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Of Property and Antiproperty

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OF PROPERTY AND ANTIPROPERTY

Abraham Bell and Gideon Parchomovsky***

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INTRODUCTION

Private property is widely perceived as a potent prodevelopment and anticonservationist force. The drive to accumulate wealth through private property rights is thought to encourage environmentally destructive development; legal protection of such property rights is believed to thwart environmentally friendly public measures. Indeed, property rights advocates and environmentalists are generally described as irreconcilable foes. This presumed clash often leads environmentalists to urge public acquisition of private lands.

Interestingly, less attention is paid to the possibility that the government may prove no better a conservator than private owners. Government actors often mismanage conservation properties, collaborating with private developers to dispose of government property at submarket prices and encouraging inefficient development on conservation property. The federal Bureau of Land Management, for instance, came under fire in a recent congressional report for its sale of seventy acres of Nevada land to a private developer for \$763,000; the developer sold the land the next day for \$4.6 million.¹

The reasons for potential government mismanagement of conservation lands should be familiar to public choice theorists. First, government decisionmakers are often influenced by the desire to extract

1. Joel Brinkley, *A U.S. Agency Is Accused of Collusion in Land Deals*, N.Y. TIMES, Oct. 12, 2002, at A16.

rents.² Thus, decisionmakers may dispose of government properties at submarket prices in order to obtain benefits for themselves in their private capacities.³ Conservation lands are particularly vulnerable to this phenomenon when they produce widely dispersed public benefits, but, if developed, would produce smaller, highly localized benefits.⁴ Second, decisionmakers often fall prey to fiscal illusion, leading them to fail to account for public benefits or costs that do not appear directly in the government budget.⁵ Together, these factors lead to a high likelihood that conservation properties will be mismanaged even in government hands.

Our project in this Article is to design a new private property regime capable of providing optimal preservation incentives to both market participants and political representatives.⁶

We begin with the observation that, notwithstanding the pressures to develop conservation land, not every park or open space on valuable land succumbs to such political pressures.⁷ Central Park in Manhattan, for example, occupies some of the most valuable acreage in the world.⁸ Yet, despite the enormous potential for commercial gains to politically influential developers, there is very little chance that the Park will be converted into luxury property. How does Central Park fend off its potential predators, while other greenbelts so frequently fall prey to the predations of urban development?⁹

2. See, e.g., Richard E. Caves, *Economic models of political choice: Canada's tariff structure*, 9 CAN. J. ECON. 278, 285-89 (1976) (discussing evidence of rent-seeking in context of tariff-setting); Robert E. McCormick & Robert D. Tollison, *Legislatures as Unions*, 86 J. POL. ECON. 63, 65-71 (1978) (examining evidence that where legislators set their own compensation, they extract extraordinary extra-competitive salaries).

3. See *infra* notes 178-182 and accompanying text.

4. See generally William W. Buzbee, *Sprawl's Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 URB. LAW. 367, 373-74 (2000).

5. See *infra* notes 60-61 and accompanying text.

6. As we discuss in Part III, *infra*, our goal is to develop a regime that will protect commons whose ideal use has already been identified as conservation. We do not develop a means for identifying such commons in this Article.

7. While the Article focuses on preservation of green space, the analysis and policy recommendations apply with equal force to preservation of historic districts and other landmarks. Historic districts differ from the prototypical case described in this Article, insofar as there may be persons with private property interests within the zone of the protected space. That is, while ordinarily there will be no private property interests in a city park, for example, there will be numerous private property owners with stakes in a neighborhood with historically significant architecture. This fact does not, however, ultimately alter our analysis or conclusions.

8. In addition to Central Park, many other parks — such as Grant Park in Chicago, Fairmount Park in Philadelphia, and Golden Gate Park in San Francisco — have evaded undesired development. We do not suggest, of course, that all development is undesirable, as we discuss *infra*, in Parts III-IV.

9. The most famous historic example of undesirable development is the case of New York City's Penn Station. The majestic station was destroyed to make room for Madison Square Garden and the office building that sits atop the sports arena. This act not only de-

The answer to this question, we posit, lies in an unrecognized but potent hybrid of de facto public and de jure property rights. Central Park is surrounded by luxury properties whose owners enjoy the amenities and views of the adjacent park.¹⁰ Formally, the Park is owned by the public as open-access commons, and private owners have no formal property interests in it. Nevertheless, owners of real estate abutting the Park benefit in ways different than the general public. For the abutting owners, the Park is a lustrous front yard, a panoramic view, an acoustic barrier, and an air freshener. Adjacent property owners thus possess a de facto quasi-property interest of considerable value. This unique interest transforms the owners of property in close proximity to the Park into the Park's "public guardians," and parlays into a political force in favor of conservation by providing an incentive for these owners to protect the open space.¹¹ While the de facto easement is not absolute — abutting owners do not have veto power over nongreen uses — in some cases it suffices to block harmful development.¹²

Yet, at present, aside from extremely rare instances we discuss later,¹³ the property interest can only be enforced through politics. Although this de facto interest displays the salient features of an easement appurtenant — it is a nonpossessory interest that attaches to particular parcels and runs with the land — the property owners have no formal legal claim.¹⁴ Aggrieved adjacent property owners can only en-

stroyed the station itself, it also destroyed the preexisting architectonic symmetry between the station and the Post Office building across the street — a symmetry that may still be seen in Philadelphia. The destruction of Penn Station prompted a massive public outcry and was directly responsible for the enactment of the city's Preservation Ordinance. See John Nivala, *The Future for Our Past: Preserving Landmark Preservation*, 5 N.Y.U. ENVTL. L.J. 83, 89 (1996) ("New York City enacted its landmark preservation ordinance in direct response to a single incident: the razing of Penn Station to permit construction of a new Madison Square Garden.").

10. See Alison Beard, *Global Investing: New York's Wealthy Apartment Hunters Are Spoilt for Choice*, FIN. TIMES, July 9, 2002, at 27, available at 2002 WL 23847024. After reviewing approximately 30 empirical studies, a recent article suggested that for policy analysis, it should be assumed as a "point of departure" that parks have a positive impact of 20% on property values abutting or fronting a passive park. John L. Crompton, *The Impact of Parks on Property Values: A Review of the Empirical Evidence*, 33 J. LEISURE RES. 1, 1 (2001). The Trust for Public Land, a nonprofit organization dedicated to conservation, estimated that Golden Gate Park in San Francisco "increases the value of nearby property by an estimated \$500 million to \$1 billion, in the process generating \$5-\$10 million in annual property taxes." See *The Economic Benefits of Open Space*, at <http://www.openspace1.org/OpenSpace/ISSUES/economicbenefitopenspace.htm> (last visited Sept. 19, 2002).

11. Indeed, the de facto interest produces a strong incentive for abutting homeowners to invest in the upkeep of the park. See *infra* note 221.

12. See *infra* notes 99-102 and accompanying text.

13. See *infra* Part II.D.

14. Indeed, absent legislation formally recognizing such interests, courts might not recognize them as valid easements. Under the traditional English rule, there are only four valid types of negative easements: "[T]he right to stop your neighbor from (1) blocking your win-

force their de facto interests by exerting their political influence; if their political influence falls short of blocking undesired development, as is often the case, the owners cannot assert any cognizable de jure property interest in the park's preservation in court.¹⁵ As repeat players in the political process without significant coordination costs, developers generally have a leg up in the political arena.¹⁶

To remedy the political disparity, we propose to formalize the neighbors' de facto interests into full-fledged property interests. Such formalization would produce two desirable results. First, formal legal recognition of the neighbors' interests would enable them to press their anti-development claims in court. Second, and more importantly, formalizing the neighbors' interests into formal negative easements creates a new element in conservation of the threatened park: a network of *antiproperty* rights.

Antiproperty rights are veto rights over the use of an asset that are granted to a large number of private actors — so large a number, in fact, that due to holdout problems and transaction costs, it is highly unlikely that they will ever voluntarily aggregate to alter use of the asset. In our case, formalized negative easements (which we label antiproperty easements) in the hands of neighbors are likely to produce a regime in which it is practically impossible for unwanted development to threaten conservation of the defended property.

Our proposal to formalize antiproperty easements gives rise to several important insights — both practical and theoretical. First, and counterintuitively, we show that increased transaction costs can be a valuable policy response to market failures. The accepted lore among law and economics scholars has been that when transaction costs are positive, “the preferred legal rule is the rule that minimizes the effects of transaction costs.”¹⁷ We introduce a corollary: when transaction costs may not be minimized by legal rules, the solution may be to consciously create additional transaction costs. Where transaction costs systematically bias the market in favor of one outcome, and it is too costly to eliminate the transaction costs, the best option for decision-

dows, (2) interfering with air flowing to your land in a defined channel, (3) removing the support of your building (usually by excavating or removing a supporting wall), and (4) interfering with the flow of water in an artificial stream.” JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 855-58 (5th ed. 2002) (footnotes omitted). In the main, this position has been adopted in the United States, although “now and then a new type of negative easement is recognized.” *Id.* at 857.

15. See *infra* notes 115-129 and accompanying text. The importance — and relative fragility — of de facto political rights in promoting environmental protection has been noted previously. See, e.g., Jason Scott Johnston, *On the Market for Ecosystem Control*, 21 VA. ENVTL. L.J. 129, 139-41 (2002).

16. See generally, *infra* notes 63-68 and accompanying text.

17. A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 13 (2d ed. 1989).

makers may be to create countervailing transaction costs.¹⁸ The Article thus points to a new way of resolving market flaws, applicable even beyond the context of conservation.

Our second insight relates to the literature on private property and commons. Existing theory recognizes three cardinal prototypes of property regimes: public, commons, and private property.¹⁹ Public property, as we have discussed, may be prone to mismanagement due to political failure. Theorists have also identified a paradigmatic shortcoming that plagues each of the latter two regimes: the tragedy of the commons²⁰ and the tragedy of the anticommons.²¹ The former plagues commons property, leading to overexploitation of commons resources. No one owner fully internalizes all of the costs associated with the commons, so all users have an incentive to overuse. The tragedy of the anticommons, conversely, is emblematic of private property regimes. In an anticommons, "multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use."²² The result is that resources are underexploited. In this Article, we herald the existence of a fourth prototype that avoids the problems of mismanagement, overuse, and underexploitation: a hybrid conservation commons that incorporates aspects of the three pure regimes. We explain how the existence of a group of property owners that receives positive externalities from an asset often eviscerates the ordinary concept of commons, creating in its place a hybrid commons with elements of private property.²³

18. Our proposal here may be seen as a proposal for a second-best outcome, in which economics seeks the optimal result given the constraints of irresolvable market distortions, as well as resource constraints. On second-best theory, see Karla Hoff, *The Second Theorem of the Second Best*, 25 J. PUB. ECON. 25 (1994); R.G. Lipsey & R.K. Lancaster, *The General Theory of the Second-Best*, 24 REV. ECON. STUD. 11 (1956).

19. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 37-42 (1988); cf. Daniel H. Cole, *Clearing the Air: Four Propositions About Property Rights and Environmental Protection*, 10 DUKE ENVTL. L. & POL'Y F. 103 (1999) (arguing that all environmental problems must be solved within the framework of the traditional property trilogy). But see Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQUIRIES L. 79 (2001) (arguing for a distinction between private and anticommons property, and for the inclusion of anticommons as a fourth type).

20. Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

21. See Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) [hereinafter Heller, *The Tragedy of the Anticommons*].

22. *Id.* at 624.

23. Ellickson was the first to note that anticommons may be a useful policy tool when the goal is non-use. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322 n.22 (1993). Yet, he concluded that "[b]ecause anticommons yield no profits, they are typically owned by either governments or nonprofit organizations." *Id.* This conclusion ignores the positive externalities that anticommons regimes can generate for private property owners. We show that insofar as parks and open space are concerned, a properly tailored anticommons regime yields real benefits to adjacent property owners, as well as the public at large, and is thus perfectly suitable for private ownership.

Third, our analysis reveals a surprising symbiotic dynamic between private development on the fringes of green space and environmental conservation. Specifically, we show that public parks enhance the value of private properties abutting them, which in turn creates abutting owners' stakes in park preservation.²⁴ We harness this insight to provide a new blueprint for conserving open spaces in areas expecting aggressive and undesired development.

Fourth, and finally, we submit that formalizing antiproperty easements adds a legal dimension to the already-present political right, and creates the dynamic of Yes In My Back Yard ("YIMBY").²⁵ The antiproperty easement provides the inverse of a nuisance suit; where nuisance allows proximate-property owners to counteract negative externalities affecting the enjoyment of their property, enforcement actions based on antiproperty easements can preserve positive externalities benefiting their property. The antiproperty easement thus permits the correction of inefficiencies created by externalities. Formalizing the easement allows the courts to become an additional arena (in addition to legislative, executive, and administrative bodies) in which abutting owners can fight to preserve the positive externalities produced by green space.

The Article proceeds in five parts. In Part I, we describe conventional theories that predict underprovision and overexploitation of parks and green spaces, and urge government intervention to resolve these difficulties. We then show how these conventional theories overlook the corollary problem of conserving parks and green spaces consequent to government intervention. Lobbying by developers may in many cases prompt the government to succumb to political pressure and permit development of previously designated green areas, even when development is undesirable.

In Part II, we discuss the empirical evidence of the existence of de facto antiproperty easements and their importance in preserving open space. We then establish the details of our proposal for de jure formalization of such easements, and employ public choice theory to demonstrate the desirability of our proposal.

In Part III, we broaden our analysis to demonstrate that our approach to hybrid public-private goods has important implications for the concept of commons in property theory. We show that antiproperty regimes build on the concept of anticcommons to add a fourth method of governing commons to the existing three mechanisms: pri-

24. See *infra* Part II.A.

25. YIMBY is the opposite of the more famous NIMBY ("Not In My Back Yard"). For a discussion of NIMBY, see William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 GEO. MASON L. REV. 881 (1999); Barak D. Richman, *Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response*, 20 UCLA J. ENVTL. L. & POL'Y 223 (2001/2002).

vatization, regulation, and reliance on public norms. Specifically, we demonstrate that antiproperty systems create a unique hybrid of commons and private property, and ideally preserve conservation commons.

In Part IV, we explore the flexibility offered to policymakers by antiproperty easements by connecting our analysis to entitlement theory. Specifically, with reference to our previous writings on the law of entitlements, including takings,²⁶ givings²⁷ and pliability rules,²⁸ we show that antiproperty easements can be adapted to changing circumstances and a variety of policies.

Finally, in Part V, we discuss potential objections to our proposal, examine the alternatives to antiproperty regimes, and illuminate the interplay between our proposal and other proposals in property and environmental law. We conclude that antiproperty regimes will often outperform regulation, judicial enforcement of the public-trust doctrine, and conservation easements in ensuring conservation.

I. PARKS: THE GOOD, THE BAD, AND THE TRAGIC

Parks and green spaces are unique goods within the world of property theory. They are, on the one hand, impure public goods, thought to be subject to underprovision by the market.²⁹ The traditional remedy for this problem is government provision.³⁰ On the other hand, parks are commons property, typically open to the public at large, and thus susceptible to the problem of overexploitation.³¹ The standard re-

26. Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277 (2001) [hereinafter Bell & Parchomovsky, *Takings Reassessed*].

27. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001) [hereinafter Bell & Parchomovsky, *Givings*].

28. Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002) [hereinafter Bell & Parchomovsky, *Pliability Rules*].

29. See *infra* note 34 for a definition of public goods. See also JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* 49-74 (1968); RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 49-85 (5th ed. 1989); Barton H. Thompson, Jr., *Conservation Options: Toward a Greater Private Role*, 21 VA. ENVTL. L.J. 245, 252 (2002).

30. See, e.g., William H. Oakland, *Public Goods, Perfect Competition, and Underproduction*, 82 J. POL. ECON. 927 (1974).

31. See Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV* 3, 5 (J. Roland Pennock & John W. Chapman, eds., 1982) (A commons property is one in which "there are never any exclusionary rights. All is privilege. People are legally free to do as they wish, and are able to do, with whatever objects (conceivably including persons) are in the [commons]."). Elinor Ostrom defined a "common-pool resource" as "a natural or man-made resource system that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use." ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 30 (1990).

sponse to such tragedies of the commons is privatization.³² This tension between the two demanded solutions — government provision, on the one hand, and private ownership, on the other — should not obscure the source of both underprovision and overexploitation. Both underprovision and overexploitation stem from a collective action problem.³³ In both cases, the allocation of marginal costs and benefits leads individual users and producers to make decisions that detract from net social welfare, while a collective decisionmaking apparatus would lead to optimal provision and preservation.

In this Part, we examine the collective action problem posed by parks and bring to light an important element that has eluded traditional theory. Any analysis of publicly provided goods must incorporate an examination of the question of public decisionmaking. In other words, it is not enough to note simply that mismatched incentives will lead a privately ordered market to welfare-diminishing decisions. We must also take account of the fact that mismatched incentives may also lead public decisionmakers to make similarly welfare-diminishing decisions. For example, prodevelopment interest groups may, on account of inherent coordination advantages, capture the political process in order to effect inefficiently development of parks and other green areas. This problem may be labeled mismanagement.

In the following sections, we aim to describe fully the trio of collective action problems associated with parks: underprovision, overexploitation, and mismanagement. We discuss the question of the timing of each problem, noting which problems arise *ex ante* (prior to provision of the park) and which arise *ex post* (after provision). Since our goal in this Part is to set up our discussion of *ex post*, rather than *ex ante*, solutions to the challenge of park provision and maintenance, we pay closer attention to overexploitation and *ex post* mismanagement. We begin our discussion by laying out the theory of public goods and commons property.

A. *Traditional Understandings of Public Goods*

Pure public goods, in economic parlance, display two salient characteristics: lack of rivalry in consumption and nonexcludability of benefits.³⁴ Nonrivalry implies the inexhaustibility of the good. For

32. See Hardin, *supra* note 20, at 1247; see also, e.g., Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 748 (1986) (discussing the privatization of shoreline to prevent the overexploitation of fish).

