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The "Shift to Privatization" in Land Conservation: A Cautionary Essay

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ABSTRACT

Land trusts and other market-based approaches to conservation have gained increasing visibility in recent years. We investigate the degree to which these new policies indicate a "shift to privatization" in U.S. conservation policy. Our review indicates that instead of a clear shift towards private alternatives, we are seeing a growing complexity of policy arrangements affecting private lands that mirrors the policy fragmentation that took place on public lands 100 years ago. This growing policy complexity is reinforced by new theoretical approaches to property law, including Joseph Sax's "economy of nature" perspective on private land ownership. Finally, we consider some of the implications of this new blurring between public and private rights, including those of public accountability and impacts on minority and low-income communities.

Dedicated...to the Preservation of the revenue generating activities of our farmers and ranchers along with their most valuable, renewable resource—Land. To the preservation of our wildlife, environmental, and soil resources through voluntary and compensatory programs. To the preservation of private property rights.
I. INTRODUCTION

Environmental policy has become increasingly entangled with private property rights, especially those pertaining to land. The closeness of the relationship reflects two distinct trends. On the one hand, growing awareness of the connections between living systems has promoted the goal of ecosystem management and the protection of natural resources across a mix of public and private land. On the other, property rights are being created to address new environmental challenges, like air and water pollution, that previously have been regulated in a less market-based, more command-and-control manner. Both trends constitute a challenge to the Progressive/Conservationist focus on public ownership and management by government experts for resource conservation.

Indeed, the growing interest in private lands and private property in general has led some authors to conclude that the Progressive Era model of resource management is crumbling away, awaiting replacement by an as yet unspecified alternative. Although we share some sympathy with this perspective (and indeed have embraced the idea ourselves in print on more than one occasion), we are increasingly inclined to feel that this view is too simple and leads to misguided conclusions about new policies appearing in the environmental arena. This article is presented, therefore, as a preemptive response to an emerging narrative in environmental policy: as Progressive Era mechanisms and ideals break down, we are presently undergoing a "shift to privatization" in policy. By "shift to privatization," we mean specifically a coherent movement toward policies that have four qualities in particular:

1. They promote conservation on private lands;
2. They rely on market-based mechanisms including the following:
   2.1 Depending primarily on voluntary actions by private actors;


(2.2) Providing compensation to private actors for meeting environmental goals beyond a certain, basic threshold level; and,

(2.3) Utilizing or contracting with private groups to achieve conservation objectives.

It is important to note that there is no definitive proclamation of such a shift in the literature on environmental policy to date. However, we do see numerous signs that this story is gaining credibility as the latest trend in environmental policy at the turn of the twenty-first century. Besides the aforementioned declarations of the demise of the Progressive Era, the privatization narrative arises in settings as diverse as the Kyoto Protocol,4 the acid rain provisions of the 1990 Clean Air Act amendments,5 and the emergence of land trusts.6 The new policy direction is sometimes seen as a reaction, welcome or otherwise, to decades of inefficient, intrusive, and mal-administered environmental regulations.7 In the same vein, support for these ostensibly private policy alternatives is frequently accompanied by a yearning for an earlier understanding of private property based on Lockean ideals.8 Perverse incentives9 are now ebbing, advocates of this shift might tell us, washed away by a rising tide of private, market-based transactions.

4. Approval of the Kyoto Protocol continues to rely heavily on the question of “market-based” mechanisms for compliance, including emissions trading between nations and “credits” for emissions reductions made in other countries through the “joint implementation” and “clean development mechanism” programs. See generally SEBASTIAN OBERTHUR & HERMANN E. OTT, THE KYOTO PROTOCOL (1999).

5. Title IV of the 1990 Clean Air Act Amendments included an innovative new program to control emissions of sulfur dioxide (SO2) by utilities, a significant contributor to the problem of acid rain. The Title IV program installed a cap and trade system, requiring utilities to obtain an “emission allowance” for every ton of SO2 they emitted per year. Allowances are very much like private property rights, being fully-tradeable among utilities and other buyers (including environmentalists). To date, the program has witnessed nearly 100 percent compliance by utilities and a significant reduction in SO2 emissions as a result. See U.S. ENVTL. PROT. AGENCY, Doc. No. EPA-430-R-00-007, 1999 ACID RAIN PROGRAM COMPLIANCE REPORT (1999); Brian J. McLean, Evolution of Marketable Permits: The U.S. Experience with Sulfur Dioxide Allowance Trading, 8 INT’L. J. ENV’T & POLLUTION 19, 20-22 (1997).

6. See infra part IV.


8. See, e.g., Yandle, supra note 3, at ix-xviii. For a more visceral window, see American Land Rights Association, Home Page, at http://www.landrights.org (last visited Aug. 3, 2002) (providing links to many useful websites such as that of LAND).

The idea that we are privatizing environmental policy provides an antidote, or at least an antipode, to an equally simple understanding of the turn-of-the-twentieth-century Progressive Era. The received wisdom regarding that period describes a policy shift from disposition to permanent retention of the federal public domain. We have previously spilt considerable ink detailing our reservations about this story; these concerns are summarized in part II of the present text. Suffice it to say for now that we found limited evidence for any such shift; instead, we described the period as one marked by a fragmentation of policies with respect to public lands. While some lands were clearly retained by the government, the idea that there was any sort of coherent movement towards a unified policy of full federal ownership is incorrect.

Indeed, we found that the Progressive Era narrative of a shift towards public ownership for conservation has deeply confused subsequent debate regarding public lands, particularly after the Second World War. Herein we will argue that the original "shift" narrative's shortcomings also feed misperceptions with respect to private lands in the present era. Most notably, the deep lines allegedly drawn during the Progressive Era between public and private lands provide an unrealistic starting point for any modern shift to privatization narrative. In reality, the ideas of public and private blurred together on the federal lands during this period. Taking this blurring as fundamental, in this article we build upon our previous analysis in an effort to deepen our understanding of the current policy environment with respect to private property.

With one element of the modern privatization story we have no cavil: both sides of the environmental debate are increasingly interested in private property in general and private land in particular. Environmentalists want to extend government control over private land in more and more ecologically-driven detail. In part, they are looking to


11. See generally Raymond & Fairfax, supra note 10. See also infra part II.


13. However, focusing on private rather than public lands does not signal a privatized or marketized approach to conservation issues. We are reminded that diverse advocates, with fundamentally incompatible goals and institutions for public domain management, generally agreed on the advisability of federal land retention. For example, both John Muir and Gifford Pinchot favored federal land retention—Pinchot for use and development, Muir to achieve wilderness protection. And while Muir supported using the army to protect the forest reserves, Pinchot opposed that in favor of developing a corps of scientific foresters trained at Yale. See John Muir, Gifford Pinchot, et al., A Plan to Save the Forests: Forest Preservation by Military Control, 49 CENTURY 626, 630-32 (1895).
market-based mechanisms to extend conservation onto private lands because of growing opposition to traditional forms of government regulation. That opposition rallies around the Fifth Amendment and the need to protect private property from government interference. Such Lockean concerns are augmented by other worries about gridlock and corruption in political processes that have also given rise to an interest in market-based alternatives. A growing reliance on “contracting out” government functions and “inviting in” participation of private, non-governmental organizations has also contributed to this trend. 

In light of this increased focus on private lands and markets, the idea that we are moving into an era of private property rights, market-based policies, and other alternatives to the dreary task of making and enforcing coercive regulations is alluring. Unfortunately, it is also misleading at best. The purpose of this article, therefore, is to argue against a shift to privatization narrative, and to offer a more complex alternative in its stead. We will argue that rather than a reassertion of private ownership rights and an outright rejection of Progressive Era concepts, we are actually experiencing a continued blurring of ideas about property and policy with respect to private lands, much like what occurred on federal lands in the Progressive Era. This blurring is reflected in numerous modern policy innovations, including the leading examples of conservation easements and land trusts.

Thus, we interpret the current debate as an elaboration rather than a rejection of Progressive Era notions of property and land use policy. In making this claim, we are well aware that when we turn to current events, we lose the advantages of hindsight that we enjoyed in our review of the Progressive Era. We have no equivalent of Gifford Pinchot to anchor the presently emerging narrative. Nor do we have a clear picture of what happens next. But we are convinced that in the current rush of attention towards private property and market-based policy, we risk embarking on

14. See generally Yandle, supra note 3 (outlining many of the specifics of this opposition and speaking of a movement, a rebellion, or a revolution); id. at ix.


17. Economists, of course, have a long tradition of preferring market solutions to environmental problems, most notably institutionalized in Resources for the Future (RFF). The emergence of the New Resource Economics, as institutionalized in organizations like the Political Economy Research Center (PERC) and the private property rights movement may be only a difference of degree rather than of substance.
another era of miscommunication and misunderstanding. Like the shift to retention story, the shift to privatization idea contains some obvious elements of truth while concealing important changes in policy affecting private lands that elaborate, in many ways, on the changes we saw on public lands 100 years ago.

