of subjects that commissioners

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42. See generally White, supra note 41. Several scholars and chroniclers of the organization's history allude to federal-state relations as an underlying theme in the organization's work—either responding to a fear of increased federal power and preemption of state law or legislating in the absence of federal authority to do so. In the UCEA case, the impetus was probably the latter. Id.

43. That definition includes the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

44. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 2002-2003 REFERENCE BOOK (2002). "The expenses are apportioned among the States primarily based upon their population." Id. at 9.
discuss.\textsuperscript{45} CEs are situated within state common law,\textsuperscript{46} and the common law defenses available against CEs (as well as the growing body of state legislation) created uncertainty regarding CE enforceability that the ABA and NCCUSL considered an obstacle to their efficient use.

D. Who Participated: Federal Involvement and Public-Private Blurring

The group of organizations invited to participate in the UCEA drafting process is an important indicator of the politics around CEs in the early years of the land trust movement. Although the NCCUSL is a "private legislature," outside stakeholders may participate in the drafting process in three ways. The first is as a reporter,\textsuperscript{47} a liaison between the drafting committee and NCCUSL Committee of the Whole. Second, outsiders are invited to serve on an advisory committee that comments on and helps structure the proposed act. Third, outside individuals or groups may provide comments to the committee or attend drafting committee meetings and Meetings in Committee of the Whole. Serving as a reporter or as a member of the advisory committee is probably the best way for stakeholders to shape a proposal.\textsuperscript{48} Although the commissioners were aware of the growing land trust movement,\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{45} Interview with K. King Burnett, member of NCCUSL Special Committee on the UCEA and former president, in Salisbury, Md. (July 23, 2004).
\item \textsuperscript{46} See generally infra Part II.D (a short discussion of federal law as it applies to conservation easements).
\item \textsuperscript{47} The UCEA had two co-reporters, neither of whom were state commissioners, both of whom were deeply involved in the land trust community at the time. Russell L. Brenneman had experience in public service with the Connecticut Resources Recovery Authority and had been a director of the Conservation Law Foundation of New England. He authored numerous papers and studies on preservation agreements while in private practice. This included a report to the National Park Service (NPS) that advised the NPS to "encourage the preparation of a uniform law relating to conservation and historic preservation easements for consideration by the various state legislatures." BRENNEMAN, A STUDY FOR THE NATIONAL PARK SERVICE, supra note 33. John J. Costonis had worked on transfer of development rights (TDR) while a professor at the New York University School of Law and his research extended from local historic preservation to the use of conservation easements and TDRs internationally.
\item \textsuperscript{48} See generally NCCUSL Constitution and Bylaws § 2.9(b), available at http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18 (last visited Mar. 22, 2006). "An advisory member has the privilege of the floor at any annual or special meeting of the Conference during the terms of the appointment and is eligible to serve as an advisory member of a Special Committee, but may not vote." Id. Although advisory committee members do not have a vote in drafting committee decisions, many decisions are made through discussion and consensus rather than votes.
\item \textsuperscript{49} See Interview with Russell Brenneman, co-reporter, NCCUSL Special Committee on the UCEA, in Hartford, Conn. (July 22, 2004); Interview with K. King Burnett, supra note 45; Telephone Interview with Michael Dennis, General Counsel, The Nature Conservancy (Aug. 24, 2004). Nevertheless, at least two of the drafting committee members (Brenneman...
the land trusts were not deeply involved in the deliberations. Only one land trust, The Nature Conservancy was invited to participate in the advisory council.\textsuperscript{50} Although the NCCUSL received comments from several major private organizations,\textsuperscript{51} land trusts were not among the major participants.

More significantly, given the commissioner's emphasis on private holding and ordering, the advisory board was dominated by federal agencies. The Federal Highway Administration, the Bureau of Outdoor Recreation, the National Park Service (NPS), the Council on Environmental Quality, the Advisory Council on Historic Preservation (ACHP),\textsuperscript{52} and the Committee on Interior and Insular Affairs of the U.S. Senate were all invited to participate. The role of federal agencies extended beyond participation in the advisory committee: both the NPS\textsuperscript{53} and the Bureau of Outdoor Recreation\textsuperscript{54} had conducted early studies on the topic, and the Department of Transportation contributed $25,000 to fund the NCCUSL’s work.\textsuperscript{55} Employees of the NPS and the

\textsuperscript{50} Note, however, that early in the movement the larger national and regional organizations, which we now routinely consider land trusts, did not view themselves as such. TNC, the Trust for Public Land, and The Trustees believed themselves to be a cut above the proliferating new organizations. See Fairfax et al., Buying Nature, supra note 1, at 293 n.24. Three other private groups, the Environmental Law Institute, the Conservation Law Foundation of New England, and the Conservation Foundation, were invited to participate in the discussions, along with two private individuals, a practicing attorney, and a law professor.

\textsuperscript{51} Comments were received from the National Trust for Historic Preservation, the Conservation Law Foundation of New England, and the Trust for Public Land. See Letter from Ralph W. Benson, General Counsel, Trust for Public Land, to Robert H. Cornell, Halley, Cornell & Lynch (Feb. 20, 1981).

\textsuperscript{52} See infra note 83.

\textsuperscript{53} See Brenneman, A Study for the National Park Service, supra note 33. See also National Park Service, Scenic Easements (nd), \textit{id.}, \textit{app.}

\textsuperscript{54} Norman Williams, Jr., Land Acquisition for Outdoor Recreation—Analysis of Selected Legal Problems 16 (report to the Outdoor Recreation Resources Review Commission (1962)). Robert E. Coughlin & Thomas Plaut, \textit{The Use of Less-Than-Fee Acquisition for the Preservation of Open Space} (Regional Science Research Institute, Discussion Paper Series No. 101 (1977)) (based on research conducted for the Bureau of Outdoor Recreation).

\textsuperscript{55} The ABA secured funding for the UCEA from the Department of Transportation (DOT). In the late 1970s, as it was assembling a committee and beginning the UCEA drafting process, the NCCUSL was experiencing general difficulty securing funding from states—“four states made no contribution to the Conference or to defraying the expenses of their commissioners, although they were not averse to adopting uniform acts.” In fact, the only grant that the NCCUSL received that year was for the UCEA. Armstrong, supra note 40, at 114. The DOT also commented on the Act. See, e.g., Memorandum from Lorenzo
ACHP accepted the invitation to serve on the UCEA advisory committee.56 This federal participation indicates that, by the early 1980s, federal agencies were relying heavily on CEs, indeed on privately held or negotiated CEs, to implement federal programs.57 Where the federal government acquired easements appurtenant to federal property (e.g., scenic easements on the Blue Ridge Parkway), it avoided the common law challenges faced by *easement in gross*, as discussed below. But it became reasonably certain during the UCEA discussions that CEs *in gross* conveyed to federal agencies were not likely to be unhinged by state common law.58 In *United States v. Little Lake Misere Land Co.*, the
Supreme Court concluded that state law did not govern the federal interests in land, but the Court also rejected the government's argument that "virtually without qualification...land acquisition agreements of the United States should be governed by federally created federal law." Soon after, a series of cases challenged U.S. Fish and Wildlife Service (FWS) wetland easements, which, unlike NPS scenic easements, were frequently in gross. *United States v. Albrecht* concerned the validity of waterfowl easements acquired by the FWS under the Migratory Bird Conservation Act. The defendants argued that North Dakota law did not authorize the type of *in gross* servitude held by the FWS, and that "without [state] statutory authorization the Government did not have the power to acquire the disputed interest in land." The court concluded that,

> while the determination of North Dakota law in regard to the validity of the property right conveyed to the United States would be useful, it is not controlling....We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern...and should not be defeated by any possible North Dakota law....[T]he property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein.

The Eighth Circuit therefore concluded that federal, rather than state, law applied.

However, the legal consequences were far less predictable for state and private entities working in cooperation with federal agencies. At the first meeting of the NCCUSL commissioners, co-reporter Brenneman observed that

61. United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974).
62. 16 U.S.C. § 715, particularly d(2).
63. *Albrecht*, 496 F.2d at 909.
64. *Id.* at 911 (citation omitted).
[t]he state of the law in many states prevents an accurate assessment of the results of a given transaction, and as a result there is some perturbation in federal programs which seek to use these approaches on a comprehensive basis, such as those encouraged by the Historic Preservation Act, the Federal Highway Administration and the...Heritage, Conservation and Recreation Service of the Department of the Interior.66

The FWS, which had extensive experience both in using CEs and in litigating their status under state law, did not participate in the UCEA drafting process.67 Instead, federal aid to highways and federally supported historic preservation involving land acquisition defined federal participation in the UCEA.

1. CEs and Highway Beautification

The federal government began giving matching funds to states for road construction in 1908, and the federal defense “system” of highways that began in 1952 continued the practice. The 1956 version of the regularly reauthorized Federal Aid to Highway Act put enough money on the table to fund a 90 percent federal investment while still continuing the state grants. Surprisingly, although the Trust for Public Land now concludes that the “net effect” of post-World War II road and housing policies was to “explode the metropolis and scatter it across the countryside,”68 early environmentalists’ efforts focused on aesthetics and billboard control. Encouraged by President Lyndon Johnson’s wife, Lady Bird, “natural beauty” became a major strand of pre-Earth Day environmentalist attention.69

66. 1979 Proceedings, supra note 6, at 11-12 (statement of Brenneman).
67. This may have been because the FWS was acquiring and holding wetland easements rather than relying on states and private organizations. The U.S. Forest Service was also notably absent from the federal side. Id. Also missing was the Bureau of Land Management (BLM). Id. This likely reflects the importance of historic preservation in the NCCUSL discussions. The BLM now appears along with the FWS as the most effective participant in the easement game. See FAIRFAX ET AL., BUYING NATURE, supra note 1, at 245-48.
69. Environmentalists, government officials, business leaders, and private citizens attended the White House Conference on Natural Beauty held in May 1965. The topics suggest the environmental priorities of the day: automobile junkyards, underground installation of transmission lines, tree-planting, local programs for natural beauty, and “policies of taxation which would not penalize or discourage conservation and the preservation of beauty.” LBJ for Kids!, America the Beautiful: A Legacy, White House
Lady Bird’s personal crusade culminated in the 1965 Highway Beautification Act.\textsuperscript{70} The Act was a near-total failure at controlling billboards,\textsuperscript{71} perhaps because land acquisition was a key program element. The federal government was authorized to use eminent domain to remove unwanted signage. This assured that advertisers would be compensated, but the ill-thought-out process would have left the federal government owning very odd patches of relatively useless land. In response, the Department of Transportation, formed in 1966, encouraged states to use scenic easements instead\textsuperscript{72} and was concerned about their enforceability.\textsuperscript{73}

2. Protection of Historic Sites

Federal grants to states for protection of historic sites also have a long provenance. Although Congress, in the 1935 Historic Sites Act, specifically intended for the NPS to acquire historic sites with national significance,\textsuperscript{74} NPS staff clearly recognized their limits. The “Park Service could not deal with the vast number of preservation crises that came up each year”; it did not have the resources to manage all endangered properties.\textsuperscript{75} Based in part on England’s National Trust, Congress chartered the National Trust for Historic Preservation as a charitable non-profit in 1949.\textsuperscript{76} In 1964, a presidential task force recommended a

\textsuperscript{70} Conference on Natural Beauty, at http://www.lbjlib.utexas.edu/johnson/lbjforkids/enviro_legacy.shtm (last visited June 12, 2006).
\textsuperscript{72} The title of the best book on the subject suggests that the Act had major flaws: CHARLES F. FLOYD & PETER J. SHEDD, HIGHWAY BEAUTIFICATION: THE ENVIRONMENTAL MOVEMENT'S GREATEST FAILURE (1979). More recently, and with the same conclusions, see Craig J. Albert, Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification, 48 U. KAN. L. REV. 463 (2000). The President was so insistent on passage of the Act to please his wife that one Senator moved to insert “Lady Bird” in place of the Secretary of Commerce in the implementation language. FLOYD & SHEDD, supra, at 81.
\textsuperscript{73} Foger A. Cunningham, Scenic Easements in the Highway Beautification Program, 45 DENV. U. L. REV. 167 (1968).
\textsuperscript{74} For a pre-Highway Beautification Act description of use of highway easements, see ROSS D. NETHERTON, CONTROL OF HIGHWAY ACCESS 266–70 (1963).
\textsuperscript{75} BARRY MACKINTOSH, THE HISTORIC SITES SURVEY AND NATIONAL HISTORIC LANDMARKS PROGRAM: A HISTORY 17 (1985). In particular, the NPS sought to avoid sites representing any socially or politically controversial subject. For example, following an Advisory Board recommendation, a list of places sent in 1937 to the NPS regional offices for study under the Historic Sites Survey intentionally omitted “all sites of contemporary or near contemporary nature which might lead to controversial questions.” Id. at 81.
\textsuperscript{76} Id. at 824–41. For detail on the English system, see Gwin & Fairfax, supra note 34.
program, drafted by NPS staff, to provide federal loans and matching
grants to state and local governments for historic preservation, as well as
tax deductions for private property owners who would participate in the
effort.\footnote{77} In 1965, the U.S. Conference of Mayors created a Special
Committee on Historic Preservation. Its report, \textit{With Heritage So Rich}, led
to passage in 1966 of the National Historic Preservation Act (NHPA).\footnote{78}