33. The classic work on collective action problems is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

34. The precise definition of public good is a matter of some controversy. Harold Demsetz has argued that a good is a public good solely on the grounds of nonrivalrous consumption. To Demsetz, a public good which satisfies the additional condition of nonexcludability is a "collective good." Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. &

example, Jane can breathe all the air she wants without impinging upon Karen's use of the air. Nonexcludability refers to the inability of public good owners to limit use of the good. For example, if Laura were to buy all the clean air in the world, she would not be able to limit Jane's and Karen's ability to breathe it. These twin characteristics are responsible for the long-recognized problem of underprovision of public goods.³⁵

Nonexcludability prevents producers from capturing the full marginal benefit of providing a product, even though they bear the full marginal cost. For example, suppose that Laura would like to enjoy the benefits of a clean public street. If Laura were to pay for street cleaning, however, she could not prevent Jane and Karen from enjoying the aesthetic pleasure of a clean street free of charge. Laura, in other words, could not block Jane's and Karen's attempts to engage in free-riding. In this case, no individual would clean the street since the clean street would be used for free by all, while the street cleaner would bear the cost. Thus, from an *ex ante* perspective, nonexcludability undermines the provision of public goods.

The public goods problem may be expressed in game theoretic fashion as a "Prisoners' Dilemma."³⁶ Coordination of all concerned parties leads to the most advantageous result. Absent such coordination, however, public goods are underproduced.³⁷

The traditional solution to the problem of underproduction of public goods is government intervention.³⁸ Indeed, for economists, the provision of public goods is so closely connected with government that one definition of public goods is "all those effects which a government has on the members of society."³⁹ Generally, government has either subsidized or provided public goods in order to make up for under-

ECON. 293 (1970); *see also* RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 6-7 (1986).

35. Importantly, the characterization of goods as public depends in large part on technology. New technologies allow for exclusion from goods that were previously deemed "public." The most famous example of this phenomenon is the invention of barbed wire. Ellickson, *supra* note 23.

36. *See* ALLAN M. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* 112-14 (1980); DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* 72-77 (1994); RUSSELL HARDIN, *COLLECTIVE ACTION* 16-28 (1982); DENNIS C. MUELLER, *PUBLIC CHOICE II* 9-15 (1989); EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 49-53 (1977); Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377 (1998). The Prisoner's Dilemma is often demonstrated tabularly in the form of a two-player matrix.

37. *See* Oakland, *supra* note 30.

38. *See id.*

39. WALTER NICHOLSON, *MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS* 484 (1972).

production; the costs of these measures, however, are borne by the public at large, through taxation.⁴⁰

B. *Tragedy of the Commons*

Alongside the traditional problem of underproduction of public goods, lies the different, but no less acute, dilemma of overexploitation of publicly owned goods. Garrett Hardin's *The Tragedy of the Commons* famously unveiled this problem.⁴¹ Hardin illustrated the phenomenon with the example of an open rural pasture. He posited that shepherds would allow their herds to overgraze the pasture since each shepherd only bears a small fraction of the marginal cost of each use, while enjoying the full marginal benefit. The result is the tragedy of the commons: property held in common will be overexploited.⁴² Hardin's oft-cited conclusion was that "[f]reedom in a commons brings ruin to all."⁴³

For the sake of clarity, it must be noted that Hardin was not referring to public goods, but rather to commons goods. Indeed, Hardin's tragedy would never arise with respect to pure public goods, since pure public goods are inexhaustible. By definition, a pure public good may never be overexploited; the pure public good of information is never depleted, for example, and consequently is not susceptible to overexploitation. Impure public goods, however, may fall prey to Hardin's tragedy.

Within the realm of impure public goods, Hardin presented an important counterpoint that calls for government provision of goods. Traditional public goods analysis focuses on the ex ante problem of provision: the inability of producers to appropriate the full marginal benefit of provision leads to an ex ante decision not to provide. Once the assumption of inexhaustibility is relaxed, an ex post problem arises as well. As Hardin noted, the mismatch between beneficiaries of commons goods and those who bear the marginal cost of each use will eventually lead to the "tragedy" of overexploitation.⁴⁴

40. Since it is often infeasible to measure accurately individual use of public goods, the government cannot calibrate tax payments to actual use of public goods, and thus cross-subsidization results. See, e.g., Shubha Ghosh, *Pills, Patents, and Power: State Creation of Gray Markets as a Limit on Patent Rights*, 14 FLA. J. INT'L L. 217, 226-27 (2002) (noting that when a public good is provided by the government and financed through taxes "some will pay more and some less than their valuation of the public good").

41. Hardin, *supra* note 20.

42. But see Rose, *supra* note 32.

43. Hardin, *supra* note 20, at 1244.

44. *Id.*

With regard to overexploitation, public parks are generally considered public goods that may acquire characteristics of private goods.⁴⁵ A common example of such hybridization is the imposition of fees on park users.⁴⁶ The fee requirement eliminates the strict nonexcludability of the park. Only paying users may enter the park and enjoy its facilities. Simultaneously, other aspects of the park remain non-excludable. For instance, even for nonpayers, the park produces clean air and pleasant views. Parks are not alone in their hybrid nature; renowned economist James Buchanan posits that “the elements of demand for any good whether this be classified as wholly, partially, or not at all ‘public’ by the standard criteria, may be factored down into private and collective aspects.”⁴⁷

An example may help illustrate the problems of overexploitation and underprovision with respect to parks. Assume that the construction of a park in the city of Springfield will cost \$750,000 and enhance the welfare of the collective citizenry by \$1 million, for a net societal gain of \$250,000. The land on which the park is to be built, however, is privately owned, and the owner estimates that only \$500,000 could be collected in fees from potential park users; the other benefits take the form of clean air and aesthetic beauty accessible to nonpayers from outside the park. Absent government intervention — or some other form of collective action — Springfield will not build the park, providing a classic illustration of underprovision.

Suppose, therefore, that Springfield takes the property through its power of eminent domain and creates an open-access park, funded by taxes imposed equally on the entire population — say, a tax of \$1 per person on a population of 750,000. The *ex ante* problem of underprovision is assuaged by government intervention, but an *ex post* problem of overexploitation is created in its stead. Under an open access regime, all Springfield residents will use the park, even though overuse means trampling vegetation, tearing up turf, and generating litter beyond the city’s ability to clean. Any individual Springfield citizen will pay \$1 regardless of whether he or she uses the park, and therefore the marginal cost of each individual use is \$0. On the other hand, each use provides enjoyment to the citizen, creating a marginal benefit greater than \$0. Springfield citizens will therefore use the park until its de-

45. For an analysis of parks and open spaces as public goods, see, for example, Marla E. Mansfield, *When “Private” Rights Meet “Public” Rights: The Problems of Labeling and Regulatory Takings*, 65 U. COLO. L. REV. 193, 203 (1994) (extending “public goods” analysis to sound ecological management). Cf. Thompson, *supra* note 29, at 252 (stating that “[a]lthough no empirical study has been conducted, the bulk of the benefits from most land conservation may not constitute public goods”).

46. See JAMES M. BUCHANAN, 4 *THE COLLECTED WORKS OF JAMES M. BUCHANAN: PUBLIC FINANCE IN DEMOCRATIC PROCESS: FINANCIAL INSTITUTIONS AND INDIVIDUAL CHOICE* 21 (1999).

47. *Id.*

struction. Importantly, raising taxes will not solve the problem of distorted *personal* incentives. No matter how high taxes are, the marginal cost of each use will remain zero since there is no relationship between tax liability and use. Residents will continue using the park so long as their marginal benefit is positive.⁴⁸

C. The Anti-Conservation Bias

Parks are impure public goods on two counts. First, many parks may be fenced in to exclude nonpaying users. Admittedly, with respect to some parks, exclusion is not cost-effective. Especially with respect to large parks, the cost of erecting and maintaining fences may often outweigh the benefits.⁴⁹ Moreover, many would oppose a limited access regime for parks on distributive and ideological grounds.⁵⁰ The distributive concern is that limited access to parks would invariably exclude the least-well-off members of society, depriving them of recreational opportunities and nature. The ideological opposition is that nature must remain accessible to all, free of the restraints of private property.⁵¹

Second, parks admit of nonrivalrous uses only to a certain point. While low intensity uses in moderation, such as bird watching, are nonrivalrous, uses beyond a certain intensity or frequency are incompatible. For example, intensive hunting is not likely to be compatible with intensive hiking within a confined area. Indeed, conservation — if defined as preserving nature in its pristine state without human interference — is likely to rival every other use.⁵²

On the surface, conservation, as an anti-use, appears to be a low-intensity use that seems to be inversely symmetrical to other uses of undeveloped property. The symmetry is false, however, since many uses are compatible with one another, while conservation is incompatible with all.⁵³ To illustrate this further, it is helpful to return to the tragedy of the commons. Standard analysis of commons property always posits a group of users who wish to exploit the resources in some way — be it logging, grazing, farming, or mining. The inevitable

48. Of course, considerable tax increases may lead voters to press for a different government decision regarding the park. We address this issue in *infra* Part I.D.

49. See Ellickson, *supra* note 23.

50. We remain agnostic with respect to the cogency of the two concerns.

51. See Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 163 (1998).

52. In this definition of conservation, we do not mean to exclude no-impact and low-impact uses.

53. We presume, for simplicity's sake, that all other uses involve "human interference" incompatible with our definition of conservation. For a general discussion of the false allure of symmetry in describing rights, see Daphne Barak-Erez & Ron Shapira, *The Delusion of Symmetric Rights*, 19 OXFORD J. LEGAL STUD. 297 (1999).

result of this assumption is that holding property in commons is inexorably accompanied by excessive use of resources. The standard story fails to consider the possibility of a preference for conservation (or other highly demanding use). If one assumes that some of the common owners wish to conserve rather to consume, a very different problem arises. Since conservation is incompatible with any mode of exploitation, conservationists and exploiters will find themselves on a collision course. Since a commons regime permits every group member to use the property as she wishes, however, conservationists will almost certainly lose. Nonconservationists, however, will not necessarily lose since their competitors' use will often still leave enough of the resource for them to use, at least in the short term. Ironically, the conservationists' sure loss occurs despite the fact that conservation as an anti-use is the only preference that does not lead to depletion, and thus averts the tragedy of the commons.

Hence, in an open access regime, conservation is sure to lose out, joined only by the most highly demanding uses. And yet at the same time, conservation is also the one use that, if universally shared, aligns individual and group welfare. In a commons, it only takes one person who fails to share the conservation preference to undo the conservation equilibrium.

D. *Conserving Government-Provided Public Goods*

While traditional theorists debate extensively the measures required to ensure the provision of public goods, they generally do not connect the discussion to an equally extensive examination of the question of how government actually makes choices. Rather, the traditional discussion of public goods has treated government as an idealized provider in accordance with the collective interest.⁵⁴ This idealized view of government is belied by the more complex political realities as captured by the teachings of public choice theory. Public choice teaches that government, no less than any other institution, is an arena in which participants seek to maximize their welfare. Accordingly, the decisions made by government are driven by rent-seeking, and such decisions often fail to coincide with the collective good.⁵⁵

There are various views as to which rent-seekers generally dominate the political process — agents (the politicians), interest groups, or

54. See, e.g., WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS* 203-04 (1995) (noting that this view is often labeled, not entirely accurately, as "Pigovian" or "Pigouvian").

55. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 294-95 (1988) (describing the social costs of rent-seeking statutes).

majorities. For simplicity's sake, suppose a world in which decisions are made according to the net value of campaign contributions. Let us suppose further that campaign contributions are made on the basis of voters' perceived self-interest. While eschewing the question as to whether agents, majorities, or interest groups are likely to dominate the political process, we posit that the distortions produced by rent-driven decisionmaking may undermine both the production and preservation of parks.⁵⁶

Consider again our earlier example of the potential park in the city of Springfield. Assume that the park is now established, and that it provides a net benefit of \$1 million to the 750,000 residents of Springfield, i.e., a net benefit of \$1.33 per resident. Concrete Jungle, Inc., a private construction company, estimates that if it could build a parking lot on the space occupied by the park, it would generate a profit, net of building and other expenses, of \$200,000. In an ideal world, the proposed project would not be built since it is a less efficient use. Maintaining the park benefits social welfare by \$1 million, while building the project yields a gain of only \$200,000; thus, the net effect of building the project is a social loss of \$800,000. Introducing public choice theory, however, demonstrates the perils of relying upon overly simplistic models.⁵⁷

To explore the insights of public choice theory, let us now add three assumptions to the story. First, suppose that each potential beneficiary of the land use will make a campaign contribution up to the level of her net benefit. Second, suppose that due to administrative costs, no campaign contribution of less than \$5 will be accepted. Third, suppose that organizing citizens into lobbies costs \$5 per person. Given this political structure, Concrete Jungle will be able to go forward with its inefficient plan. Concrete Jungle will be ready to contribute up to \$200,000 in campaign contributions in order to lobby for the land use change it desires. By contrast, conservationists will not be able to contribute even one penny. Individual residents of Springfield would each be ready to contribute up to \$1.33 in campaign contributions toward conservation of the park. Their contributions would not be accepted by politicians or lobbying groups, however, given administrative and organization costs. And, given coordination costs of \$5 against a benefit of only \$1.33, no resident will undertake to organize her own lobby. Thus, in a system in which votes reflect campaign contributions, Concrete Jungle will defeat conservationists.

56. Our model is loosely modeled on the observations of Mancur Olson. See OLSON, *supra* note 33; see also TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan et al. eds., 1980); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

57. For simplicity's sake, we do not yet take account of disparities among residents' ability to enjoy the park's positive externalities. For discussion based upon relaxation of this assumption, see Part II.A.

Naturally, the result we obtained in our Springfield example depends on our assumptions, including the presumed cost structure and administrative expenses. Nevertheless, the example shows that ordinary political decision structures may lead to decisions undermining a beneficial decision to provide parks. Indeed, there is ample reason to believe that our hypothetical example is emblematic of the political choice structure regarding parks. Parks produce widely diffused benefits, where most beneficiaries enjoy a relatively small gain. The competing development interest produces a concentrated benefit, where each beneficiary enjoys a large gain. Given the existence of organization costs, conservation interests operate under a substantial disadvantage.

One might object to our analysis on the ground that Mancur Olson's traditional minoritarian model of politics, under which small interest groups with low coordination costs have an inherent advantage over larger, yet more diffuse groups, is overly simplistic. After all, votes also matter, and democratic elections favor majorities. This objection has not escaped the attention of public choice theoreticians. Indeed, some public choice scholars have rejected the interest group model of political decisionmaking and developed an alternative model under which the outcome of the political process is shaped by two countervailing forces: the minoritarian force and the majoritarian force.⁵⁸ The minoritarian force represents the influence interest groups exert over the political process through superior organization and funding. The majoritarian force embodies the ability of the majority to affect political decisionmaking through voting. Because the two forces often pull in opposite directions, the outcomes of political processes cannot be determined in the abstract. Rather, it depends on the interplay among various factors such as intensity of preferences, the distribution of benefits and costs, and the severity of the coordination problem faced by the majority.

It is important to understand, however, that the incorporation of the majoritarian force does not guarantee optimal decisionmaking.⁵⁹ The majoritarian force mitigates to some extent the ability of interest groups to capture the political process, but it does not eliminate the inherent advantage of organized groups. When the gains from development are substantial, the group pursuing development can increase campaign contributions to offset the potential loss in popularity. Moreover, the organized group can pass some of the gains to members

58. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 53-97 (1994), and authorities cited therein.

59. Indeed, as Kenneth Arrow demonstrated in what has come to be known as his "impossibility theorem," there is no system of collective choice that consistently produces coherent choices in accordance with voters' preferences. KENNETH ARROW, *SOCIAL CHOICES AND INDIVIDUAL VALUES* (2d ed. 1963).

of the majority — either in the form of cash or in-kind benefits — to ameliorate their opposition to the project. Thus, at the end of the day, the incorporation of the majoritarian force into the model affects the magnitude of the distortion caused by interest groups, but it certainly does not imply socially optimal outcomes.

Moreover, whether subject to minoritarian or majoritarian domination, distortions in government decisionmaking, such as fiscal illusion, are likely to make parks vulnerable. The standard account of fiscal illusion predicts that government decisionmakers will ignore all social costs and benefits that do not specifically appear in the governmental budget.⁶⁰ Accordingly, when considering parks, municipal decisionmakers are disposed to looking at revenues from taxes, fines, and other sources, on the one hand, and operational costs, on the other.⁶¹

This limited prism disadvantages public parks in two complementary ways. The first is the high maintenance cost of parks. Flowers need watering, trees and shrubbery necessitate trimming, trails require upkeep, and the grounds as a whole demand constant cleaning and monitoring. These services impose a substantial burden on the municipal budget, and turn parks, especially in times of economic distress, into primary candidates for the budgetary axe.

The second disadvantage is the perceived negative effect of parks on municipal tax bases. Public parks and green space do not contribute to the pool of taxable resources. On the contrary, parks occupy valuable property whose development into residential and commercial projects could substantially increase the municipal tax bases. Thus, the development of parks not only eliminates a budgetary liability but also promises more revenues in property taxes.⁶² Fiscal illusion can be particularly devastating to decisionmaking when beneficiaries of parks and those who fund the parks' continued existence come from different jurisdictions.

Finally, the possibility that the agents — government decisionmakers — may make decisions based on illicit rents cannot be ignored. Sadly, government corruption may make public assets vulnerable, as

60. See, e.g., Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 621 (1984).

61. See Crompton, *supra* note 10, at 1-2.

In contrast to the enhanced tax revenues accruing from development, contemporary conventional wisdom among many elected officials and decision makers is that open space and park land is a costly investment from which a community receives no economic return. The social merit of such investment is widely accepted, but social merit amenities frequently are regarded as being of secondary importance when budget priorities are established.

Id.