We will make our case with both empirical and theoretical arguments. We begin in part II by quickly summing up our earlier analysis of the Progressive Era to show how diversifying ideas of property and other changes in U.S. political economy resulted in a crazy quilt of policy outcomes on public lands. Using this analysis as a guide of sorts, we will then ask, in two empirical settings, whether the modern "shift" idea is any more realistic. In part III, we use the criteria of "voluntary, compensatory, and private" to evaluate the relative "privateness" of a range of modern policies with respect to private lands. We find, not surprisingly, that the evidence for a shift to privatization from this review is not convincing. We then look in part IV at the emergence of land trusts as the strongest case for the privatization argument. Even here, we conclude, there is no evidence of a clear shift towards privatization; there is simply even more fragmentation of policy options and more blurring of the distinction between the terms "public" and "private."

Moving to a more theoretical question, we then ask in part V whether the changes documented in parts III and IV are indicative of a movement away from Progressive Era ideas about ownership. As noted above, we find that current changes appear to be a further elaboration of Progressive Era trends and not a reversal or rejection of them in favor of older Lockean concepts. Finally, in part VI, we discuss the practical implications of our argument. First and foremost, what are the equity implications of our new and ostensibly private policy-making efforts? Second, and not unrelated, how do we ensure continued public accountability under new, mixed public-private arrangements? Our conclusion is that the new institutional arrangements present a number of challenges regarding the allocation of public resources and environmental benefits and liabilities more generally. In addition, in the absence of a clear process of accountability, we must be even more vigilant than we have been in holding government agencies' toes to the fire. This vigilance is required not only on behalf of the aspirations of aesthetic and ecological advocates, but also for less enfranchised fellow citizens. Our fear is that urban poor and minorities risk being even less well served under these new policy options than under previous regimes, while the notion that such policies are

"private" alternatives to regulation may exempt them from adequate public scrutiny and concern. In this respect, the "shift to privatization" narrative could have important negative outcomes.

II. THE PROGRESSIVE ERA—A FRAMEWORK FOR ASSESSMENT

We start by summarizing our earlier article as a basis for the current analysis. Beginning roughly 125 years ago, law and policy regarding property, ownership, and government underwent a deep reorientation. The ensuing clash of ideas is clearly etched in policy regarding federally owned lands in the western states and territories. The pervasive narrative about the period describes a "shift to retention" in federal land policy. After spending a century transferring public domain land as rapidly as possible into private ownership, the story goes, in the late nineteenth century the government began to hold onto land in order to conserve and manage it. Although this simplistic tale continues to shape our understanding of both conservation history and the nature of public control over federal lands, the reality was far more complex.

While the idea that the federal government might retain vast tracts of the western United States in public ownership became viable during the Progressive Era, we discern no sweeping movement toward a policy of federal land ownership. The underlying assumption of the Progressive conservation agenda was that private ownership was inadequate to protect land and resources, necessitating public ownership for environmental protection. The details of the resulting forms of public ownership varied greatly, however, as land policy fragmented into a variety of title and management arrangements—an admixture of public and private rights on federal lands.
what we uniformly refer to as the federal or public lands. Those arrangements reflected changes in the political economy of the era, including new ideas about property, the rise of scientific management within the growing federal bureaucracy, and a greater sense of national identity. The result was not a clean shift from one policy to another, but an extremely complex mixture of government and private ownership and control over land and resources.

In particular, fragmentation of the idea of property was of critical importance. During the Progressive Era, the instrumental conception of ownership associated with legal scholars like Morris Cohen gained significant acceptance. The instrumental view declares property to be a political device. As such, property can be used to further the collective goals of society and is subject to modification by government as those collective goals change over time. This notion of property supported the Progressives' larger agenda of social reform. It endorsed the manipulation of property to improve public health, mitigate workplace abuses, and generally achieve a more equitable apportionment of both the goods and ills created by the gilded era. Accordingly, property on this account is a political right serving social ends.

Cohen's ideas can be distinguished easily from the Lockean or intrinsic notion of property that had dominated American thought for most of the nation's history. Locke describes property as a pre-political (or natural) right of unilateral appropriation. Property arises, in Locke's familiar allegory, through labor: someone removes something from the state of nature, making it her property, by mixing her sweat with it. Property thus serves the goals of specific individuals who formed the state largely to protect it and therefore is entitled to unwavering protection from political modification.


28. See Raymond & Fairfax, supra note 10, at 682-83.

Expanding the reach of the idea of property while dividing and separating the various powers of ownership was another key development in the late nineteenth century. During this period, increasingly abstract and intangible entities (such as corporations and ideas) became both owners and subjects of ownership. Meanwhile, the traditional connection between ownership and absolute control over one's property weakened. Instead of a strong and coherent notion of the unified powers of ownership of physical items, the right of property began to split into a number of divisible "sticks" within the "bundle of rights" that came to symbolize ownership at the time. The metaphor complemented the emerging view of property as exchange value rather than simply a physical object.

While the instrumental view of property gained significant traction during this period, it never fully replaced the ideas of Locke in American political economy. Lockeian ideas based on first possession and ownership as a reward for labor remain influential in American law and society to the present day. Yet clearly by the end of the Progressive Era we were no longer the same near-perfect children of Locke, so dear to Louis Hartz, as we had been prior to the Civil War. Unmistakably, more instrumental notions of ownership associated with scholars like Morris Cohen were added to the mix as we complicated our understanding of both property and government.

The policy consequences of this blurring were significant. First, although public land ownership did in fact emerge as a constitutionally approved and publicly accepted option, management responsibilities were divided among many competing agencies. Second, and partially as a result of the first, policy began to divide the land and resources. Land, water, trees, scenic and natural wonders, and wildlife were sorted out among different agencies and professions, further fragmenting the whole enterprise of conservation. Third, policies with respect to public land ownership did not move in lockstep towards retention; instead, they embodied a surprisingly diverse set of title arrangements and management strategies.

32. See Raymond & Fairfax, supra note 10, at 695-98.
33. Id. at 710.
34. Id. at 685-86.
37. Id. at 747.
38. Id. at 727-47.
This diversity of policies is summarized in Table 1. Some federal lands, including those containing scenic wonders, antiquities, and certain untouched stands of timber, were strongly retained by the government in accordance with the traditional shift to retention narrative. On these lands, the degree of public control was strongest. On other federal properties, however, the story was much different. An increasingly emphatic commitment to continuing disposition was in fact the most prominent public land policy during the period in which a "shift-to-retention" is supposed to be taking place. Homesteading continued with heavy subsidies under the Reclamation Act and the enlarged grants of the Stock Raising Homestead Act of 1916. This emphasis on disposition reflected the larger Progressive social agenda: all retention of land was intended, at least rhetorically, to serve the family farmer creating a home in the wilderness.

<table>
<thead>
<tr>
<th>Category</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strong Retention</td>
<td>Some timber lands (e.g., wilderness areas)</td>
</tr>
<tr>
<td></td>
<td>Parks with scenic wonders</td>
</tr>
<tr>
<td>Reserve and Rescind</td>
<td>Irrigation reserves</td>
</tr>
<tr>
<td></td>
<td>Indian reservations</td>
</tr>
<tr>
<td></td>
<td>Some forest reserves</td>
</tr>
<tr>
<td>Nominal Retention</td>
<td>Forest Service grazing lands (after WWI)</td>
</tr>
<tr>
<td></td>
<td>Dept. of Interior mineral lands</td>
</tr>
<tr>
<td></td>
<td>Oil and coal mineral lands</td>
</tr>
<tr>
<td>Partial Retention</td>
<td>Split estates (Stockraising Homestead Act)</td>
</tr>
<tr>
<td></td>
<td>Some National Park properties</td>
</tr>
<tr>
<td>Continued Disposition</td>
<td>Multiple homesteading laws through 1934</td>
</tr>
<tr>
<td></td>
<td>Ongoing hardrock mining claims</td>
</tr>
</tbody>
</table>

39. Id. at 734-39.
40. The term "disposition" is typically used to gloss a wide variety of Congressional policies—sales; grants to states, corporations, and private individuals; and homesteading—that transferred the public domain from government to state or private ownership.
41. Homesteading is the most familiar and arguably the least important of the disposition era policies. The Homesteading Act, which promised 160 acres of free land to "actual settlers," finally passed in 1862 when southern representatives in Congress had left. Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392 (repealed 1976) (allowing entry and patent of 160 acres of public domain land); see also The Desert Lands Act of 1877, 43 U.S.C. §§ 321-329 (1994) (expanding opportunities for settlement in the arid areas of the west by providing for entry on 320 acres with patent to the land to be issued upon proof that the land had been irrigated).
43. GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION 21-23 (1911).
Another key category was lands that were nominally retained by the government. While the federal government continued to hold title to these parcels, which included grazing districts and mineral lands delegated to various federal agencies, effective control was given to local users.\(^{44}\) This "nominal" form of retention relied heavily on the fragmentation of ownership and control noted above.\(^{45}\) To a substantial degree, the nominal retention arrangement remains in effect for many public lands to the present day.\(^{46}\) Closely related are lands that were partially retained. The Stock Raising Homestead Act, for example, simply divided the earth into two separate estates, retaining the subsurface minerals while disposing of the surface estate.\(^{47}\) Even while establishing the National Park Service in 1916, Congress simultaneously opened parks and monuments to timber harvesting and livestock grazing.\(^{48}\)