The NHPA created the National Register of Historic Places\footnote{79} and
authorized grants to the states for preservation.\footnote{80} Responsibility for the
Register, as well as the authority to make grants to state and local
governments, was originally given to the NPS.\footnote{81} However, the federal
government plays a relatively passive role in the maintenance of the
Register: the state historic preservation offices (SHPOs) do most of the
actual registering.\footnote{82} When tax credits for rehabilitating historic buildings
became available, nominations increased, over-stressing NPS staffing
and funding.\footnote{83} The Register also grew increasingly reliant on state

\begin{footnotes}
\item 77. This task force was appointed by President Johnson to report on the preservation
of natural beauty. The findings of the task force were issued as a report to Congress,
\textsc{Lyndon B. Johnson, Natural Beauty of Our Country: Message from the President of
the United States}, H.R. Doc. 89-78 (1965). See also \textsc{James A. Glass, The Beginnings
\item 78. Specifically, the Act states that “the historical and cultural foundations of the
Nation should be preserved as a living part of our community life and development in
order to give a sense of orientation to the American people.” National Historic Preservation
Act, 16 U.S.C. § 470 (b)(2) (2000). Glass notes that the Johnson administration, the NPS
and the Rains Committee were all seeking legislation for different reasons: “The administration
desired to encourage a popular activity through grants to the states. The NPS wanted to
enhance its position in the preservation movement through a grants-in-aid program. The
Rains Committee was seeking primarily to curb destructive actions by federal agencies.”
\textit{Glass, supra} note 77, at 17. During 1966, all three worked to have their own objectives
emphasized in legislation.
\item 79. The statute itself did not officially mandate the name; the NPS began referring to
the register by this name in mid-1968, and Congress made it the legal name in the 1980
amendments to the Act. \textit{Mackintosh, supra} note 74, at 38–41.
\item 80. The NHPA also established a federal loan program for those wanting to acquire
and rehabilitate historic properties and for tax relief measures. The 1976 NHPA
amendments established a Historic Preservation Fund (HPF) providing matching grants to
states and the National Trust—money comes from outer continental shelf oil leases. 16
\item 81. \textit{Mackintosh, supra} note 74, at 5.
\item 82. Once the NHPA passed, the NPS sent letters to each state governor requesting that
liaisons for the new program be appointed; these became the SHPOs. \textit{Glass, supra} note 77,
at 23. Glass notes that “[a]bout half of them represented state historical commissions or
societies; a third park and recreation departments; and the remainder miscellaneous
entities, such as planning or economic development agencies, tourism divisions, secretary
of state offices, and even a state highway department.” \textit{Id.} (citation omitted).
\item 83. \textit{Mackintosh, supra} note 74, at 63. The NHPA also created the ACHP, which soon
morphed from an inter-agency panel to an independent agency no longer staffed and
supported through the NPS. This change resolved a tension that developed because the
\end{footnotes}
acquisitions and easements, which readily explains why the NPS\textsuperscript{84} was interested in CE enforceability.\textsuperscript{85}

Indeed, the NCCUSL debates emphasized historic preservation to a degree that might surprise newcomers to the land trust community. The term “conservation” was not initially acceptable to some commissioners concerned primarily with historic preservation.\textsuperscript{86} The final version of the UCEA subsumed historic preservation under conservation. Historic preservation lost visibility but was not completely obliterated as a CE purpose or use.\textsuperscript{87}

In sum, federal participation in UCEA drafting indicates agency awareness of the degree to which they relied upon state and local governments and charitable organizations to effectuate federal programs.\textsuperscript{88} Both highway and historic preservation programs involved federally funded easement acquisition. Because state and private actors


\textsuperscript{85} “[The UCEA] seems essential for even administration of federal grant programs.” Letter from Luther J. Avery to Committee, \textit{supra} note 26, at 2.

\textsuperscript{86} A few commissioners were hostile to conservation easements and were more willing to embrace historic preservation: “I would suggest to the Committee that they consider two Acts, one on historic preservation and the other on conservation. Historic preservation by itself may have a much better chance.” 1979 \textit{Proceedings}, \textit{supra} note 6, at 22 (remarks of Comm’r Hershman). Albert Wolff noted that the 1976 IRS code also included historic preservation under conservation. Letter from Albert B. Wolff, ABA Advisor to the NCCUSL Drafting Committee, to Chairmen, ABA Entities Concerned with the Proposed Uniform Conservation Easement Act, and Their Designees (July 27, 1981).

\textsuperscript{87} UCEA, § 1(1). But historic preservation is not a major element of the land trust movement. According to the most recent Land Trust Census, only 191 land trusts are working in the area of historic and cultural preservation. See http://www.lta.org/aboutlt/census.shtml (last visited July 27, 2005).

\textsuperscript{88} Discussed extensively in FAIRFAX ET AL., \textit{BUYING NATURE}, \textit{supra} note 1, especially ch. 9. “The conclusion that in all likelihood federal law would be applied to validate easements on National Historic Landmarks if they are held by the National Park Service, however, leaves open the question of the applicable law in the case of an easement held by a unit of local government or a private charitable organization....” I BRENNEMAN, A STUDY FOR THE NATIONAL PARK SERVICE, \textit{supra} note 33, at 69.
were involved, the federal agencies were concerned about the long-term validity of easements acquired under those and similar programs.  

E. The Philosophy: CEs as Private Ordering  

The UCEA drafters were well positioned to shape the relationship between public and private spheres of land and CE holding, as well as to define appropriate standards for public participation in CE transactions. The drafting committee was informed of options for inserting public accountability and oversight into the UCEA proposal; it had located existing state statutes and debated diverse mechanisms for achieving public review throughout the life of a CE, from its creation to its possible termination. Committee members discussed the "new set of problems [that could arise] where you are hybridizing a private ordering system with public planning and other governmentally expressed policy." The first draft of the UCEA, for example, included Massachusetts-like provisions requiring CE approval or filing with appropriate government units, or a waiting period in which a state agency may file an objection.  

Yet, despite the obvious blurring of public and private actors, interests, and funds inherent in standard CE practice, the NCCUSL commissioners chose to strengthen CEs as part of a private ordering system. Although there was not consensus on this issue, many approached CEs as an element of private property and likened CEs to conventional common law easements between private parties. Their view of CEs as permutations of common law easements and of the

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89. See infra Part IV.B.4 (regarding UCEA amendment and the relationship between federal regulatory programs and non-federal easement acquisition, particularly with regard to exacted CEs).  
90. The committee had probably looked at every statute in existence. Brenneman looked in-depth at three (Massachusetts, Connecticut, and New Hampshire). Brenneman, A Sampling, supra note 22.  
91. Most concisely articulated in Russell L. Brenneman, Background, Issues and Options (Draft 3), written for the Drafting Committee on Uniform Conservation and Historic Preservation Agreements Act (July 25, 1979) [hereinafter Brenneman, Background, Issues and Options] (on file with author).  
92. 1979 Proceedings, supra note 6, at 41–42 (remarks of Brenneman).  
93. Brenneman, Background, Issues and Options, supra note 91, at 8, 9.  
94. UCEA, Commissioners' Prefatory Note.  
95. They described their task as "assimilating these easements to conventional easements." Id. ¶ 6. This was apparently not in conformity with some of the priorities of the members of the ABA committee. See Letter from Russell L. Brenneman to R.R. Bullivant 1 (June 1, 1979).
UCEA as limited in scope guided the discussion throughout the drafting process.96

As the private ordering idea gained traction, the public oversight provisions disappeared from subsequent drafts. Co-reporter Costonis stated the NCCUSL approach succinctly:

[I]t’s a misconception to assume that this Act creates a power that doesn’t already exist with respect to most private arrangements regarding restrictions, covenants, and the like....It’s not the case that we are taking conservation and preservation easements and elevating them in relation to other private ordering arrangements at all. We’re basically giving them the same status that other kinds of private ordering arrangements have.97

The commissioners rejected many of the additional options and avenues for accountability suggested in the drafting process.98 They believed that public oversight would hinder private action because of bureaucratic red tape, discourage adoption of the statute by state legislatures, and place additional fiscal and administrative burdens upon state agencies.99 They did not want the UCEA to remove common law impediments to the use of CEs only to place bureaucratic constraints on streamlined and efficient use of CEs. “Why,” Brenneman asked, “should a public agency be required to give its blessing in order to gain protection of the statute?”100

The UCEA reflects the expectation that mechanisms were already in place to ensure that easements were used appropriately for a public purpose. First, the NCCUSL suggested that codification in state statute signified a level of state involvement and concern that CEs were in the public interest: “the very adoption of the Act by a state legislature facilitates the enforcement of conservation easements serving the public interest. Other types of easements, real covenants and equitable servitudes are enforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies.”101

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96. And, we note, that strategy was not only applied to public accountability but also to tax provisions, etc. The drafting committee repeatedly emphasized that the Act was limited in its purposes.


98. See infra Part III.B.3.

99. UCEA, Commissioners’ Prefatory Note ¶7.

100. Letter from Russell L. Brenneman to R.R. Bullivant, supra note 95, at 2.

101. UCEA, Commissioners’ Prefatory Note ¶8.
Second, the commissioners were aware of the limits of uniformity and did not want to be so specific as to conflict with existing state law or constrain states' adoption of appropriate oversight measures. Although the UCEA carefully did not prevent states from including provisions regarding CE oversight, most states did not adopt oversight provisions beyond those that appeared in the UCEA; until the Washington Post and the IRS became interested, there had been little public oversight at any level of these only nominally private transactions.\textsuperscript{102}

Finally, and most importantly, the NCCUSL believed that, by limiting the holder to government or charitable organizations, it had established sufficient oversight mechanisms. Charitable holders, they believed, were trustworthy enough to exercise discretion in the absence of public oversight and would not take on obligations and responsibilities that they could not uphold.\textsuperscript{103} The commissioners were confident that the law concerning charitable organizations and levels of federal and state tax law would prevent abuse.\textsuperscript{104}

In sum, the commissioners saw a distinction between rationalizing the law and facilitating the use of CEs and controlling their specific

\textsuperscript{102} Not all states have abstained; Virginia, Massachusetts, Colorado, and Montana are among those states that have adopted provisions for public approval and/or restrictions on land trusts. See Todd D. Mayo, \textit{A Holistic Examination of the Law of Conservation Easements}, in \textit{Protecting the Land: Conservation Easements Past, Present, and Future}, supra note 28, at 26. Interestingly, states have generally taken a much more aggressive tack with regard to water rights acquired by private organizations for instream conservation purposes. Not only are all transactions subject to public approval (which is characteristic of all water rights creation, transfers, or changes of use), but also private organizations are precluded in many states (e.g., Washington, Oregon, Colorado, Montana) from holding the rights they acquire. In this respect, instream water rights have not found equal footing with water rights for consumptive use. The Colorado easement enabling statute was amended in 2003 to clarify that a conservation easement may tie water rights to the encumbered land in certain circumstances. \textit{See} Mary Ann King, \textit{Getting Our Feet Wet: An Introduction to Water Trusts}, 28 \textit{Harv. Envtl. L. Rev.} 495 (2004); Jack Sterne, \textit{Instream Rights \& Invisible Hands: Prospects for Private Instream Water Rights in the Northwest}, 27 \textit{Envtl. L.} 203 (1997). \textit{See also} Mary Ann King \& Sally K. Fairfax, \textit{Beyond Bucks and Acres: Land Acquisition and Water}, 83 \textit{Tex. L. Rev.} 1941 (2005).

\textsuperscript{103} 1979 \textit{Proceedings}, supra note 6, at 33–34 (remarks of Bullivant).

\textsuperscript{104} This reliance on charitable organizations has taken on an interesting spin among colleagues who have assisted us by commenting on earlier versions of this article. Some, like Nancy McLaughlin, wonder why land trusts should be subject to any less scrutiny than any other charitable organization. Many NCCUSL commissioners appear to have believed that CEs should not be subject to any more scrutiny than any other servitude or easement. Others assert that land trusts should not be subject to more scrutiny than any other charitable organization. We notice that the public has long had well-defined rights to plan for community land use. Accountability measures should acknowledge that charitable arrangements may threaten to erode or preempt democratic planning processes.
social uses. Many commissioners believed the Act should not attempt to do the latter.

I think the fear that our clarifying what is already the state of the law might unleash undesirable kinds of groups is somewhat misplaced, because you already have a private ordering system in effect. It isn't essentially different from what we are suggesting here; and all I think we are doing is not reforming the law, but simply clarifying and restating it.\textsuperscript{106}

The commissioners sought to encourage the use of CEs as a private ordering system by providing a simple, streamlined act for consideration and adoption by the states.

In limiting the scope of the UCEA, the commissioners decided not to address some key elements of CE policy, including public accountability and tax implications of CEs, leaving them to the states. With regard to tax law, the commission decided not to write the UCEA to match the tax code, asserting that federal tax statutes and regulations "rigorously define the circumstances under which easement donations qualify for favorable tax treatment."\textsuperscript{107} The UCEA may have been important in ensuring that donated easements would qualify for tax benefits,\textsuperscript{108} but it does not address the relationship between easements and real property assessment or other taxation questions.\textsuperscript{109} Public accountability, the subject of this article, was similarly undefined. One co-reporter stated, the UCEA "does not deal with systems of public

\textsuperscript{105} Telephone Interview with Prof. John J. Costonis, Chancellor of the LSU Paul M. Herbert Law Center (Aug. 26, 2004).

\textsuperscript{106} 1979 Proceedings, supra note 6, at 46-47 (statement of Costonis).

\textsuperscript{107} UCEA, Commissioners’ Prefatory Note ¶ 8. Perhaps the fledgling land trust community did not participate in the NCCUSL process as vigorously as one might have presumed because it was focused on assuring favorable federal legislation and interpretation regarding tax issues. See generally FAIRFAX ET AL., BUYING NATURE, supra note 1, at 178-83.

\textsuperscript{108} In the early 1980s, particularly when IRS regulations were either unwritten or untested and the IRS had not yet weighed in on what would qualify for a deduction, it was unclear what would qualify and how strictly the "conservation purpose" language of the 1980 Act would be interpreted and reviewed. The Brandywine Conservancy, for example, went to great lengths to document the conservation and public purposes served by its easements to support the easement’s deductibility. The Conservancy also was an early leader of a movement to adopt the UCEA in Pennsylvania in order to assure that easements in gross would be valid and perpetual; both are requirements of tax deductibility. Thus, although the UCEA was not written to match the tax code, it did support easement legal validity and perpetuity required by the Code. Interview with William Sellers, Executive Dir., French & Pickering Creeks Conservation Trust, in Chadds Ford, Pa. (July 27, 2004).