62. See *id.* at 1 ("Government officials often seek to enhance the tax bases of their communities by encouraging development. There is a widespread belief that this strategy raises additional revenues from property taxes, which then can be used to improve community services without increasing the taxes of existing residents.").

decisionmakers sell off public assets for private gain. The case of the Bureau of Land Management is illustrative. Part of the Interior Department, the Bureau of Land Management is responsible for over 260 million acres of public land. A major function of the Bureau is to "trade parcels with private landowners who want to acquire government land for commercial development."⁶³ For years, federal auditors have expressed concern that the agency consistently underappraises government land in trades with private developers.⁶⁴ For example, in one trade in Nevada, involving seventy acres of public land, the agency appraised the land transferred to the developer at \$763,000; yet, the developer sold it the next day for \$4.6 million, for a profit of 600%.⁶⁵ In another recent case, the Bureau hired "an employee of a private developer to work in the land management office as an agency official. His job was to manage land exchanges being pursued by the developer."⁶⁶

Last year, the Appraisal Foundation, a private group authorized by Congress to set appraisal standards for government agencies, finally launched an investigation into the practices of the Bureau of Land Management. The findings were so alarming that, in its report, the Foundation said that "the bureau's appraisals were so often the subject of political influence and potentially criminal abuse that the agency should no longer be allowed to carry them out."⁶⁷ The Foundation further suggested an immediate moratorium on all land exchanges, adding that the Bureau's "past and currently proposed land exchanges, and their implications for the public trust, clearly warrant comprehensive investigation from outside the Department of the Interior."⁶⁸

While the Bureau of Land Management's case by no means implies that all other government agencies are guilty of the same conduct,⁶⁹ it does suggest that public officials may not be the best guardians of public parks and open space. Indeed, there is ample reason to believe that, like any other agent,⁷⁰ notwithstanding the law, public

63. See Joel Brinkley, *A U.S. Agency Is Accused of Collusion in Land Deals*, N.Y. TIMES, Oct. 12, 2002, at A16.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Indeed, a similar investigation into the practices of the Forest Service did not reveal any improprieties. See *id.*

70. On agency problems, see, for example, Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972), and Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). See also Ellickson, *supra* note 23, at 1327-28 (explaining how private property regimes lower monitoring costs).

officials may seek to maximize their own utility, rather than that of their principal, the public at large.

E. *Public Goods and Pigou*

In this Part we explained why, *ex ante*, provision of public goods requires government intervention; for example, nonrivalrousness and nonexcludability of air may require government provision of clean air. We then demonstrated, however, that an initial government decision to provide an impure public good does not necessarily secure its *ex post* preservation. Two effects are liable to produce this unhappy result. First, the tragedy of the commons predicts that open access spaces are prone to overexploitation and, ultimately, destruction. Second, distortions in the political process created by politicians' fiscal illusion, rent-seeking, and citizens' coordination costs are apt to cause the political process to bow to antipreservation forces (both *ex post* and *ex ante*).

The failing of traditional models to account for *ex post* distortions can be traced to a common failing of Pigovian models of decision-making.⁷¹ In the Pigovian model, the government is assumed to make decisions that maximize public welfare.⁷² Unfortunately, this romantic assumption does not represent reality. Modern political theorists widely agree that the interests of government actors and the interest of the public are not perfectly aligned. Public choice models posit that government actors may seek to maximize their own welfare, leading to decisions that are suboptimal for the public.⁷³ Thus, while a Pigovian government would carefully preserve parks and other impure public goods for public use, a public choice government is likely to cater to the preferences of interest groups or self-interested politicians.

II. THE SOLUTION OF ANTIPROPERTY EASEMENTS

Given the expected failings of the political process outlined in the previous Part, one might wonder how any parks or open access green spaces survive in urban areas. After all, development interests have low coordination costs and a clear incentive to draw the public spaces into their private realms. Indeed, one would expect development interests to benefit from particularly low transaction costs in the domain of politics, as they are well-organized repeat players who are

71. The name Pigovian comes from the famed economist A. C. Pigou, who is commonly, if inaccurately, thought to have been loyal to a model of the government as a neutral servant of the public good. See A.C. PIGOU, *THE ECONOMICS OF WELFARE* (2d ed. 1924); see also FISCHER, *supra* note 54, at 203-04.

72. See FISCHER, *supra* note 54, at 203-04.

73. See FARBER & FRICKEY, *supra* note 55, at 22.

intimately familiar with the political process. Yet, the empirical results fail the theory. In many American cities, notwithstanding the obvious pecuniary benefits of development, large public green spaces thrive, despite being open access.⁷⁴ What explains this seemingly anomalous result?

We posit that the explanation for green space preservation lies in the existence of another commonly overlooked interest group: proximate-property owners. Unlike the public at large for whom the benefits from parks are relatively small and coordination costs are often prohibitive, proximate-property owners receive sufficiently substantial benefit from green space to overcome inertia. Open spaces benefit adjacent homeowners in ways distinct from the public at large. We examine this phenomenon by exploring, first, the evidence for enhanced value of neighboring properties (known as “proximate-property value”), and, then, the political results of that value. We then show the shortcomings of the current *de facto* system of conservation protection, and demonstrate that those shortcomings can be resolved by formalizing a system of antiproperty rights.

A. *Proximate-Property Value*

Previously, we assumed that all members of the public are equally situated to consume publicly provided goods. In our Springfield hypothetical, for instance, we assumed that the park provided equal benefits to all members of the public at large, albeit in two different capacities: first, as direct users of park services, and, second, as beneficiaries of clean air, aesthetic beauty, and the like. In reality, however, members of the public are not similarly situated to enjoy the benefits of the park. Proximate-property owners because of their location derive unique benefits unavailable to the public at large. They may enjoy park services more easily and more frequently. The park’s aesthetic beauty is particularly beneficial to those who enjoy it every day by reason of their proximity. Finally, the park provides proximate-property owners with publicly provided substitutes for private yards and acoustic barriers. Naturally, as we noted, these advantages are reflected in property values.

Numerous empirical studies show that parks and open spaces contribute to the value of surrounding real estate. Although parks and open spaces are not private goods that are supplied by markets, they represent a “capitalization” for proximate landowners, and thus their economic effect is reflected, to some degree, in the value of neighboring properties. The added value of abutting parks, while not independently marketable, may be measured by a comparison of proper-

74. To be sure, in some areas, green space has not fared as well. See examples cited *infra* in Section II.C.7.

ties that abut parks with those that do not. In economic parlance, this valuation method is called "hedonic pricing."⁷⁵

The "proximate-property principle," which posits that properties in proximity to parks enjoy enhanced value, achieved fame thanks to Fredrick Law Olmsted. Olmsted successfully invoked this principle to convince the city of New York to move forward with his plan for constructing Central Park.⁷⁶ While at the time the study of statistics was insufficiently developed to offer a reliable method for isolating the effect of parks on property value from other economic effects,⁷⁷ it was widely believed that the positive impact of abutting parks was considerable.⁷⁸ Indeed, the highly publicized success of Central Park prompted calls for constructing parks throughout the country at the turn of the twentieth century.⁷⁹

The first rigorous empirical studies on the economic effect of parks appeared in the 1970s. The overwhelming majority of the studies reported a significant positive effect in both urban and rural areas. For example, a 1974 study analyzed the effect of Pennypack Park in north-eastern Philadelphia on 336 nearby properties.⁸⁰ The study found that the park accounted for 33% of the value of the land that was 40 feet away from the park, 9% of the value of the property at 1,000 feet, and 4.2% of the land value at 2,500 feet.⁸¹

Another oft-cited study from 1978 examined the effect of greenbelts on properties in Boulder, Colorado.⁸² The regression analyses revealed a \$4.20 price decrease for every foot one moved away from the green space.⁸³ In percentages, this means that the greenbelts were re-

75. See Crompton, *supra* note 10, at 2. This means, of course, that the negative effect of parks and open space on municipalities' tax bases is smaller than commonly thought. The increased value of properties near parks implies higher property taxes. Thus, the change in property values created by public spaces partially offsets the fiscal illusion that undermines the creation of parks. Cf. *supra* notes 60-61 and accompanying text.

76. Crompton, *supra* note 10, at 7. Indeed, Olmsted was so persuasive that in a letter from 1856, the New York City Comptroller wrote, "the increase in taxes by reason of the enhancement of values attributable to the park would afford more than sufficient means for the interest incurred for its purchase and improvement without any increase in the general rate of taxation." *Id.* (quoting METROPOLITAN CONFERENCE OF CITY AND STATE PARK AUTHORITIES 12 (1926)).

77. The first sophisticated method that enabled researchers to isolate the effect of parks from other economic factors was published in Charles Herrick, *The Effects of Parks Upon Land and Real Estate Values*, 5 PLANNERS' J. 89 (1939).

78. See Crompton, *supra* note 10, at 7-8.

79. *Id.* at 9.

80. Thomas R. Hammer et al., *The Effect of a Large Urban Park on Real Estate Value*, 40 J. AM. INST. PLANNERS 274 (1974).

81. *Id.* at 277.

82. Mark R. Correll et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, 54 LAND ECON. 207 (1978).

83. *Id.* at 211.

sponsible for a price increase of up to 32% in the value of adjacent properties, relative to properties located 3,200 feet away.

Likewise, a Massachusetts study from the early 1980s on the impact of four parks on nearby properties reported that, on average, a house located twenty feet away from a park sold for \$2,675 more than a house located 2,000 feet away.⁸⁴ The study further found that 80% of the added value was captured by properties within 500 feet from the park.⁸⁵ No effect was observed for properties more than 2,000 feet away from the park.⁸⁶

A 1985 study from Ohio echoed the previous findings.⁸⁷ The study focused on two parks: Cox Arboretum in Dayton and Whetstone Park in Columbus. The results indicated that a one-foot remove from the park represented a price decrease of \$3.83 in the case of the former, and a \$4.87 in the case of the latter.⁸⁸ The average park premium was 5.13% for properties in the Cox Arboretum subdivision, and 7.35% for residential properties in the vicinity of Whetstone Park.⁸⁹

Surprisingly perhaps, empirical studies also indicate that parks and open spaces can enhance property values even in nonurban areas. For example, a 1978 study of the values of privately owned properties in the Adirondack Forest Preserve in upstate New York reported that being adjacent to state land increased property value by \$20 per acre,⁹⁰ which represented a 17.5% increase in value.⁹¹ Similarly, a 1993 study from Maryland showed that the preservation of a significant tract of forest land increased the value of houses in Baltimore County (within one mile of the site), by at least 10%, and houses in the neighboring Carroll and Howard Counties by at least 8% and 4% respectively.⁹²

Not all empirical studies support the proximate-property principle. For instance, a 1986 study of Westchester County, New York, con-

84. J. Hagert et al., *Benefits From Open Space and Recreational Parks: A Case Study*, 11 J. NORTHEASTERN AGRIC. ECON. COUNCIL 13 (1982); Thomas A. More et al., *The Economics of Urban Parks: A Benefit/Cost Analysis*, PARKS & RECREATION, Aug. 1982, at 31-33.

85. Hagert, *supra* note 84; More, *supra* note 84.

86. Hagert, *supra* note 84; More, *supra* note 84.

87. Crompton, *supra* note 10, at 17 (citing M. Kimmel, *Parks and Property Values: An Empirical Study in Dayton and Columbus, Ohio* (1985) (unpublished Master's thesis, Miami University, Oxford, Ohio)).

88. *Id.* (citing Kimmel, *supra* note 87).

89. *Id.* (citing Kimmel, *supra* note 87).

90. See David H. Vrooman, *An Empirical Analysis of Determinants of Land Values in the Adirondack Park*, 37 AM. J. ECON. & SOC. 165, 173 (1978).

91. Crompton, *supra* note 10, at 23.

92. *Id.* (citing R.E. Curtis, *Valuing Open Space in Maryland: An Hedonic Analysis* (1993) (unpublished Master's thesis, University of Maryland)).

cluded that parks have no impact on the value of proximate property.⁹³ Such studies, however, represent the minority view. In a comprehensive review of the extant empirical literature, Crompton reported that twenty out of the twenty-five studies he reviewed were supportive of the proximate-property principle.⁹⁴ Crompton further noted that of the remaining five cases, four may have produced “ambivalent findings” as the result of “methodological limitations.”⁹⁵ In summarizing the empirical findings, Crompton wrote:

[I]t is suggested that a positive impact of 20% on property values abutting or fronting a passive park area is a reasonable starting point guideline. If the park is large (say over 25 acres), well-maintained, attractive, and its use is mainly passive, then this figure is likely to be low. If it is small and embraces some active use, then this guideline is likely to be high. If it is a heavily used park incorporating such recreation facilities as athletic fields or a swimming pool, then the proximate value increment may be minimal on abutting properties but may reach 10% on properties two or three blocks away.⁹⁶

As we show, this proximate-property value that accrues to nearby neighbors substantially affects the continued existence of the park. The unique stake of a particular group in the park creates a set of private owners who may play a special role in conservation.⁹⁷

B. *The De Facto Rights of Neighbors*

To see how the special interest of proximate homeowners aids conservation and changes the predicted anti-conservation outcome prophesied by the analysis of the previous Part, let's return to our Springfield hypothetical. So far, we assumed the park produced net public benefits of \$1 million, spread evenly among the 750,000 residents of the city. Given this distribution, and the cost of organizing politically, we concluded that beneficiaries of the park would be unable to fend off the inefficient development proposal of Concrete

93. Crompton, *supra* note 10, at 27 (citing J.A.Yoegel, *An Inquiry Into the Impact of Park Land Location Upon Single Family Residential Property Values in Middle and Upper Income Communities in Westchester County* (1986) (unpublished Ph.D. dissertation, New York University)).

94. *Id.* at 28.

95. *Id.*

96. *Id.* at 29.

97. There may be rare cases in which there is an inherent clash between the interests of proximate-property owners and those of the public at large. For example, there may be instances in which the proximate-property owners all despise a certain historical site (such as a sports stadium which produces noise and crowds), while the more distant public enjoys and supports the continued existence of the site. In such cases, obviously, proximate property owners do not serve as good proxies of the public interest, and antiproperty easements, as we shall describe them, will not be useful policy tools.

Jungle, Inc., whose project would produce a net benefit of only \$200,000.

Let us now change the example by incorporating a more realistic distribution of benefits. Assume that the thousand nearest neighbors of the park capture 25% of the benefits produced by the park. Under this distribution, each of the thousand nearest neighbors stands to gain \$250 from the existence of a park. The other \$750,000 in benefits are divided among the remaining 749,000 residents of Springfield, giving each a benefit of slightly over \$1. We retain the premise that only campaign contributions of \$5 or more will be accepted, and that decisions are made strictly in accordance with the amount of money received. While under a uniform distribution of benefits Concrete Jungle could move forward with its inefficient construction plan, Concrete Jungle would be unable to implement its development proposal under this more realistic distribution of benefits. This is because each of the thousand nearest neighbors will make campaign contributions of up to \$250 to preserve the park and stop construction.⁹⁸ In turn, the \$250,000 in total contributions will outweigh the maximum amount of \$200,000 Concrete Jungle would be willing to pledge. Thus, the existence of a concentrated group of property owners who benefit disproportionately from the park may secure the economically efficient result and benefit the public at large.

The phenomenon of a small group of proximate-property owners blocking inefficient development may also be illustrated by some real-world examples. Recently, in south Florida, neighborhood residents successfully thwarted an effort to convert a planned park expansion into a commercial development.⁹⁹ In Glastonbury, Connecticut, residents came together to oppose the construction of a large shopping center on nearby property, demanding that the property be used as a park or open space.¹⁰⁰ Motivated by a concern that the proposed development would affect, *inter alia*, “extremely fragile wetlands,” some residents “are waging a campaign to kill the proposal” currently pending before the local conservation commission.¹⁰¹ Likewise, a group of neighbors and business owners from Grand Rapids, Michigan, formed a united front to oppose the development of John Ball Park and Zoo,¹⁰² ultimately defeating the plan.

98. Of course, our example includes many simplifying assumptions, and ignores such factors as coordination costs and collective action problems. We address these factors in the next Section.

99. See Jeremy Milarsky, *Building Near Park Rejected*, S. FLA. SUN-SENTINEL (Ft. Lauderdale), Feb. 6, 2002, available at 2002 WL 2945260.

100. Eric R. Danton, *Neighbors Fight Shopping Center; Developer Addresses Concerns with Plan to Protect Wetland*, HARTFORD COURANT, May 22, 2002, at B2.

101. *Id.*

102. Kyla King, *Group Forms to Oppose Zoo Plan: The Residents and Business Owners Want to Present a “United Front,”* GRAND RAPIDS PRESS, Dec. 12, 2001, at A20.

C. *The Shortcomings of De Facto Rights*

The above examples illustrate that sometimes proximate-property owners' special interest in conservation is strong enough to bar inefficient development of lands. At other times, however, proximate-property owners' efforts at conservation are thwarted by a complex set of strategic considerations that generate a collective action problem.¹⁰³

To illuminate these difficulties, let's revisit our Springfield example and our basic assumptions: the park produces public benefits of \$1 million for the city's 750,000 residents, 25% of which are captured by the nearest 1,000 neighbors. Concrete Jungle wishes to convert the park into a project that will produce \$200,000 for the corporation. Political decisions are made in accordance with the magnitude of campaign contributions, and no contribution of less than \$5 is accepted. Earlier, we suggested that the nearby neighbors would be able to defeat the inefficient development scheme. Ignoring issues of coordination, we suggested that the neighbors could pledge up to \$250,000 in campaign contributions — a sum that would outweigh Concrete Jungle's contribution of \$200,000.

The introduction of strategic considerations into the discussion, however, changes the result considerably. Thus, we now consider six different strategic problems that may undermine the neighbors' quest to save their park: free-riding, the need for an entrepreneur or organizer, agency problems, insufficient group size, skewed distribution of benefits or burdens, and the likelihood that developers are repeat players.

1. *Free-riding*

To understand the free-riding problem, consider the case of Freddie Freeloader, one of the nearby neighbors. He knows that if Concrete Jungle succeeds in developing the park, his property will lose \$250 in value. Naturally, if Freddie knew that his contribution would be decisive in the campaign against the project he would donate up to \$250 in order to preserve the park. As his name suggests, however, Freddie is a freeloader, and would prefer to let others do the job for him. He knows that his 999 neighbors also stand to lose \$250 each, and if they each contribute \$200.21 or more, Concrete Jungle's initiative will fail. Thus, Freddie will keep his money and let his neighbors make their contributions. Of course, Freddie is not an outlier; he is the prototypical self-interest maximizer. Where enough neighboring owners are like Freddie, Concrete Jungle will succeed in destroying the park.