Further eroding the "shift-to-retention" theme are the many public land reservations that were reserved-and-rescinded. This process took several forms. Notably, extensive reservations for American Indians and early irrigation surveys eventually were opened to disposal, the latter ironically during the same year (1891) that forest reservation authority was granted to the president.\(^{49}\) In the early 1900s, Congress also opened existing forest reservations to homesteading, grazing, and minerals entry.\(^{50}\)

What this all means is that public domain policy did not shift consistently towards simple retention in the Progressive Era but rather became much more complicated. Where once were private lands and a presumption that federally owned land would eventually become, in the main, private, we now found lands called "public" but actually utilized and managed under a somewhat astounding array of public and private controls. Many of these ostensibly public lands were in fact shot-through

\(^{44}\) Raymond & Fairfax, supra note 10, at 739-43.
\(^{45}\) Id. at 740-41.
\(^{46}\) Id. at 745-46.
\(^{47}\) Id. at 744.
\(^{48}\) Id. at 738-39. The National Park Service "Organic Act" is much discussed in terms of the putative conflict between the "preserve" and the "enjoy" elements of its mandate, which is frequently glossed and lamented as irreconcilable. As an antidote the whole statute can be found at 16 U.S.C. § 1 (1994) or in LARY M. DILSAVER, AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 46-47 (1994).
\(^{49}\) Raymond & Fairfax, supra note 10, at 718-20, 733-34. See also Forest Reserve Act of 1891 ch. 561, 26 Stat. 1095 (repealed 1976).
with diverse private claims. Other policies separated resources among
diverse agencies and "partial" owners, further complicating the issue.51

Where land title is thus fragmented, the statement that a piece of
property is public is sometimes confusing and limits our understanding of
the actual allocation of rights. Using the term "public" to describe diverse
properties such as the nominally retained grazing districts established
under the Taylor Grazing Act,52 the split mineral estates in the Powder
River Basin, and Fred Harvey's vacation empire in Yosemite National Park
clearly holds little analytical or descriptive power. We conclude therefore
that despite the best efforts of Pinchot and others, the Progressive Era did
not mark a clear shift toward a single new category of lands remaining
under unqualified federal ownership and control. Rather, it signaled a
distinct blurring of the meaning of ownership itself that played out on these
various public properties. Lands we have become accustomed to thinking
of as public (or federal) are, in significant part, owned, controlled, and/or
developed by private entrepreneurs. And this blurring is exactly what we
now see continuing in the present era of putatively private, voluntary, and
compensated conservation.

III. PUBLIC POLICIES TOWARDS CONSERVATION ON PRIVATE
LANDS—EVIDENCE OF A SHIFT?

In this section and the next, we draw inspiration from our analysis
of the Progressive Era to discuss environmental policy on private lands in
the present day. We start by noting that modern environmentalists have
embraced a significantly different set of conservation priorities than those
of their Progressive predecessors. The emphasis now is on preventing urban
sprawl and preserving wildlife habitat, watersheds, and natural systems
that cross multiple property lines. Because private land is central to
achieving these goals, advocates have increasingly concluded that pursuing
protections on public land alone is inadequate.53 Partially in response to this
growing pressure for regulation of private land, others have argued that
private stewardship and market-based incentives can improve on the
results of government programs that protect the environment. Accordingly,
if a shift to privatization is truly emerging, we ought to be able to identify
new policies that are moving towards these tools and away from

51. See Raymond & Fairfax, supra note 10, at 728-30, 732-33, 739-41. See also Sally K. Fairfax
et al., The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands, 25
To explore that thesis, we shall review a wide range of policies affecting conservation on private lands in terms of three adjectives that are central to the shift-to-privatization narrative: voluntary, compensated, and private. Our goal in this section is simple. We are looking for clear movement away from involuntary, uncompensated, and public controls over private lands toward approaches with the opposite qualities. This section will focus on policies undertaken or implemented directly by government, leaving the distinctive case of conservation efforts by private actors like community land trusts to the following section.

For the limited purposes of the discussion that follows, we will center our understanding of voluntariness on the process by which changes to the conditions of private land ownership are decided upon. Was the new arrangement consented to or negotiated by the affected landowner, or was it compelled or extracted? Obviously at some point we will trip over the notion of political consent here—especially when “involuntary” land use decisions are made by local governments and therefore may be presumed to have involved a landowner more or less directly. Nevertheless, we will speak below in terms of direct landowner involvement in the transaction at issue and not confuse ourselves with the larger question of political participation.

We will simplify our use of the terms “compensation” and “private” in a parallel manner. For compensation, we will focus on the monetary, financial benefits the landowner receives in the transaction. And we will define a “private” transaction in two ways. First, was any money involved spent freely and openly by private interests to further their own priorities, or was it paid for with government dollars? Second, who decided the terms of the land use control; that is, what restrictions will be imposed and on what parcels? Private transactions will make those choices without government direction or funding. We realize that we still risk confusing ourselves with even those gross definitions since we continue to use the terms “public land” and “private land,” as well as “public ownership” and “private ownership,” in the standard sense of identifying the formal fee holder. Nevertheless, if we are careful, we should be able to avoid capsizing the discussion completely.

Some leading modern methods for controlling private land use for conservation are summarized, along with their relevant qualities, in Table 2. Several general points emerge from a quick perusal of this data. One is that six of the seven options rely on government actors for their implementation. Thus, right away it should be apparent that any ostensible shift to privatization is substantially qualified by the ongoing, significant role of government agents. Second, three out of six public options for controlling private land remain uncompensated and involuntary, making...
them especially poor candidates for supporting a shift to privatization story. Of course, the relative importance of the various policies in the table could be changing significantly, despite the fact that they all remain viable options for modern policy makers. This possibility will be considered in detail below. Nevertheless, the initial impression given by the table is that reports of the demise of the Progressive-like strategy of using public experts to control land use and development seem premature.

A. Public, Involuntary, and Uncompensated Policies

Private land use has always been subject to a number of public controls. As described below, the common law has restrained private land use for centuries from certain actions that were a nuisance to other landowners, or that violated other equitable doctrines like the public trust. In addition, other forms of government regulation have increasingly restricted the freedom of private landowners in the twentieth century. While the influence of some of these coercive public powers may have peaked in the 1970s and 1980s, there can be little doubt that they remain a central part of our current portfolio for controlling private land use for conservation.

One of the most important of these coercive options is zoning. Upheld as a constitutional expression of the police power by the U.S. Supreme Court in the landmark 1926 decision Euclid v. Ambler, zoning is an important tool for separating residential from commercial areas, defining reasonable uses of property in the close quarters of urban life, and protecting public and private investments in land and facilities. Following the Second World War, zoning became an increasingly vital element of county and city planning. Both planning and zoning retain an important role in land conservation policy today in spite of growing criticism of the tool itself, as well as increasingly effective efforts by property rights advocates to limit restrictions on private development without compensation.

Unlike local zoning rules, federal regulations affecting private property for conservation waited until the 1970s to take flight. Modern laws

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56. Randal O'Toole, The Vanishing Automobile and Other Urban Myths: How Smart Growth Will Harm American Cities (2001). This book inveighs against the most recent manifestation of urban planners.
57. For the most recent major case in the field, see Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003 (1992).
<table>
<thead>
<tr>
<th>Policy</th>
<th>Primary Actor</th>
<th>Voluntary?</th>
<th>Compensated?</th>
<th>Funding Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Public Trust Doctrine</td>
<td>Public</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>2. Zoning Codes</td>
<td>Public</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>3. Environmental Regulations</td>
<td>Public</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>4. Eminent Domain</td>
<td>Public</td>
<td>No</td>
<td>Yes</td>
<td>Public</td>
</tr>
<tr>
<td>5. Habitat Conservation Plans</td>
<td>Public</td>
<td>Yes</td>
<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>6. Subsidies (Sodbuster, etc.)</td>
<td>Public</td>
<td>Yes</td>
<td>Yes</td>
<td>Public</td>
</tr>
<tr>
<td>7. Land Trusts</td>
<td>Private</td>
<td>Mixed</td>
<td>Mixed</td>
<td>Mixed</td>
</tr>
</tbody>
</table>
like the Clean Air Act,\textsuperscript{58} the Clean Water Act (CWA),\textsuperscript{59} and the Endangered Species Act (ESA)\textsuperscript{60} all gave the federal government a powerful role in the regulation of private land use for the first time. These laws, and others like them, created an enhanced federal role as well as enormous state regulatory programs concerning private land. For in spite of their titles, there should be no mistaking that these three statutes turn, in significant part, on regulating use and development of private property. For "non-point" pollution sources in both air and water, land use plans are the answer, and for wetlands protection, the sky's the limit.\textsuperscript{61} For the ESA, concern over wildlife habitat on private lands has translated into even more restrictions on use and development.\textsuperscript{62}

Finally, the public trust doctrine is less frequently considered as a modern restraint on private land use but remains a vital part of conservation law in many states. While the detailed origins of the doctrine\textsuperscript{63} need not concern us here, suffice it to say that the doctrine underscores the idea that private land in the United States is considered to be held by the present or a prior sovereign and is subject, upon granting to private individuals, to terms that inhere in the nature of sovereignty. Title to land is accordingly not "absolute." No matter how clear the deed, grant, or terms and conditions of the contract that ostensibly gave the private landowner dominion over a piece of land, that title is always subject to underlying limits of public rights.