\textsuperscript{109} UCEA, Commissioners’ Prefatory Note ¶ 11.
approval for the imposition of restrictions of this kind. It does not deal, in short, with public ordering systems. It simply deals with the common law."\(^{110}\)

F. Summary

The UCEA emerged from a process that had become familiar to attorneys over almost a century of cooperation between the NCCUSL and the ABA. Land trusts were less involved than one might have predicted, but the importance of CEs to federal programs, for example, federal highway beautification and historic preservation law, was unmistakable. The federal agencies' early recognition of their dependence on state and private partners encouraged greater federal involvement than perhaps might be expected.\(^{111}\) To understand why federal agencies and others were concerned with the common law context of CEs, we look in the next section at the cobwebs that NCCUSL swept away and those that remain.

III. ACCOUNTABILITY, COMMON LAW, AND CES

A. The Common Law Problem—The Alleged Cobwebs

At the first meeting of the NCCUSL Committee of the Whole, Brenneman identified two major goals: (1) "to sweep away the common law defenses" to CE enforcement and (2) to "facilitate the creation and use" of easements by establishing a context that "provides predictable legal consequences" arising from a CE.\(^{112}\) The common law concerns were paramount.

American property law inherited the English common law's hostility to what the UCEA called conservation easements. Part of the hostility was simply the accumulated weight of minute terminology and

\(^{110}\) 1980 Proceedings, supra note 97, at 5 (statement of Brenneman). We think the Commissioners did more than merely leave the issue to the states. We argue that their decision to exclude measures regarding greater public oversight and participation from the uniform act and to relegate inclusion of those measures to the states complicated efforts to make CE decisions and holders accountable to the public.

\(^{111}\) See Letter from Luther J. Avery to Committee, supra note 26. One commissioner stated, "the main purpose of it right now is government acquisition. [The g]overnment is actively using this device—the federal government—and they need the protection of being sure that these are valid, as, in most cases, they are paying for them." 1979 Proceedings, supra note 6, at 45 (statement of Com'rn'r K. King Burnett).

\(^{112}\) 1979 Proceedings, supra note 6, at 12-13 (statement of Brenneman).
interpretive distinctions in the “law of servitudes.” CEs were odd new ducks in a complex body of law regarding easements, servitudes and covenants, and the combination of the new and the old concepts made it difficult to assume that the courts would enforce any particular CETYPE AGREEMENT, or do so with any predictability.

The underlying issue is the idea of the “dead-hand.” At a time when land was the basic source of wealth, the British common law restricted private agreements that could “freeze land uses in a potentially inefficient pattern.” Even though the more recently evolved idea that some property ought to remain undeveloped or “unimproved”

113. A servitude is “[a]n encumbrance consisting in a right to the limited use of a piece of land without the possession of it; a charge or burden on an estate for another’s benefit.” BLACK’S LAW DICTIONARY 1400 (8th ed. 2004).

114. Dukeminier and Krier remind us that modern servitudes (generally, a right to affect someone else’s use of their own land, see RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 1.6 & 7.11 (1998), can be divided into easements (a limited right to use the land) and covenants (a promise regarding the use of land). Covenants can be enforced at law (real covenants) or in equity (equitable servitudes). There is a long story behind these terms and many complications that we will try not to explore. According to Dukeminier and Krier,

[when easements were hedged in during the Industrial Revolution by judges who regarded them as interfering with marketability, landowners sought enforcement in the law courts of promissory agreements (covenants) against successors to the promisor’s land. But the law courts, ever jealous of fetters on land, threw up roadblocks against these “covenants running with the land.” Finally, turning to equity, landowners found a more sympathetic ear. The chancellor began to enforce restrictive covenants, which came to be known as equitable servitudes. The law of servitudes thus is a study of how the tides of urbanization and the demands of the market for efficient control of externalities swept around the artificial barriers limiting one form of servitude and forced courts to develop other forms.

JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 781 (5th ed. 2002). The authors go on to describe the resulting law as “disorderly.” Id. at 782. Hearty souls who have not benefited from a property law course may enjoy Private Land Use Controls: The Law of Servitudes, id. ch. 10.

115. Gerald Korngold, supra note 5, at 436-37, is among those who argue that using the easement terminology in discussing conservation easements is incorrect (CEs are not easements) and is likely to cause confusion when the contracts are interpreted by judges steeped in the common law of property. See also Antony W. Dnes & Dean Lueck, Common Law, Statute Law and the Birth of the Conservation Easement (prepared for the Property and Environment Research Center’s 14th Political Economy Forum, Private Land Conservation: Institutions and Instruments, Big Sky, Montana, Dec. 5-8, 2002).

We are grateful to Professor Andrea Peterson for her help, discussion, and reading assignments on this topic.

is widely accepted,\textsuperscript{117} the terminology and concerns of the common law were a serious barrier to widespread use of easements as durable tools of conservation.\textsuperscript{118} CEs are a problem because one landowner's preferences, if perpetuated over time, could become impediments on the free market in land. The dead hand also acts politically: a landowner’s commitments trump not only the land market, but also future generations’ ability to adopt plans and regulations suitable to their own priorities.

The cobwebs that the NCCUSL swept away were specifically related to notions of \textit{positive} and \textit{negative}, \textit{appurtenant}, and \textit{in gross} easements.\textsuperscript{119} The common law has historically allowed a landowner to grant \textit{positive} rights in land—an individual, for example, may acquire a right to cross a neighbor's property to access a land locked or difficult to reach parcel. But being a neighbor mattered: the holder of the \textit{non-possessory interest} or easement typically had to own land in the area, or be \textit{appurtenant} to (or \textit{touch and concern}) the eased land. All of that was well accepted centuries ago. However, easements that \textit{limit} the landowner's use of her own land for the benefit of the general public or an individual rather than a land owning neighbor—what was called a \textit{negative} easement \textit{in gross}—were not readily enforcable under common law.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{118} Some authors have suggested that the common law of servitudes is not only hostile to CEs but could also be “hazardous to your health”:
\begin{quote}
\textit{The law in this area is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.}
\end{quote}

\textit{Edward H. Rabin, Fundamentals of Modern Real Property Law 489 (1974) (quoted in Susan F. French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. Cal. L. REV. 1261, 1261 n.1 (1982)). But we should also be clear that there was a rationale behind the impediments that arose to negative easements in gross: an appurtenant landowner served an important function in being aware of and concerned about an easement, particularly in the absence of adequate recordation systems. And concerns about CE recording have not disappeared. See infra Parts III.B.3 (“Out with the Interested Neighbor”) and V.C.3 (“Issues that Provide Room for Everybody—Even Academic Researchers”). This is also echoed in Dnes and Lueck's efforts to find an economic logic to the evolution of the common law of servitudes. Dnes \\& Lueck, supra note 115.}

\item \textsuperscript{119} UCEA, Commissioners' Prefatory Note ¶ 7.
\item \textsuperscript{120} Cheever, supra note 24, at 1080. Except for one of the four types recognized by common law: light, air, and subjacent or lateral support or for the flow of an artificial stream. But there was some indication at the time of the UCEA's drafting that lack of appurtenance would not necessarily render a servitude invalid. In early communications
Nor did the common law generally recognize conservation or historic preservation as a valid purpose for a negative easement—another potential defense against CE enforceability. Thus, in limiting common law defenses to CEs, the UCEA expanded both who could hold a CE and CE purposes.

B. Sweeping the Cobwebs

1. Expanding Categories of Eligible Holders

In removing defenses against easements in gross, namely by removing common law requirements for appurtenance, the commissioners were redefining the scope of eligible CE holders. They sought to open CE holding to charitable organizations that did not own appurtenant land. At the time the NCCUSL debated, only seven of the 29 states that had enacted some form of CE legislation recognized non-governmental organizations as eligible holders. The commissioners expanded the notion of who could hold a CE from government entities to include charities. In its most obvious nod to issues of public

about the UCEA, Allan Rodgers and Albert Wolfe of the ABA suggest that many cities had engaged in federal urban renewal programs with “restrictive schemes” that were considered enforceable without appurtenant land. Allan G. Rodgers & Albert B. Wolfe, “Some Legal and Policy Questions” Re a Proposed Uniform Conservation and Preservation Act 3–4 (1976) (prepared for the NCCUSL Drafting Committee). “[B]ut not until the blanketing of the country with renewal authorities were state courts put into the position that they could not require ownership of appurtenant land for enforcement, without thereby undermining a major federal program.” Id. at 4. The IRS rulings “supporting deductibility of donations of such interests...gave further seal of legal respectability.” Id.

121. The commissioners sought to identify common law defenses against conservation easement and to “negate[e] their use in actions to enforce conservation or preservation easements.” UCEA § 4 cmt. They did so in section 4 of the UCEA, which states:

A conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.

Id. § 4.

122. McLaughlin notes that until recently it was common practice for land trusts in Wyoming to acquire a small parcel of appurtenant land. Interview with Nancy A. McLaughlin (Aug. 6, 2005).

123. California has recently added Indian tribes to the list of eligible CE holders. California Senate Bill 18 includes two categories: (1) “a federally recognized California Native American tribe” and (2) “a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission.” 2004 Cal. Adv. Legis. Serv. 905 (Deering).
accountability, the commissioners limited holders to “charitable organization[s] having an interest in the subject matter.”124 The prefatory note is not, however, particularly restrictive regarding easement holders. More restrictive alternatives were suggested by members of the drafting committee, for example, restricting the holders to charities “having as a primary purpose the subject matter of the restriction.”125

The UCEA addressed accountability only indirectly.126 The commissioners relied on the public face of private charities. They reasoned that federal and state law authorizing charitable organizations provides some measure of accountability.127 Drafters were also confident that charitable organizations would have some “self-governing restraints.”128 They reasoned that neither government agencies nor charitable organizations were likely to accept easements indiscriminately. Finally, Americans have long regarded private charities as sound participants in health, education, and many other public

124. UCEA, Commissioners’ Prefatory Note ¶ 3. The committee considered including private individuals as eligible holders but decided against it. 1979 Proceedings, supra note 6, at 26 (statement of Bullivant). The charitable organizations category was defined in section 1(2)(ii) of the Act as

a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

UCEA § 1(2)(ii). The Restatement (Third) of Property suggests that conservation easements granted to private individuals function in the same way as other easements but without the special treatment that conservation easements might receive. RESTATEMENT (THIRD) OF PROPERTY § 1.6(a) cmt. (1998).

125. The new Wyoming statute, for example, provides that a charitable easement holder must have as a primary purpose or power “retaining or protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological or cultural aspects of real property.” UCEA, WYO. STAT. ANN. §§ 34-1-201 to 34-1-207 (2005).

126. See 1979 Proceedings, supra note 6, at 33-34 (statement of Bullivant).


Thus, as they expanded the categories of eligible CE holders, many commissioners did not view their deference to charities as radical.

2. The Purpose of a CE

The other key element of NCCUSL cobweb sweeping was to free the CE from the common law’s narrowness of purpose and insistence that negative constraints on the fee holder were generally unacceptable. The purposes of a CE include “retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.” The UCEA ensured that a CE can impose more diverse restrictions on the fee holder than a traditional common law easement.

3. Out with the Interested Neighbor

To expand the eligible holders and purposes, the commissioners sacrificed the watchful neighbor, with costs, as noted above, for record keeping, monitoring, and enforcement.

Record Keeping: The UCEA provides no special provision for recording CEs except that the CE holder must accept the easement in

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130. According to the Commissioners, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

UCEA, Commissioners’ Prefatory Note ¶ 8.

131. Id. § 1(2)(ii); Brenneman, Background, Issues and Options, supra note 91, at 6–7 (discussing how charitable purposes may change). A period piece, the UCEA does not mention wildlife, habitat, or endangered species although the commissioners contemplated that the uses that society would define as charitable and as conservation may change. See Letter from Robert H. Cornell to R.R. Bullivant, Esq. (Oct. 9, 1980) (considering whether it might be appropriate to consider solar energy as a conservation easement purpose); FAIRFAX ET AL., BUYING NATURE, supra note 1, chs. 6–9 (discussing changing conservation goals over the last half century).
writing. This was designed to protect easement holders from unwanted donations.\textsuperscript{132} Hence, CEs are recorded as any other interest in land. Some commissioners emphasized the import of easement recordation, reminding the commissioners that the "cobwebs" of the common law and historic objections to easements in gross were intended to ensure that servitudes were not lost because of ineffectual recording systems, particularly if an appurtenant landowner was not present to remember. In this respect, the watchful neighbor served an important role in keeping track of and monitoring an easement.\textsuperscript{133} One ABA advisor noted that "[t]he present draft does not specifically require recordation.... Recordation is of significant practical importance, however, in meeting the common law's traditional concern that interests in gross may be easily overlooked and thus become hidden clouds on title."\textsuperscript{134}

Another advisor recommended "anti-abuse provisions,"\textsuperscript{135} including mandating the

recording and distribution of copies to appropriate public officials sufficiently concerned to keep their own geographic indexes; requiring identification of burdened land by tax sheet and lot number, or enclosing latitude and longitude or other grid cell, to facilitate such indexing; index maps designed to accommodate public utility line easements as well as conservation ones...; and geographic indexes of all public orders affecting particular parcels such

\textsuperscript{132} The Act specifies that the conservation easement is not valid without the written acceptance of the holder. The drafters were concerned that at common law it was possible to convey property without the knowledge or consent of the recipient, as in a will. Recognizing that acceptance of conservation easements could give rise to obligations upon the holder not necessarily present with a traditional common law easement, the commissioners were persuaded to include a provision to protect the holders from unwanted donations. As the Commissioners' Comment for section 2 states, "Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations." UCEA § 2, Comment ¶ 2.

\textsuperscript{133} We are grateful to our colleague Carol Rose for pounding on us about the interested neighbor. We hope we have it right now.

\textsuperscript{134} Letter from Ross Netherton, Chairman ABA Comm. on Historic Preservation & Easement, to Chairman & Members of the ABA Real Prop. Div. Subcouncil 4 (June 12, 1980). McLaughlin notes that many state easement-enabling statutes require that a conservation easement be recorded in the local property records to be valid, and, for all practical purposes, so do the IRS regulations under section 170(h). See McLaughlin, \textit{Rethinking, supra} note 4, at 494 n.244.