103. For an alternative discussion of the political failures of environmental protection, see Johnston, *supra* note 15.

Each of the neighbors will prefer to let their fellow neighbor contribute, and thus, no contributions will be made to preserve the park.¹⁰⁴

2. *Entrepreneurs and Organizers*

The free-riding problem might be solved by enforcement mechanisms such as social norms — the common name for informal social rules enforced by social conventions such as the norm of tipping at restaurants — or altruistic behavior.¹⁰⁵ And yet the conservation effort may falter even with such enforcement mechanisms in place. For a conservation effort to succeed, it is not enough to have the goodwill of the neighbors and their willingness to contribute campaign funds. Someone must organize the effort and spearhead the political campaign. The activists must be instructed where to contribute their funds and when; a common message must be drafted; connections with local politicians must be established; meetings must be held to coordinate action; and someone must give feedback to the activists to help them monitor the effectiveness of the campaign. Obviously, the organizer of this campaign will have to expend efforts well beyond those of the rank and file, and those efforts may well exceed her personal pecuniary stake in the dispute. Moreover, the need for an entrepreneur or organizer exacerbates the free-riding problem; even where neighbors see fit to contribute funds, few will want to bear the high costs associated with the leadership role. Here, again, unless a collective mechanism is developed for selecting and compensating the organizer, the conservation campaign may never get off the ground.¹⁰⁶

To illustrate, we return to Springfield. Assume that Robin Rabblrouser contemplates leading the conservation effort. She estimates the expected cost in time and effort at \$5,000. Yet, her personal stake in the park is a mere \$250. Unless Robin can somehow be compensated for the remaining \$4,750, she will shy away from the leadership role.¹⁰⁷

104. On free-riding and its role in foiling political organization, see Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 285 (1984).

105. See Russell Hardin, *Law and Social Norms in the Large*, 86 VA. L. REV. 1821, 1821 (2000) (demonstrating the use of social norms to prevent free-riding for taxation); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1027 (1995) (describing social norms as a non-legal method of preventing undesirable actions like free-riding).

106. On the importance of an organizing entrepreneur, see TERRY M. MOE, *THE ORGANIZATION OF INTERESTS* (1980).

107. The compensation may be psychic as well as pecuniary, which may explain why, in some cases, entrepreneurs do emerge notwithstanding the absence of a payment mechanism.

3. *Agency Problems*

The need for a leader and other specialized roles invariably introduces an agency problem in the conservationist camp. Each person with a specialized role faces a different utility function — and therefore a different set of incentives — than the rest of the group. Robin Rabblrouser, for example, must consider not only the cost of campaign contributions and the benefit of park preservation; she must also consider the cost of her leadership role and the benefit of her compensation scheme. This creates a danger that she may decide to undermine the conservation effort in order to advance her personal benefit. For instance, Concrete Jungle may promise to pay Robin \$20,000 to send inaccurate signals to the activists. This sum would dwarf the \$4,750 in compensation that induced her to take on the leadership role and the \$250 in park benefits that are at stake for her. Robin may also accept compromise proposals that benefit her but not the group at large. The existence of an agency problem creates the need for monitoring, to be carried out by yet a new set of agents. The need for multiple agents imposes additional costs to the conservation effort, and, at a minimum, creates distrust among the conservationists.¹⁰⁸

4. *Group Size*

The conservation effort will obviously also be affected by the size of the group of neighbors. As the group grows in size, it becomes increasingly difficult to coordinate actions among the group. To act in concert, the conservationists will need to introduce mechanisms for intragroup communication. To make matters worse, as the group size grows beyond the ability of the members to know one another, social norms and other informal regulatory mechanisms become less effective. This imposes two more sets of transaction costs within the conservationist camp: communication costs and monitoring costs.¹⁰⁹

5. *Skewed Distribution*

The pattern of distribution of benefits from the park is closely related to the question of group size, and it too may hinder effective coordination. Returning to Springfield, assume that there are only 100 proximate-property owners, and their share of the benefits is only 10%, rather than 25%. In such a case, the nearby neighbors would each enjoy a benefit of \$1,000 each, while other residents of the city would each enjoy a benefit of approximately \$1.20. The group of con-

108. See *supra* note 70.

109. See generally Hardin, *supra* note 36 (discussing role of group size in overcoming collective action problems).

servationists would raise — assuming no other coordination problems — \$100,000 in campaign contributions. This sum would be insufficient to counter Concrete Jungle's expected contribution of up to \$200,000. Thus, the existence of a group of specially benefited homeowners is not enough in itself to protect the park. In addition to all its other difficulties, the group must represent a collective interest sufficiently large to outweigh the interest of the competing developer.¹¹⁰

6. Repeat Players

Finally, we must consider the possibility that there will be repeated rounds of political decisionmaking. We have assumed thus far that each decision of the city was discrete and based solely on campaign contributions related to the specific decision at hand. But in reality, the city makes many decisions over the course of time, and decision-makers motivated solely by campaign contributions will have to calculate the effect of their decisions on future fundraising drives in addition to the present round of contributions. Generally, abutting homeowners will not be repeat players in the political process, as they will rarely have interests at stake that are sufficiently large as to warrant repeated campaign contributions. On the other hand, development companies are more likely to have a number of interests that warrant continuous participation in the political arena.¹¹¹

Concrete Jungle, for example, is an ongoing concern, and its interests are not restricted to this single park. Concrete Jungle has developed other properties, and it will have future development projects that will lead it to shower contributions upon friendly politicians. Politicians may want to avoid alienating Concrete Jungle to avoid jeopardizing future campaign gifts. Thus, even though in our example Concrete Jungle will want to contribute only \$200,000, against \$250,000 in contributions that abutting owners will muster, politicians may decide to take Concrete Jungle's smaller contribution in order to assure access to future contributions from the developer.

Repeated plays in the political arena may affect potential outcomes in another way. As repeat players in the political process, developers and politicians are conscious of the signals they send to

110. Strictly speaking, skewed distribution as we have described it in the text does not constitute a *strategic* difficulty.

111. On repeat players, see, for example, Guido Calabresi and Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 863 (1996) (observing that tort reform is controlled by repeat players); Dennis S. Karjala, *Copyright Protection of Operating Software, Copyright Misuse, and Antitrust*, 9 CORNELL J.L. & PUB. POL'Y 161, 179-80 (1999) (describing the pivotal role of repeat players in shaping copyright law). The classic articles analyzing the inherent advantages of repeat players are Marc Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347 (1975), and Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

other players and potential players. Developers may find it in their interest to “overinvest” in campaign contributions for a development project in order to deter anti-development forces from organizing to block future projects. In our example, Concrete Jungle may decide to invest more than \$250,000 in campaign contributions, even though its potential profit is only \$200,000, in order to send a signal to homeowners that it is not worth organizing to fight Concrete Jungle developments, because Concrete Jungle will always invest “whatever it takes.” If the signal saves Concrete Jungle more than \$50,000 in the future, it will be worth the investment.¹¹²

7. Summary

As a result of the special burdens and costs confronting preservationists, prodevelopment interest groups will often prevail in their effort to push forward inefficient projects, notwithstanding the opposition of proximate-property owners. Accordingly, the de facto interest of neighbors in preserving green space will frequently fall short of achieving the optimal equilibrium between development and preservation.

The shortcomings of the status quo, in which proximate-property owners lack formal legal protection for their interest in preservation, may be summarized under two headings. First, preservationists rather than developers bear the lion’s share of transaction and coordination costs. The preservation interest consists of widely scattered stakes, and each of relatively small value, while the development interest is generally unitary, politically savvy, and of relatively large value.¹¹³ Second, the benefits of development generally find full expression in the political arena, while the political arena does not fully account for the benefits of preservation. The unitary developer fully internalizes all of the benefits of its project and will invest up to the full value of the benefits in order to reap a profit. Many preservationists, however, enjoy too small a benefit to warrant participation in the political process. They will sit on the sidelines, as the political process ignores the benefits the conservationists could potentially enjoy.¹¹⁴

112. For example, in an effort to forestall future litigation, tobacco companies frequently expend more litigating a claim than they would have to expend if they were to simply pay the claim without contesting it. See Mary Ann K. Bosack, *Cigarette Act Preemption — Refining the Analysis*, 66 N.Y.U. L. REV. 756, 757 n.8 (1991) (characterizing tobacco litigation costs as between \$600 million and \$3 billion as of 1988).

113. For a contrary view of the impact of strategic factors on political organization, see Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983).

114. See also Thompson, *supra* note 29, at 258-62 (discussing risk that government action will “crowd out” altruistic environmentalism).

Unfortunately, our analysis of the political decisionmaking process is not merely theoretical; it is borne out by reality. Four recent examples demonstrate the national influence of fiscal illusion in undermining conservation, and the potential weakness of proximate-property owners. In 2001, the city of Las Cruces, New Mexico agreed to sell 3.2 acres of undeveloped city-owned land — one of the last such parcels remaining in the area — to a commercial corporation for a reported amount of \$694,000, despite the protests of proximate-property owners.¹¹⁵ In explaining the decision, city manager Jim Erickson said that the only consideration weighed by the city was “to look at the highest and best use.”¹¹⁶ He added that “leaving the land vacant would cost the city to maintain the land, cleaning weeds and trash.”¹¹⁷

In a similar vein, leaders of Daytona Beach, Florida “are discussing a plan that could put the city’s last swath of undisturbed green space on the Halifax River on the auction block.”¹¹⁸ Residents who oppose the plan describe the proposal as “a sellout of public property to private development,” claiming “that this time Daytona Beach is putting a price tag on its character.”¹¹⁹ Yet, for the local politicians, the logic is simple: “More marinas, more restaurants and more condominiums on the river mean a more vibrant downtown and new tax money to shore up finances.”¹²⁰

Finally, the city of Novi, Michigan realized that there must be more than one way to appease a developer. Facing a \$70 million judgment, the city decided to settle the case by offering the plaintiff-developer, Sandstone Associates, ninety-five acres (!) of park land.¹²¹ Responding to criticism from local conservationists, city officials explained that this extreme measure was necessary to “save the city from big tax increases and cuts in services.”¹²²

Fittingly, however, the “gold medal” for allowing political failures to trump conservation interests goes to the Golden State, California, thanks to the “ingenuity” of the city of Palm Springs. In 1986, the city of Palm Springs “eagerly accepted”¹²³ thirty acres of undeveloped land

115. Christopher Schurtz, *Councilors Question Why Las Cruces, N.M., Is In Land-Sale Business*, LAS CRUCES SUN-NEWS, June 27, 2001.

116. *Id.*

117. *Id.*

118. Matt Donnelly, *Downtown Daytona: What Next? Many Angry over Talk of Land Sale; Protestors Try to Save Riverfront Property*, ORLANDO SENTINEL, Feb. 3, 2002, at K1.

119. *Id.*

120. *Id.*

121. See Matt Helms, *Planners to Decide on Park Giveaway; Public Hearing, Vote Set Wednesday in Novi*, DETROIT FREE PRESS, Jan. 7, 2002, at 1B.

122. *Id.*

123. *Palm Springs v. Living Desert Reserve*, 70 Cal. App. 4th 613, 629 (1999).

on the express condition that the property be used in perpetuity as a desert wildlife preserve and an equestrian center.¹²⁴ The grant explicitly stated that if the condition was breached the land would pass to “the Living Desert Reserve . . . and grantee shall forfeit all rights thereto.”¹²⁵ Less than three years later, the city decided it would be better served if the land was developed into a golf course.¹²⁶ To effect this plan, the city exercised its eminent domain power to condemn the reversionary interest in Living Desert Reserve.¹²⁷ Amazingly, the city convinced the trial court not to award any compensation, since the possibility of breach of condition by the city was too “remote and speculative,” and thus the future interest was valueless for the purpose of condemnation compensation.¹²⁸

These and other examples¹²⁹ illustrate the systematic disadvantage of conservation interests in the political arena.

D. *Formalizing Neighbors’ Antiproperty Rights*

Having demonstrated both the benefits and the shortcomings of the de facto rights of nearby neighbors in green space, we now show how formalizing those rights in de jure antiproperty easements preserves the benefits of the de facto rights, while drastically reducing the shortcomings.

We propose to grant every proximate-property owner a formal legal entitlement to the preservation of green space. Specifically, each property owner situated within a certain distance of the designated green space — say 200 yards — will be granted a negative easement appurtenant in the park, which we call an “antiproperty easement.” This would vest in each of the property owners the right to veto any development or destruction of the green space. Thus, under our proposed regime, a developer seeking to build on the green space would have to obtain permission, or acquire the right, from the neighboring owners. As with all other easements, antiproperty easements would be

124. *Id.* at 618.

125. *Id.*

126. *Id.* The California Court of Appeals attributed the city’s inconsistent behavior either to a “promissory fraud or a subsequent change of heart.” *Id.* at 630.

127. *Id.* at 618.

128. *Id.* at 624-25. In response to this argument, the California Court of Appeals said: “the decision to assert that position did not display the high degree of fairness, justice, and virtue that should characterize public entities. Such inequitable behavior must not be rewarded.” *Id.* at 630.

129. It turns out that, on occasion, even the court system poses a threat to parks. Consider the case of Hardy Park in Fort Lauderdale, Florida. Despite opposition from neighbors, the park might be destroyed to make room for a new \$100 million court house. See Brittany Wallman, *Judge Regains Favored Court Site: Federal Plans Upset Residents*, FLA. SENTINEL (Ft. Lauderdale), Sept. 5, 2002, at 1.B.

formal legal rights enforceable in a court of law or equity; holders would be entitled to injunctive relief against building without consent.

As we explain in greater detail in the next Part, however, anti-property easements differ from standard easements. Ordinarily, easements appurtenant seek to optimize land use between two property owners: the dominant parcel owner (the beneficiary) and the subservient parcel owner (the benefactor). Moreover, standard easements, like other known property rights, may be transferred voluntarily at the sole discretion of the easement holder.¹³⁰ For instance, Ollie, the owner of Oceanside, may give Grace, the owner of Graceland, an easement appurtenant to cross Oceanside to get to the beach. One would expect that Fanny Faraway, who lives on the other side of town, would enjoy no benefit whatsoever from the transaction, as her own beach access is not affected by the easement grant. Further, if Ollie changed his mind, and then convinced Grace to annul the transfer, there would be no practical difficulties in eliminating the access privilege created by the easement. In short, easements typically affect only two parties who fully internalize, usually contractually, the costs and benefits created by the easement.¹³¹

The antiproperty easements we propose are quite different. They are aimed primarily at ensuring benefits for third parties and designed to be practically (albeit not formally) inalienable. In economic parlance, the purpose of antiproperty easements is to create a unique, positive externality.¹³² The formalization of antiproperty easements will ensure the continuous existence of parks and green space, which will benefit not only the easement holders but also the public at large. And by dispersing rights among multiple owners, antiproperty easements create a regime that makes it exceedingly unlikely that property owners could ever aggregate to alter or annul the negative easements.

To illustrate these critical differences, let us change slightly our previous hypothetical. Suppose that Oceanside is a public park (not a private estate) and that it is abutted by 100 private property owners, each of whom enjoys a negative easement appurtenant (an antiproperty easement) blocking any development in Oceanside. Let us now

130. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 4.6(1), 5.8 (2000); DUKEMINIER & KRIER, *supra* note 14, at 830.

131. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerous Clausus Principle*, 110 YALE L.J. 1 (2001); see also, e.g., *Estate of Thomson v. Wade*, 509 N.E.2d 309 (N.Y. 1987) (holding that an easement cannot be reserved in favor of adjacent property previously owned by grantor). *But see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 2.6(2) (2000) (stating that an easement can be created in favor of a third party).

132. See Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 542 (1998) (defining positive externalities as "the presence of an intrinsically valued institutional structure even where that structure is not necessary to optimize social welfare").

suppose that Donny is a developer who wishes to build a tall glass tower on Oceanside (as he did in several locales in New York City). We finally assume that most citizens of the town, Placidville, enjoy the use of Oceanside and prefer to keep it in its pristine state.

The first thing to notice about the negative easements is that they benefit the Placidville citizenry as a whole, not merely the 100 proximate-property owners. Second, the negative easements make development of Oceanside Park virtually impossible. In order for Donny to bring his planned development to fruition, he must acquire all 100 antiproperty easements. If even one outstanding antiproperty easement remains unacquired, Donny will be barred from proceeding with his planned tall glass tower; buying ninety-nine easements is as good as buying none.

Donny will almost invariably fail to acquire the negative easements, however, since he is facing a practically insurmountable hold-out problem. Buying all the negative easements requires Donny to engage in a sequence of transactions with the easement holders. Each of the easement holders is effectively a monopolist since she holds a unique asset that cannot be purchased elsewhere; there is no spot market and no substitute good. Each monopolist easement owner will seek to extract the entire profit of the developer in exchange for relinquishing the veto power.

Assume that Donny expects a gross profit (net of all costs save easement acquisition) of \$100 million, a fact published in the local media.¹³³ Looking forward, Donny expects an average profit of \$1 million from each easement transaction, less the price he actually pays the holder. Even if limited in ability to predict the outcome of negotiations, the first easement holder approached by Donny, as a self-interested profit maximizer, will ask for the full \$1 million.¹³⁴ The second easement holder to be approached, however, will ask for more. Now that Donny has purchased one easement, he must purchase ninety-nine easements to enjoy the \$100 million, creating an expected profit of \$1.01 million per transaction. This is because Donny rises above the sunk-cost fallacy¹³⁵ and ignores the price he has already paid in the previous easement transaction. The second easement holder will therefore ask for the full \$1.01 million. This process will go on until the

133. We make this assumption for simplicity's sake. Of course, in many cases there are information problems that may make the likelihood of consensual transfer less or more likely.

134. We assume that each easement owner will seek to gain the maximum share of the profit that will allow the project to go forward, and that each will assume similar behavior from other owners.

135. Under the sunk-costs doctrine, "costs incurred in the past . . . should not be counted as costs of present or future decisions." David R. Steele, *Nozick on Sunk Costs*, 106 *ETHICS* 605, 605-06 (1996). People who irrationally fail to operate under this rule have fallen prey to the sunk-cost fallacy.

hundredth easement owner — who will hold the key to the full \$100 million in profit — asks a price of \$100 million.

Worse yet for Donny, because of the dramatic disparity in bargaining power between those who sell early and those who sell late, easement owners will hold out until the end of the process in order to maximize their profits. This, of course, increases transaction costs even further.