All of these restraints on private landowners are involuntary and uncompensated. While landowners do have considerable opportunity to influence zoning and planning processes through politically responsive city and county councils, nevertheless, in the end they must obey the edicts of these public officials. Federal regulations are even more coercive, having been formulated at the national rather than the local level, making less persuasive any notion of implied political acquiescence by private landowners. The judge-made public trust doctrine ignores the wishes of the private landowner in favor of the larger needs of the political community. Moreover, none of these policies or doctrines provide compensation—in all

\begin{enumerate}
\item Clean Air Act, 42 U.S.C. §§ 7401-7431 (1994).
\item See Freyfogle, supra note 31, at 74.
\end{enumerate}
cases, affected landowners must support the economic burdens of these regulatory decisions themselves.

As involuntary, uncompensated, and public controls over private land use, these are the policy options we would expect to see weakening significantly if a shift to privatization story were accurate. In recent years, aggressive land use regulations in places like North Carolina and Oregon have been struck down as unconstitutional takings of private property, providing at least a murky outer boundary on what local governments can do with this particular kind of policy. Meanwhile, federal environmental regulations have entered a period of retrenchment and stalemate since the 1980s, with environmental advocates focusing primarily on maintaining existing regulations rather than expanding them. The ESA has yet to be formally reauthorized, for example, despite having expired in 1992, while the Environmental Protection Agency (EPA) continues to struggle with an effective approach to non-point source pollution stemming from agricultural practices and other private land uses under the CWA. These limits indicate that alternative policy options more friendly to private property could ultimately take on greater importance.

It would be a huge overstatement, however, to translate this discernible hiccup in regulatory policy into a "shift" to alternative, market-based approaches. While local land use planning may have reached a plateau, large-lot zoning remains an important tool in many areas for controlling growth and preserving open space and habitat on private lands. In addition, the ESA remains by most accounts the single most important environmental law for controlling private land use and development. Even the public trust doctrine, which languished somewhat after the Progressive Era, reemerged to play a key role in environmental disputes of the 1970s and 1980s. These modern cases even expanded the doctrine beyond its traditional "bed and banks" limitations to include public rights in a variety of ecological and recreational resources in addition

64. Lucas, 505 U.S. at 1016; Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).
to the original largely commercial foci. This is hardly the pattern we would expect during a "shift to privatization."

Instead, we see a pattern very similar to the "fragmentation" of policies on public lands that occurred 75 to 100 years ago. Traditional, coercive public controls over private land use appear to have reached a limit of sorts, at least for now. But they have not been replaced by more voluntary and compensated alternatives relying on private actors. Instead, some new ideas and options have taken a place beside these more traditional approaches, expanding the array of methods for affecting private land use, and making the tenure arrangements on private lands a more complicated mix of public and private claims and entitlements. A few of these alternatives to traditional, Progressive-inspired policy options are described below.

B. Alternatives—Public Policies that Are Voluntary, Compensated, or Both

Not every arrangement for conservation on private land is involuntary and uncompensated. Some alternatives, like eminent domain proceedings providing compensation to the landowners, have been around for centuries. Others, including incentive-based programs for conservation of important natural resources on private property, are slightly more modern innovations. In addition, the rise of federal regulations affecting private land use has created a secondary set of policies at the local level designed to help landowners with the new costs of compliance. Taken as a whole, these alternatives to uncompensated, mandatory regulations are clearly gaining greater influence over private land use. However, they represent an augmentation of, rather than a replacement for, their more coercive cousins discussed above.

The right of eminent domain is an extreme form of public control over private land that has been around for centuries. It expresses the ancient notion that the sovereign has the authority to acquire private land for public purposes even from an owner who does not wish to sell. This authority rests on some permutation of the assumption that because the sovereign makes property ownership possible and enforceable, she can take a specific parcel back if it is needed for a public use. Eminent domain

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71. A good general introduction with reference to natural resource conservation can be found in Errol E. Meidinger, The "Public Uses" of Eminent Domain: History and Policy, 11 ENVTL. L. 1 (1980).

72. See id.; see generally NICHOLS ON EMINENT DOMAIN (Sackman Van Brunt ed., 3d ed. 1979).
facilitates the construction, among other things, of linear or place-dependent public works, such as lighthouses, highways, and harbors, which could easily be thwarted by a single recalcitrant property owner who refused to sell.

Incentives or subsidies to private landowners also have a long history in environmental policy. The choice between cooperation and incentives versus acquisition and regulation, for instance, split the advocates of public forestry as early as 1911 and gave rise to a whole raft of incentive-based legislation for private forests in the 1920s. Farmers also were the recipients of a number of early incentives and subsidies, articulated through cooperative extension programs at land grant universities under the Morrill Act, as well as later incentives for improved plowing techniques and land retirement under Roosevelt during the New Deal. These agricultural incentives continue into the present day under the "sodbuster," "swampbuster," and conservation reserve programs, as well as tax breaks to those who keep their land in agricultural use under laws like California’s Williamson Act.

More recently, however, we have witnessed some interesting and more complex variations on incentive-based regulation of private lands. For example, consider the ever-developing relationship between local and federal laws regarding land use. In Marin County, California, local officials have given private landowners a portion of the money they needed to comply with new federal and state regulations regarding water quality. This is an odd new form of public incentive that relies on a backdrop of coercive federal standards. Or consider the Habitat Conservation Plan (HCP), created by amendment to the ESA in 1982. HCPs allow a private

73. See DANA & FAIRFAX, supra note 50, at 123-32.
77. HART, supra note 67, at 62-65.
78. Under the amendments, exemptions from the ESA are available to those with an approved HCP or who apply to the cabinet-level “God Squad” (Endangered Species Committee) for a special exemption. 16 U.S.C. §§ 1536(e)-(o), 1539(a) (1994). The background for this amendment is discussed in FAIRFAX & GUENZLER, supra note 2, at 38-42.
property owner to obtain a permit to "take" a small number of endangered species or modify their habitat in exchange for other mitigation efforts. Modifications to the program by the Clinton administration in the 1990s significantly expanded the popularity of HCPs. A new policy of "no surprises," for example, encouraged private landowners to work with the government to further protect species on their property, in exchange for a guarantee that there would be no additional uncompensated mitigation requirements from them, regardless of the species' condition down the road. In addition, a new "safe harbor" policy provided an incentive to owners of private land suitable as habitat for an endangered species (but presently unpopulated by any endangered creatures) to preserve that habitat rather than eliminate it immediately to avoid any future ESA restrictions.

Like zoning and other traditional regulatory approaches, these alternatives are all implemented by public agencies. It is true that the actual taking of land in an eminent domain proceeding is sometimes done by a private corporation that has been delegated the power of condemnation. Even when a private corporation is executing or otherwise benefiting from the transaction, however, or winds up as the ultimate titleholder, a goal in the "public interest" is mandatory to justify use of the authority. The money for the compensation comes from the public treasury, and the government initially owns and controls the taken land.

Unlike more coercive environmental regulations, however, and with the exception of eminent domain, most of these policies are voluntary. But this quality is often ambiguous in practice. HCPs are only voluntary to the degree a private landowner is willing to otherwise refrain from developing his land in violation of the ESA. This is a significant legal restriction with stiff financial implications for many affected landowners,

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79. The ESA meaning of the term "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1994). Harm and harass are the most clearly expansive terms in the list and have produced much litigation.

80. Sax, supra note 68, at 886.


calling the voluntary nature of the HCP into doubt. Even incentive-based programs like agricultural subsidies can become less and less voluntary over time. Incentive policies that exhibit significant political stability, like many agricultural programs, tend to become incorporated into the price of private land. This makes them much less "voluntary" for subsequent land purchasers, who pay a higher price for the property based on the assumption that the incentive will remain in place. Thus, while incentives represent something other than a command-and-control regime, they risk becoming more coercive and less voluntary over time rather than the reverse.

Most of these alternatives also offer compensation to the landowner for participation. Eminent domain and many incentive programs do so explicitly; others like the HCP initiative do so more implicitly by providing landowners with regulatory relief in exchange for certain actions that go beyond the bare requirements of the law.84 The case of local governments helping to fund compliance with federal regulations is especially intriguing on this point. Here, involuntary compliance with a federal regulation is subsidized by public dollars at the local level. This is an interesting twist on what is sometimes called "cooperative federalism," in which the federal government provided significant funding for targeted new programs to the states.85

Finally, it is also worth noting that the multi-party negotiations regarding modern programs like HCPs further fragment the institutional setting for private land regulation. With the regulator and various private stakeholders negotiating the content and enforcement of the rules, planning has now become so complex in some settings that we have to set up separate negotiation groups to figure out how to move the whole bundle of entitlements and expectations forward. This is a new level of complexity for the institutional fragmentation that characterized the Roosevelt-Pinchot era.