\textsuperscript{135} Letter from Albert B. Wolfe to Chairmen, \textit{supra} note 86, at 3.
as the English have been using successfully for more than half a century....\textsuperscript{136}

Some commentators recommended establishing databases or indexes to facilitate CE location and tracking.\textsuperscript{137} Beyond that, a recording process, dissenting commissioners asserted, could provide at least two additional benefits. First, recording would increase public notice and awareness of a CE. Second, recording could provide an occasion for review and perhaps public comment, "assuring that private arrangements are bona fide and compatible with local master plans of community development or special conservation/preservation programs."\textsuperscript{138} Others argued, more specifically, that a "fundamental restraint upon future land use" like a CE required "the involvement of those governmental authorities responsible for record-keeping, planning and certifying that the transaction serves a public ('charitable') purpose."\textsuperscript{139}

The commissioners' liveliest discussions concerned the role of planning or zoning commissions in CE creation, amendment, and termination, and the relationship between CEs and land use planning. As one commissioner stated:

\begin{quote}
136. Memorandum from Albert B. Wolfe, ABA Advisor to the NCCUSL Drafting Comm., to Chairmen, ABA Entities Concerned with Approval of the UCEA as being submitted to the House of Delegates at their Mid-Winter Meeting, & Designees of such Chairmen 3 (Nov. 25, 1981) (on file with author). \textit{See also} Gwin & Fairfax, \textit{supra} note 34 (National Trust land protection programs seem more effective than American ones, they argued, in part because effective national land use planning mechanisms minimize the need to buy land or interests in land in order to prevent urban sprawl.)

137. UCEA § 2(a). \textit{See Memorandum from John McCabe to Drafting Committee, supra} note 35 (discussing alternatives in recording, such as geographic indexing, that would make conservation easements more easily identifiable).

Governmental agencies interested in making use of easements may well be loath to support enactments unless some reasonable way is found to avoid loss of interests if a governmental clerk 30 years hence fails to file claim of notice, and name the owners. Some way of keeping track of conservation and preservation easements by location, as in case of public utility easements, with maps filed at Registries, say be ever[y] ten years, could coordinate the two Acts.


138. Letter from Ross Netherton to Chairman and Members, \textit{supra} note 134, at 3–4. Note that California has enacted a supplemental recordation statute that requires the registrar to maintain, "within the existing indexing system, a comprehensive index of conservation easements and Notice of Conservation Easements on land within that county." \textit{CAL. GOV'T. CODE} § 27255(a) (West 2006).

139. Brenneman, Background, Issues and Options, \textit{supra} note 91, at 8.
\end{quote}
While I sympathize with your point that an "approving agency" is not desirable, I am also aware of the great pressures in most states in governmental control of all types of local planning and development. I think there is a valid argument that some type of public approval is necessary in order that agreements falling under the proposed Act will mesh with existing local development regulations and plans.140

Ultimately, provisions for recording CEs beyond those placed on other servitudes were not included in the UCEA, nor was any process that subjected them to direct public discussion, review, or approval.141 In removing some of the barriers to easements in gross, however, the NCCUSL eliminated the informal recording and monitoring system personified by the watchful neighbor and abjured replacing it with additional recording requirements that might burden the use of CEs.142 We argue that the commissioners would have been justified in, and indeed the public nature of CEs now demands, establishing even more comprehensive requirements for recording CEs.

Monitoring—Incredibly, given the attention paid to easement monitoring in the land trust community during the 1990s,143 the UCEA does not even use the term. The Act does not, the Comment notes, "impose restrictions or affirmative duties" on either the fee holder or the easement holder. Rather, it "merely" allows the parties to make whatever arrangements seem appropriate.144 Thus, the watchful neighbor’s role in monitoring the easement evaporated in the transition from the common law to statute.

Enforcement—The commissioners viewed the issue of “who can enforce” a CE with the same private ordering glasses that colored

141. 1980 Proceedings, supra note 97, at 76 (remarks of Bullivant).
144. UCEA, Commissioners’ Prefatory Note ¶ 2.
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everything else. Section 3 identifies four categories of persons who may bring actions to "affect[] a conservation easement," which includes not only enforcing, but also modifying and terminating a CE. The categories include not only the holder of the CE and the owner of the underlying fee land, but also parties identified by the grantor and holder at the time of the conveyance. The UCEA refers to the fourth category of persons as a "person authorized by other law." Early drafts specifically authorized the state attorney to become involved, but inclusion of the attorney general (AG) was hotly debated. The commissioners' comments on the UCEA state that the Act recognizes that the other applicable law may create standing in other persons, such as the AG, who could have standing in her capacity as supervisor of charitable trusts.

Absent the commissioners' preoccupation with adopting a private ordering system, it is not clear why those party to a CE designed to serve the public interest ought to be able to change it. But one commissioner confessed to being "bothered" in the other direction by the "standing to enforce provision...which goes way beyond the common law. The attorney general, for example, can participate in a modification proceeding, as I read it, without the consent of anyone else." The UCEA reflects this confusion in that it does not mention the AG. Initially, the act included the AG specifically, but some commissioners believed that mentioning the AG in the Act might signal their acceptance of charitable trust law in CE enforcement and modification, and the AG was removed and relegated to the notes. The Chair of the UCEA Committee, Bullivant, explained the rationale for mentioning the AG at all: he might represent one of the public entities

145. UCEA § 3(a)(1)-(4). See also Sheila S. Asher, Termination and Modification of Conservation Easements (n.d.) (document found in the NCCUSL files). All three elements have become hotly debated topics within the land trust community. The 2005 LTA Rally included well-attended debates, particularly on modifying and terminating. See, e.g., Andrew C. Dana & Nancy A. McLaughlin, Extinguishments of Conservation Easements (Advanced Legal Roundtable, National Land Conservation Conference, Oct. 15, 2005, Madison, Wis.).

146. UCEA §§ 1(3), 3(a)(3).

147. Id. § 3(4). Most obviously, the AG might become involved under charitable trust law, discussed below at Part III.C.1.b. See also Jessica E. Jay, Third-Party Enforcement of Conservation Easements, 29 Vt. L. Rev. 757, 776 (2005). Land trusts generally have deep concerns about any third-party enforcement. They conclude correctly that they cannot count on attorneys general to help them when they need help, or to stay out when they do not want to pursue issues in court. See id.; McLaughlin, Increasing, supra note 13; McLaughlin, Rethinking, supra note 4.

involved. But another commissioner observed perspicaciously that the result was confusing: relegating mention of the AG to the comments muddied the issue on the applicability of charitable trust law to the easement context. The result did not clearly preclude "charitable trust [law] from the provisions of the enforcement mechanism, which leaves uncertain what is a charitable trust." We agree. The result remains ill-defined. We make no argument that the watchful neighbor had ever played an important role in a public ordering system. However, without the watchful neighbor, and with the role of charitable trust doctrine uncertain, problems of accountability for CEs were profoundly complicated.

4. What's In a Name?

Having extracted the CE from some common law cobwebs, the commissioners decided, after some debate, to call their new element of property a conservation easement. At the time of the NCCUSL debates, CEs were confused by the proliferation of terms that different groups and states were using to describe what are now generally called conservation easements. Massachusetts, as noted above, called them conservation restrictions; others called them recorded land use

149. Id. at 158 (remarks of Bullivant). Bullivant noted further:
the historic concern with and obligations concerning a charitable relationship of some kind, and many of these relationships where the government or governmental agency is not a grantee will involve charitable considerations where the attorney general has duties and certainly a legitimate interest.
That is the reason, primarily, for placing him in this provision, which involves either modification or termination.

Id.

150. 1980 Proceedings, supra note 97, at 108 (remarks of Dunham). Others have urged us to ignore the green curtain that the AG was placed behind, asserting that the charitable trust doctrine clearly applies.

151. The confusion between land trusts and charitable trusts is significant enough that in Michigan the AG has ruled that charitable organizations holding conservation easements cannot use the term "trust" in their name. Hence, Michigan organizations tend toward names like "conservancy," "association," or "foundation." See FAIRFAX & GUENZLER, supra note 4, at 21-22.

152. One letter attempted to compile the language used in the state statutes and found 15 different terms for what we might now understand to be a conservation easement. "Preservation restriction" and "conservation easement" were the most commonly used. Memorandum from Paula Craighead, Greater Portland Landmarks, Inc., to Ross D. Netherton and the Comm. on Historic Preservation & Easements, at app. A (Feb. 25, 1980).

153. Which did not further the commissioners' effort to establish conservation easements as interests in land.
agreements or land use restriction easements (LUREs). As a result, it was difficult to talk clearly and consistently across jurisdictions. The UCEA nailed the CE terminology to the courthouse door, at least temporarily.

Again the commissioners debated. The title “easement” was not an instantly acceptable term. The UCEA drafting committee and commissioners were aware of issues later raised in a pivotal article by Gerald Korngold: naming the instrument identifies the body of law that would govern interpretation of the instrument. He warned that using the term “easement” to label a “conservation interest” was risky. It “could lead an uncritical decision maker to a quick and rigid result without the necessary policy analysis.”

The UCEA considered that possibility, but the result reflects an opposite impulse: the majority commissioners’ efforts to “go back to the source” of the common law servitudes and to expand the idea of an easement. The UCEA states that, “[e]xcept as otherwise provided in

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155. Brenneman expressed his own confusion:

It bothers me...to call an “agreement” a “right” which then becomes an “interest in land.” In the past, I have favored the use of the word “restriction” over the word “easement” because the latter carried with it unwanted history and concepts. However, I grant that “restriction” does not quite carry the day either because we are interested in affirmative “running” obligations as well as negative limitations.

Letter from Russell L. Brenneman to R.R. Bullivant, supra note 95.

156. But only after three permutations of the Act’s title.

157. Korngold, supra note 5, at 436-37. Korngold urged that the temptation to do so should be avoided for two reasons:

First, assuming there is validity to the traditional dichotomy between real covenants and easements, conservation servitudes more closely resemble real covenants than easements and hence should not be labeled and treated as easements. Although conservation servitudes are negative restrictions, they do not resemble any of the four traditional types of negative easements. Like real covenants, conservation servitudes are “promises respecting the use of land.”

Id.

158. UCEA, Commissioners’ Prefatory Note ¶¶ 3-5. In doing so, the NCCUSL rejected two alternatives: first, removing the common law disabilities associated not only with easements, but also real covenants and equitable servitudes when used for conservation; second, creating a new interest, a “statutorily modified amalgam of the three traditional
this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements." Thus, the CE resembles the common law analogue in many particulars.

Unfortunately, the commissioners clarified the nomenclature without clarifying what a CE actually is. The UCEA has been less successful in imposing the commissioners’ views of CEs as interests in land as distinct from a mere agreement or restriction regarding its use. Questions about the nature of the instrument arose early in the drafting process. Brenneman mused:

> Are we creating anything that can rightly be called an “interest in the land” or a free-floating right to enforce promises in respect to land entirely independent of classical “interests”? What is the importance of making this doctrinal identification? If a promise blessed with statutory authentication serves a properly “charitable” social purpose...and is recorded on the land records, what does it matter what it is called...?

One way to understand the importance of this question is to ask, if land under an easement were taken for public purposes, for what, specifically, would the easement holder be compensated? The drafters did not agree on the precise nature of the stick in the bundle. What was being condemned? In Maryland, Burnett noted, the owner of property subject to a donated CE would be compensated for the full value of the common law interests.” The Commissioners’ Prefatory Note provides three reasons for favoring the easement designation:

First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act’s less demanding requirements as “easements.” Hence, the Act’s easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

Id. ¶ 5.
159. UCEA § 2(a).
160. Brenneman, Background, Issues and Options, supra note 91, at 5.
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property if a condemnation occurred, as if the holder of the nonpossessory interest never owned a stick with any value at all.\footnote{161}{1980 Proceedings, supra note 97, at 55 (remarks of Burnett). Burnett notes that the Maryland provision does not reflect confusion regarding the nature of CEs, but rather an effort to reduce the temptation for government agencies to focus condemnations of private property for projects on land that had been lowered in value by an easement. Email from K. King Burnett, member of NCCUSL Special Committee on the UCEA and former president, to Mary Ann King (on file with author). See also RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY 581 (1968) (noting that, in most states, the condemnation of a conservation easement would be treated as the taking of an interest in property, and compensation would be paid to the holder of the easement). For discussion on the issue of valuating a modified or terminated easement, see McLaughlin, Increasing, supra note 13, at 68–91.}

Unfortunately, the commissioners were not consistent about the nature of CEs as interests in land throughout the drafting process.\footnote{162}{Note as well that recommended nomenclature continues to change. TNC and TPL commissioned research to formulate an “everyday vocabulary which resonates with the general electorate.” Memorandum from Lori Weigel, Public Opinion Strategies, John Fairbank & Dave Metz, Fairbank, Maslin, Maullin & Assoc. to The Nature Conservancy/Trust for Public Land, Lessons Learned Regarding the “Language of Conservation” from the National Research Program 1 (June 1, 2004). The report offers “A New Vocabulary for Conservation Easements.” Id. at 5. The consultants recommend avoiding the term easements and using a vocabulary that stresses “the voluntary nature of land preservation agreements.” “Voluntary is inherent in the word ‘agreement,’ which in part explains why phrases which incorporate the word ‘agreement’ test far better than the word ‘easement.’” Id. at 6. The public responds more positively to “land preservation agreements” or “land protection agreements” than conservation easements. Id. at 5.}

The Land Trust Alliance (LTA) web page clouds the water, defining a CE as “a legal agreement between a landowner and a land trust or government agency that permanently protects land while the landowner continues to own it.”\footnote{163}{Land Trust Alliance, Frequently Asked Questions, http://www.lta.org/faq/index.shtml (last visited Mar. 24, 2006). We return to questions regarding whether a conservation easement—as legal agreement or an interest in property—would have sufficient heft to constitute a trust corpus below. The answer is not clear. But there is sufficient possibility for courts to identify donated easements as charitable trusts and, indeed, good reason for asserting that they ought to do so. See generally McLaughlin, Rethinking, supra note 4.}

Land trusts muddy the issue further when they use the “bundle of sticks” metaphor to describe an easement—which compensates the landowner for transferring certain “sticks” to the land trust to harvest, build, subdivide, or mine, for example.\footnote{164}{The bundle of sticks metaphor is not itself without controversy. See Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 YALE L.J. 357, 365 (2001). See generally Eric T. Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. REV. 77 (1995); J.E. Penner, The Bundle of Rights Picture of Property, 43 UCLA L. REV. 711 (1996); Jeanne L. Schroeder, Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property, 93 MICH. L. REV. 239 (1994).}
"interest in land" argument. But land trusts also describe the forgone rights as terminated. This disappearing stick theory receives considerable support when land trusts assert that the disappeared stick cannot be sold or has no value. That is, in turn, supported by the fact that in many jurisdictions land trusts do not pay local property taxes on the easement interests that they hold.\textsuperscript{165} The confusion is compounded, however, when a land trust asserts that a particular stick has disappeared and \textit{then} relies upon its value in another context.\textsuperscript{166} For example, a land trust may include the value of its easements when it reports its charitable income for the year to the IRS.\textsuperscript{167} Similarly, land trusts use the value of an easement as a basis for meeting matching requirements in federal programs such as the Forest Legacy program.