Indeed, there are probably no barriers to easement holders' ability to predict the course of negotiations. A precocious first easement holder will therefore decline to make the modest request of \$1 million, and instead ask for the same \$100 million as the hundredth easement owner. Reasoning backwards from this daunting outcome, Donny will likely shy away from the project and devote his funds to the easier task of building tall glass towers on nonpark land in New York City.¹³⁶

Although the objective total value of the antiproperty easements only represents the share of the abutting homeowners' interest in the continued existence of undeveloped parks, as a practical matter the cost of acquiring the antiproperty easements will be considerably higher. Indeed, as a general matter, the cost of buying up the antiproperty easements will be prohibitive. The holdout dynamic created by the dispersed easements effectively protects the interest of the public at large in conservation, even though the public's interest isn't, technically speaking, represented.

The irony implicit in antiproperty may be described in another way. Conventional wisdom suggests that environmental goods are underproduced due to widely dispersed positive and negative externalities.¹³⁷ Overproduction of pollution, for example, is often ascribed to the ability of polluters to externalize many of the costs of their activities to the public.¹³⁸ The standard policy prescription, therefore, calls for forcing the polluters to internalize these costs, by means of fines, for example.¹³⁹ The policy prescription relies upon the assumption that transaction costs are too high to allow internalization through

136. On holdouts, see Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 109 (1986) [hereinafter Merrill, *Public Use*], for a description of G.M.'s difficulty in buying a large tract in a major urban area, and Richard A. Epstein, *A Clear View of the Cathedral: the Dominance of Property Rules*, 106 YALE L.J. 2091, 2112 (1987), for a discussion of the use of eminent domain to resolve holdout problems.

137. See Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 60 (1992) (exposing the problem of free-riding with regard to public goods, which in turn leads to underproduction).

138. See Michael J. Gergen, Note, *The Failed Promise of the "Polluter Pays" Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 624, 627 (1994) (theorizing that the polluter should reimburse society for costs imposed on others).

139. See *id.* at 628.

private bargaining between pollution victims and producers.¹⁴⁰ On this view, transaction costs are the culprit for the market's failure to curb suboptimal pollution. And if transaction costs could only be lowered sufficiently, presumably, the market failures would dissipate.¹⁴¹ Indeed, it is for this reason that law and economics scholars generally call for policymakers to craft market mechanisms that reduce transaction costs, in order to pave the way for unimpeded bargaining among market participants.¹⁴²

The counterintuitive goal of antiproperty easements is to create transaction costs, which in this case are produced by strategic holdout. Here, we rely upon two common observations that are rarely applied together to the pollution dilemma. First, the problem of transaction costs may be assuaged completely by allocating resources, *ex ante*, to the party who would have received those resources through the market if transaction costs were low.¹⁴³ Second, when transaction costs are insurmountably high (so as to make bargaining impossible), the initial allocation is dispositive¹⁴⁴ — once allocated, the asset never moves. Combined, these two phenomena produce the perverse outcome of antiproperty easements. To overcome high transaction costs among

140. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (assuming high transaction costs preclude socially optimal results); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1545 (1999) (acknowledging that high transaction costs may lead to suboptimal resource allocations).

141. See Coase, *supra* note 140.

142. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 102 (1st ed. 1988); ANTHONY T. KRONMAN & RICHARD POSNER, *THE ECONOMICS OF CONTRACT LAW* 254 (1979); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 12 (2d ed. 1989) (positing that when transaction costs are positive, "the preferred legal rule is the rule that minimizes the effects of transaction costs."); Eric L. Talley, Note, *Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule*, 46 STAN. L. REV. 1195, 1198 n.14 (1994).

143. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 90 (2d ed. 1996) (stating that when transactions costs prevent bargaining, "the law should allocate property rights to the party who values them the most" (emphasis omitted)). Peter Schlag summarizes the law and economics analysis of entitlements as follows:

1. Assign entitlements to the party who most values them. 2. If it is not clear who most values the entitlement, grant the entitlement to the party who can most cheaply initiate an exchange. 3. Where transaction costs are low, grant absolute entitlements. 4. Where transaction costs are high, structure the legal regime to approximate the outcomes that the parties would have reached in a zero transaction cost world. 5. Where transaction costs are high, restructure legal entitlements so as to reduce transaction costs.

Peter Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1663 (1989) (citations omitted).

144. See Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 813 (2002) (noting that when the "initial allocation of an entitlement is inefficient, transaction costs can inhibit or prevent the transfer of the entitlement"); Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143, 1151 (1999) (pointing out that when transaction costs are high "the entitlement will stay where it is initially allocated no matter what transaction rule we select").

victims of suboptimal or inefficient development, antiproperty easements allocate the right to block such inefficient development to nearby neighbors. To ensure that nearby neighbors adequately represent the unaccounted-for social benefit of undeveloped green space, however, antiproperty easements are scattered, creating transaction costs, and thereby defending the initial allocation.

It is important to note that the mechanism of antiproperty easements does not effect a first-best solution. Transaction costs do not go away — on the contrary, new transaction costs are created. Also, antiproperty easements do not lead to a full internalization of unaccounted-for benefits of undeveloped green space. Instead, the mechanism of antiproperty easements institutes transaction costs as a rough counterbalance to the unaccounted-for benefits of conservation. Specifically, these new rights we propose force developers to add substantial transaction costs to their balance sheet as a proxy for the currently unaccounted-for component of public benefits from conservation. Antiproperty easements are not capable — in themselves — of creating a one-to-one correlation between the costs paid by developers and the accurate benefits of the conservation foreclosed by development. Rather, decisionmakers should employ antiproperty easements only where they conclude that the unaccounted-for public interest in conservation is sufficiently large to warrant creating transaction costs that make the status quo practically unassailable.

In our Oceanside example, the benefits from preservation are often so small and dispersed that the cost of coordinating preservation campaigns is prohibitive. Put differently, the high transaction costs created by the widespread scattering of benefits produce a situation in which it is often impossible for beneficiaries to ensure that their interests in park preservation are taken into account by the political and economic process. As we pointed out earlier, this means that without legal intervention, inefficient development is a likely outcome. Practically, however, there is no way to lower sufficiently transaction costs (in this case, primarily the cost of coordination) on the beneficiaries' side in order to produce an efficient market. Our proposal, therefore, employs the next best option: shifting the transaction costs to the other side by engendering a holdout problem.¹⁴⁵

It is important to note that just such an arrangement was implemented in Chicago in order to protect Grant Park against development. After the city dedicated land for the park some 150 years ago, the Illinois legislature enacted legislation providing that:

[a]ny person being the owner of or being interested in any lot, or part of a lot, fronting on Michigan Avenue [abutting the park], shall have the right to enjoin . . . all [] persons and corporations[] from any violation of

145. In Part IV.C, *infra*, we offer a first-best mechanism that incorporates antiproperty easements and the takings power.

the [non-encroachment] provisions of this section . . . and by bill or petition in chancery, . . . enforce the provisions of . . . this section, and recover such damages for any such encroachment or violation as the court shall deem just.¹⁴⁶

In a series of cases, the courts upheld abutting owners right to enjoin development on dedicated park land.¹⁴⁷

Antiproperty easements thus simultaneously aim at goals that are considered the basis of property, and those that are ordinarily thought of as antithetical to the property system. On the one hand, antiproperty easements, like ordinary property, curb overexploitation by forcing the internalization of costs. On the other hand, antiproperty easements achieve this goal by deliberately creating a holdout problem — a strategic problem that many commonly see as the bane of the property system.

E. *Public Choice and Antiproperty Rights*

As we noted earlier, successful conservation policies must take into account possible political failures that may undermine conservation regimes. First and foremost, we should explain why political actors may find it beneficial to implement our proposal. After all, one might argue that the inherent predisposition of political actors to favor development should preempt any attempt at granting antiproperty rights to private property owners. All the political shortcomings and political difficulties we discussed earlier would simply carry over. As we show in the proceeding paragraphs, however, the semblance of symmetry is misleading. An antiproperty regime may often avoid the political failures that plague *ex post* protection of green space and other conservation properties.

First, it is important to recall that conservation regimes may emerge from different levels of government. For example, our proposal may be adopted at the federal level, the state level, the county level, or the municipal level. As William Fischel noted, the influence of different interest groups varies among the different levels of government.¹⁴⁸ At some levels, prodevelopment interests may carry a lot of clout, while at others their influence may be quite limited. Naturally, the same holds true for proconservation interests. The latter group, however, will be abetted by an often sizable group of property

146. *See City of Chicago v. Ward*, 400 48 N.E. 927 (Ill. 1897).

147. The fascinating history of Grant Park is discussed in a series of cases known as the Ward cases. *See City of Chicago v. Ward*, 48 N.E. 927; *Bliss v. Ward*, 64 N.E. 705 (Ill. 1902); *Ward v. Field Museum*, 89 N.E. 731 (Ill. 1909); *South Park Com'rs v. Montgomery Ward & Co.*, 93 N.E. 910 (Ill. 1911). *See also McCormick v. Chicago Yacht Club*, 163 N.E. 418 (Ill. 1928); *Stevens Hotel Co. v. Chicago Yacht Club*, 171 N. E. 550 (Ill. 1930).

148. WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 100-40 (1995).

owners who stand to gain from the enactment of the antiproperty regime, which would increase the value of their realty. Therefore, it is quite possible that the proconservation forces and their allies will win the political battle at some level. Accordingly, such conservationists may introduce an antiproperty regime in a congenial political arena in order to block future losses on less congenial ground. Thus, the grant of antiproperty rights represents a valuable precommitment strategy for conservationists that will allow translating a one-time political victory into a more permanent defense of conservation properties.¹⁴⁹

Second, the coalitions forming around a decision to grant antiproperty easements may create an entirely new political dynamic, at any level of government. Antiproperty easements represent an identifiable good that will be distributed to an identifiable (and possibly influential) group. The possibility of obtaining this good may rally proximate-property owners into forming political pressure groups, even where a one-time battle to save a park from a particular project would not. Antiproperty regimes may thus create their own interest group lobbyists to support conservation and battle anticonservation lobbyists.

Third, and finally, the granting of antiproperty easements raises the value of affected property by creating greater certainty about the continued existence of the park. By means of property taxes, governments can partly recapture this value. In a world where fiscal illusion distorts government decisionmaking, this added marginal benefit in favor of conservation may sometimes tip the scales.

III. ANTIPROPERTY AND THE THEORY OF THE COMMONS

Having described antiproperty easements as a potential solution to the problem of mismanagement of publicly owned conservation resources, we now turn to the broader question of where to place antiproperty within the broader context of the theory of property. As we show, an antiproperty analysis introduces important changes to traditional understandings of property theory, especially in the realm of commons property.

Commons property regimes have long been of interest to property theorists.¹⁵⁰ Traditionally, theorists elaborated Hardin's central proposition: that commons property is likely to lead to overexploitation and

149. To be sure, development forces may similarly seek the high political ground, and they too will try to parlay their victory there into a permanent structure in accordance with their own precommitment strategy. The granting of antiproperty rights, however, is not a tool that will assist such development forces. Moreover, as we note in Part IV, *infra*, if the antiproperty regime is properly structured, even a successful confiscation of antiproperty rights will not undermine optimal conservation.

150. See, e.g., Hanoch Dagan & Michael A. Heller, *The Liberal Commons*. 110 YALE L.J. 549, 559-60 (discussing commons property in an Aristotelian context).

exhaustion of resources.¹⁵¹ Michael Heller adduced an important corollary to Hardin's theory by pointing out that the opposite problem could also arise.¹⁵² Heller showed that too many property rights too widely dispersed may lead to underexploitation and underutilization of resources.¹⁵³ Citing the division of private property in the former U.S.S.R. as an example, Heller demonstrated that too many owners holding veto rights over property can lock the property into indefinite suboptimal use, or even, no use at all.¹⁵⁴ Heller aptly labeled this phenomenon "anticommons property."¹⁵⁵ Paralleling Hardin, Heller described the "tragedy of the anticommons" as a peril to be averted, and this view has since been accepted.¹⁵⁶

Our proposed antiproperty easements present an important counterpoint. As Ellickson,¹⁵⁷ and later Heller,¹⁵⁸ noted, insofar as nonuse is, at times, the optimal use of property, the scattering of property rights — and the deliberate creation of anticommons and their attendant high transaction costs — is an important policy tool that ought to be considered. Indeed, we suggest an addition to Heller's terminology to reflect the fact that some anticommons are desirable; we propose the name "conservation commons" for commons whose most efficient use is nonuse.

Antiproperty, and its use in preserving conservation commons, thus introduces two important innovations. First, antiproperty is a quasiprivate mechanism for pursuing goals that are generally thought to be paradigmatic public functions. Resource conservation through antiproperty relies on private enforcement by interested private actors, funded by costs imposed on private opponents of the public goal.

151. See Hardin, *supra* note 20; Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000); Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123 (2001).

152. Heller, *The Tragedy of the Anticommons*, *supra* note 21.

153. See *id.* at 673-77.

154. See *id.* at 633-59.

155. See *id.*

156. See, e.g., Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 208 n.3 (citing Heller's "tragedy of the anticommons"); James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 1 n.1 (2000); Francesco Parisi, *Entropy in Property*, 50 AM. J. COM. L. 595, 613-614 (2002) (discussing reunification mechanisms designed to overcome the problem of anticommons in property law); Francesco Parisi & Catherine Sevchenko, *Lessons from the Anticommons: The Economics of New York Times Co. v. Tasini*, 90 KY. L.J. 295, 310-15 (2001-2002) (discussing the anticommons problem underlying the case of *New York Times Co. v. Tasini*, 533 U.S. 483); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 914 n.179 (citing Heller).

157. See Ellickson, *supra* note 23.

158. See Heller, *The Tragedy of the Anticommons*, *supra* note 21, at 668.

As we will show, resource conservation effected in this way has important practical implications as well as theoretical ones. Antiproperty is a flexible tool that may be used for conservation of assets or for controlling the rate of their exploitation, by means of the market and courts.¹⁵⁹ The second advance embodied in antiproperty is a fleshing out of a new category of entitlement — a veto entitlement that ensures nonuse and nonexploitation by virtue of its part in an anticommons. Translating Ellickson's and Heller's observations about potential virtues of anticommons into a comprehensive structure of antiproperty demonstrates a concrete manner in which anticommons may be exploited.

A. *Situating Antiproperty in Commons Theory*

Studies of commons property have, quite naturally, focused on resolving Hardin's tragedy of the commons. The traditional remedy is privatization.¹⁶⁰ If too many shepherds ruin the common pasture because none has a sufficient pecuniary interest in the pasture's preservation, the difficulty can be easily resolved by giving ownership of the pasture to one of the shepherds, or by dividing the pasture among the several shepherds. Each shepherd can then be counted on to protect her financial interest in the land by blocking overgrazing and properly balancing the benefits of grazing against the costs of pasture depletion.¹⁶¹

A second common remedy for the tragedy — often cited in the field of environmental law — is regulation. For example, to prevent shepherds from overgrazing the pasture, state regulators can limit grazing hours, or the number of sheep with access to the field. Indeed, regulation is an enormously popular remedy for commons abuse in such diverse contexts as hunting,¹⁶² logging,¹⁶³ and air¹⁶⁴ and water pollution.¹⁶⁵ Yet, regulation has drawn its critics, as it is viewed as cumbersome, costly, and inefficient.¹⁶⁶

159. See *infra* Part IV.

160. See Hardin, *supra* note 20.

161. See Demsetz, *supra* note 34.

162. See, e.g., Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 et seq. (1994) (regulating, *inter alia*, hunting on federal lands).

163. See, e.g., National Forest Management Act, 16 U.S.C. §§ 472a, 476, 500, 513-516, 521b, 576b, 1600-1602, 1604, 1606, 1608-1614 (2002); Multiple-Use and Sustained-Yield Act, 16 U.S.C. § 528-31 (1994).

164. See, e.g., Clean Air Act, 42 U.S.C. §§ 7401-7671 (2002).

165. See, e.g., Clean Water Act, 33 U.S.C. §§ 1251-1387 (2002).

166. See, e.g., Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L.Q. 1, 8 (1991); Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Envi-*

In her groundbreaking work, *Governing the Commons*, Elinor Ostrom demonstrated the possibility of a third remedy by highlighting the importance of social norms in regulating the commons.¹⁶⁷ Ostrom observed that social norms may lower coordination and other transaction costs to such an extent that overexploitation will not occur, even without fully privatizing the commons, or introducing an external government regulator.¹⁶⁸ On the basis of extensive empirical research, Ostrom identified and categorized a number of different public/private mechanisms that harness social norms to bridge the gap between commons and ordinary private property.¹⁶⁹

Ostrom recognized that her commons remedies were limited to those situations in which the group accessing the commons was sufficiently small and cohesive that it could regulate its own members through social norms. For example, Ostrom described public/private commons regimes governing uncultivated lands near small Japanese villages,¹⁷⁰ Philippine irrigation communities,¹⁷¹ and several fisheries.¹⁷²

Our strategy in proposing antiproperty approaches the problem from a different angle. Like Ostrom, we seek to expand the possibilities of commons management beyond privatization and regulation. We resolve the problem of overexploitation by creating a new public-private hybrid, along a different axis than that explored by Ostrom. Ostrom described situations in which the many users of a commons resource are yoked together by social norms and induced by social enforcement mechanisms to engage in efficient use. Our aim, by contrast, is not to achieve coordination among all affected users, but rather to single out a select group of users, vest its members with nonusary property rights, and use the resulting anticommons to deter inefficient use. Importantly, at this stage, we do not expect this set of users, or any cohesive group for that matter, to fully internalize the costs and benefits associated with conservation of the resource. Yet, we are able to attain the desired conservation by taking advantage of strategic flaws inherent in certain transactional settings. An important advantage of our mechanism is that it may be employed in situations where neither a full-fledged regulatory scheme nor a scheme of

ronmental Policy, 22 HARV. ENVTL. L. REV. 313 (1998); James E. Krier, *The Irrational National Air Quality Standards: Macro- and Micro-Mistakes*, 22 UCLA L. REV. 323 (1974); Richard B. Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1, 7 (1985).

167. OSTROM, *supra* note 31.

168. *See id.* at 18-21.

169. *See id.*

170. *See id.* at 65-69.

171. *See id.* at 82-88.

172. *See id.* at 144-78. Ostrom noted that several of the fisheries were unsuccessful in maintaining reliable governing commons regimes.

private property rights is feasible, and in which it is practically impossible to lower transaction costs, even through social norms.