While some of these options for affecting private land use are familiar and well-seasoned, others are new and innovative. Some of them tinker with the involuntary qualities of earlier rules, adding a degree of freedom for private owners without fully embracing a voluntary approach. Others provide forms of compensation to help landowners comply with new, coercive land use regulations. Still others dangle new financial incentives in front of property owners, seducing them to adjust their use of the land accordingly. Taken as a group, these new forms of regulating private lands are indicative of the growing variety and complexity of

84. See supra notes 72 to 81 and accompanying text.
approaches to that topic, however, rather than a clearly discernable shift towards a voluntary, compensated, and private approach.

C. Summary—Do We See a Clear Shift?

Although they vary tremendously in their details, all of these government policies seek to affect private land use. In this respect, they serve as an important complement to the suite of public land policies reviewed in part II. While sharing a focus on private land, each type of policy seems to scramble public and private controls over private lands in new and interesting ways. Title continues to remain (in most cases) with the landowner, but the public gains control over different aspects of land management and use.

Thus, just as public lands once became marbled with private claims and entitlements, so too are private lands becoming more riddled with public encumbrances. The doctrines of the public trust and eminent domain are examples of these public claims on private property that originated well before the Progressive Era. Zoning and federal environmental regulations add another layer of public entitlements as newer forms of coercive, non-compensated regulations affecting private land. All of these particular rules reflect a bias towards an instrumental view of private property as something subject to significant modification in service of the public interest.

Some land use policies rely more on voluntary incentives and other alternatives to coercive regulation. Agricultural incentive programs have been around (in form if not in specific content) since the Progressive Era. Others, like HCPs and local funds to support compliance with federal regulations, are more recent innovations. Voluntary and incentive-based policies do seem more popular now than in the past, and it is clear that some of the assumptions of the Progressive Era—for instance, that mandatory regulations drafted by scientific experts will solve all our problems—have eroded. Zoning and kindred coercive rules have arguably receded in importance, at least for now.

But we do not seem headed in the direction of an unqualified embrace of voluntary, compensated, private transactions. Coercive alternatives like zoning, federal regulations, and the public trust doctrine have not faded away. They remain a key influence on modern private land use policy. Even voluntary incentives such as habitat conservation plans

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and soil conservation programs rely in part on a sense that private ownership power is limited. Coercive powers held by the public provide an important backdrop to these kinds of "voluntary" programs. Titles, entitlements, expectations, multi-layered government roles, and institutional forums for debating priorities and outcomes all seem to be increasingly complicated as the line between public and private continues to blur.

In short, we find the idea that we are shifting towards a system favoring private ownership rights is too simple. Rather, we are seeing a proliferation of complex and fragmented claims on private land, much as we saw on the public domain 100 years ago. Most policies relating to private land use encompass a mix of elements. It is less and less useful to define them as "public" or "private," and more and more important to explore exactly how the specifics of each arrangement vary. Nowhere is this point more evident than in the paradigmatic "private" example of land trusts.

IV. PRIVATE ACTIONS INFLUENCING PRIVATE LAND USE—LAND TRUSTS

In this section we look at land trusts as the most promising candidate for a truly voluntary, compensated, and private approach to land conservation. The land trust appears, at first blush, to be the most "Lockean" of the newly evolving conservation instruments affecting private land. Yet land trusts also evince a wide mix of institutional and property theory elements, combining an intrinsic respect for the rights of property owners with an instrumental flexibility in defining and fragmenting the various aspects of those private rights in pursuit of public goals. In the final analysis, we conclude, they are no more clearly "voluntary, compensated, and private" than the policies we reviewed in part III.

The term "land trust" has no specific legal content. Typically, it refers to a nonprofit corporation registered under section 501(c)(3) of the Internal Revenue Code that "works to conserve land by undertaking or assisting direct land transactions—primarily the purchase or acceptance of donations of land or easements." However defined, land trusts are

Chart 1: Growth of Land Trusts Over Time

Source: Land Trust Alliance, www.lta.org
proliferating rapidly: data from the Land Trust Alliance (LTA), the national
county of land trusts, indicate that since 1950 the number of
organizations fitting their definition and joining their group has jumped
from nearly none to more than 1200 today. (See Chart 1.) And, since 1988,
LTA data also indicate that the number of acres protected by land trusts has
increased by more than 135 percent.

The number of land trusts continues to grow in part because of
public enthusiasm, and, at least in some measure, because it has been the
goal of both the LTA and of many local, regional, and national land trusts
to ensure that that happens. The LTA runs courses throughout the nation
training interested groups on how to raise money, gain public support, and
write easements. 88 Large established trusts often support and encourage the
"fledging" of smaller peer organizations. This allows for a product mix in
the land trust market, but it also divides the landscape among ever more
diverse stakeholders, another interesting example of institutional
fragmentation. For example, at last count there were 119 land trusts in
California, 137 in Massachusetts, and 113 in Connecticut. 89 In tiny New
Hampshire alone, the ancient and mammoth Society for the Protection of
New Hampshire Forests (SPNHF) is but one of 38 land trusts. Many of these
organizations have no staff, no funds, and sometimes even no land or
easements to manage.

Land trusts are very much a regional phenomenon, most common
in New England, the mid-Atlantic states, and on the West Coast, and far
less common in the intermountain West and Southwest. 90 The
overwhelming focus of trust activity is wild lands: wetlands, forests,
scenery, and open space. Only ten percent of the LTA member
organizations even claim to protect urban lands (see Chart 2). 91

training/rally.htm (last updated Aug. 20, 2002).
89. It is not clear that all of these institutions are necessary. While the 119 in California
may make some sense, we wonder about the 137 in Massachusetts and the 113 in Connecticut.
90. Land Trust Alliance, National Land Trust Census: Charts and Graphs, at www.lta.org/
newsroom/census_charts.htm (posted Sept. 12, 2001). See also JOHN B. WRIGHT, ROCKY
MOUNTAIN DIVIDE: SELLING & SAVING THE WEST (1993) for an interesting discussion of why land
trusts fit into the culture of Colorado but not of Utah.
91. Compare the following examples: (1) the commitment of the Trust for Public Land
(TPL) on the "about TPL" page of its website, at http://www.tpl.org (last visited Aug. 22,
2002), to "working exclusively to protect land for human enjoyment and well being. TPL helps
conserve land for recreation and spiritual nourishment and to improve the health and quality
of life of American communities." with (2) the Nature Conservancy's emphasis on science and
its mission to "preserve the plants, animals and natural communities that represent the
diversity of life on Earth by protecting the lands and waters they need to survive." The Nature
Chart 2: Types of Land Protected by Land Trusts

- Urban Open Space: 10%
- Coastal Resources: 18%
- Historic/Cultural Sites: 24%
- Trails: 27%
- Scenic Views/Scenic Roads: 34%
- Habitat of Rare or Endangered Species: 42%
- Open Space: 43%
- Nature Preserves: 45%
- Farm/Ranch Land: 46%
- Watersheds/Water Quality: 47%
- River Corridors: 51%
- Wetlands: 52%

Source: Land Trust Alliance, www.lta.org
Land trusts conduct their business in three basic ways. What are sometimes called "flip" or assisted transactions, in which a land trust acquires a property that it then resells or otherwise transfers to a government agency, account for over half of the acres land trusts claim to have protected in 1990 (see Table 3). Other choices include conservation easements and private reserves owned and managed by trusts for the long-term. Our discussion will focus on conservation easements, but all three elements of land trust activity figure in our continuing search for a shift-to-privatization.

<table>
<thead>
<tr>
<th>Acres Protected</th>
<th>2000</th>
<th>1990</th>
<th>Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conservation easements</td>
<td>2,589,619</td>
<td>450,385</td>
<td>475%</td>
</tr>
<tr>
<td>Owned by land trusts</td>
<td>1,247,342</td>
<td>435,522</td>
<td>186%</td>
</tr>
<tr>
<td>Transferred to government agencies and other organizations</td>
<td>2,388,264</td>
<td>1,022,640</td>
<td>133%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>6,225,225</td>
<td>1,908,547</td>
<td>226%</td>
</tr>
</tbody>
</table>

Source: Land Trust Alliance, www.LTA.org

A. Flip or Assisted Transactions

In flip transactions, the land trust acquires land and transfers title to the government at a later date. LTA data from Table 3 shows that between one-third and one-half of the land "protected" by land trusts actually winds up being paid for and managed by the government. Land trusts act as procurers for the government for many reasons: landowners may not want to deal with government bureaucrats, government acquisition procedures may be too clunky and rule-bound to meet the family and estate planning needs of potential sellers, or land trusts may be able to move faster in a competitive market. A dissenting view argues, however, that land trusts add little to traditional government land

92. Like the organizations themselves, the types of protection that land trusts extend are deeply regionalized. Most of the flip transactions are in the Middle Atlantic States and the West Coast; there are almost none in the Southwest.
acquisition programs except for logistical support, advocacy, and frequently a hefty surcharge. 93

In terms of our analysis, flip transactions are voluntary and compensated—the landowner is not compelled to deal and she is paid—but they are not really private. Ultimately the government pays for the land, in cash and/or in the form of tax deductions for the donor. Indeed, additional contributions of public funds may be compelled when land flipped to the government goes off the property tax roles, with consequences for the local tax base. 94 These transactions are also not private in that the land is ultimately owned and managed by the government (subject to whatever restrictions the original seller was able to negotiate). The fact that these deals allow private organizations to commandeer important elements of government acquisition and management budgets is not new—many private interests exist in large part to steer government programs toward their priorities. However, neither is it private land conservation.