Congress has concluded in Internal Revenue Code language that "the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization...."\textsuperscript{168} Surprisingly, that does not seem to have resolved the matter as we shall discuss when we turn to the issue of charitable trusts. Meanwhile, a "here-today-gone-tomorrow-but-here-it-is-back-again" stick will not aid land trusts in their renewed attention to public credibility.\textsuperscript{169}

\textsuperscript{165}. See Arpad, \textit{supra} note 117, at 112-20. In addition, Arpad argues that this does not address the issue of who gets what if the easement is terminated for any reason. But see McLaughlin, \textit{Increasing}, \textit{supra} note 13, at 25-26, 70-71; McLaughlin, \textit{Rethinking}, \textit{supra} note 4, at 490-502.

\textsuperscript{166}. See \textit{FAIRFAX ET AL., BUYING NATURE}, \textit{supra} note 1, at 176-77. Colleague and author Nancy McLaughlin, when reviewing an earlier draft of this article, commented:

\begin{quote}
The problem is that it is little understood that an easement should be treated as a restricted gift or charitable trust. Therefore, the value of the easement is suppressed until released in the context of a cy pres proceeding. At that point the value should be applied to similar charitable purposes in another location or manner. The value of any restricted charitable gift is suppressed in the holder's hands—i.e., the gift of a Monet to an art museum that is subject to the condition that it cannot ever be sold and must be displayed by the museum. How much is the Monet worth to the museum if it is not allowed to sell it? It may be a net liability because maintenance costs exceed the percentage of entrance fees attributable to the Monet. But the museum will still list the Monet as an asset that has value for certain purposes, such as insurance.
\end{quote}

Email from Nancy McLaughlin to authors.

\textsuperscript{167}. See Arpad, \textit{supra} note 117, at 136. The IRS uses the reports to distinguish between a public charity and a foundation. Land trusts need to ensure that they are viewed by the IRS as a non-profit.


\textsuperscript{169}. Sellers responds, correctly, that IRS regulations require that the holder must be compensated for any rights that are taken. Thus, the sticks do not go away—the holder simply cannot sell or exercise them. Interview with William Sellers, \textit{supra} note 108. This again raises the possibility that the easement is not a right or a stick, but a restriction.
5. Sweeping: A Summary

The upshot of the NCCUSL’s efforts is less clear than might first appear. CEs, freed from the strictures of appurtenance and broadened in their purpose, were rapidly embraced by conservationists. The clarification of the tax-deductible status of donated easements and the enactment of state CE legislation allowed an enormous expansion of the land trust movement. Nevertheless, serious issues remained.

The commissioners had justified their treatment of CEs as a private ordering system both practically and philosophically, but there was no consensus on this point, and confusion remains. The combination of expanding purposes and removing the interested neighbor created important, largely unseen problems in recordation, monitoring, and enforcement. Perhaps that is just as well: a neighbor who could remember a traditional easement for access across her neighbor’s land could monitor and enforce it by crossing the property and informing a new fee-holder about it if the underlying property changed owners; the neighbor might be hard pressed to do the same for a modern CE with complex provisions to protect air or water quality. But the UCEA did not address the newly enabled complexity in CEs by creating accountability mechanisms appropriate to the task. Instead, it relied on rather remote elements of the same common law just swept partially away. To understand the confused accountability picture provided by the UCEA, it is necessary to look as well at the elements of common law that the commissioners left undisturbed.

C. Confused and Continuing Straws of Applicable Common Law

The commissioners were hopeful, if clearly not unanimous in their sentiment, that continuing common law doctrine provided appropriate constraints on charitable holders and CEs. In this section we discuss the constraints they left in place. We address perpetuity (our discussion combines eminent domain, charitable trust law, and marketable title acts), the doctrine of merger, and existing liens and encumbrances. The NCCUSL left the CE, if not in the dreaded cobwebs, at least well within reach of other straws of common law that can and do create confusion without establishing meaningful public accountability.

170. See UCEA, Commissioners’ Prefatory Note ¶ 7.
171. See generally King & Fairfax, supra note 102 (discussing the problems of enforcing water quality and quantity oriented easements).
1. Perpetuity

One of the land trust's chief selling points regarding a CE is its alleged perpetuity. The UCEA provides that "a conservation easement is unlimited in duration unless the instrument creating it otherwise provides."172 More compelling, the IRS insists that a temporary or term CE is not eligible for charitable treatment in federal income tax returns.173 But the CE's vaunted perpetual protection is far more illusory than land trust advocacy might suggest.

The issue of perpetuity was debated by the NCCUSL: many commissioners challenging the proposed UCEA language echoed the anti-dead hand tradition. Accountability to the public was a major concern of those opposing permanent easements. Allowing a private agreement to control land use forever against community interests seemed particularly problematic. One commissioner suggested that "restrictions which can go on in perpetuity, without any...ability of the community to intervene in its own interest, seems to me a terribly radical proposition."174 Another, "fearful that this [perpetuity language] gives approval to an unlimited condition," advocated term easements. "I would ask whether the Committee gave any thought to making preservation or CEs good for a period, and then renewable, to put some check in time on this."175

Commissioners were aware that removing protections against the dead hand was upsetting a long-standing and appropriately venerated apple cart. But advocates defended perpetuity as essential:

Ridding property of "stale" restrictions is a valid and valuable purpose underlying marketable title acts, the doctrine of "changed conditions" and other firmly rooted common law concepts. Yet, it is assumed that the proposed controls, especially those for land conservation and historic preservation, may serve their purpose only if enforceable for very long periods of time....176

In the end, the commissioners waffled; they embraced perpetuity but did not protect CEs from standard judicial tools for modifying or terminating

172. UCEA § 2(c).
174. 1979 Proceedings, supra note 6, at 49 (remarks of Comm'r Hershman).
176. Brenneman, Background, Issues and Options, supra note 91, at 9.
an easement. This fit with their philosophy of treating CEs like any similar private property interest. But the straddle leaves the CE enmeshed in some complex straws of accountability that can be grabbed to protect or defang their conservation goals.

a. Eminent Domain

The most obvious threat to perpetual CEs is eminent domain, the government’s authority to take land, or interests in land, from unwilling sellers for public purposes. The UCEA made no effort to protect CEs from condemnation. The UCEA “neither limits nor enlarges the power of eminent domain” regarding either condemning easements or the eased property. Without exception, government officials are reluctant to actually use the condemnation authorities they have, but over time, if a CE becomes burdensome on a community or a public purpose, public officials are not without recourse.

b. Charitable Trust Doctrine

The UCEA also left open the possibility that CEs would be interpreted as charitable trusts. States have codified common law trust

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178. UCEA, Commissioners’ Prefatory Note ¶ 11.

179. FAIRFAX ET AL., BUYING NATURE, supra note 1, at 263–64 (expressing our opinions about the wisdom of eminent domain). Compare with the “inalienability” rules under which the British National Trust operates. See Lauren Gwin & Sally K. Fairfax, England’s National Trust: What Can It Teach U.S. Land Trusts? (unpublished manuscript, on file with author) (noting that lands declared “inalienable by the [National Trust] are not subject to compulsory purchase without the site specific approval of Parliament”).

180. 1979 *Proceedings*, supra note 6, at 37–38 (remarks of Bullivant). Bullivant raised an interesting issue that we do not consider here but that merits further analysis, that the relationship goes beyond a charitable trust and may implicate a public trust:

OIn the issue of termination by agreement of the involved parties, I agree this is a very feasible and worthwhile objective. But we are somewhat concerned, because these instruments may create a public trust. Once it is created, irrespective of the language of the creating document, you may run into a problem of whether you can by this agreement effectively foreclose those persons which may be entitled to assert some area of the public interest not specifically contemplated by or provided for in the originating document.

*Id.*
principles in statutes in slightly different ways, but the basics are familiar. Rules for establishing a trust, what it entails, and for dealing with non-performing trustees and changed conditions are especially important for those interested in CEs.\footnote{181} The commissioners, as we noted above, discussed but did not resolve the relationship between CEs and charitable trusts.\footnote{182} But the issue is crucial because charitable trust accountability mechanisms are not well adapted to established land trust practice.\footnote{183}

i. What is a charitable trust and why does it matter if a CE is viewed as one?

Basically, a trust is established when a \textit{trustor} directs a \textit{trustee} to manage designated \textit{property} to achieve specific \textit{benefits} for an identified \textit{beneficiary}.\footnote{184} A \textit{charitable} trust is one that benefits the general public and can be distinguished from a private trust, which is designed to benefit the trustor’s grandchild or someone similarly situated, in principle part because courts allow charitable but not private trusts to be perpetual. Moreover, trust rules do not require an explicit attempt to create a trust. If the easement donor/fee holder fits the role of the settlor, the land trust is the trustee, and the general public is the beneficiary, then the courts might find an implied trust even if one was not intentionally or clearly established.\footnote{185}

Most trust law is designed to protect the beneficiary—who is presumably less familiar with the business of the trust and the ways of the world than the trustee—specifically from the trustee. Moreover, trust principles generally assign an insignificant continuing role to the settlor

\footnote{181. Fairfax and Guenzler make a hard distinction between the two that is useful but may turn out not to be the complete story. See FAIRFAX & GUENZLER, supra note 4.}
\footnote{182. The most interesting issue seems to be whether an easement is sufficiently weighty to constitute trust property. The commissioners’ position that easements are an interest in land is, as noted above, not consistent, nor are land trusts’ positions.}
\footnote{183. Readers may already have noticed that both the applicability of charitable trust principles to conservation easements and the desirability of using those principles to address problems of easement modification and termination are under intense discussion as we write. We are skeptical on both counts and emphasize that the unsettled issues create uncertainty for public accountability. McLaughlin, Rethinking, supra note 4, and JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM (2005), are strong advocates on both counts. Arpad, supra note 117, perhaps falls somewhere in the middle.}
\footnote{184. For the particulars, with slight legal detail but diverse applications, SOUDER & FAIRFAX, supra note 4, at 2-4, and FAIRFAX & GUENZLER, supra note 4, at 27, are good places to start.}
\footnote{185. For the fastest possible rundown on implied trusts, see FAIRFAX & GUENZLER, supra note 4, at 27.}
of the trust. The idea is that the settlor's role is confined to defining the purposes of the trust. But that relationship is precisely the opposite of what land trusts usually experience: the land trust is locked in a relationship, not with the grantor, but with the holder of the underlying fee, for which there is no analogy in charitable trust doctrine.

Applying the charitable trust doctrine to CEs is controversial within the land trust community. Most obviously, trust rules envision the worst possible relationship between the trustee and the beneficiary and contemplate a significant role for the attorney general in protecting the public. As noted above, land trust discussions of outside third-party enforcement have often been reluctant or hostile.

ii. Other basic trust principles

Other elements of trust law may not fit well with land trust practice. First, trust rules require the trustee to disclose fully to the beneficiary information about transactions. In the current political climate, full disclosure may be an appropriate response to both public concerns and to the increasing visibility of rogue land trusts that bend CEs to private enurement. However, such disclosure could complicate land trusts' relationships with landowners who want their private affairs kept private.

Finally, the cy pres doctrine provides flexibility to courts to protect the purposes of a trust in the face of changed conditions. This is different both from what many citizens understand to be the essential ingredient of a perpetual easement—it cannot be changed—and what the UCEA itself contemplated regarding modification of an easement. Because the UCEA attempts to treat CEs as any other private ordering system, presumably, the owner of the eased land and the CE holder may enter agreements that modify an easement if state law permits the same for conventional easements. If charitable trust rules are applied to CEs,
the doctrine of cy pres would allow modification of an easement, but the process and the parties are considerably different. Cy pres allows the court to reformulate the trust to achieve the settlor’s intentions to the maximum extent possible. The classic case involves a trust established to educate slaves that was somewhat undone by emancipation. When the next in line for the property sought to terminate the trust on that basis, the court relied upon the cy pres doctrine to jiggle the trust purpose ever so slightly—it became a trust to educate freed men—to preserve the settlor’s charitable intent.\(^\text{188}\)

Although the UCEA language on easement modification appears to treat a CE as any other easement, the UCEA also suggests that the doctrine of cy pres may be available.\(^\text{189}\) The difference is that, under the first reading, the parties negotiate changed easement terms that suit their priorities. Obviously, the easement holder is responsible for upholding the public purposes of the easement, but oversight is limited. Under the cy pres/charitable trust reading, the courts have a role in defining appropriate modifications or alternatives to the CE terms in a situation in which it is genuinely impossible for the trustee to achieve the purposes of the trust. One commissioner explained the rationale:

> The intent there was to include principles involving trust and cy-pres...and because under Section 1 a charitable type of relationship is invoked, and is necessarily invoked when you define a holder, any court which is going to be confronted with a modification or termination problem has got to consider not only the law of easements with respect to modification and termination, but also trust implications, such as cy-pres.\(^\text{190}\)

This is a double-edged sword. Access to cy pres flexibility allows the courts to define an appropriate response to changed conditions and provides a process for adjusting CE terms to new data or conservation priorities. It also could parry to economists’ complaints about perpetuity

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In this regard subsection (a) reflects the Act’s overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act’s purposes given the adopting state’s existing common law and statutory framework.