The relative advantages and disadvantages of each commons governance scheme — and the situations in which each is desirable — are illustrated in the following table:

TABLE I. COMMONS GOVERNANCE

	Transac- tion Costs	Group Size and Cohe- siveness	Monitoring and Enforce- ment	Share in Resource	Potential Drawbacks
Privatization	Low	Small, Low	Low, Private	Irrelevant	Negative Externalities
Government Regulation	High	Large, Low	High, Public	Irrelevant	Administra- tive Rent- Seeking and Capture
Social Norms	Low	Small, High	High, Private	Roughly Equal	Negative External- ities; Limited Coverage
Antiproperty	High	Large, Low	Low, Private	One Special Interest Group	Limited Use

As the table suggests, antiproperty provides an important policy tool that outperforms its more well-known cousins in certain settings.

1. *Privatization*

Privatization works best when transaction costs are sufficiently low to allow resources to gravitate through market transactions to their highest-value users. Private property lowers monitoring costs, as the owner need not monitor compliance by other users of the property, and only has to guard the property against incursions by others.¹⁷³ Group size and cohesiveness among group members are not prerequisites for establishing private property regimes. As group size rises and cohesiveness diminishes, however, transaction costs are likely to increase as well, making private property regimes increasingly

173. See Ellickson, *supra* note 23.

unwieldy.¹⁷⁴ It is important to note that private property does not eliminate all externalities. Private property schemes are flexible with regard to the allocation of entitlements; nothing demands that all property owners receive equal shares in the commons. Yet, private property regimes rarely achieve a full accounting of costs among property owners.¹⁷⁵ Generally, some negative externalities of property use escape full accounting, creating the need for some external regulatory mechanism such as tort (primarily nuisance) or explicit government regulation.

2. Regulation

Regulation is a standard response to various market failures. When markets produce socially suboptimal results, the government is expected to supplement market mechanisms, or even to supplant them altogether in order to remedy deficiencies.¹⁷⁶ In the extreme, the regulator is supposed to set up optimal standards for behavior (e.g., emission quotas), monitor compliance, and prosecute violators.¹⁷⁷ Group size is not an inherent limitation on regulatory schemes, but the cost of monitoring is likely to rise with group size. Monitoring and enforcement are typically performed by government agencies that are set up precisely for this purpose. Naturally, this requires the regulator to have adequate information and expertise for the task.

Regulatory schemes suffer from two major flaws. First, regulators are not themselves market participants, and they lack a direct interest in the outcomes they seek to protect. Regulators are therefore susceptible to being captured by their "clients," who may promise the administrators better working conditions (through the appearance of compliance) or future benefits (such as postgovernment work in the industry).¹⁷⁸ Regulators may also seek to protect their own jobs by instituting unnecessary regulations to foment busywork and adminis-

174. See Heller, *The Tragedy of the Anticommons*, *supra* note 21.

175. See YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 4-6 (2d ed. 1997).

176. See, e.g., Daniel C. Esty, *Towards Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1504 (advocating the correction of market failures through the enforcement of environmental rights); Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 926 (1990) (describing government response to such suboptimal problems as free-riding).

177. See Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 550 (1979) (discussing the theory that government regulation solves problems in unregulated markets).

178. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 672 (2000) (discussing the interdependence of private and public actors).

trative “creep.”¹⁷⁹ Additionally, regulators often lack direct access to information necessary for monitoring, and must therefore rely upon their clients to supply the very information needed to limit the clients’ behavior; to say the least, this creates a potential conflict of interest.¹⁸⁰ Finally, as regulators benefit a particular set of clients, they are likely to create a dynamic of adverse selection, in which the regulators and clients develop increasingly cozy relationships at the expense of the public at large.¹⁸¹ A second, related flaw is the high cost of government regulation. Perhaps due to the regulators’ attenuated relationship to the subject of their work and to the ubiquity of administrative rent-seeking, full-fledged regulatory schemes tend to be enormously more expensive than allocative techniques that use the market.¹⁸²

3. *Social Norms*

One of Ostrom’s most important contributions to the commons literature was positive, rather than normative. In her empirical study, Ostrom observed numerous commons — or common-pool resources, in her terminology — that managed to avoid overexploitation despite minimal government regulation, and notwithstanding the fact that the commons had not been divided among private property owners.¹⁸³ Ostrom attributed the preservation to social norms.

Ostrom noted, however, that such norms could only be successful in governing commons under the limited circumstances in which resource users could be expected to obey social norms, i.e., where users constitute a small and cohesive group, with roughly equal shares in the resource.¹⁸⁴ Absent the small size or cohesiveness, resource users would expect to evade social sanctions, and they could safely ignore the social norms and over-exploit the commons. The utility of social-norm-enforced commons governance is further restricted by high monitoring costs among the group of resource users. Like the privati-

179. See Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1004 (1999) (acknowledging the process of “creeping” as asserting jurisdiction without authority).

180. David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 927 n.29 (2001). On capture theory, see generally, WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); and Stigler, *supra* note 56.

181. See Johnston, *supra* note 15, at 145.

182. See Emerson H. Tiller, *Resource-Based Strategies in Law and Positive Political Theory: Cost-Benefit Analysis and the Like*, 150 U. PA. L. REV. 1453, 1460-61 (2002) (describing the expense of policymaking by rulemaking for an administrative agency); Jonathan B. Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 704-35 (1999).

183. See OSTROM, *supra* note 31.

184. *Id.*

zation remedy, governance of commons through social norms effects internalization of costs only among users (or owners, in the case of privatization), and does not block the creation of negative externalities. Such externalized costs are left to such devices as tort law or government regulation.

4. *Antiproperty*

Governance of the commons through antiproperty mechanisms is recommended when: (1) transaction costs are high (and consequently, private ordering cannot be relied on to achieve the socially desirable outcome); (2) effective social norms are unlikely to develop on account of group size and lack of cohesiveness; (3) regulation is either excessively costly or impractical due to inadequate information; and (4) the ideal management of the commons involves complete or staggered conservation. When these conditions obtain, antiproperty provides an attractive alternative to the traditional means of commons governance as it involves negligible set-up costs, requires little information, and is self-enforcing.

Moreover, antiproperty protection of commons generates positive externalities to the public at large. This is due to the peculiar nature of this regime as rights delivered to those especially benefited on behalf of a larger group of beneficiaries. The protection of the interest of the larger public comes at no additional cost to the easement holders, but rather stems from the dispersion of rights and the concomitant coordination costs imposed upon would-be developers.

B. Utilizing Antiproperty to Govern Conservation Commons

The practical usefulness of antiproperty as a regulatory tool stems from three factors. First, antiproperty is a privately owned entitlement, protected through the ordinary legal system. If an interloper begins undesired development on the protected property, owners of the antiproperty entitlements will have recourse to law enforcement and the courts to enforce their rights. The executive organs of the state, by contrast, will be able to stand aside, and permit the ordinary legal process to block the undesired development. Owners of antiproperty rights are likely to oversee their own property and bear the responsibility of enforcing their entitlements. Antiproperty therefore presents decisionmakers with a conservation tool whose cost is not borne by the public purse.

Second, antiproperty places the duty to monitor on those actors who already have the best access to information about the protected resources and can perform this task at the least cost. The surrounding property owners are in constant contact with the protected green space; indeed, it is this contact that produces for them the special

value they attach to the park. For these neighbors, collecting information about the green space is a natural byproduct of their daily activities and creates no marginal cost.

Third, shifting attention to the benefit side, antiproperty rights are vested in precisely those persons who have the greatest interest in protecting the endangered resource. The easement holders are selected on the basis of a pecuniary interest in the park that sets them apart from the public. The addition of antiproperty easements, therefore, compounds their incentive to protect the integrity of green spaces in court.

It is worth stressing that while our proposal involves a hybrid of public and private rights, the combination is uniquely suited to preservation of conservation commons. The public-private hybrid we devise rests on combining different types of nonpossessory property rights vested in different actors. In addition, the privileged group members are not entitled, by law, to any special use benefits. Nor can they exclude outsiders from enjoying the benefits produced by conservation. Hence, the term “antiproperty.”

The three most important rights in the “property bundle” are the right to exclude, the right to use, and the right to transfer.¹⁸⁵ Antiproperty easements are nonpossessory, practically inalienable, and confer no special-use rights. In addition, insofar as they are exclusive (only of developers), this attribute is necessary to achieve a predominantly inclusive regime in which the general public may very well enjoy the lion’s share of benefits. Thus, while the easements may technically be classified as property — mainly because of the almost infinite flexibility of the term¹⁸⁶ — they are better viewed collectively as “antiproperty.”

The extant commons literature has hitherto focused primarily on possessory and usary rights in commons. This focus has limited the analysis to three paradigmatic cases: (a) private ownership and private regulation; (b) common ownership and public regulation; and (c) common ownership and private regulation. We show, however, that conservation commons may be preserved with hybrids of both ownership and regulation. In our paradigmatic case, private antiproperty rights work alongside common ownership, and private market dynamics supplement public decisionmaking. This reshuffling of the traditional elements of commons analysis produces an ironic but highly desirable result. By employing private nonpossessory entitle-

185. For discussion of the “bundle of rights” theory of property, see generally, LAWRENCE C. BECKER, PROPERTY RIGHTS PHILOSOPHIC FOUNDATIONS 11-21 (1977); STEPHEN R. MUNZER, A THEORY OF PROPERTY 22-36 (1990); WALDRON, *supra* note 19, at 47-53, 59-60.

186. See Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1519-20 (2003).

ments, decisionmakers ensure limited open access commons,¹⁸⁷ and guarantee equal use rights to all members of the public regardless of their proximity to the park.

C. *The Hidden Virtues of Transaction Costs*

A key component of our proposal is the deliberate creation of transaction costs — generally considered the bane of efficiency — in order to remedy inefficiencies in the market for conservation. Two notes about this strategy are in order. First, we are aware of the dangers inherent in using transaction costs as a proxy for unaccounted for public benefits of conservation. There is no direct correlation between the two values, and inaccurate estimates of the two figures could lead to too much conservation. Therefore, it is imperative to introduce flexibility into antiproperty easements — a challenge we address head on in the next Part.

Second, it is worth mentioning other contexts in which transaction costs have been used as a proxy in remedying market failures. For instance, the National Environmental Protection Act (“NEPA”) requires environmental-impact statements to be produced for many public projects.¹⁸⁸ As interpreted by the courts, NEPA’s requirement is mainly procedural. The relevant agency must fully examine environmental impacts and issue a report; if the report is found inadequate by the courts, the agency need only study the impact further, and produce a new report.¹⁸⁹ Yet, many environmental protection advocates have hailed the substantive effects of NEPA.¹⁹⁰ One possible way of under-

187. In principle, the resource is subject to open access. As we explained, inclusion of the public at large lies at the heart of antiproperty regimes. We add the “limited” proviso strictly because uses inconsistent with conservation, such as undesired development, are excluded.

188. National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq. (2002).

189. See Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 921 (2002) (noting that neither the statute nor the courts have imposed a minimum adequate standard on NEPA with regard to environmental assessments).

190. See Lynton K. Caldwell, *Implementing NEPA: A Non-Technical Political Task*, in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT AND FUTURE 25, 26 (Ray Clark & Larry Canter eds., 1997); Karkkainen, *supra* note 189, at 970; William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: “The Whats”*, 2000 U. ILL. L. REV. 1, 31 (“The most admired of all the environmental laws is the NEPA. It is admired for its form, its structure, and its robustness. It is praised for its eloquence of formulation and for the cleverness in the way it was attached to existing agency mandates. It has been emulated by a hundred other initiatives. It is celebrated for any number of paradigm shifts — from simple public policy evaluation to impact assessment to comprehensive rationality to ecological experimentation to public participation to integrated decisionmaking.”). *But see* Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239 (1973) (“I know of no solid evidence to support the belief that requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of the administrative decisions. I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil.”).

standing these effects is as the result of transaction costs. NEPA creates reporting costs for would-be-developers as a proxy for the unaccounted-for public interest in environmental protection, and these costs deter certain projects at the margin.¹⁹¹ Naturally, this is a very rough proxy, as there is no inherent correspondence between the costs of reporting and the magnitude of the public interest.

Finally, our antiproperty proposal thus far, based as it is on creating holdout problems through the generation of transaction costs, creates only a second-best solution to the problem of preserving conservation commons. Our mechanism does not lead the relevant parties (developers, neighbors, et al.) to internalize fully the benefits and costs of conservation and development. Rather, it leads to efficient results on the assumption that decisionmakers have correctly identified the commons as one whose ideal "use" is conservation. As we show in the next Part, a first-best solution is attainable when antiproperty easements are combined with another key element in the law of entitlements: the takings power.

IV. ANTIPROPERTY AND ENTITLEMENT THEORY

Thus far, we have introduced the concept of antiproperty easements, situated it within property theory, and demonstrated its normative appeal as a policy tool. A seeming challenge we have eluded so far is flexibility. To be sure, circumstances change, and conservation that was desirable at one time may be less so at another. Indeed, it is for this reason that property law disfavors permanent limitations on alienability,¹⁹² and provides tools like the power of eminent domain for overcoming holdout problems.¹⁹³ In this Part, we show that antiproperty can be combined with other powers such as eminent domain in order to create regimes that are sensitive to change. Indeed, we show that when the takings power is added to the picture, the mechanism of antiproperty easements can lead to first-best outcomes for the preservation of conservation commons, giving policymakers two innovative

191. Likewise, Thomas Merrill has argued for a "due process tax" to deter the government from using its takings power excessively. See Merrill, *Public Use*, *supra* note 136, at 77-81. The gist of the proposal is to insist that "courts strictly enforce procedural limitations on the exercise of eminent domain." DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 205 (2002). Implementing this proposal would increase the cost of takings for the government, and ensure that the eminent domain power is only used "where the surplus to the taker is greater than the due process tax." *Id.* at 206.

192. See, e.g., Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 755 (1988) (viewing the restraints on alienability with disfavor); see also DUKEMINIER & KRIER, *supra* note 14, at 227 (explaining the objections to restraints on alienation).

193. See, e.g., Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2112 (1987) (resorting to eminent domain when holdouts prevent voluntary transactions).

approaches for dealing with the conservation challenge: a second-best and a first-best mechanism.

Our second-best mechanism is a private mechanism, predicated on voluntary transacting, which preserves parks and green spaces as undeveloped conservation commons. Our first-best mechanism requires government mediation or delegation, through the power of eminent domain. While the first-best mechanism allows for development of certain parkland, it guarantees that such development will only occur when it is efficient.

To demonstrate the flexibility and utility of antiproperty, we connect antiproperty to our previous work,¹⁹⁴ and place it within the broader frameworks of entitlement theory and the law of takings. We begin by reviewing Guido Calabresi and Douglas Melamed's famous model of property rules and liability rules.¹⁹⁵

A. Flexible Antiproperty and Pliability Rules

Calabresi and Melamed's classic model divides the world of entitlements into three types of protection: property rules, liability rules, and inalienability rules.¹⁹⁶ Entitlements protected by property rules may only be taken with the consent of the entitlement owner, allowing owners to determine the price of their entitlement.¹⁹⁷ Liability-rule protection, by contrast, allows potential takers to avail themselves of other people's entitlements as long as they are willing to pay a collectively determined price that is usually set by a court, a legislator, or an administrative agency.¹⁹⁸ Inalienability rules bar transfer of the entitlement altogether.¹⁹⁹ The differences between the rules may be illustrated with reference to the celebrated case of *Boomer v. Atlantic Cement Co.*²⁰⁰ In *Boomer*, homeowners near Atlantic Cement's manufacturing plant complained that the plant's pollution gave rise to an actionable nuisance, and sought to enforce their property rule protection with an injunction that would close down the plant. The court, however, decided to grant the homeowners only liability-rule protection, permitting the plant to continue operations, subject to the payment of permanent damages to the homeowners.²⁰¹

194. See Bell & Parchomovsky, *Givings*, *supra* note 27; Bell & Parchomovsky, *Pliability Rules*, *supra* note 28; Bell & Parchomovsky, *Takings Reassessed*, *supra* note 26.

195. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. 257 N.E.2d 870 (N.Y. 1970).

201. *Boomer*, 257 N.E.2d at 875.

The three forms identified by Calabresi and Melamed may be joined by a fourth variety. Entitlements are often protected by amalgamated “pliable” protection that incorporates elements of both property and liability-rule protection.²⁰² Pliability, or pliable, rules are contingent rules that provide an entitlement owner with property- or liability-rule protection as long as some specified condition obtains; once the relevant condition changes, however, a different rule protects the entitlement — either liability or property, as the circumstances dictate.²⁰³ For example, in *Boomer*, the court might have employed a two-stage rule of liability-rule protection followed by property-rule protection. The court could have achieved this by issuing an injunction that would block the plant’s operation, but would take effect only in, say, ten years. In the meantime, the plant could continue operations in exchange for the payment of damages to the homeowners.²⁰⁴

Pliability rules are flexible tools; the shift between different stages of rule protection may be triggered by time (as in our *Boomer* example), changed circumstances, magnitude or nature of use of the entitlement, or a combination of these factors.²⁰⁵ For our purposes, the importance of pliable rules lies in their ability to contain built-in limitations on property-rule protection.

As we have described antiproperty easements thus far, they are entitlements formally defended by property-rule protection and substantively governed by an inalienability regime.²⁰⁶ Indeed, each owner is empowered to set a price for transferring her easements; and that power creates the holdout dynamic that in turn makes each owner’s easement effectively inalienable. Decisionmakers may not want a conservation regime to govern a commons forever, however.²⁰⁷ In such cases, the antiproperty easements could be given the characteristics of pliability-rule protection.

For instance, antiproperty easements may be used to delay or stagger development, rather than to block it forever. To accomplish this, decisionmakers may impose a time limit on the antiproperty easements. Upon the passage of the specified time the easements would expire and the barrier to the development of the commons would be alleviated. Assume, for example, that decisionmakers in the town of

202. Bell & Parchomovsky, *Pliability Rules*, *supra* note 28.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Supra*, Parts II.C-III.

207. Cf. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 744 (2002) (cautioning that, due to their binding effect on future generations, conservation easements “may further the interests of members of the present generation at the expense of future generations”). We discuss conservation easements further in Part V.B.3, *infra*.