B. Conservation Easements

Like the term “land trust,” a “conservation easement” has no specific content. 95 It is a contract negotiated by two parties that separates some of the rights of ownership from the underlying fee title. The landowner retains ownership of the land but transfers some use or development options to the trust. The land trust also accepts responsibility for monitoring and enforcing the contract. The transaction is registered as a part of the deed to the property and constrains all future owners. Because the easement typically lowers the value of the parcel, the landowner may be entitled to lower property or estate taxes and may, if the easement was donated, receive income tax benefits as well. 96


94. This is not always true, however. When land is already covered by “current use” or other farm or conservation oriented reduction of property taxes, the acquisition may not have much tax impact at all.

95. The standard source is Diehl & Barrett, supra note 87, especially ch. 1.

96. Although “land trust” is a relatively new concept, the easement is not. Easements, ways of necessity, and a myriad of divisions of rights, title, and access have characterized land ownership for many centuries. However, the conservation easement is enjoying a currency and application that is unprecedented. Our discussion draws on the website of the Maine Coastal Heritage Trust. See Maine Coastal Heritage Trust, Conservation Easements, at http://www.mcht.org/easements.html (last visited Aug. 22, 2002). When a land trust acquires an easement, it assumes major, long-term responsibilities. It must monitor the easement to ensure that the
Land trusts and easements can be criticized for just this reason: almost uniformly, easement deals are constructed to meet the specific financial and real estate needs of the donor or seller. Conserved land thus comes under protection because it is available to a land trust, not necessarily because it is an appropriate parcel to conserve. The landowner, rather than the trust, drives the process. Moreover, during negotiations private landowners can reserve rights, exclude portions of the property in order to allow construction of homes for children and grandchildren, and generally define the nature of the protection on the land to suit their own priorities.

Although easements are indeed compensated, it is important to note the myriad ways in which they are not private and ultimately troubling on the voluntary dimension. They are not private for a combination of three reasons. The tax benefits that facilitate most easement deals are an expenditure of public funds. In other cases, government agencies provide funds directly to private land trust groups to purchase easements. In the extreme case, the land trust itself may be a public entity—many conservation easements are entered into by government agencies specifically constituted as land trusts for acquiring them.9

The U.S. Forest Service's Forest Legacy Program (FLP) is a typically complex public/private land trust arrangement. The FLP provides funds to acquire conservation easements and creates a "partnership" between state and local governments, land trusts, and interested landowners to conserve "environmentally important forests" in participating states. The participating state or local governments provide at least a 25 percent match for FLP funds, and they may hold the easement as well. The landowner typically retains management responsibilities for the land, and a private land trust typically monitors the easement. In the seven-year period ending in April 2000, the government protected 111,000 acres under the FLP, contributing half of the funding to achieve related projects valued at over $54 million.98

The interplay of public and private under the easement can become even more confusing. Conservation easements held by land trusts are terms of the contract are complied with. It must act to enforce the easement, including litigation if necessary. Further, it must educate new owners of the underlying fee and the community about the nature and importance of the restrictions contained in the easement.

97. Organizations in Massachusetts, Maryland, and New Jersey come immediately to mind. The role of states and state attorneys general in running land trusts and enforcing private easements was extensively discussed in Sylvia Bates & William Silberstein, The Role of State Attorneys General in Developing and Enforcing Conservation Easements, National Land Trust Rally, Portland, Oregon (Oct. 21, 2000) (unpublished paper, on file with author).

sometimes woven into local zoning and planning programs. This occurs when trusts acquire easements as part of the formal implementation of a county plan, as has happened in Marin County, California.99 More complex still, a land trust might monitor and enforce easements extracted from developers by county planners as a part of a permitting process. In those instances, the transactions begin to look not only "not private," but also less and less voluntary and compensated as well.100

As in the case of government incentives, the problem of future ownership transfers also threatens to erode the voluntary nature of the conservation easement. Subsequent land buyers, who may be more or less aware of and enthusiastic about the easement, will not likely view it as a voluntary encumbrance in the same manner as the original owner. This is why a land trust must monitor the easement in perpetuity to insure that the terms of the contract are complied with. If a downstream owner violates the terms or wishes to do something other than what the original grantor intended, the land trust must take action to enforce the easement, including litigation if necessary.

Although it is possible to imagine a conservation easement arrangement that is voluntary, compensated, and private, such an arrangement appears to be neither inevitable nor the norm. The financing of easements almost always involves public funding of one sort or another. The extent to which government regulation is involved in compelling the donation of easements varies, but in instances where that is an explicit or implicit element of the transaction, it is difficult to view easements as voluntary.

C. Private Reserves

Not infrequently, a land trust makes a fee acquisition with the intention of holding and managing the property on a continuing basis. This is the strongest example of a private alternative to public land use incentives and regulation. Private reserves, rather than conservation easements, would appear as the archetypal private, voluntary, compensated conservation transaction. For example, imagine that a group of private individuals wants a tract of land protected. They join together to buy it from the owner and protect it. No appropriated funds are involved and no government resources are committed to long-term management. While only

100. See Fairfax & Guenzler, supra note 2, at 195-98.
a small percentage of land trust transactions are of this type, surely one might conclude that they at least represent a truly "private" alternative.

Typically, however, even these deals depend upon public money. Some acquisitions involve corporate sponsors seeking public relations benefits. Individual and corporate contributions to preserve acquisitions are also typically viewed as charitable donations by the Internal Revenue Service. So, while the seller of the land enters the deal voluntarily and is undeniably compensated, even this type of transaction is not appropriately considered wholly private. The transaction almost inevitably will include tax benefits for the seller, hence an infusion of government funds.

D. Summary—Are Land Trusts a True Example of "Private" Land Conservation?

As in part III, we are left with a rather muddled picture of the degree of "privateness" in land trust activities. Land trusts suffer from the same mixing of public and private claims that we saw in other strategies for conservation on private lands. While the remarkable rise of land trusts in the 1990s as yet another institution to control private land use is indisputable, their existence as some sort of clean, private alternative to public action is not. In fact, between one-third and one-half of these "privately" conserved lands wind up in government ownership down the road. Among those that do not, tenure arrangements are getting more and more complex, rather than shifting towards some sort of private property-based ideal.

V. ARE WE RESHAPING PROGRESSIVE ERA NOTIONS OF PROPERTY?

This empirical analysis is not promising for a shift to private conservation story. Yet there is another argument to be considered: perhaps ideas about property and policy are outpacing our political outcomes. While it seems clear, in other words, that our policies have yet to "shift" discernably to a new position, maybe our larger ideas of property law and theory are paving the way for bigger policy changes down the road. Again drawing on the framework in part II, such a movement would be towards a return to intrinsic, Lockean ideas of private property and away from alternative instrumental concepts.

In this section we will briefly consider this possibility. Are we rejecting key components of Progressive Era property notions, or are we moving on to new and different combinations of intrinsic and instrumental

ideas about property? We focus our discussion on three key elements of the
Progressive Era changes in our understanding of property: (1) the
abstraction of owners and subjects of ownership; (2) the separation of title
from control and multiplying estates in resources; and (3) the changing
powers of ownership.

A. Abstractions as Owners and Subjects of Ownership

The Progressive Era idea of property was increasingly willing to
deal with intangibles. Artificial entities like corporations became common
owners of property.\(^{102}\) Land was fragmented into diverse resources with
different owners and managers, and abstract and non-physical items like
ideas and revenue streams became the subject of ownership
claims.\(^{103}\) If we are witnessing a return to Locke and the intrinsic paradigm of ownership
under the shift to privatization narrative, therefore, we ought to see
movement off this trajectory in the direction of more physical and less
abstract forms of ownership.

In reality, we see almost none of that—indeed, we find that the land
trust approach to conservation is very much dependent on the abstraction
of property that characterized the Progressive Era. The idea of separating
development rights, or other management choices from the underlying fee
by means of a conservation easement, is simply a further splintering of the
landowner's bundle of sticks. And, selling or donating those rights depends
on the late nineteenth century idea that ownership in title can be separated
from ownership of income from the land.\(^ {104}\) Thus a conservation easement
embraces the Progressive Era abstraction of ownership.

Perhaps more interestingly, the conservation easement seems to
eradicate some elements of a private property right entirely. The use and
development rights restricted by an easement are arguably relegated, as one
irate critic has styled it, "to the dustbin of history."\(^ {105}\) If the easement works
as intended, those rights will never again reappear in connection with the
parcel. In addition, the easement holder does not pay taxes on the acquired
development value; it also seems to disappear.\(^ {106}\) The dustbin notion may
be slightly overwrought—if the land trust holding the easement should

\(^{102}\) See supra notes 30 to 32 and accompanying text.

\(^{103}\) See supra notes 26 to 38 and accompanying text.

\(^{104}\) Raymond & Fairfax, supra note 10, at 695-98.