Id. § 2 cmt. ¶ 1.
188. See FAIRFAX & GUENZLER, supra note 4, at 33.
189. See also UCEA § 3 cmt. ¶¶ 2-3.
190. 1981 Proceedings, supra note 175, at 32 (remarks of Bullivan).
and the dead hand. On the other hand, it is the courts, not the easement or fee holders that reshape the CE/trust. Indeed, if the CE is in fact a charitable trust, neither the land trust nor the fee holder, but only the court can modify a CE purpose. In some CE documents, the easement and fee holders are authorized to make minor adjustments unless a party with standing, typically the AG, objects. In the latter case, the court would become involved. Land trusts may not appreciate the courts redefining easement terms, nor would they necessarily want the courts entering into the delicate relationship between fee and easement holder. The possibility might put off landowners potentially interested in an easement transaction.

Finally, trust principles give the courts a significant role in dealing with failed trusts and trust termination. Again, a court may make different decisions about modifying or terminating a CE/trust than the land trust might.

Clearly, the public interest in CEs is sufficient to justify efforts to constrain easement and fee holders from modifying the terms of the agreement at will. Just as clearly, charitable trust rules are generally designed to hold trustees to the trust's purposes. However, it is less obvious that trust principles are mandated in the CE context and less obvious still that they are optimal in achieving accountability. Although the public could perhaps find a protective harbor in charitable trust principles, that is not necessarily the outcome. The state AG can


192. A few commissioners suggested that charitable organizations like land trusts should exercise caution and care in modification: "Mr. Chairman, in the alternative draft...it says: 'Conservation and preservation agreements may be transferred by the holder.' But it seems to me that the holder has an interest in perpetuities that no one else can challenge. They may very well not want to do that." 1979 Proceedings, supra note 6, at 32 (remarks of Commissioner Davies).

And we felt that the parties then in interest—to wit, the holder or the alternate enforcer or the grantor or his agents—should be able, if they are prepared, to enter into such a type of modification.

However, it would seem that if this modification involved a substantial change, the parties, like any prudent trustee, would seek the advice of a court, to protect them in what they are doing.

Id. at 35 (remarks of Bullivant).

193. A court would not, of course, have carte blanche to rewrite easements. They go through a rather tightly choreographed series of analyses designed to protect the purpose of the easement as closely as possible. See McLaughlin, Rethinking, supra note 4, at 464–80.

194. For example, in Maine, a UCEA-influenced state according to Mayo, most easements are drafted as hybrids of statutory easements/express charitable trusts. When a town sought to terminate a land use restriction on a property by selling an easement back to a developer, the effort was "forestalled by a well-placed inquiry to the town by the
decide whether or not to play a major role in easement enforcement. An understaffed AG's office cannot be counted on to provide the kind of oversight that land trusts and conservation easements require. Indeed, there is no guarantee that an AG sensitive to the priorities of wealthy landowners would act to assure the integrity of the public's investment in an easement.

As noted above, over the course of the UCEA debate, the AG faded from explicit mention in the text. However, if charitable trust doctrine applies, the AG can come back, not only to participate in decisions regarding whether to enforce the terms of the easement on behalf of the public, but also to participate in decisions regarding the modification and termination of easements that have over time become unworkable or no longer serve a public purpose. Land trusts are not generally enthusiastic about what could amount to a significant loss of discretion. They may not be accustomed to acting "on behalf of" a beneficiary, except in quite theoretical terms. Some form of accountability is obviously required—but both the ambiguities regarding the applicability of charitable trust doctrine and the apparent and real incompatibilities between land trust practice and charitable trust principles suggest that it may not adequately address land trust accountability problems.\footnote{Marchetti and Cosgrove's tale, supra note 194, could have had a very different outcome, of course, if the AG had been oppositely inclined.}

attorney general, who noted that the easement was granted 'in trust.' Karen Marchetti & Jerry Cosgrove, Conservation Easements in the First and Second Federal Circuits, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT AND FUTURE, supra note 28, at 78, 88; see Arpad, supra note 117, at 144 n.266, and accompanying text.

\footnote{196. McLaughlin and Pidot present compelling arguments that application of the charitable trust doctrine may be the best and even perhaps the only available viable option for existing easements. Advising on an earlier draft of this article, Pidot comments: If conservation easements are not charitable trusts, what then? Can it really be viable to argue that an easement, once established for the public purposes that it expresses pursuant to an enabling law that was enacted to allow those public purposes in derogation of the common law, is really just a private arrangement between the land trust and the landowner?...[T]hen what happens to an easement that is abandoned, as many will be in coming years? If a tax deduction was taken, can it be that Congress meant just to let the thing go? Does the AG really have no charitable oversight of both the easement and of the land trust? In the end, to me the strongest argument is that CEs are charitable trusts and LTs are charitable trusts because all other roads lead ultimately to hell. I say let's make this clear in the enabling statutes, but in the meantime we have to go with the only thing that we have, which is charitable trust doctrine. E-mail from Jeff Pidot, to Sally Fairfax & Mary Ann King (Aug. 4, 2005) (on file with author).}
c. Marketable Title Acts

Marketable title acts, now codified in about one third of the states, can be viewed as a statutory assist for the watchful neighbor. Designed to limit restrictions on real property, the statutes generally provide that easements either expire automatically or must be re-recorded periodically. Thus, they could become a threat to the notion of a perpetual CE. The UCEA comments are nevertheless clear that the proposed statute does not deal with “potential impacts of a state’s marketable title laws upon the duration of conservation easements.” The commissioners left it up to the state to ensure that presumptively perpetual CEs would remain valid if—a big, unclear, and unsettling if—marketable title statutes were applied to easements. The ambiguity generated discomfort with some of the commissioners, who questioned the meaning of perpetuity. It continues to create ambiguity.

d. The Doctrine of Merger

Although not thoroughly discussed among the commissioners, we note that CEs may become vulnerable under the common law doctrine of merger. The basic idea is that obligations between two parties that precede a purchase agreement disappear after a CE holder becomes the fee holder. In this context, if the fee holder obtains title to the CE or if the easement holder acquires the underlying fee, the easement simply is merged back into the title and disappears. This could become an issue in two obvious ways. First, if a land trust holds an

197. For a quick rundown on marketable title acts as they apply to CEs, see McLaughlin, Increasing, supra note 13, at 27 n.96. See generally Owley Lippmann, ECEs: The Hard Case, supra note 142.

198. See UCEA, Commissioners’ Prefatory Note ¶ 10; 1980 Proceedings, supra note 97, at 58 (remarks of Bullivant); E-mail from K. King Burnett to Mary Ann King (Nov. 1, 2005) (on file with author).

199. Commissioner Dunham stated, Under existing law in a marketable title state, I would take it that perpetuity means no more than forty years, because the state statute so provides... Adverse possession means that it can be terminated in twenty years, of[r] whatever the state statute is. So I have a feeling that the comments are trying to conceal from us what is really the case, that there is no such thing as perpetuity.... 1980 Proceedings, supra note 97, at 55 (remarks of Dunham).

200. McLaughlin discusses marketable title acts in Increasing, supra note 13, at 27, n.96.

201. Merger was discussed in the context of eminent domain proceedings. 1980 Proceedings, supra note 97, at 71-72 (remarks of Burnett).

easement on a property that it subsequently acquired in full fee, the restrictions in the easement disappear. Second, if a land trust finds itself a judgment debtor and if the creditor can purchase the fee and then gain the easement as part of a settlement, the protection in the easement may be lost. In diverse circumstances, overlapping CEs held by different organizations (or co-holding easements) may ensure that the CE is not lost to the creditor, but neither the CE itself nor the land trust enjoys any special protection.

e. Other Elements of Common Law Property

Finally, the UCEA is clear that the easement is "subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement...." The comment was included at the insistence of a number of commissioners concerned about the confusion that could result from placing a CE on land where title was divided between surface and sub-surface owners. Some commissioners feared that the Act could be used to argue that the relationship between the owners had changed and that the CE could be used to interfere with subsurface rights. Others feared that the CE would involve the third-party CE holder in the original relationship, or that the easement holder would have standing to enforce the easement against actions outside the eased land that may be detrimental to easement purposes.

D. The Benefits of a Lawyerly Discussion

The UCEA was an important vehicle for state legislation, but its importance extends beyond removing common law barriers to CEs. Despite its title, the UCEA did not result in uniform law across states. But the UCEA represented a well thought-out and integrated effort that

203. See FAIRFAX & GUENZLER, supra note 4, at 188–90. See also Rob Levin & Jessica Jay, Memorandum of Law 4–7 (Legal Roundtable on Third-Party Standing, LTA Rally 2003).

204. Discussed in FAIRFAX & GUENZLER, supra note 4, at 78, 188–90. Levin and Jay believe that it is "relevant to query whether courts afford standing to multiple holders; if so, how (individual or joint); and how the co-holders define their own relationship to the conservation easement, grantor, and enforcement rights and responsibilities." Levin & Jay, supra note 203, at 4.

205. UCEA, Commissioners' Prefatory Note § 2 cmt. ¶ 4.

206. 1980 Proceedings, supra note 97, at 26–27 (comments of Comm'r Thomas). See also Jay, supra note 148, at 791 (discussing Tennessee Environmental Council and the precedent it sets for creating standing for "citizens and neighbors to enforce conservation easements against owners of property adjacent to and unencumbered by conservation easements for their impacts to the easement property").
provided the basics—a coherent definition of an easement and a careful positioning relative to the common law terms and interpretations (although not without ambiguity).

The importance of its provisions was amplified by the involvement of national legal and legislative organizations like the ABA and NCCUSL. Having a neutral body of real property lawyers and legal scholars draft the proposal probably lent legitimacy to growing land trusts by bringing credibility to the legal tools, the problems, and the institutions involved. In that sense, the drafting process (not just the Act’s language) was also important in building the infrastructure for the growth of the land trust movement.

Second, part of the task of the NCCUSL is to promote the adoption of the drafted legislation. Commissioners are expected to return to their respective states and “seek introduction and enactment of Uniform Acts.” Land trusts probably could not have hired better consultants for drafting and pushing the legislation, and they did not have to foot the bill for advocating for UCEA passage. The committee members had experience working with public, private, local, regional, state, and federal conservation and historic preservation programs; had a comprehensive knowledge of the common law and its application to CEs; and brought the states’ perspectives and experience.

At the very least, the NCCUSL helped to put an arcane area of the law in a more contemporary context and to articulate the importance and the problems—and that may have been important to expanding a budding land trust movement. The UCEA and the debate surrounding it serve as an important reference. The Act generated a paper trail and legislative history. The debates and comments are valuable reminders that, for example, the name “conservation easement” and the relationship between public agencies and private land trusts were not inevitable.

But the majority’s insistence on CEs as a private ordering system bequeathed enormous accountability problems to the land trust community. In spite of the participation of federal agencies that were increasingly dependent on privately held CEs for the implementation of their own land acquisition programs, the commissioners positioned CEs as a private ordering system, choosing not to subject the new tool to public oversight. Eliminating the watchful neighbor to facilitate CE holding by non-appurtenant private charities opened the door to serious problems in recordation, monitoring, and enforcement. And the

207. Interview with William Sellers, supra note 108.
remaining straws of common law accountability are confusing, inappropriate, and not clearly available to interested members of the public. The layers of IRS supervision, charitable trust provisions, and the host of other justifications that the commissioners stated to support their conclusion that CEs would support the public interest do not assure adequate public accountability.

We have concluded that the UCEA did not bind CE use or the action of CE holders tightly enough to ensure that CE transactions are publicly accountable, that they serve the public interest, that they provide public benefits commensurate with public investment, that they are monitored and enforced adequately, or that the public is assured access to information about the easements. Nevertheless, the NCCUSL discussions provide useful insight into the pitfalls and remedies of private ordering. The debates can be used as a catalog both of what could transpire and of what has gone wrong in the land trust movement. Revisiting those arguments provides both a glimpse into the history of the CEs and land trusts and a valuable guide for reforming the CE and the standard land trust practice.

IV. AND THEN WHAT HAPPENED: THE CALL FOR ACCOUNTABILITY

The efforts of NCCUSL and others in overcoming common law impediments to enforcement were critical. They facilitated confident reliance on CEs by both public and private entities. Twenty-two states and the District of Columbia have adopted the UCEA in whole or in part. The result has been a harmonization of some of the basic CE provisions, but not uniformity across states. The land trust movement has been growing steadily since the Second World War.

A. The Rapid Expansion of the Land Trust Movement

Two factors contributed greatly to the rapid emergence of land trusts and CEs.209 First, since the 1980s, the federal and state governments have for diverse reasons—changing expectations about the role of government, fiscal crises, and budget short falls—cut back on their land acquisition programs.210 Second, landowner participation has been encouraged by myriad tax benefits. A series of IRS decisions beginning in the 1960s and later legislative clarifications and regulations

209. See FAIRFAX ET AL., BUYING NATURE, supra note 1, chs. 7, 8.
210. Id. But note that state and local bond issues and referenda continue to provide funding for state and local acquisition programs. Id. at 241.
determined that donated CEs qualified as deductions from the donor's taxable income. In addition, a CE frequently lowers the appraised value of a property, creating property and estate tax benefits.\textsuperscript{211} When these pieces fell into place in the early to mid-1980s, the land trust movement took off.