Evergreen Park, Illinois foresee a possibility that in twenty years, the downtown commons currently used as a park will be more efficiently used as commercial and residential space. In order to ease the transition, and protect the commons in the meantime, Evergreen Park can issue twenty-year antiproperty easements to nearby neighbors of the commons. Pliability-oriented antiproperty easements thus create an option not only for conserving environmentally valuable resources, but also for regulating the speed of development.

An alternative pliability-oriented antiproperty easement could follow up the formal property-rule stage with liability-rule protection. These antiproperty easements would require the consent of easement-owners for transfer of the easements in the first stage. In response to changed circumstances, or some other trigger, however, the easements would enjoy only liability-rule protection. This would allow developers to build upon the affected green space in exchange for the payment of damages to easement owners. Returning to our previous example, to allow development and simultaneously compensate affected nearby neighbors, Evergreen Park could issue perpetual antiproperty easements which would only enjoy property-rule protection for twenty years. Thereafter, others could use the protected property without the consent of the easement holders, so long as they pay damages in the amount stipulated by the municipality or the court. The shift to a liability-rule regime eliminates the holdout problem and reintroduces full alienability to the easements.

Decisionmakers can use the same design to adapt the easements to unforeseeably changed circumstances as they occur. For example, over time, owing to demographic changes, there is a danger that a city park could become a magnet for illegal drug transactions, and, therefore, a nuisance to proximate-property owners. To counter this threat, decisionmakers could stipulate that if there are over a certain number of arrests for serious crimes in the park in any given time period, the easements would terminate.

The above examples demonstrate that antiproperty easements do not have to be constructed to lock resources in their undeveloped state in perpetuity. Rather, antiproperty easements are an adaptable tool, sensitive to changing circumstances, that may be used in numerous ways by decisionmakers to promote various policy goals. A final example illustrates how antiproperty easements may be useful for ensuring no net loss of green space within a given region. Again, the key to achieving this policy lies in the use of a pliability mechanism. Rather than starting the liability phase upon the passage of a certain period of time, decisionmakers could stipulate a different triggering event: liability protection would begin once a potential taker of the easement aggregated within her possession alternate green space of greater volume than the green space she proposed to develop. For instance, if Concrete Jungle wished to convert forty acres of protected

green space into a factory, it could trigger the shift to liability protection by purchasing more than forty acres of space elsewhere, and dedicating them to conservation by distributing antiproperty easements to nearby neighbors of the new location.²⁰⁸

B. *Antiproperty, Takings, and Givings*

The government's power of eminent domain, also known as its takings power, is seen as the quintessential means for government to overcome strategic problems in the property market.²⁰⁹ Where it finds the necessity to do so, the government may avoid the ordinary market for property. Instead, it may employ its power to take property, so long as it abides by the constitutional requirement that it pay "just compensation," i.e., the property's fair market value.²¹⁰

Technically, the Constitution adds a further requirement before an act of eminent domain: the taking must be for a "public use."²¹¹ In practice, however, courts find any purpose as "public use" for constitutional purposes.²¹² The takings power thus remains almost boundless. Indeed, the government often uses its takings power to assemble properties for private interests; sometimes, it even delegates its power of eminent domain to private actors.²¹³

208. In citing this example, we do not intimate that either "no net loss" or "permanent conservation" is a preferred strategy; implementing a no-net-loss policy for green space could involve some difficult legal and factual determinations. Decisionmakers might profit from examining the experience of the federal no-net-loss policy for wetlands. For a discussion of some of the issues that have arisen, see, for example, Michael C. Blumm, *The Clinton Wetlands Plan: No Net Gain in Wetlands Protection*, 9 J. LAND USE & ENVT'L. L. 203 (1994), and S. Scott Burkhalter, Comment, *Oversimplification: Value and Function: Wetland Mitigation Banking*, 2 CHAP. L. REV. 261 (1999).

209. See Merrill, *Public Use*, *supra* note 136, at 65 (arguing that the purpose of eminent domain is to facilitate transactions that would not occur voluntarily); Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177, 1192 (2002) (explaining how the government negates the ability of owners to free-ride through the use of eminent domain); Rose, *supra* note 32, at 750 (describing the anti-holdout rationale for the building of public roads and waterways).

210. See Douglas T. Kendall & James E. Ryan, "Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan, 81 VA. L. REV. 1801, 1816 (1995) (explaining landowners' entitlement to just compensation); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 896 (1989) (justifying the use of fair market value to calculate just compensation).

211. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Donald J. Kochan, "Public Use" and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998) (calling for reinterpreting the Takings Clause to reduce private rent-seeking).

212. See Merrill, *Public Use*, *supra* note 136, at 63 (characterizing the history of eminent domain as one of extreme deference); Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 410 (1983) (acknowledging that the requirement for public use has relaxed considerably).

213. See Abraham Bell, *Private Takings* (unpublished manuscript, on file with authors); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 979

The power of eminent domain thus provides a potential escape route for developers seeking to evade the restrictions on conservation commons created by antiproperty easements. Developers can use their superior political power to persuade decisionmakers to seize all the relevant easements, thereby permitting development. In the case of a taking, the government would be required to pay just compensation to the easement holders. Nothing in the current law would require the developer to reimburse the public fisc for this expense, or for the value it will be given, however.²¹⁴ Moreover, neither the government nor the developer would have to make any payment to conservation beneficiaries lacking property interests. Thus, from the developer's viewpoint, the process would not pose any substantial additional deterrent to inefficient development.²¹⁵ Furthermore, the holdout dynamic would not pose a barrier to the development, since easement owners would not be able to block the government taking. Worse yet, since the easement holders would be fully compensated, they would have very little incentive to lobby against the inefficient development. This means that the public's interest in conservation would receive no representation in the case of a taking.

Preventing takings from undermining the entire regime of conservation commons requires two important steps. First, decisionmakers must close the loophole in the law of takings which allows private beneficiaries to enjoy taken property while compensation is paid from the public purse. Developers — the beneficiaries of the act of eminent domain — must be forced to pay the just compensation out of their own pockets, or to reimburse the government for the value of the givings they receive (i.e., the fair market value of the easements). Second, the magnitude of the compensation, or the charge for the giving, must be made to reflect the interests of the wider public that enjoys the park. This may be accomplished either by applying a multiplier to the compensation that must be paid per easement, or by adding an additional easement that represents the public interest. These two meas-

(2000) [hereinafter Merrill, *Constitutional Property*] (analyzing the effects of delegating the power of eminent domain); Merrill, *Public Use*, *supra* note 136, at 75 (describing the building of an oil pipeline where only one feasible route exists); *cf. In re Condemnation of 110 Washington St.*, 767 A.2d 1154, 1159 (Pa. Commw. Ct. 2001) (holding that power of eminent domain “may not be delegated by agreement or contract”).

214. In *Givings*, we noted the inefficient decisions produced by the failure to require recipients of government largesse a fair charge for the giving parallel to the compensation they would be paid were their property taken. Bell & Parchomovsky, *Givings*, *supra* note 27, at 553. To be sure, a full givings regime would require charging not just the developers, but also the nearby neighbors who initially receive the antiproperty easements.

215. If the political process placed a greater price on takings than on permitting development, the necessity of resorting to eminent domain would pose a real barrier to the developers. Our model, however, has thus far assumed that political decisions are made in accordance with the magnitude of campaign contributions, rather than according to a pay scale depending on the nature of the act.

ures would lead would-be developers to internalize the cost of their actions, and pave the way for development only where its benefits truly outweighed the costs. Each of these elements warrants further explanation.

Requiring the developers to compensate easement holders would force them to account for the cost of the proposed development, and thus, would serve as an internalization mechanism. Legally, this result may be achieved in one of two ways. The government may delegate its takings power to a private developer — as it sometimes does in the case of utility companies²¹⁶ — and mandate that the developer pay compensation to affected easement holders. Alternatively, the government could execute the taking itself, but require the developer who benefits from the act to reimburse it for the amount paid in just compensation. Importantly, in order to make the easements effective, the government must specify in the easements that they may only be taken in one of these two ways.

Forcing developers to pay compensation to easement holders would not lead them to fully internalize the cost of development, however, since they would still ignore the cost to the wider public that enjoys use of the park. Thus, the second important step in preventing takings from undermining the conservation commons regime involves forcing developers to take account of this cost component. To accomplish this, the government can either use a multiplier to increase the compensation award to each easement holder in order to reflect the proportionate share of the public value lost.²¹⁷ The drawback of this solution is that it creates an agency problem. Knowing that they would be compensated above and beyond their private loss, the easement holders may conspire with developers to bring about inefficient or premature development. Therefore, the proportion of the compensation reflecting the public loss should be transferred to a pro-conservation organization, i.e., a body whose utility from preserving the park would exceed any likely compensation to be paid, or one required by charter to exercise a fiduciary duty to protect the public's interest in preservation. Alternatively, decisionmakers could award an

216. See Merrill, *Constitutional Property*, *supra* note 213, at 979 (citing the example of delegation of eminent domain to a private utility prior to the creation of the Tennessee Valley Authority); J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 898 (1996) (discussing the delegation of the power of eminent domain to railroads and utilities). See generally Bell, *supra* note 213.

217. For example, if each easement is worth \$5,000, there are 100 easement holders, and the public value/private value ratio is 1, then each easement holder would receive \$10,000 in compensation. That is, the multiplier is 2 in this case.

additional antiproperty easement that represents the public interest²¹⁸ to a conservation organization to become effective upon a taking.²¹⁹

Of course, a government-mediated takings process will not be costless for developers. The urge to take easements through eminent domain will not spontaneously materialize, and the political burden will rest on the developers to produce the funds to move the political process forward. This has the potential of producing substantial transaction costs that would block efficient development if developers also had to pay the full takings compensation discussed here. This distortion is substantially mitigated, however, by the likely reduction in political opposition produced by the payment of compensation. While there will be some owners whose subjective attachment to their easements will make them dissatisfied by the compensation award, many will be satisfied with the compensation paid. Even those who find the compensation inadequate will find the margin of their disappointment less than if the park was destroyed without compensation. And some owners may actually find that they prefer the compensation to the easement. Overall, it is quite likely that the compensation regime will substantially reduce public opposition to development, which should help reduce the developer's costs in the political arena. Indeed, in cases in which full compensation makes easement holders indifferent between conservation and development, so that no lobbying occurs, the takings framework may open the way to a market solution unaffected by the distortions of the political process.

C. *A First-Best Solution*

The takings framework introduces a possibility for attaining a first-best solution for the conservation problem. By using the takings power in combination with antiproperty easements, a legal regime may emerge in which developers will fully internalize the costs and benefits

218. This easement would technically be classified as a negative easement in gross, but would otherwise partake of the qualities of the antiproperty easements granted to proximate-property owners.

219. For simplicity's sake, we have assumed away, in the foregoing discussion, the many practical problems that would likely accompany any attempt to ascertain the magnitude of "just compensation" for antiproperty easements. While such compensation ordinarily reflects the fair market value of the property, in this case there is not likely to be a market for antiproperty rights, making it difficult to establish a baseline. Measuring the fluctuations in property values before and after the granting of antiproperty easements might provide such a benchmark. This, however, would not take account of the fact that even before the granting of the formal easements, nearby neighbors likely benefited from *de facto* easements. A taking, on the other hand, should prompt compensation for the full value of the property; thus, full compensation would rightly include not only the value of the formal easement, but that of the *de facto* easement as well. Cf. Theodore Groves & John Ledyard, *Optimal Allocation of Public Goods: A Solution to the "Free Rider" Problem*, 45 *ECONOMETRICA* 783 (1977) (proposing mechanism for revealing preferences of consumers of public goods despite absence of market).

of their actions, leading them to press forward with development only when it is socially desirable. This possibility stems from the developers' payment of full compensation. The compensation reflects the value of the antiproperty easements, as well as the wider public interest, making the outlay a good measurement of the social benefit produced by the park. Naturally, on the other side of the cost-benefit equation, developers already take into account the profits they expect to earn from a given development project. Thus, once compensation is properly calibrated, developers will move forward only when proposed development produces a net social gain.

In a sense, the compensation that developers must pay for taking antiproperty easements may be seen as "Pigovian taxes" that lead to full internalization.²²⁰ This may be seen graphically below.

1. *No Efficient Development*

Our first graph illustrates the economics of development for a single firm in a competitive market where no development would be the most efficient outcome.

220. "Pigovian taxes are charges for units of an activity that are intended to internalize external costs and thereby bring actors' decisions closer to social optimality." Henry E. Smith, *Ambiguous Quality Changes from Taxes and Legal Rules*, 67 U. CHI. L. REV. 647, 654 n.11 (2000).

FIGURE I.
DEVELOPMENT WITH AND WITHOUT INTERNALIZATION – NO
EFFICIENT DEVELOPMENT

The graph shows the cost function of a possible development company — which we will call Development, Inc. The marginal cost to society of building up a given quantity of area out of parkland is shown by the curve MC . This value includes not only the cost of construction, but also the opportunity costs of retiring the park from public use. The marginal cost borne by Development, Inc. for building up a given area, however, is shown by curve MC' . As can be seen, Development, Inc. need bear only a portion of the marginal societal cost; for any unit produced, the cost borne by Development, Inc. is lower than that borne by society. Finally, the marginal revenue earned by Development, Inc. for built-up area is shown by the line MR — which appears as a straight line, since we are assuming that there is a competitive market for developed property, making Development, Inc. conform to the price of the market. The marginal revenue thus represents the price at which Development, Inc. can sell each additional unit of built-up area.

In this situation, Development, Inc. is likely to produce the quantity Q' of built-up area, since any more than this quantity would produce a marginal loss for Development, Inc., and any smaller output would fail to capture all the profits that could be made by the com-

pany. This output is far greater than the socially optimal output, however. Indeed, the desirable amount of development in the situation illustrated in the graph is 0, shown as Q^* . This is due to the fact that if all the social costs were taken into account, the marginal cost of each unit of development would always exceed the marginal revenue produced by that development.

Using our earlier terminology, this case is one of a conservation commons. The most efficient use of this area is conservation (i.e., non-building). Since Development, Inc. needs to absorb only some of the costs of building, however, it will undertake inefficient building. In such a case, the holdout dynamic produced by distributing antiproperty rights will produce the efficient result. The existence of antiproperty rights will block all development — in this case, all inefficient development.

The availability of a takings option does not change this result. In order to take the antiproperty easements that block development, Development, Inc. would have to pay just compensation. This would force Development, Inc. to bear fully the costs of its development. In such a situation, the company will act as if its cost curve is MC rather than MC'. Thus, Development, Inc. will avoid all development, since no development will be cost effective.

2. *Efficient Development*

In our earlier example, we assumed that there was no efficient development. Antiproperty rights alone thus produced the efficient result. Situations may be hypothesized, however, where some development is efficient. In such situations, the takings regime, when combined with antiproperty rights, leads to full internalization and better outcomes, as demonstrated in the following graph.

FIGURE II.
DEVELOPMENT WITH AND WITHOUT INTERNALIZATION – SOME
EFFICIENT DEVELOPMENT

This figure shares the assumptions from the previous illustration, with one exception. The price that can be received from selling built-up area developed from the park is higher; consequently, Development, Inc. can expect to receive greater marginal revenue from each unit built. This higher marginal revenue is represented by the line labeled “MR (new)”; the marginal revenue in our previous example is labeled “MR (old)” for illustrative purposes. One can imagine that the change in marginal revenue results from an increase in the price of housing, or that the marginal revenue figures differ because the building is in different areas. The other curves — MC and MC' — should be familiar from the previous example.

Given the new expected marginal revenue, Development, Inc.’s decisions will change. Absent the internalization produced by a takings regime in combination with antiproperty rights, Development, Inc. will fail to take into account costs borne by the public, and it will build the quantity specified by the intersection of MC' and MR (new), i.e., Q' (new). Much of the development at the level of Q' (new), however, is excessive and reflects Development, Inc.’s failure to fully account for development costs. Once the company is forced to take note of the full social cost of development, it will act as if its marginal

cost curve is MC, rather than MC'. This will lead Development, Inc. to produce the much smaller quantity of Q^* (new), meaning that more parkland will be preserved. Because this calculation takes into account the full costs and benefits for society, Q^* (new) is also the efficient amount of building for society.

Notably, this result can be reached only with the full internalization produced by a takings regime that requires payment of full compensation for seized antiproperty easements. Were antiproperty easements to be distributed without the possibility of subsequent takings, the likely outcome would be no building at all. In this situation, that would be an inefficient result.

V. DISCUSSING POTENTIAL OBJECTIONS

In this Part, we discuss some potential objections to an antiproperty regime and compare our proposal to potential alternatives. We begin by examining the likely social outcomes of introducing an antiproperty regime, focusing on whether granting antiproperty rights should be seen as objectionable on distributive grounds. We then address the question of whether antiproperty regimes are superior to their potential competitors. Among our important points of reference here are the public-trust doctrine, the doctrine of environmental standing, and conservation easements. After comparing the various alternatives, we specify the conditions under which each policy tool should be used, thereby providing a comprehensive menu for land use policy that takes account of conservation goals.

A. *Social Impacts of Antiproperty Regimes*

1. *Distributional Effects*

On the surface, the distribution of antiproperty easements seems to raise concerns about distributive justice, since the proposal involves the transfer of rights over public property to private hands that already gain unusual benefit from that property. Yet, a closer look shows that our proposal has quite desirable distributive effects. While it focuses on certain property owners and enhances the value of their properties, it also bestows direct benefits on the public at large. This result is enabled by the fact that antiproperty easements do not diminish the access and use rights of third parties; they only serve to impede development. Thus, the recipients of antiproperty easements also become "trustees" for the public at large, which otherwise lacks a dependable way to protect its share in a public good.

Simultaneously, formalizing antiproperty easements places the cost of conservation on those who receive particular benefits. In the case of Central Park, for example, the affluent owners of luxury housing bear

the burden of preserving open space for all citizens. Perversely, perhaps, our analysis enhances the wealth of the general public by recognizing property rights in the most affluent members of our society. Owners of luxury housing near open spaces contribute to conservation in three different ways. First, because the value of their property depends on the continuous existence of the park, the owners of realty abutting the park will do everything in their power to arrest harmful development. Second, the higher value of the property near parks translates into higher tax payments that are used, in part, to maintain the parks. Third, and finally, studies reveal that owners of luxury housing near parks donate disproportionately to the maintenance of the parks.²²¹ Thus, we submit that the development of luxury housing on the fringes of parks and open spaces is an important key for stable conservation with desirable distributive effects.