\(^{105}\) James Burling, Conservation Easements, Comments at the Wise Use Conference (May
1999), quoted in Carol W. LaGrasse, Land Trusts Threaten Private Property, in 5 POSITIONS ON

\(^{106}\) Thus the private transaction involves a very involuntary loss of tax revenues at the
local level, determined by a process that has little or no formal accountability to public decision
makers.
ultimately acquire the underlying fee, the development rights, under the concept of merger, are rejoined to the land.107 However, the fundamental point remains that a relatively abstract notion of what can be owned and traded that characterized the Progressive Era has not been reversed—it is a basic element of the land trust operation.

B. The Separation of Ownership and Control

The Progressive Era was also characterized by a growing separation of ownership from control, as well as a tendency to divide a single landscape among multiple owners.108 This trajectory is also not reversed or altered but relied upon and intensified in the era of land trusts. A conservation easement, for example, gives the land trust powerful control over future use of the property, while fee title and management thereof remains with the original owner.109 Frequently, the government subsidizes or funds the purchase of these private use rights without controlling which parcels are acquired.110 These arrangements are a far cry from the Lockean notion of a unified parcel of rights owned in full by a single person.

Furthermore, each parcel of land is managed according to a unique contract negotiated between a land trust and landowner, each with distinct goals, financial priorities, and legal obligations. In the future, different owners will frequently manage different aspects of a specific parcel under the land trust model. This is not unlike the modern residue of early twentieth century fragmentation on public lands that finds the Bureau of Land Management (BLM) in the Department of the Interior managing the minerals estate on National Forests, the surface estate of which is managed by the U.S. Forest Service (USFS) in the Department of Agriculture.111 The late twentieth century has complicated that pattern, adding the possibility that both the BLM and the USFS will be cooperating under different programs with different land trusts in management of the same landscape. Finally, these various parties are now responsible for the management of the easement-encumbered landscape in coordination with owners who are

107. This is why some land trust specialists recommend that those owning conservation properties in fee donate an easement to a separate organization. Fragmenting the title would prevent the property from being an attractive target for a judgment creditor. See Fairfax & Guenzler, supra note 2, at 188-90.
108. See discussion supra part II.
110. See discussion supra part IV.
111. See the Multiple-Use-Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1994) (stating, "Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands" (i.e., they will remain under the jurisdiction of the BLM)).
managing interspersed parcels without the intervening factor of easements.\textsuperscript{112}

C. The Powers of Ownership

We find the most interesting changes, however, in our ever-changing limits on the powers of private ownership. As command-and-control regulations steadily reduced the rights of private property owners during the Progressive Era and beyond, we witnessed a growing influence of the weaker, instrumental concept of property over the intrinsic view. But as it was on the public lands, the influence of the instrumental has been limited on private properties as well. The instrumental perspective has been an augmentation, not a replacement, of the Lockean outlook in American political economy. As the instrumental weakening of private property rights through the public trust, eminent domain, zoning, and other regulations peaked, resistance on intrinsic grounds increased. After some significant losses to Cohen, we might style it, Locke has been digging in his heels of late and gaining purchase. But the renewed emphasis on Lockean ideas in the modern era does not resemble a shift back to intrinsic ideas of ownership; significant instrumental assumptions remain in the system. What we are seeing instead are more complex and sophisticated (and thus fragmented) policies that balance intrinsic and instrumental principles of ownership in new and different ways.

In the face of modern hostility from property rights advocates, Cohenesque notions of property owners' social responsibility to the collective good have been eroded. A number of decisions in modern takings jurisprudence indicate this gradual waning of Cohen’s ideas.\textsuperscript{113} In particular, the 1992 decision in \textit{Lucas v. South Carolina Coastal Council} was hailed as a victory by defenders of private property by requiring compensation for regulations that eliminate all of a property's economic value, except where the regulation prohibits a land use already considered a nuisance under the common law of the state.\textsuperscript{114} This new restriction on public claims against private property represents the high-water mark (to date) for the Lockean, intrinsic notion of property in the present era.

Legal scholars sympathetic to environmental regulations have condemned \textit{Lucas} for grounding private ownership rights on an inflexible and outdated common law standard. Two leading proponents of this view

\textsuperscript{112} See generally 16 U.S.C. § 2103(C) (1994). See also FAIRFAX & GUENZLER, supra note 2, at ch. 9.


\textsuperscript{114} See Lucas, 505 U.S. at 1028-29.
are legal scholars Joseph Sax and Eric Freyfogle. Both writers are environmentalists working solidly within the instrumental tradition that property rights must change to reflect shifting social goals and norms over time. "As much as any body of law," concludes Freyfogle, "property law [has] evolved in response to the felt needs of the American people." Sax offers multiple examples of changes in the law of property from both the nineteenth and twentieth centuries, while Freyfogle speaks more generally of the shift in ownership powers as industry overtook agriculture as the dominant economic priority of the country. Both argue emphatically that property must continue to be evaluated based upon the changing goals and values of the community at large, and not by some relatively static, nineteenth century notion derived from the common law.

What both authors offer, in response to the growing influence of the Lockean approach in modern takings law, is an entirely new Cohenesque view of property. Down but not out, they argue for a new ecological, rather than social, imperative to restrict the power of private property. While not fully described by either author, this emerging ecological mandate would require landowners to provide adequate soil and water supplies for endangered ecosystems, preserve critical wetlands, and protect undeveloped barrier islands to prevent future coastal erosion. Sax bases these restrictions on private property owners in what he calls the "economy of nature." Under this new paradigm of legal thought, land is viewed as providing important ecological services in its natural, undeveloped state, and landowners are sometimes required to avoid interfering with those services, without compensation by the public. Indeed, for Sax, property in land needs to become more of a usufruct than a Blackstonian right of absolute dominion. Freyfogle concurs with this view, arguing that "a much more inductive, empirical, contingent inquiry is needed to decide what it means, at any given time and place, to own a piece of the Earth." Despite their resonance with instrumental ideas of property dating back to Cohen, the positions of Sax and Freyfogle differ from earlier instrumental arguments in ways that signal a new diversity of modern perspectives on property. For example, their emphasis is on ecology, rather than social justice concerns, as the driving norm for limiting property rights.

116. Freyfogle, supra note 31, at 98.
119. See id. at 78; Sax, supra note 115, at 1440.
120. Sax, supra note 115, at 1443.
121. Id. at 1452.
122. Freyfogle, supra note 31, at 121.
This is not to argue that either author rejects limitations on property for reasons other than ecological ones. But such concerns are conspicuously absent from the visions they present. Freyfogle, in particular, speaks in sweeping terms of an imminent "age of ecology" in which property will be re-shaped primarily, it seems, to serve environmental ends. Meanwhile, Sax's alternative to the strong property rights of old is grounded in an "economy of nature," and not an economy of social justice or welfare. This is a substantial change of target compared to the economic and social objectives that served as the primary restraints on private property during the Progressive Era. While understandable given the high profile of environmental regulations in modern takings law, this change of focus may nevertheless have some unfortunate equity implications in how we approach our conservation goals in the coming years, as will be discussed further in part VI below.

Perhaps more interestingly, it is unclear to what degree these new, ecological objectives for property are themselves subject to change over time in the true instrumental tradition. While the details of the new ecological objectives are not entirely specified, the need to protect them seems surprisingly absolute. It is true that Freyfogle concludes his paper by suggesting that property rights will eventually move into yet another age beyond the ecological one, the specific principles of which remain undetermined. Sax, by contrast, does not raise the issue of future changes in property beyond the economy of nature at all. But both authors rely heavily on the idea that we have far exceeded the "carrying capacity" of many ecosystems, and therefore are going to have to restrain ourselves in the foreseeable future. Given this "limits to growth" perspective, it is unclear when or under what conditions either author would envision the new ecological objectives they support receding in importance. Indeed, the more likely outcome seems to be that ecological priorities will remain a perpetual restraint on private property rights in the indefinite future.

The seemingly perpetual nature of these ecological imperatives leads to an ironic result. By embracing what are likely to be de facto fixed

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123. *Id.* at 138.
127. "Carrying capacity" is the common ecological concept indicating the maximum number of living things that can be supported by a specific habitat or ecosystem. *See* JAMES H. SHAW, *INTRODUCTION TO WILDLIFE MANAGEMENT* 34 (1985).
128. The "limits to growth" idea that exponential human population and economic expansion cannot continue without causing ecological collapse dates back to the work of Donella Meadows and others. *See* DONELLA H. MEADOWS ET AL., *THE LIMITS TO GROWTH* (1972).
shift to privatization

standards for restraining private property, the “economy of nature” version of ownership shares some qualities of the intrinsic view it is criticizing. There is a sense in which the right to a functioning ecosystem is in effect a new intrinsic right of property held by all citizens. Indeed, Freyfogle more or less acknowledges this point, noting that his complaint is not regarding an absolute notion of property rights per se, but rather about who gets to own what. A citizen’s right to a healthy, functioning wetland, for example, on Freyfogle’s account is much like an easement of sorts that prevents an owner from draining his land for development. And this seems like a property right that is unlikely to change or recede in the foreseeable future, which gives it a rather more intrinsic and less instrumental quality. There is, in effect, something of a “natural right to nature” emerging in these essays—another surprising new way in which Locke’s ideas and Cohen’s are coming together in the modern era.