**Graph 1. Number of Land Trusts, 1950–2003\textsuperscript{212}**

Graph 1 shows that this steady growth has intensified in the last decade: the number of land trusts has increased 26\% between 1998 and 2003 alone. The number of CEs has also increased dramatically in the same period. Total acreage conserved by local and regional land trusts doubled, from 4.7 million to 9.4 million, and CEs account for most of that increase: local and regional land trusts hold 17,847 CEs, up from 7,392 in 1998, and the total acreage protected by CEs has increased 266\% since 1998, from 1,385,000 to 5,067,929 in 2003.\textsuperscript{213}

\begin{itemize}
\item \textsuperscript{212} The Land Trust Alliance: Land Trust Census, graph 1, available at http://www.lta.org/census/index.shtml (last visited Nov. 18, 2004).
\item \textsuperscript{213} Id. LTA data does not include information regarding the acreage protected or conservation easements held by national land trusts, TNC, TPL, and TCF.
\end{itemize}
B. A Shaky Start on Adolescence: Blurring of Public and Private and Calls for Greater Accountability

The movement's tough adolescence began as the dot.com bubble ran out of steam. The LTA came on hard financial times in the late 1990s and began to cut services and consolidate.\(^{214}\) It is easy to overstate the current difficulties; a myriad of issues and organizations have threatened the viability of the land trust movement and CEs.

1. The Sagebrush Rebellion

Criticisms of the land trust movement became apparent even during the NCCUSL process. Among the first were Wise Use Movement/Sagebrush rebels\(^ {215}\) concerned about land trusts' role in expanding federal land holdings. As one commissioner remarked, "It's shocking to me that we're today considering this kind of arrangement with respect to conservation to place in government control more and more land."\(^ {216}\)

Some commissioners representing western states expressed concern about the possibility that CEs would add to federal land holdings. Today critics also highlight the degree to which land trusts protect land by "preacquiring" parcels for subsequent government purchase.\(^ {217}\) While the commissioners focused on their preferred "private ordering system," critics within NCCUSL and elsewhere protested the blurring of public and private programs.

2. The Private Property Rights Movement

The land trust movement also became the target of intense criticism from private property rights advocates. If one were inclined to assume that private property interests would applaud the CE's compensated approach to land regulation,\(^ {218}\) one would be wrong. They

\(^{214}\) FAIRFAX ET AL., BUYING NATURE, supra note 1, at 209.


\(^{216}\) 1979 Proceedings, supra note 6, at 61 (remarks of Comm'r McClautherty).

\(^{217}\) More recently, preacquisitions have been expanded and complicated by complex land exchanges, in which private entities such as land trusts serve as a go-between, helping both the government and private holders acquire parcels that would be useful to balance a large land swap. For more detail on both preacquisitions and land exchanges, see FAIRFAX ET AL., BUYING NATURE, supra note 1, at 191, 63-66, 211-15, respectively. On land exchanges generally, see Janine Blaloch and the Western Lands Project website at http://www.westlx.org.

\(^{218}\) See generally Cheever, supra note 24; FAIRFAX ET AL., BUYING NATURE, supra note 1.
were early and outspoken opponents of the land trusts’ public transactions in private clothing. A consistently credible refrain in their sometimes outrageous rhetoric has been that decisions that affect the livelihood and environment of communities ought to be debated publicly, not glossed as private and put beyond public comment.219

The property rights groups exhibited political muscle in Congress during debates on the Conservation and Reinvestment Act (CARA). At the end of the Clinton administration, and in spite of considerable support from conservative representatives who viewed CARA’s funding provisions as an effective means for states to increase their share of outer-continental shelf oil revenues, conservationists were unable to achieve passage of a spectacular federal funding scheme.220 CARA would have provided $2.8 billion a year in funding over 15 years, largely for land acquisition, much of it to be administered by or in cooperation with land trusts. CARA was defeated by private property rights advocates that have continued to play a significant role even in land trust transactions.221

3. Charitable Trust Issues Are Raised but Not Resolved

Just as CARA failed, the complicating possibilities that CEs could be interpreted as charitable trusts emerged in a dispute regarding CE amendment.222 One opportunity for a clarification of the relationship between CEs, land trusts, and charitable trust law was lost in 1998 when the parties settled a vexing case regarding a National Trust for Historic Preservation (NTHP) easement on the “Myrtle Grove” property in Easton, Maryland. However, the spectacle of a quasi-government agency invoking charitable trust law to reverse its own politically unacceptable decision speaks volumes regarding the need for public oversight and participation in land trust decisions.

219. FAIRFAX ET AL., BUYING NATURE, supra note 1, at 261–62.
220. See id. at 239–42.
221. The authors’ research assistant, Matt Gerhart, talked with David Brooks and Margaret Stuart, Senate Energy and Natural Resources Committee; Shawn Whitman, Staff to Senator Craig Thomas; Max Peterson, International Association of State Fish and Wildlife Agencies; and John Doggett, American Farm Bureau, who greatly enhanced our understanding of CARA.
222. The Washington Post ran a series of articles in 1998 about the Myrtle Grove controversy that were quite supportive of the NTHP’s position to prevent subdivision. The series featured such headlines as Peter S. Goodman, Agreement Saves Estate on Maryland’s Eastern Shore; Trust Had Wrongly Approved Subdivision, WASH. POST, Dec. 11, 1998, at G7.
223. NTHP was created by legislation in October 1949 and received federal funding until 1998. It is presently a nonprofit. A history of the organization is available on the NTHP website at http://www.nationaltrust.org/about_the_trust/history.html.
The easement, donated to the NTHP in 1975, precluded subdivision and development of the property. In the late 1980s, the underlying fee changed hands—the original grantor passed away and her heirs sold Myrtle Grove. The new owners petitioned the NTHP to subdivide the property. In 1994, the NTHP agreed to modify the easement to permit the subdivision in return for a 20-acre easement over an adjacent tract, new documentation, and funding for additional easement enforcement.\textsuperscript{224} Under pressure, the NTHP withdrew its approval a few months later, asserting that the amendment had been "improvidently granted,"\textsuperscript{225} and the new owner sued. The NTHP used charitable trust law, among other things, to support its revised conclusion, claiming that the existence of a charitable trust on Myrtle Grove would not allow the NTHP to treat the easement so cavalierly.\textsuperscript{226} Numerous land trust interests, including TNC and LTA, joined as friends of the court, filing amicus briefs in support of the NTHP's position.\textsuperscript{227}

The Maryland AG filed a separate case against both the landowners and the NTHP.\textsuperscript{228} Although the state had taken no direct role in negotiating or paying for the easement, the AG recognized the importance of the case for Maryland’s large investment in CEs.\textsuperscript{229} He argued that “Myrtle Grove is, or is subject to, a charitable trust for the benefit of the people of Maryland, and that the terms of the trust may not be broken.”\textsuperscript{230} A settlement in which the NTHP paid the developer $225,000 ended both lawsuits and the possibility of clarifying the issue.\textsuperscript{231}

\begin{itemize}
\item \textsuperscript{224} Memorandum of Law in Support of Attorney General's Motion for Summary Judgment at 12, Att'y Gen. for the State of Maryland v. Miller, No. 20-C-98-003486 (Cir. Ct. for Talbot County, Md.).
\item \textsuperscript{225} Letter from David A. Doheny, Vice President and General Counsel, National Trust for Historic Preservation, to Thomas A. Coughlin, Esq. (June 27, 1994). We are not convinced that, balancing what was lost and gained, the choice was on its face a bad one.
\item \textsuperscript{226} Memorandum of Law in Opposition to Defendant Miller Trusts' Motion to Dismiss or Stay at 4, Attorney Gen. for the State of Maryland v. Miller, Case No.: 20-C-98-003486 (Cir. Ct. for Talbot County, Md.).
\item \textsuperscript{227} Given the Myrtle Grove facts, this seems obvious. But one point in the discussion is that the "right side" of the issue is not necessarily that easy to identify. A charitable trust will not always help the land trust and/or its conservation goals.
\item \textsuperscript{228} Bill Silberstein, \textit{Law Update: The Doctrine of Merger as Applied to Conservation Easements}, EXCHANGE, Winter 1999, at 17.
\item \textsuperscript{229} "Perhaps most importantly this case raises issues of first impression of Maryland law that could affect hundreds of preservation easements in Maryland held by state agencies and private non-profit organizations." Memorandum of Law in Opposition to Defendant Miller Trusts' Motion to Dismiss or Stay at 6, Attorney Gen. for the State of Maryland v. Miller, Case No. 20-C-98-003486 (Cir. Ct. for Talbot County, Md.).
\item \textsuperscript{230} Id. at 4 (emphasis added). The Maryland AG filed suit in Talbot County Circuit Court in Maryland. The landowners had filed suit against the NTHP in the District of
\end{itemize}
At present, the ambiguities in charitable trust law’s relationship to CEs remain. We do not know, for example, whether a CE is an interest in property sufficient to give rise to an implied trust. When the NTHP made an error in modifying an easement without consulting neighbors or the public, the land trust community turned to the AG in hopes that reliance on the charitable trust doctrine could correct the blunder. Thus, the Myrtle Grove cases evince a need for a more explicit set of expectations regarding public review and accountability concerning both charitable trusts and CE amendment.232

4. Exacted Easements

Issues of accountability for easements have been complicated considerably by government agencies’—local, federal, and state—reliance on easements exacted during planning and permitting procedures. During the Reagan era, private land trusts were inclined to present themselves as a private voluntary compensated alternative to regulation,234 and government regulators, anxious to avoid the political and administrative costs of regulatory enforcement, were happy to support CEs rather than regulations. The emergence of exacted CEs—CEs created as part of government permitting processes under statutes as diverse as the Federal Endangered Species Act235 and local planning efforts236—is a confusing pastiche of incentive-based conservation and dispersion of government authority to nonprofit organizations.

Exacted CEs utilize the private ordering system in problematic ways. Like highway and historic preservation programs, the federal government relies on non-federal actors to achieve federal regulatory
goals. But it is not clear that such CEs are valid under state CE statutes, and mechanisms for recording, monitoring, and enforcing these hybrid easements are inadequate. Several preliminary reports conclude that the government is shockingly ineffective at not only monitoring and enforcing easement requirements, but also at recording them. It is extremely difficult to locate many exacted CEs. Although some land trusts have avoided association with exacted CEs, others are deeply involved. In the process, the credibility of CEs and land trusts has eroded further.

5. The Washington Post, the IRS, and Congress

These scattered clouds on the horizon achieved critical mass, and legs, when the Washington Post published a series of widely read articles that were highly critical of The Nature Conservancy’s business practices. Although many in the land trust movement speak privately about the bias and basic misconceptions in what they regard as the Post’s sucker punch, the criticisms are nevertheless echoed elsewhere within the land trust community. Perhaps most telling, attorney Stephen Small, an architect of the CE tax law and a major practitioner in and supporter of the land trust community, sounded an alarm at the 2004 LTA

237. Owley Lippmann, ECEs: The Hard Case, supra note 142.
238. Owley Lippmann’s work on CEs exacted in the Habitat Conservation Plan process under the Endangered Species Act has been complicated by myriad difficulties in identifying and locating the easements. See Owley Lippmann, ECEs: The Hard Case, supra note 142, at 303 (observing that “[h]olders of conservation easements may be located anywhere”).
239. FAIRFAX & GUENZLER, supra note 4, at 155–68 (discussing the private Stephen Phillipps Memorial Preserve Trust, which is at the center of a “growing web of land conservation” in Maine).
240. See generally Owley Lippmann, ECEs: The Hard Case, supra note 142. The Tri-Valley Conservancy in California receives easements from the Alameda County bonus density plan. Similarly, the California Coastal Commission accepts “offers to dedicate” easements from coastal property holders when granting them permission to develop. Amy Wilson Morris, This Land: Private Rights and Public Benefits—Conservation Easement Governance in California and Massachusetts (Oct. 18, 2005) (unpublished qualifying exam proposal, on file with author).
national meeting and in his publications: things in his practice had
begun to change. Initially, his clients had been individuals with
conservation interests trying to understand how to protect land. Now,
the customer base was different: "Private land protection was growing at
exponential rates and real estate developers, tax advisers, and
‘promoters’ outside of the traditional land conservation field started to
become more interested in the potential tax advantages...."243

At the same 2004 meeting, IRS personnel presented a panel that
explained why they had singled out CEs for special review and what the
heightened review meant for land trust practice. Distressingly,
deductions for donated CEs appeared in the IRS presentation in the same
breath as donations of junker cars. This was not an enviable position to
be in.

Finally, a high profile congressional reconsideration of all
charitable deductions followed.244 After several decades of seeming
inevitable, it was beginning to look like the land trust movement was
losing its wheels. The NCCUSL commissioners’ suggestion that federal
tax law might provide one means of oversight over CEs proved correct.
As a result, the LTA and its members engaged in both defensive and
constructive actions designed to strengthen both the appearance and the
reality of public accountability.245

V. WHAT SHOULD HAPPEN NEXT—USING THE UCEA TO
REFRAME ACCOUNTABILITY

In looking for ways to address the accountability issues created
by the UCEA’s approach, we reiterate that the UCEA evolved
considerably during the drafting process. Whereas the first version
contemplated public agency approval of CEs and a host of similar

243. Stephen J. Small, Proper—and Improper—Deductions for Conservation Easement

244. See supra note 211.

245. Rand Wentworth, President of the Land Trust Alliance, stated,
To crack down on transactions of dubious conservation purpose the
committee staff has considered requiring the federal government to certify
land trusts and/or conservation easements. As an alternative, LTA has
suggested that the committee allow land trusts to create a program of
voluntary self-regulation based on the Land Trust Standards and Practices,
and the LTA is studying the best approach to such a program.

Rand Wentworth, President’s Column: Senate Finance Committee Pushes Reforms—LTA
provisions, the commissioners quickly defined the Act's purposes more narrowly. The UCEA did not wholly preclude public oversight, but the commissioners rejected numerous proposals for it. Moreover, by leaving in place much but not all of the common law, the drafters created talking points and perhaps the appearance of oversight without identifying useful tools and institutions for achieving it.

Because not all of the commissioners accepted the private ordering notion that dominated the final draft, the UCEA debates provide a useful source of insight into both the problems that beset the land trust community and ways to approach them. Between 1975 and 1981, the NCCUSL wondered why CEs should be subjected to public scrutiny. Almost a quarter of a century later, we reverse the commissioner's logic to ask why the involvement of a charitable organization in a conservation program should insulate public expenditures and management of public resources from public scrutiny.