As we show in Part V.B below, private conservation mechanisms clearly outperform public schemes in ensuring cost-effective conservation. Our proposal not only reduces enforcement and monitoring costs that would otherwise be borne by the public at large; it also makes the beneficiaries of antiproperty easements responsible for those reduced costs. The recipients of the public largesse are thus also the bearers of the public responsibility. All segments of the public (other than inefficient developers) should therefore expect to gain.²²²

2. *Dynamic Effects*

By stabilizing green spaces, antiproperty mechanisms can enhance the positive dynamics that lead homeowners to seek the efficient conservation of parks and nature preserves. Generally, property owners seek to discourage the nearby location of properties that produce negative externalities, while encouraging the location of properties that produce positive externalities. This natural tendency is responsible for the much remarked-upon NIMBY (Not In My Back Yard) phenomenon, in which homeowners acknowledge the social utility of a particular land use but combat its nearby location because of localized negative externalities.²²³ The positive externalities created by green

221. In 2000, for example, wealthy nearby neighbors donated \$19 million to Central Park. Barbara Stewart, *Central Park-Like Rebirth Is Sought for Other Parks*, N.Y. TIMES, Jan. 27, 2001, at B1. This may be explained by the special "endowment effect" such property owners share with respect to the park. See Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193 (1991).

222. As we show in Part IV, *supra*, flexibility can be added to antiproperty mechanisms to reduce the burden on developers as well.

223. See *supra* note 25. NIMBY, it turns out, belongs to the family of property acronyms known as LULU ("Locally Undesirable Land Use"). See DUKEMINIER & KRIER, *supra* note 14, at 1063 & n.32; cf. Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

spaces can create the opposite YIMBY (Yes In My Back Yard) phenomenon, in which property owners will seek the nearby location of the socially beneficial land uses. Antiproperty easements enhance this trend by providing the inverse of a nuisance suit. Nuisance permits proximate-property owners to counteract negative externalities affecting the enjoyment of their property. Antiproperty easements, on the other hand, permit nearby neighbors to bring enforcement actions to preserve positive externalities benefiting their property. The enhanced YIMBY effect promoted by antiproperty easements should, in turn, increase the ex ante incentive to seek local development of parks and green spaces.

B. *Policy Alternatives*

In this Section, we examine the possible policy alternatives to an antiproperty regime, focusing on the public-trust doctrine, expanded environmental-standing doctrines, and the use of conservation easements. While we determine that each tool has its use in a scheme of conservation, none provides a complete alternative to the use of antiproperty.

1. *Public Trust*

The public-trust doctrine holds that “some resources, particularly lands beneath navigable waters or washed by the tides, are either inherently the property of the public at large, or are at least subject to a kind of inherent easement for certain public purposes.”²²⁴ In an influential article in 1970, Joseph Sax argued for the expansion of the public-trust doctrine in order to more effectively protect natural resources.²²⁵ Sax argued both for a revival of the largely dormant doctrine, and for the inclusion of a wide array of environmental goods (in addition to the traditional water-related resources) in the scope of the doctrine.²²⁶ Sax hoped that the public-trust doctrine would become a tool for courts to engage in more probing judicial review of state actions that adversely impacted publicly and privately owned environmental resources.²²⁷ In Sax’s formulation, a court should “look with considerable skepticism upon any governmental conduct which is cal-

224. Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351, 351 (1998).

225. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471 (1970).

226. *Id.*

227. *Id.*

culated either to reallocate that resource to more restrictive uses or to subject public uses to the self-interest of private parties.”²²⁸

Sax intended the public-trust doctrine to produce a trust dynamic similar to that sought by antiproperty easements. Faced with distortions in the market and a political arena inimical to conservation, Sax sought to appoint a set of guardians to watch over the underprotected environmental concerns.

Yet, notwithstanding courts' sporadic use of the public-trust doctrine to strike down measures perceived as environmentally unfriendly, Sax's efforts fell short of his stated goal.²²⁹ Courts have proved reluctant to accept the mantle Sax wished to bestow upon them, and even where they have, they have not necessarily reached the judgments that Sax would prefer.²³⁰ In our analysis, the chief failing of Sax's proposal is its failure to take into account the incentives of the chosen trustees and the vices of the institutional actors on whom his proposal so critically depends.

In the public-trust doctrine, the government is expected to see itself as a trustee of certain natural resources for the benefit of the public, and the courts are expected to enforce the fiduciary relationship. Yet it is precisely the failings in governmental decisionmaking that led to Sax's proposal, and one could hardly expect the political process to change because of the invocation of the magic words “public trust.” The courts, therefore, must play a crucial role in forcing the government to fulfill its duties, but the courts have very little incentive to do so. Determining the efficient use of natural resources is a time-consuming and information-intensive endeavor of the kind that courts are ill-equipped to conduct.²³¹ Moreover, even if courts were equipped to handle the task, it cannot be taken for granted that they would arrive at the conclusions desired by Sax. Judges of different backgrounds and viewpoints value natural resources differently, and one would expect that some jurisdictions would block too much develop-

228. *Id.* at 490 (emphasis removed).

229. See Sax, *supra* note 225 (citing cases using the public-trust doctrine for environmental issues); Sharon M. Kelly, Note, *The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895, 912 (1989) (describing courts' ability to use the public-trust doctrine to require environmental impact studies).

230. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986) (reviewing successes and failures). See also Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 (1991).

231. See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1306 (1982) (“[C]ourts lack the capacity to gather and analyze data that are needed to gauge the economic benefits of increased regulatory protection.”).

ment, while others would block too little.²³² Instead of ensuring optimal development, the public-trust doctrine could bring about too much and too little conservation, depending on the jurisdiction.

By contrast, our antiproperty mechanism avoids this central pitfall. Our trustees, the antiproperty easement holders, have a pecuniary incentive in conservation since the values of their properties depend on the continued existence of parks and green spaces. Additionally, due to their immediate proximity to the conserved area, the nearby neighbors are uniquely positioned to monitor its use and acquire information cheaply. Yet, in our system, the trustees' role is mostly passive. Conservation commons can be preserved (or disbanded in the case of takings) without any significant action on the part of the easement holders. Indeed, the holdout dynamic generated by the easements locks the easement holders into their roles as trustees.

An even more important virtue of our proposal is its reliance on a predominantly private market mechanism for achieving conservation. The reduced public role in enforcement of conservation lowers costs and eliminates the agency problem that plagues public enforcement schemes. The ideological disposition of the easement holders is irrelevant, as is that of the developers. Moreover, no bribes or other financial incentives are likely to undermine the conservation-commons regime. Finally, absent naked trespass (a highly unlikely occurrence), there is virtually no need for enforcement, greatly reducing the cost of oversight.

2. *Environmental Standing*

Similar observations may be made concerning proposals for special standing doctrines in environmental litigation. Periodically, proposals have been made to relax the requirement of standing in order to allow more litigants into court to plead for environmental protection, notwithstanding their lack of a traditional connection to the legal claim.²³³ The most extreme and intriguing of these suggestions was made by Christopher Stone, who proposed granting standing to in-

232. See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (describing an empirical study finding that ideology plays an important role in judicial decisionmaking in the D.C. Circuit).

233. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 751-55 (1972) (Douglas, J., dissenting); Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 Nat. Resources J. 76 (1973); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165-66 (1992) (arguing for creating a bounty for environmental claimants, in order to provide the injury-in-fact necessary to establish standing); cf. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (allowing students attenuated standing for an environmental claim).

animate natural objects in order to defend themselves in court.²³⁴ The efforts to relax standing should be seen as the procedural counterparts to Sax's suggestions regarding the public-trust doctrine. Both sets of claims aim at expanding the courts' role in overseeing environmental protection: the public-trust doctrine by adding to the menu of substantive claims that can be brought by environmentalist litigants, and environmental standing doctrines by eliminating procedural barriers. Nominally, each targets a different set of trustees — judges or environmentalists — but, in fact, both require both sets of trustees in order to achieve their goals.

Unfortunately, expanded environmental standing, if granted, would likely not overcome the shortcomings of the public-trust doctrine. Environmentalists' increased access to courts would not guarantee the solicitousness of the judges or their ability to oversee the complex information-gathering process that would have to accompany their determination of the issues. Nor would environmental standing doctrines bring preservation of conservation commons out of the public arena. Unlike Sax, who called for the creation a new substantive cause of action, champions of expanded environmental standing only seek to clear a procedural hurdle, while relying on traditional claims under administrative law for substance. Yet, absent a new substantive cause of action, such as Sax's public-trust doctrine, it is unclear that environmental litigants would fare well in court.

While we do not doubt the genuine commitment of environmental groups to conservation, budget constraints, high monitoring costs, and the reliance on litigation as an enforcement mechanism may combine to prevent these groups from achieving their professed goals.

3. Conservation Easements

A conservation easement is "a negative restriction on land which prohibits a landowner from using her land in a manner that will change the ecological, scenic, open or natural state of the land."²³⁵ Conservation easements are widely recognized in state law,²³⁶ and are

234. Christopher Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

235. Kimberly K. Winter, Comment, *The Endangered Species Act Under Attack: Could Conservation Easements Help Save the ESA?*, 13 N. ILL. U. L. REV. 371, 385 (1993) (footnote omitted).

236. See ALASKA STAT. §§ 34.17.010-34.17.060 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (West 2000); ARK. CODE ANN. §§ 15-20-401 to -410 (Michie 2000); CAL. CIV. CODE §§ 815-816 (West 1982); COLO. REV. STAT. §§ 38-30.5-101 to -111 (2002); CONN. GEN. STAT. §§ 7-131b-d (2003); D.C. CODE ANN. §§ 45-2601 to -2605 (2001); FLA. STAT. ANN. § 704.06 (West 2000); GA. CODE ANN. §§ 44-10-1 to -8 (2002); HAW. REV. STAT. ANN. §§ 198-1 to -6 (Michie 1988); IDAHO CODE §§ 55-2101 to -2109 (Michie 2003); 505 ILL. COMP. STAT. ANN. 35/2-1 (2003); IND. CODE ANN. §§ 32-23-5-1 to -8 (West 2002); IOWA CODE ANN. §§ 457A.1-457A.8 (West 1996); KAN. STAT. ANN. §§ 58-3803 to -3809 (1991);

generally created by private agreement between owners of the green space and government agencies or private conservation organizations that purchase the conservation easements. Conservation easements protect the designated property in perpetuity, though they usually may be discharged by circumstances that make it impossible for the property to continue to meet its intended purpose.

Conceptually, our antiproperty easements differ in three important respects from ordinary conservation easements. First, with conservation easements, private property owners generally cede non-possessory rights in privately owned green spaces to public (e.g., government agency) or quasi-public (e.g., an environmental group) organizations.²³⁷ Our antiproperty easements move in the other direction: the government grants the easement to private property owners, thereby divesting itself from one of the sticks in its bundle of property rights. Second, and relatedly, usually there is but one conservation easement per green space. Numerous antiproperty easements are created for each space and ownership in them is widely dispersed. As we explained earlier, the dispersal of easements is critical to creating an antiproperty regime that enhances conservation. Third, conservation easements are generally thought to be immutable and perpetual. Absent the most extraordinary circumstances, conservation easements are expected not to be transferred; they protect the property in its pristine state forever. Antiproperty easements, however, when combined with takings regimes, or when protected by pliable protection, may be dissolved in order to permit efficient development.

These differences notwithstanding, conservation easements and antiproperty easements may share certain characteristics. To the extent that conservation easements are granted to environmental groups (as opposed to the government), both mechanisms shift enforcement

KY. REV. STAT. ANN. §§ 382.800-382.990 (Michie 2002); LA. REV. STAT. ANN. §§ 9:1271-9:1276 (West 2000); ME. REV. STAT. ANN. tit. 33, §§ 476 to -479-B (West 1966); MD. CODE ANN. REAL PROP. § 2-118 (2003); MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (West 2002); MICH. COMP. LAWS ANN. §§ 324.2140-324.2144 (West 1997); MINN. STAT. ANN. §§ 84C.01-84C.05 (West 1995); MISS. CODE ANN. §§ 89-19-1 to -15 (1999); MO. ANN. STAT. §§ 67.870-67.910 (West 1998); MONT. CODE ANN. §§ 76-6-201 to -211 (2003); NEV. REV. STAT. ANN. §§ 111.390-111.440 (Michie 2001); N.H. REV. STAT. ANN. §§ 477:45-477:47 (2001); N.J. STAT. ANN. §§ 13:8B-1 to -9 (West 2003); N.M. STAT. ANN. §§ 47-12-1 to -6 (Michie 1978); N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to -0311 (McKinney 1997); OHIO REV. CODE ANN. §§ 5301.67-5301.99 (Anderson 1989); OR. REV. STAT. §§ 271.715-271.795 (2001); PA. STAT. ANN. tit. 3, §§ 914.1-914.2 (West 1995); R.I. GEN. LAWS §§ 34-39-1 to -5 (1995); S.C. CODE ANN. §§ 27-8-10 to -80 (Law. Co-op. Supp. 1976); TENN. CODE ANN. §§ 11-13-101 to -117, 66-9-301 to -309 (1999); TEX. NAT. RES. CODE ANN. §§ 183.001-183.005 (Vernon Supp. 2001); UTAH CODE ANN. §§ 57-18-1 to -7 (2000); VA. CODE ANN. §§ 10.1-1009 to -1016 (Michie 1998); WASH. REV. CODE ANN. § 64.04.130 (West 1994); WIS. STAT. ANN. §§ 61.34(3m), 700.40 (West 2001).

237. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 741-42 (2002).

of conservation from public to private entities.²³⁸ Even then, however, conservation easements suffer from two disadvantages. First, since the grantees of the easement do not have immediate access to the protected resource, monitoring is substantially more costly. Second, conservation easements are much less appealing politically. Antiproperty easements should appeal to politicians because they benefit voters who are likely to be among their constituents. The beneficiaries of antiproperty schemes are all local voters, who are likely to repay politicians who bestow benefits on them. Conservation easements, on the other hand, do not offer a similar quid pro quo. The beneficiaries of conservation easements are often nonlocal actors, and benefiting them is unlikely to yield meaningful returns to local politicians who determine land use policy. Thus, from a pragmatic standpoint, antiproperty easements are a preferable policy tool.

This is not to say, however, that conservation easements are without merit. On the contrary, they are a necessary complement to antiproperty easements. Insofar as conservation of wilderness is concerned, conservation easements are the better policy tool. In such cases, there are often no neighbors in whom antiproperty easements can vest, and decisions about conservation of such resources are made at the national level.²³⁹ Additionally, conservation easements may be an important component of a combined antiproperty-takings regime. As we noted earlier,²⁴⁰ conservation easements may be used to account for the value of public use of a park not captured in the value of the antiproperty easements.

4. *Summary*

We summarize our discussion of the policy tools for conservation in the following table.

238. See also Thompson, *supra* note 29.

239. See Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 41 (1997) (describing the federal wilderness system as an "important conservation asset"). But see John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 564-66 (1996) (calculating that thirty-three million wilderness acres are protected by preservationist owners).

240. See *supra* Section IV.C.

TABLE II. PUBLIC-PRIVATE METHODS OF CONSERVATION

	"Trustees"	Incentives	Monitoring Costs	Enforcement Costs	Who Bears Costs	Potential Drawbacks
Public Trust	Courts (Environmental Litigants)	None (Strong Ideological)	High	High	Public	Reluctant courts, expensive and incomplete monitoring, lack of ready litigants
Environmental Standing	Environmental Litigants (Courts)	Strong Ideological (None)	High	High	Public	Reluctant courts, expensive and incomplete monitoring, lack of ready litigants
Conservation Easements (Government)	Government	Variable	High	Low	Public	Political pressure, expensive monitoring
Conservation Easements (NGO's)	Organizations	Strong Ideological	High	Low	Private	Expensive monitoring
Antiproperty Easements	Nearby Neighbors	Strong Pecuniary	Low	Low	Private	Lack of nearby neighbors for certain resources

Two factors strongly emerge from the tabular comparison of the policy alternatives.

First, the antiproperty easement mechanism possesses a clear cost advantage over its competitors, especially those based upon encouraging environmental litigation. Antiproperty easements create a structure that preserves green space with low monitoring and enforcement expenses, due primarily to the employment of "trustees" who are posi-

tioned to oversee the condition of the protected space and are also highly motivated to do so. While some of the participants in mechanisms employing public trust or expanded environmental standing have a strong ideological motivation for protecting the natural asset, others (i.e., the courts) may lack that commitment. In any event, neither the courts nor the litigants enjoy the easy monitoring of nearby neighbors in possession of antiproperty easements. Where conservation easements are vested in conservation organizations, the “trustees” will possess a strong motivation to carry out their duties, but they too will not be as well positioned as nearby neighbors.

Second, the cost advantages of antiproperty easements will not be present in those cases where there is not a ready group of nearby neighbors, as in the case of a large and remote wilderness area. In such cases, conservation easements may be a preferred option.

CONCLUSION

In this Article, we introduced the concept of antiproperty easements — a private conservation mechanism that allows only socially desirable development.²⁴¹ En route to this mechanism, we surveyed the political and market institutions affecting conservation, and drew on the salient strengths and weaknesses of both institutions to ensure the preservation of conservation commons. We also compared our antiproperty mechanism to other theoretical and doctrinal solutions to the conservation challenge and elucidated the conditions under which our mechanism is superior to the alternatives.

Theoretically, we demonstrated that when transaction costs systematically bias the market in favor of a particular interest, the best policy response may be to grant the initial entitlement to the opposing interest and create additional transaction costs, thereby making the entitlement inalienable. An intriguing implication of this counter-intuitive insight is that anticommons regimes — currently viewed as “tragic” — are actually beneficial when conservation is the social goal. Furthermore, we showed how the interplay between market and political institutions may engender a superior equilibrium to those created by each institution alone. We demonstrated that while the political process would lead to too little conservation, and the market to too much conservation, the combination of private antiproperty easements with a carefully designed takings law may lead to the optimal balance between conservation and development.

The practical implications of the Article are quite straightforward. It is imperative to develop an effective conservation tool that would

241. As explained in our introduction, our proposal is intended to apply in the context of communities that have already identified conservation as the socially desirable use for their commons.

arrest inefficient development. We submit that our antiproperty easements are a necessary weapon in the conservationist arsenal.