There has been no simple return to Locke. Rather, we find that property ideas are becoming more complex even as the influence of the Progressive Era is challenged and reshaped. Indeed, some of the fiercest opponents to strong private property rights, like Sax and Freyfogle, almost seem to co-opt the intrinsic ideas of Locke and others in order to use them to protect ecosystem health and functioning. Fragmentation of the idea of property, the resources themselves, and the actors who control them, continues apace. Rather than rejecting instrumental property principles, we are in fact building upon the ideas that justified various forms of public land ownership to adjust and rebalance our understanding of ownership and conservation on private lands.

VI. IMPLICATIONS AND CONCLUSIONS

The changes in private land conservation we have noted thus far strike us as subtle, interesting, and potentially significant for theoretically inclined students of property, government, and land conservation. In this section, however, we try to sort out why all this should matter to practitioners.

We begin with our basic observation: beware of simple stories about land conservation policy. Things are getting more complex and fragmented, not less so, as the line between public and private continues to move and blur. We need to rely less on the idea that “public” and “private” alternatives form some kind of clear dichotomy of policy options, and more on the idea that most policies and resulting tenure arrangements are a blend of the two. The key question for practitioners then becomes which particular policy options are most effective when taken as a complete

129. Freyfogle, supra note 31, at 102-03.
package for a given parcel of land. Arguments by advocates (like the one at the start of our article) that private property remains sacrosanct or ideologically pure of public claims in practice should be taken with a large grain of salt.

Although we have not located a shift to privatization, nevertheless, conservation at the beginning of the twenty-first century is meaningfully different from what was in the works at the start of the twentieth. These differences, especially related to the rise of land trusts, hold important policy implications as well. First, we see the emergence of new decision makers. The government, we have repeatedly emphasized, has not withdrawn from the land conservation arena. Federal, state, and local policies continue to direct private land use. Tax policy and direct government appropriations provide many of the financial resources that drive ostensibly private land protections. However, government has ceded significant control over decisions directing the expenditure of these public funds and selecting which lands are to be conserved and on what terms. Many of these decisions are now made by private groups catering to those who own land and have sufficient resources to take advantage of the tax and other incentives provided by the government.

Second, we see changing forums for monitoring and accountability. The interplay—or lack thereof—between land trust activities and the more public, participatory, and accountable public planning process is a critical issue for practitioners. These private groups and individuals are, for most purposes, significantly removed from public scrutiny, public accountability, and public participation. Choices are made by private groups governed by privately selected, frequently self-replicating boards. Not only is the process not public, but also the proliferation of organizations is difficult to locate, track, and monitor, making it extremely difficult for members of the public to identify what this phalanx of new organizations is doing and to hold them accountable.

Finally, what is being conserved is changing. While there are major advantages in pursuing conservation through voluntary and compensated transactions with private owners, the approach does have consequences for the types of land conserved. The lands protected by land trusts are not, generally speaking, the large integrated tracts we associate with public ownership but rather a patchwork of deeply encumbered and partially

130. Issues of accountability and self-replicating boards are discussed in FAIRFAX & GUENZLER, supra note 2, especially ch. 11.

131. This is not to argue that all federal lands are large integrated tracts. Rather, we argue that to the degree that land trust holdings are likely to be even less integrated than the average National Forest, say, in terms of tenure arrangements, they are likely to experience even more of the difficulties of administration that bedevil "checkerboard" lands and other scattered and disaggregated federal holdings.
developed holdings. Similarly, we are not in general acquiring recreation access or other amenities that typically come with federal land ownership. Most landowners prefer not to have their underlying fee available to recreationists. For example, less than ten per cent of the land under easement in the Bay Area is open to the public. The heavy emphasis is on wetlands and other parcels valuable for their ecological attributes rather than their importance for public use and enjoyment.

All of this has very clear consequences for equitable distribution of environmental goods and services. We fully recognize that the established bureaucratic/democratic process in public land management has not been particularly welcoming of or responsive to urban poor or minorities, either as consumers of public resources, or as participants in the management process. Nevertheless, we cannot be sanguine about the implications of closing the door even further in this field, just as minorities reach the status of electoral majorities in many jurisdictions.

This is especially important given the ironic effect of many conservation easements and land trust actions on private land values. In many communities, land values on properties under conservation easement appear to go up significantly, in part because of the guaranteed amenities of open space. Thus, landowners may well be receiving double compensation for their transaction, first as tax credits or payments for the easement, second as increased value on the remainder interest in their property. The equity implications of this kind of outcome are troubling, to say the least, given the involvement of public funds in financing the original transactions.

In addition, we have noted that the shift of attention from public to private lands has redefined Progressive ideas in favor of instrumental property rights in ways that no longer serve inner-city/low wage communities. Cohen’s Progressive arguments about property underwrote the development of many regulatory regimes (providing for a minimum wage, worker protections, inner city beautification, etc.) that were designed to benefit segments of society excluded from the gains of industrialization in the Gilded Age. Those ideas have continued to support programs of that ilk. However, as the property rights folks assert ever more strongly the sanctity of Lockean understandings of ownership, we fear that the conservation community may be allowing the social justice side of the


133. As an example, see generally Kathy Hall, Impacts of the Energy Industry on the Navajo and Hopi, in Unequal Protection: Environmental Justice and Communities of Color 130 (Robert D. Bullard ed., 1994).
equation to wither in favor of an assertion of ecological "rights" against private property. The instrumental goals of Cohen's property theory are in danger of being redefined away from a commitment to social concerns such as public health and living wages and toward a social obligation to protect nature.

Even more disconcerting is the fact that these very public implications appear shielded by the rhetoric of the shift to privatization narrative. Calling an institution or a transaction "private" tends to exempt it from public scrutiny. A nominally private contract negotiation between a land trust and a landowner is not necessarily on the radar screen of even attentive conservationists, to say nothing of urban minorities who are marginal participants even in the ubiquitous electoral and notice and comment procedures for public participation and involvement. It will not become clear until years or decades pass the degree to which reliance on easements as a means to control urban sprawl represents a "contracting out" of the public function of land use regulation and enforcement thereof. These transactions are occult to all but the cognoscenti and those sufficiently well-heeled to have a parcel of land "worth protecting" on the block.

The problem of shielding land use decisions from normal public debate through the easement negotiation process is exacerbated by the proliferation of easement negotiators. The number of land trusts constitutes a major problem with public scrutiny. It is hard enough to keep up with the multitude of review documents issued routinely by public land managers. The additional task of identifying relevant land trusts and holding their toes to the fire may further exclude already marginal participants from the process.

The exclusionary effect of regarding these transactions as private is as ironic as it is obvious. We have argued in the past that the public-private distinction that arose in connection with public lands was in significant measure inaccurate given the extent to which ostensibly public lands were riddled with private claims. And we have argued herein that the effect of the emergence of private institutions, tools, and rhetoric has further diminished the utility and content of the public-private distinction. It is sadly ironic, then, that the rhetoric of private conservation has potentiated the distinction between public and private land even as the differences between the two become less and less obvious.

These concerns are difficult to get around. But it is important to note in conclusion that the emphasis on the landed gentry does not inhere inevitably in the land trust/conservation easement instrument. There are parallel efforts to use the same land trust approach, in what are called community land trusts (CLTs), to provide assistance to low and moderate income people in many realms, most notably finding affordable housing. A CLT is a non-profit corporation that acquires and holds land for the
benefit of the community. Unlike a traditional land trust, in this case the land is used for affordable housing or local businesses. These organizations are no more private than the other land trusts we have discussed, but they do apply the trust model to a different set of goals including local community development and private home ownership.\footnote{134 See generally www.nclt.org; www.iceclt.org.}

Similarly, some of the larger land trusts are also beginning to recognize the impact that their activities have on the availability of land for housing and are taking steps to offset that impact. For example, SPNHF, a consistent innovator in the field of land conservation, has developed a program in which it invests a considerable portion of its endowment in a local affordable housing project. The Trust for Public Land has instituted a program that assists Indian Tribes in creating transactions to reacquire sacred lands and sites lost during the Dawes Act\footnote{135 Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-354 (1994)).} era of creating allotments on reservations and opening the rest to homesteading.

The land trust as an institutional alternative, then, is not specifically or necessarily antithetical to the interests of urban poor and other traditional non-participants in the land conservation game. As community land trusts and their affordable housing initiatives demonstrate, some advantage for the poor and the disenfranchised can potentially be achieved by lowering the price of housing, or land for housing, through trust activities. This is not a distortion of the notion embodied, for example, in the conservation easement. However, it is without question an atypical outcome. Land trusts will, like SPNHF, have to work very much outside their normal envelope if they are going to have a role in the equitable distribution of land conservation and protection benefits. To date, this potential of the land trust movement is unrealized.

The “shift to privatization” narrative could be just another half-truth or over-simplification in the world of public discourse were it not for equity implications like these. To the degree that narratives shape our understanding, however, allowing this latest story to grow unchecked may create real mischief in the world of conservation policy. To the degree we disregard all these equity implications because we think these are “private” alternatives to regulation, we are only fooling ourselves. We conclude that we need a different story, one that recognizes the complexities of these emergent methods for influencing private land use and worries very much about their equity implications.