Below, we draw upon the debates to call attention to changes that must be made in our collective approach to CEs. We believe that for some of the issues we have discussed a reconvened NCCUSL panel is still the appropriate venue.

A. Amending the UCEA—And Not

In October 2001, members of the land trust community met with federal, state, and land trust representatives and NCCUSL commissioners to consider amending the UCEA to facilitate the use of CEs for the remediation of superfund sites. The participants concluded that an act separate from the UCEA was preferable. The Act was later drafted and adopted by the NCCUSL as the Uniform Environmental Covenants Act. But the environmental covenants discussion precipitated a second and separate meeting to discuss the value of the NCCUSL revisiting the UCEA. This time around, rather than being minor participants, the land trust community played host to the discussions. The group considered re-opening the UCEA to address five issues: (1) CE amendment; the vulnerability of easement to (2) marketable title acts; (3) condemnation and (4) tax liens; and (5) the extent of state involvement in issues of CE amendment and enforcement.


247. King Burnett, who originally served on the NCCUSL's drafting committee for the UCEA (and who was serving as both NCCUSL president and board member of the Maryland Environmental Trust at the time), proposed the second meeting and LTA policy Director Russ Shay convened it.
The last concern was prompted, in part, by the then on-going Myrtle Grove cases. In the end, the participants decided that there was little support to amend state law. But calls for reopening the UCEA continue with legitimate urgency. We believe that amendment of the UCEA is an appropriate avenue for addressing some, but not all, of the concerns discussed in this article regarding CE accountability.

B. Issues That the NCCUSL Should Address

Three issues are sufficiently complex that they would benefit from another round of lawyerly discussion and education. First, the issue of whether a CE is an interest in property or a restriction on its use deserves detailed consideration, not only because it implicates the whole issue of whether a CE is a charitable trust, but also because it is important to be able to inform the public and potential participants about what is happening. Second, the charitable trust issue and particularly its relationship to termination, modification, and enforcement would also probably best be debated, at least in the opening instance, in the precincts of the NCCUSL. Finally, the diverse intricacies of integrating CEs and public planning regimes—local, state, and federal—could profit from additional NCCUSL review.

1. What Is a CE?

The UCEA debates make it clear, and subsequent events have emphasized, that citizens and practitioners alike need a clearer understanding of what a CE is. The UCEA debate regarding CEs as interests in property versus agreements regarding land use has never been adequately addressed. This unresolved bit of business is more than semantics. It is a lynchpin in addressing the charitable trust issue: no property interest, no charitable trust. But it also sharpens the public accountability issue tremendously. If easements are servitudes and an owner parts with valuable rights and is compensated, then the role of land trusts as brokers in the transactions seems legitimate. If, as Cheever has suggested, CEs are a way of contracting out the dirty business of writing and enforcing regulations, then expectations for adequate public participation in the easement negotiation process are no less appropriate.

248. Telephone Interview with Russ Shay, LTA Public Policy Director (Nov. 11, 2004).
249. PIDOT, supra note 183, at 36-37.
Clarity regarding what a CE is seems both long overdue and essential to any improvement in land trust credibility.

2. **Charitable Trust or Not?**

The Myrtle Grove case demonstrates the need for enlightenment on this point as well. Some subset of the potential problems may be readily addressed in careful easement drafting—individual easements might be drafted to maximize or minimize the potential that they will be interpreted as charitable trusts. A more detailed parsing of whether charitable trust does apply to conservation easements is clearly needed. The NCCUSL would fill an appropriate role in considering whether charitable trust law provides an optimal approach to accountability and deciding if and how to apply the contours of trust law to future land trust transactions.

3. **The Interface with Local and Federal Land Use Planning**

Finally, the NCCUSL should revisit the relationship between CEs and planning. When the commissioners first addressed the issue, they focused on local planning. Advisors to the committee expressed concern about the “unwanted consequences of unilateral ‘single-purpose’ actions which may preempt more carefully considered comprehensive land use strategies endorsed through a democratic process by appropriate levels of government.”

Language in early forms of the UCEA even suggested that CEs incompatible with public planning and zoning processes could be terminated if “enforcement of the easement would violate a fundamental public policy of the state.”

In attempting to define what might constitute a “fundamental public policy,” the commissioners included everything from zoning to affordable housing. The issue clearly would benefit from the kind of expert exploration that the NCCUSL could provide.

It would probably also have been appropriate, given the interest of federal agencies in CEs, for the NCCUSL to address the relationship between CEs and federal planning as well. The need for so doing is unmistakable now. The NCCUSL appears to be particularly well suited to address the issue, which merits a full airing among experts and an open environment, one suited to address the issues on a more national

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251. Letter from Norman Marcus, Counsel, City of New York Dep’t of City Planning, to J.C. Deacon, President, NCCUSL (Feb. 11, 1980) (on file with author).
252. 1980 Proceedings, supra note 97, at 36.
stage. Here uniformity is at a premium, and the expectation of public comment is deeply rooted.253

We are aware, of course, that states are free to ignore the results of any sequel to the NCCUSL process. However, we are also impressed by the benefits of the discussion that proceeded from their first effort. That same kind of debate is needed now. Even if the result is not uniformly adopted, it would put tools in place.

C. Issues That Organizations Other Than NCCUSL Are Probably Better Qualified or Appropriate to Address

There are, of course, other organizations that are better positioned than the NCCUSL to debate and resolve a different set of accountability issues now confronting the land trust community.

1. Tax Deductions

The commissioners got this one right. They did not address tax issues in 1980 and they should not address them today. Congress and the IRS are the appropriate bodies to deal with CE and all other charitable deductions. The outcome may not be as damaging as the LTA is currently predicting.254 Congress may back off from its more draconian ruminations. However, even if it does, tax deductions for donated easements may play a less important role in the future than they have in the past; as Steven Small has suggested, we are moving out of the era in which donated easements are the meat and potatoes of the land trust movement. Many land trusts do not deal with donated easements at all, and never have,255 and many organizations and practitioners are now more involved in purchased easements and assembled exchanges. Although the discourse surrounding perpetual easements continues to focus on IRS code and deductibility, Peter Forbes has suggested that more than a third of CE donors eligible for federal tax deductions do not bother to take them.256 Perhaps the tax consequences for donated

253. As it was during the drafting process. See supra Part II.D.
255. For example, the Marin Agricultural Land Trust purchases all its easements in part to allow the fee holder to reinvest in her farming practices.
256. Peter Forbes, personal communication with authors, at Society for the Protection of New Hampshire Forests 100th Anniversary Celebration, Bretton Woods, N.H. (Sept. 21, 2001). Forbes reviewed TPL’s transactions and found that “less than 2/3 of the below-fair-market value-sellers had claimed a tax deduction” (by submitting IRS Form 8283, Noncash Charitable Contributions). Peter Forbes, personal communication with authors, Nov. 15, 2005.
easements should be framed not to encourage donations but—precisely along the lines that Congress is contemplating—to assure that donated easements are genuinely donated and in the public benefit. A reduced emphasis on tax deductions might also open the way for the NCCUSL to revisit the issue of term easements, which are not precluded by IRS rules but are closely tied to its edicts.

2. Who Can Hold an Easement?

In its effort to encourage the use of CE, the commissioners were disinclined to define more stringent holder qualifications, but the commissioners did contemplate the possibility of and solutions to CE abuse.257 Commissioners expressed concern that an individual with “large sums of money and a particularly geared interest” might be able to steer a charitable organization toward frustrating the public purpose.258 As “rogue land trusts”—organizations willing to sculpt easement transactions toward private rather than public benefit—and awareness of questionable transactions have become more widespread, the UCEA debates provide examples of more exacting requirements on holders.

The NCCUSL left the bar too low and inadequately defined who can hold an easement. It could reconsider the matter. However, the LTA is developing components of a system for land trust self-regulation. Its recently revised Standards and Practices259 provide a framework for ethical land trust practice, and its system for land trust accreditation should be operational in 2008. The LTA plans to establish an accreditation commission as a subsidiary of itself. Once the commission is fully operational, commissioners will be elected by accredited land trusts and appointed by the LTA board. The LTA continues to refine the

257. They discussed, for example, the possibility of permitting “a single private individual to set up a dummy corporation and whatever else he wants to do to transfer property with an open land easement in perpetuity....” 1980 Proceedings, supra note 97, at 79 (remarks of Comm’r Langrock).

258. Id. at 79–80. Another commissioner, opposing an approval role for government planning bodies, responded that a zoning commission could be similarly unrepresentative of the public interest.

Anybody who has been through a hearing of a typical planning commission or zoning board— anybody who realizes that you can control a planning commission or zoning board as readily as you can have the rich person who is controlling the charitable corporation—would be very concerned about allowing what purported to be a grant of easement in perpetuity to be terminated or modified by a planning commission.

Id. at 80–81 (remarks of Comm’r Everett).

criteria for accreditation, which will likely center around established Standards and Practices and limit eligibility to organizations incorporated for at least two years and with two completed conservation projects. Self-regulation ought to be considered and assessed before outsiders impose a certification system.

3. Issues That Provide Room for Everybody—Even Academic Researchers

Three issues are pressing but, it seems, not yet ripe for resolution. Discussions among practitioners, land trust members, supporters, funders, government agencies, and even academics seem to be called for in advance of making decisions.

Abuse Prevention—Certification and standards are not the only fruitful approaches to preventing abuses in the land trust field. Several states have rules that require approval of CEs or that limit new land trusts from holding CEs for two to five years after they are organized. This allows established land trusts to police newer ones and to assure that they are appropriately situated to protect the public’s interest in the CEs. We believe that research on the effectiveness of these provisions would be appropriate in advance of specific proposals.

Record Keeping—Recordation is another area that we need to understand far better before adopting general recommendations. Our much lamented watchful neighbor is unlikely to have been effective in simply “remembering” the provisions of the complicated CE and is further unlikely to have the skills to know what kind of baseline data needs to be recorded with an easement. Ecologists and resource managers must become more involved in defining standards for these basic CE processes.

The other key element of recordation is to make sure that notice of each CE is available to potential purchasers of the underlying fee, planners, and citizens who want to know and exercise their rights. Again this is an area in which states have adopted an interesting array of approaches. California has a new and interesting law that needs to be evaluated. This is key to tracking exacted CEs but is not limited to them. Recordation is part of embedding the easement in the community and a

261. Sellers is among those who also argue that land trusts holding easements ought to be required to demonstrate that they have a defense fund or endowment sufficient to defend the conservation goals if they are challenged. Interview with William Sellers, supra note 108.
VI. CONCLUSIONS

The NCCUSL achieved many of its goals for the UCEA. The Act removed some elements of the common law that could have impeded the use of CEs. Adopted in 22 states and the District of Columbia, the UCEA has contributed to the growth of the land trust movement and facilitated the use of CEs, and it has established a more consistent vocabulary that practitioners, the courts, landowners, and the general public can all use with some confidence.

Yet, in limiting the scope of the Act—regarding CEs as elements of a private ordering system not appropriately subjected to public oversight and scrutiny, except in narrowly circumscribed ways—the drafting committee’s perception of CEs did not accurately reflect the public nature of CEs even at the time of their discussions. Federal participation in the drafting process indicated that CEs were important elements of public as well as private land conservation. Nevertheless, it may have been impossible for the NCCUSL to foresee and account for the explosive growth in CE use; the rapid blurring and blending of public and private funding, endeavors, and ownership; and the public elements of CEs. And since the UCEA process, land trusts eager to present themselves as a private, voluntary alternative to regulation have embraced, amplified, and promoted the conception of CEs as within the realm of private ordering.

But the private ordering view embodied in the UCEA and perpetuated by many in the land trust movement misinterprets CEs. The NCCUSL’s insistence that CEs were part of a private ordering system limited the scope of the UCEA but facilitated the widespread use and acceptability of CEs. The private ordering idea has also resulted in serious accountability problems for the land trust movement. The increasingly public nature of CEs and CE transactions warrants a reconsideration of the extent to which CEs and CE holders are

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263. See FAIRFAX ET AL., BUYING NATURE, supra note 1, at 191-92.
conditioned by measures that ensure public oversight and accountability.

An appropriate place to begin the discussion is by reorienting the rhetoric regarding CEs and land trusts as private ordering. Accounting for the public nature of CEs is central to clarifying easement accountability and to considering the appropriate degree of public oversight and access to information about CE negotiation, recordation, amendment, monitoring, and enforcement. Basic elements of the relationship between land trust programs and planning for both local and federal land must still be clarified. Congressional and IRS oversight provide remote measures of accountability for public expenditures, and the charitable trust doctrine may provide appropriate public supervision for modification and termination of easements that land trusts may want to include explicitly in CE drafting. Indeed, as one ABA member noted, establishing layers of public oversight may well “giv[e] added strength to [easement holders’] enforcement efforts and protection against public criticism[,]...strengthen charities’ roles, and make a stronger case for favorable income and property tax treatment.”

Land trusts and CEs have been wounded as well as challenged by the Washington Post’s exposure of questionable practices on the part of The Nature Conservancy. However, the solutions to most of these problems are not obscure. The UCEA debates provide a reminder of the limitations and potential alternatives to the Act. As the land trust community confronts issues concerning rogue land trusts and CE abuse, useful alternatives are buried in the debates of the NCCUSL, and many others can be achieved by the organizations, particularly the LTA, that have matured since the first UCEA was drafted. From 1975 to 1981, as the NCCUSL was drafting the UCEA, the land trust movement played a minor, if any, role in its formulation. Twenty-five years later, land trusts have defined the contours of CEs and implemented the UCEA, exposing its strengths and weaknesses and even contemplating its amendment. A movement as energetic and creative as the land trust community is effectively and appropriately tested by the questions that have been raised, but neither the NCCUSL nor the Land Trust Alliance is likely to make the same errors given a second chance.

264. Letter from Albert B. Wolfe to John C. Deacon, supra note 137.